No. 20-

IN THE

Supreme Court of the United States

KOBE,

Petitioner,

v.

BEVERLY BUSCEMI, EMMA FORKNER, KATHI LACY, THOMAS WARING, JACOB CHOREY AND JUDY JOHNSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PATRICIA L. HARRISON
Counsel of Record
PATRICIA L. HARRISON, ATTORNEY AT LAW
47 Rosemond Road
Cleveland, SC 29635
(864) 836-3572
pharrison@loganharrisonlaw.com

Counsel for Petitioner

301025

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

Question 1. There is a split among the circuits regarding the interpretation and enforcement of of 42 U.S.C. 1396a(a)(8) of the Medicaid Act, which requires that "all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." In *Olmstead v. L. C. by Zimring,* 527 U.S. 581 (1999), this Court ruled that the Americans with Disabilities Act requires public entities to provide services in the least restrictive setting, and CMS regulations issued in 2014 at 42 C.F.R. 441.301 require states to provide services in the setting chosen by the Medicaid participant.

> Was summary judgment improperly granted to Respondents, who have for many years refused to provide Kobe services in the least restrictive setting, in violation of the reasonable promptness mandate at 42 U.S.C.S. § 1396a(a)(8) and the integration mandate of the Americans with Disabilities Act at 28 CFR pt. 35, where Kobe requested those services in both the original and amended complaints filed in 2011, in his motions for summary judgment filed in 2012 and 2014 and at every annual support plan meeting?

Question 2. There is a split among the circuits as to whether 42 U.S.C. 1985(3), which provides relief to persons injured by a civil conspiracy, is enforceable by persons who have disabilities. The Fourth Circuit erroneously determined that Kobe suffered no injury from the alleged conspiracy. This Court should rule upon the question of whether persons who have intellectual or related disabilities who live in congregate settings constitute a protected class.

> Does the record contain material facts showing that Kobe has suffered discrimination and injury resulting from the Respondents' longstanding civil conspiracy involving the fraudulent diversion of state and federal Medicaid dollars that were appropriated by the state and federal governments to the Respondent agencies for the purpose of providing services in the least restrictive setting, where Petitioner has presented evidence of money laundering, the submission of false claims to the federal government and spending Medicaid funds for other unauthorized purposes in violation of 42 U.S.C. 1396n(c)(2)? Are persons who have intellectual or related disabilities who live in congregate settings entitled to protection from civil conspiracies under 42 U.S.C. 1985?

PARTIES TO THE PROCEEDING

Kobe was the plaintiff-appellant in the proceedings below.

The South Carolina Department of Health and Human Services (SCDHHS) and its director, Joshua Baker; the South Carolina Department of Disabilities and Special Needs (SCDDSN) and its former director, Beverly Buscemi; the Richland Lexington Disabilities and Special Needs Board (RichLex) and its former director, Mary Leitner; the Babcock Center; and its former director Judy Johnson were defendants-appellees in the proceedings below in Counts One, Two, Three and Four (the Americans with Disabilities Act and the Rehabilitation Act and Section 1983). Respondent Buscemi has been succeeded by Mary Poole as Director of SCDDSN, Mary Leitner has been succeeded by Stacy Johnson as Director of RichLex and Judy Johnson has been succeeded by Thoyd Warren as Director of Babcock Center.

Beverly Buscemi, Emma Forkner, Kathi Lacy, Thomas Waring, Jacob Chorey and Judy Johnson were individual defendants-appellees in the proceedings below in Count Five (Civil Conspiracy).

DIRECTLY RELATED PROCEEDINGS

Kobe v. Buscemi, 821 Fed. Appx. 180 (4th Cir. July 13, 2020). Affirmed without oral argument, Diaz, Thacker and Traxler, Case Number 18-2505.

Kobe v. McMaster, 2018 U.S. Dist. LEXIS 215708 (D.S.C., December 19, 2018). Reconsideration denied, Margaret B. Seymour, Case Number 3:11-cv-00146.

Kobe v. McMaster, 2018 U.S. Dist. LEXIS 55500 (D.S.C., Mar. 30, 2018). Summary Judgment granted to Defendants, Margaret B. Seymour, Case Number 3:11-cv-01146.

Kobe v. McMaster, 137 S. Ct. 2270, 198 L. Ed. 2d 705, 85 U.S.L.W. 3587, 2017 WL 1365709 (June 19, 2017). Certiorari denied.

Kobe v. Haley, 666 Fed. Appx. 281, 2016 U.S. App. LEXIS 22283 (4th Cir. S.C., Dec. 15, 2016). Case No. 15-1419, Affirmed in part, reversed in part and remanded, Per Curium, Diaz, Thacker and Traxler.

Kobe v. Haley, 2013 WL 4056335 (D.S.C. August 12, 2013). Rehearing denied, Margaret B. Seymour, Case No. 3:11-cv-01146.

Kobe v. Haley, 2012 WL 3269221 (D.S.C., August 10, 2012). Summary Judgment granted to Defendants, Margaret B. Seymour, Case No. 3:11-cv-01146.

Kobe v. Buscemi, 2020 U.S. App. LEXIS 25276 (4th Cir., August 10, 2020) (Per Curium, rehearing denied, without oral argument by Diaz, Thacker and Traxler, Case Number 18-2505).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Other Authorities

TABLE OF APPENDICES

OPINIONS BELOW

The opinions of the court of appeals issued in *Kobe II* are not published, but are available at *Kobe v. Buscemi,* 821 Fed. Appx. 180 (4th Cir. July 13, 2020) **(Appendix A)**, rehearing denied by *Kobe v. Buscemi,* 2020 U.S. App. LEXIS 25276 (4th Cir., August 10, 2020) **(Appendix H)**. The orders of the district court reviewed by the Fourth Circuit in *Kobe II* are available at *Kobe v. McMaster,* 2018 U.S. Dist. LEXIS 55500 (D.S.C., Mar. 30, 2018) **(Appendix C)** and reconsideration denied by *Kobe v. McMaster,* 2018 U.S. Dist. LEXIS 215708 (D.S.C., December 19, 2018) **(Appendix B).** The opinion of the court of appeals in *Kobe I,* Case Number 15-1419, is not published, but is available at *Kobe v. Haley,* 666 Fed. Appx. 281, 2016 U.S. App. LEXIS 22283 (4th Cir. S.C., Dec. 15, 2016) **(Appendix E)**.

The opinion of this Court denying the Petition for writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit in *Kobe I* is available at *Kobe v. McMaster,* 137 S. Ct. 2270 (June 19, 2017) **(Appendix D).** The opinions of the district court reviewed by the Fourth Circuit in *Kobe I* are available at *Kobe v. Haley,* 2012 WL 3269221 (D.S.C., August 10, 2012) **(Appendix G)** and *Kobe v. Haley,* 2013 WL 4056335 (D.S.C. August 12, 2013) **(Appendix F).**

JURISDICTION

The court of appeals issued its opinon on July 13, 2020 and denied rehearing en banc on August 10, 2020. Appendices A and H. This petition is filed within 150 days of the latter date, pursuant to this Court's Covid Order dated March 19, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant provisions of the **Fourteenth Amendment** of the United States Constitution, the **Rehabilitation Act** at 29 U.S.C. § 794 and 29 U.S.C. § 794a, the **Medicaid Act**, 42 U.S.C. 1396a(a) and 42 U.S.C. 1396n(c), the **Civil Rights Act** at 42 U.S.C.§ 1983 and 42 U.S.C. 1985(3), the **Americans with Disabilities Act** at 42 U.S.C. § 12101, 42 U.S.C. § 12102, 42 U.S.C. § 12131- 42 U.S.C. § 12134 and the applicable implementing regulations at 28 C.F.R. § 35.130 (ADA), 42 C.F.R. § 431.10 , 42 C.F.R. § 431.205-42 C.F.R. § 431.244, 42 C.F.R. § 440.169, 42 C.F.R. § 441.18 and 42 C.F.R. § 441.301 (Medicaid Act) are reprinted in Appx. I.

STATEMENT OF THE CASE

A. Introduction

This case involves the interpretation and enforcement of the reasonable promptness mandate of the Medicaid Act at 42 U.S.C. 1396a(a)(8) and Section 1985 of the Civil Rights Act (Civil Conspiracy). Petitioner brought this case in 2011 under 42 U.S.C. 1983 to enforce the reasonable promptness mandate of the Medicaid Act, seeking the timely provision of equipment and placement in a less restrictive setting and enforcement of his Fourteenth Amendment due process rights. Kobe also alleged an ongoing civil conspiracy wherein Respondents have diverted state funds and federal Medicaid funds that have been allocated for the purpose of providing services to qualified disabled persons in the least restrictive setting, instead spending those funds for unauthorized purposes in violation of federal laws.

B. The Facts

Kobe is an adult who was born with severe cerebral palsy. He filed this lawsuit

in 2011, seeking, among other benefits placement in an apartment setting. Since birth, Kobe has been unable to walk or to use his legs or hands, which must be strapped to his wheelchair due to spasticity. Kobe is intelligent, although he cannot speak so that others can understand him. Because Kobe was misdiagnosed by the schools as having "mental retardation," he was denied the opportunity to learn to read as a child.

When Kobe's family home went into foreclosure, the state removed him at age twenty-two, separating Kobe from his then toddler siblings. The state placed Kobe in a "CTH II," a group home operated by the Babcock Center, with house-mates who have intellectual or other related disabilities, where he was subjected to abuse and neglect. For decades, despite having intellectual capacity, Kobe has been treated as if he is cognitively impaired.

Kobe receives services through the ID/RD Medicaid waiver program (Intellectual Disabilities/Related Disabilities program, formerly called the "Mental Retardation/Related Disabilities" program) operated by the South Carolina Department of Disabilities and Special Needs (DDSN) under contract with the South Carolina Department of Health and Human Services (DHHS), which is the agency responsible for administration of all Medicaid programs. DDSN contracts with local DSN Boards, such as the Richland/Lexington Disabilities and Special Needs Board (RichLex) to provide case management services, as described in 42 C.F.R. 440.169 and 42 C.F.R. 441.18. Waiver participants are required to go through their DDSN-approved case manager to access waiver services. See Affidavit at ECF 441-1 at 4874-4875. Kobe's case managers have all been employees of RichLex.

ID/RD waiver residential services are provided in a variety of settings including, in order of restrictiveness (less to more restrictive): a waiver participant's own home, as in *Stogsdill v. DHHS,* 410 S.C. 273, 282 (S.C.Ct.App. 2007), a Supervised Living Program ("SLP"), which is an apartment setting; a Community Training Home I ("CTH I"), which is a foster home; or in a more restrictive Community Training Home II ("CTH II"), a group home with up to three other persons who have disabilities. *Doe v. Kidd I,* 501 F.3d 348, 351(4th Cir. 2007). In *Olmstead v. L.C. ex rel Zimring,* 527 U.S. 581, 599-602 (1999), this Court held that treatment for disabilities must be provided in the most integrated, least restrictive setting possible. See also 28 C.F.R. § 35.130(d) (2013) ("A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.").

The Babcock Center is a private, nonprofit organization, which serves people with mental retardation and related disabilities that is "mostly funded by grants from the South Carolina Department of Disabilities and Special Needs ("SCDDSN")." *Babcock Ctr., Inc. v. United States,* 2013 WL 1857688 (S.C.D.C. 2013). Hope Bridge is a private provider of adult day health care services (ADHC) which are also funded by Medicaid. When this lawsuit was filed, DDSN paid a capitated rate to Babcock Center for Kobe's ID/RD waiver services. Babcock Center was allowed to spend Kobe's allocated funds on his services - or not. Under the funding system in place when this lawsuit was filed, Babcock Center could use funds received for waiver participants for any purpose. Hope Bridge and other providers were required to provide

waiver services, then bill their competitor, Babcock Center, for those services.

Kobe's only respite from this unconstitutional confinement at the Babcock Center group home was to attend Hope Bridge, where he was taught to read as an adult and the staff advocated for him. A Hope Bridge employee signed an affidavit stating that when she visited Kobe at the Babcock Center group home: "staff was in your face and followed me around with a camera and did not seem to want me to be comfortable visiting him." ECF 240-23, J.A. 3122.

Kobe was evaluated for a speech device in 2002 (ECF 155-3), 2008 (ECF 155-11), 2010 (JA 1064) and twice again, in 2011 (ECF 155-7, ECF 155-14), but the device was never provided. Payment for the device would have been "bundled" into payments for "residential habilitation" and come out of the capitated "band payment" DDSN paid to Babcock Center. ECF 158-3 at J.A. 1447-1448 and 184-1 at J.A. 1660.

In August, 2010, a Hope Bridge employee reported to the South Carolina State Law Enforcement Division (SLED) that Kobe had been left in bed at his Babcock Center group home all weekend and that "he is often left in feces for long periods of time." ECF JA1625. The State Ombudsman investigator issued a report on October 22, 2010, reporting that it could not be determined how long Kobe had been left on the gurney in the bathroom at his Babcock Center group home, but that Kobe needed to have an assistive communications device (ADC) to prevent recurrance. 2010. ECF 181-3, JA1622. Kobe's treating physician referred him for a speech evaluation on December 7, 2010 (ECF 155-16) and a physician's order was written for an evaluation for a speech device on January 13, 2011. ECF 155-16. A physician signed a certificate

of medical necessity on May 23, 2011. ECF 155-15. These requests were made to DDSN through Kobe's case manager, but, still he did not receive the needed device. 42 C.F.R. 440.169 and 441.18.

After the Hope Bridge employee made this report of neglect to SLED, DDSN Deputy Director, Kathi Lacy and DDSN employee Jacob Chorey, together with Judy Johnson, who was the Director of Babcock Center, attempted to terminate the ADHC services of Kobe and dozens of other Medicaid participants who attended Hope Bridge, a program that competed with Babcock Center's sheltered workshop programs. On December 31, 2010, Lacy sent an email to case managers of Hope Bridge attendees, complaining that "precious Medicaid dollars" were being expended on ADHC services at Hope Bridge and on specialized medical equipment and assitive technology items "that were extraordinarily excessive" after the Ombudsman reported the conditions at Babcock Center and identified Kobe's need for a speech device.[1] ECF155-34, J.A.1315.

---

[1] In January, 2010, DHHS and DDSN imposed drastic reductions on less restrictive services provided in DDSN Medicaid waiver participants' homes, claiming those reductions were necessary due to the state having a tremendous budget crisis. Respondents have not challenged Petitioner's evidence that when DHHS and DDSN reduced acess to home-based services, the average annual per capita cost of the ID/RD waiver program actually increased from $37,526 to $51,869, thereby increasing the total cost of the program by more than $50 million. ECF 250-1 and 250-2. Respondents have also not presented evidence to contradict Kobe's claim that the State Comptroller reported that $225,945,013 in DHHS state funds were allowed to "lapse" during FY 2010, thereby losing the then 80% federal match on those funds. ECF 250-6 at 5 of 9. During this time, DDSN distributed millions of dollars of unauthorized

In April, 2011, Kobe's case manager at RichLex sent form notices to Hope Bridge terminating the ADHC services of Kobe and dozens of other participants, without contacting the treating physicians who had ordered those services or sending a notice of termination to Kobe. ECF 188-1, J.A. 1847-1848. To prevent Respondents from terminating Kobe's Hope Bridge services, he was forced to file an administrative appeal with DDSN Director Buscemi within ten days of the notice being sent to Hope Bridge. In that appeal, Kobe complained not only of the improper notice and termination of Hope Bridge (ADHC) services. He also complained in the administraive appeal of the failure to provide a speech device, speech services, physical and occupational therapy, adult companion services and the failure to inform him of other feasible alternatives under the Medicaid waiver program. ECF 237-13, J.A. 1981-1982.

Original Complaint at ECF 1. Kobe, together with two other waiver participants whose Hope Bridge services had been terminated filed this lawsuit in federal court on May 11, 2011. ECF 1. In the original complaint, in addition to challenging the attempted termination of ADHC services, Kobe clearly and unambiguously requested other services and equipment, specifically requesting placement in a less restrictive apartment setting. The original complaint informed the agencies that Kobe "would like to move from the group home where he lives into an apartment, but the January 1, 2011 reductions in MR/RD Medicaid waiver services and the method Defendants use to fund less restrictive placements prohibit him from

---

"loans" and funds to purchase real estate to Babcock Center and forgave millions of dollars of debt owed by Babcock Center to DDSN, without authoriztion from the DDSN governing board. ECF 81-1.

moving to an apartment." at ¶107. He specifically requested "services in a supervised apartment setting..." at ¶108.

In Count One (Violation of 28 C.F.R. § 35.130 et. seq.), Kobe informed Respondents of violations of the ADA by denying his requests for an communications device and *his choice to move to a less restrictive setting*" on page 54 at ¶21. Kobe informed Respondents in May, 2011 that "Defendants have failed to make reasonable modifications to the programs operated by SCDDSN which are *necessary for Plaintiffs to receive services in the least restrictive setting*" in ¶22 of that complaint.

Count Two alleged that in violation of the Rehabilitation Act (29 U.S.C. § 794 et. seq.): "Defendants have failed to make reasonable modifications to home and community based waiver programs to allow Plaintiffs and Class Members to receive ADHC services *and other home and community based waiver services* so that they can successfully live in the least restrictive setting appropriate to their needs" at ¶40. (Emphasis added.) In ¶43, Kobe alleged:

> Defendants have also utilized criteria and methods of administration that subject Plaintiffs to discrimination on the basis of disability including risk of unnecessary institutionalization by 1. *failing to assess properly the services and supports that would enable Plaintiffs to live in the least restrictive setting* 2. failing to ensure that Plaintiffs have access to Medicaid-covered services that will meet their needs in the community and 3. compelling health care providers to reduce or eliminate recommended ADHC services thereby violating Section 504 and its implementing regulations. (Emphasis added.)

The original complaint also alleged that: "Defendants have violated Section 504 by failing to provide Kobe with an ACD and services in an apartment setting" at ¶46.

Kobe alleged in Count Three (Violation of Section 1983) of the original complaint, that "Defendants have recklessly and callously refused to provide Kobe with an ACD and have

refused to provide him with the supports he would need to live in a less restrictive setting" at ¶56. He also alleged that the directors of DHHS, DDSN and Babcock Center "have violated Kobe's civil rights which are enforceable under 42 U.S.C. 1983 because they have failed to provide him with an augmentative communications device (ACD) and *residential services in a less restrictive and more integrated setting with reasonable promptness.*"

In Count Five (Civil Conspiracy, 42 U.S.C. §1985), Kobe alleged that the individual defendants acted in a conspiracy to deprive Plaintiffs of "services which constitute a property right in order to deprive them of constitutionally protected rights and priviledges" at ¶101. He alleged that the purpose of the conspiracy was to deny plaintiffs ADHC "and *other waiver services* they are entitled to receive in furtherance of the monopoly maintained by the Babcock Center, SCDDSN and its local DSN Boards"at ¶102. The original complaint alleged that through this conspiracy Defendants "proximately caused injury to Plaintiffs by denying services which they need to live in the least restrictive setting in the community" at ¶107. Kobe claimed that Defendants had "acted in concert to deprive Plaintiffs of benefits which they are entitled to receive under the reasonable promptness (42 U.S.C. 1396a(a)(8)) and other provisions of the Medicaid Act.

Kobe alledged that while these proceedings were being litigated in the federal court, Respondents failed to act with reasonable promptness in his administrative appeal, as required by § 1396a(a)(3), § 1396a(a)(8) and 42 C.F.R. § 244(f). His administrativeappeal filed on June 8, 2011was not ruled upon by the DHHS hearing officer until August, 2012. ECF 237-13 and 237-12, J.A. 1977. The fair hearing process in South Carolina is burdensome and lengthy. It requires Medicaid waiver participants to request reconsideration from the director of DDSN, then to file an appeal requesting a fair hearing from a DHHS hearing officer. Before seeking

state judicial review, the Medicaid participant must sludge through yet a third executive branch agency, the South Carolina Administrative Law Court, which is not a court in the judicial system. This process even reaching the state judicial system takes years.[2]

In *Stogsdill v. DHHS,* 410 S.C. 273 (S.C.Ct. Appeals 2014), the first judicial decision in the administrative proceeding came only after five years of litigation, then the state appeals court remanded his case back to the agency for an assessment of his needs, requiring Stogsdill to initiate a third administrative appeal. In *Doe v. DHHS,* the plaintiff filed an administrative appeal in 2005, which was not resolved in the state system until 2013, after the South Carolina Supreme Court remanded her case in 2011. 398 S.C. 62 (2011). Doe's administrative appeal was remanded three times and the district court's rulings were remanded three times. *Doe v. Kidd III,* 656 F.Appx. 643 (4th Cir. 2016). These cases and others document that the agencies persistently disregard the reasonable promptness mandates of both §§ 1396a(a)(3) and 1396a(a)(8).

Amended Federal Complaint. In Kobe's amended federal complaint filed on October 18, 2011, he again put the Respondents on notice of his request for placement in an apartment setting. ECF 65. He complained that more than ninety days had passed since he requested and was evaluated for a speech device and "the delay in providing the medically necessary recommended device is unreasonable." Id. at ¶26. Kobe clearly informed the Defendants and the district court that he "would like to move from the group home where he lives into an apartment in a less restrictive setting, but the ...method Defendants use to fund less restrictive placements prohibit him from moving to an apartment." Id. at ¶38. He complained that he was sequestered at

---

[2] As determined in *Doe v. Kidd I,* supra, exhaustion of administrative remedies is not required in an action brought under § 1983, nor is exhaustion required in ADA Title II cases. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017).

his group home for weeks when staff dropped him in his wheelchair, causing damage to the wheelchair, injury to his head and psychological trauma.

Kobe described, in specific detail, in the amended complaint kickbacks and a pattern of racketeering activity wherein hundreds of millions of dollars intended to provide services in the least restrictive setting were being diverted by Defendants for unauthorized purposes, including, but not limited to purchasing and increasing attendance at large, profitable sheltered workshops where wiaver participants were isolated and segregated from non-disabled persons. ECF 65 at ¶¶ 120-128, 143-148, 152-205, 243-255, 366-370.

In the amended complaint, Kobe alleged that waiver participants had been forced into "inappropriate placements where their health and safety will be endangered at greater costs to taxpayers of the State." Id. at ¶ 275. He complained of the Defendants' "failure to offer Plaintiffs and Class Members services, including but not limited to ADHC services, to allow Plaintiffs to live in integrated home and community-based settings" and that constituted "unlawful discrimination in violation of Title II or the ADA and its implementing regulations at 28 C.F.R. § 35.130(d)." Id. at ¶281.

Kobe also specifically alleged that Defendants had violated the ADA by failing to make reasonable modifications to their programs and "by denying Kobe's requests for an ACD and his choice to move to a less restrictive setting..." Id. at ¶ 280-281. Kobe repeated allegations in Count Two (Rehabilitation Act) that Defendants failed to provide services in the least restrictive setting, specifically complaining that "Defendants have violated Section 504 by failing to provide Kobe with an ACD and services in an apartment setting...and other cost effective home and community based services that allow participants to live in the least restrictive setting. Id. at ¶ 306.

In Counts Three and Four, Kobe alleged violations enforceable through §1983 of the Medicaid Act, including the reasonable promptness provision at § 1396a(a)(8). At ¶ 318 Kobe alleged that Defendants have "refused to provide Kobe with the supports he would need to live in a less restrictive setting. Kobe alleged that Defendants denied services, "including but not limited to ADHC services, which they are entitled to receive to enable them to live in the least restrictive setting." Id. at ¶ 327. The amended complaint alleges that Defendants failed to inform waiver participants of "other feasible Medicaid services which they are entitled to receive with reasonable promptness as is required by the Medicaid Act and its regulations. Id. at ¶ 333. Kobe also alleged that Defendants violated his civil rights by failing to protect him from abuse and neglect and failing "to provide him with an augmentative communications device (ACD) and residential services in a less restrictive and more integrated setting with reasonable promptness." Id. at ¶ 338.

In Count Five, Kobe alleged that Defendants deprived them of "ADHC services and other waiver services they are entitled to receive" through the illegal diversion of funds and that "Defendants have proximately caused injury to Plaintiffs by denying services which they need to live in the least restrictive setting in the community."

On November 11, 2011, DHHS refused to process Kobe's request for a speech device on the grounds that was an adult "not involved in educational endeavors." ECF 155-1, J.A. 896. But, since 2009, Kobe had been requesting adult education services to improve his reading skills that had not been provided. ECF 251-3, J.A. 3100 at ¶ 6.

On January 25, 2012, Kobe's counsel informed DHHS counsel that "what it would take for DHHS to settle this case now is for DHHS to agree to fund [Kobe's] placement in SLP we are developing for [name redacted] and another consumer, promptly [and] payng the cost of his

assistive communications device..." ECF 155-24, J.A. 1028. Kobe's Support Plan, approved by DDSN in April of 2012, included an eye-gaze communications device and a new wheelchair to replace the malfunctioning wheelchair, which kept Kobe confined to bed for weeks when it was not working. ECF 251-3, J.A. 1873.

Order in State Administrative Appeal. On August 9, 2012, more than a year after Kobe filed this lawsuit and the administrative appeal, the DHHS hearing officer finally issued an order concluding that Kobe and his co-plaintiffs were entitled to continue to receivve ADHC services, and his administrative appeal was dismissed. ECF 237-12, JA1977. As a result of this administrative appeal, DHHS was required to change the eligibility criteria for attending adult day health care programs.[3] ECF 237-9, J.A. 1964.

2012 Summary Judgment Motions. The parties filed cross motions for summary judgment. Kobe's summary judgment motion filed on December 28, 2012, specifically sought placement in a less restrictive setting, either in his own home or an apartment setting, a wheelchair and a speech device. ECF 155, JA867. He sought summary judgment in the district court on his claims for violation of the reasonable promptness mandate and the integration mandate of the ADA. 28 C.F.R. § 35.130.

In response to Respondents' motions to dismiss and later, motions for summary judgment, Kobe provided evidence in support of his conspiracy claim, documenting the misuse

[3] Two weeks after Kobe's administrative appeal was dismissed, DHHS denied Kobe's request for a speech device. Because of the delays in providing a fair hearing and obtaining judicial review in the fair hearing process, Kobe elected to seek relief in the federal court litigation for claims of delays in providing equipment and placement in a less restrictive setting.

of funds that had been paid to DDSN to provide services in the least restrictive setting. For example, out of $10.5 million in state dollars paid to DDSN to provide services to children with autism, the agency spent less than $700,000 actually providing those services, thereby losing the federal match (then 70%) on the funds that were used for unauthorized purposes. Kobe presented evidence of other state and federal funds being diverted for improper purposes. ECF 81-6 and ECF 81-7 at J.A. 523-524.

Kobe provided an affidavit signed by DDSN's former internal auditor (ECF 158-18), financial audits of Babcock Center indicative of kickbacks, and audits conducted by the South Carolina Legislative Audit Council and the United States Department of Health and Human Services Office of Inspector General reporting a total lack of accountability for funds provided for services. He also provided affidavits, reports and audits documenting systemic abuse, neglect and explotation of clients in DDSN programs. ECF 251-13 through 251-16, ECF 81-1 to 81-7.

In an attempt to moot Kobe's claim that a speech device had not been provided, Respondents arranged for a communications device to be "loaned" to Kobe some time in the summer of 2013. *Kobe v. Haley,* 666 at 292. Kobe was not provided a speech device of his own until just before the hearing on cross summary judgment motions on September 23, 2014.

2013 Support Plan. On October 1, 2013, DDSN approved Kobe's support plan which included the need for services to be provided in an apartment setting. That plan notified DDSN, which approved the plan, that Kobe "wants to live in an apartment setting." ECF 118-2 at J.A. 1877. It was the responsibility of the case manager to transmit the proposed plan to DDSN for approval. That plan unambiguously identifies the need for "supports in place to be able to live in an apartment setting" and that Kobe still had not been provided with a speech device or a wheelchair. JA1877.

CMS "Final Rule." On January 16, 2014, CMS, the federal Medicaid Agency designated by Congress to administer all Medicaid programs issued regulations, referred to as the "Final Rule" which clearly require states to provide Medicaid services in the setting chosen by the participant. 79 Federal Register 2947, 42 C.F.R. 441.301(c)(2)(i).

Second Summary Judgment Motions. Kobe filed a second motion for summary judgment on January 22, 2014, again providing the district court with evidence of kickbacks and massive unauthorized diversions of funds, and systemic abuse and neglect in Babcock Center programs. ECF 250. Kobe requested summary judgment on his claims for violation of the reasonable promptness mandate, because the device provided was a "loaner," he still had not been provided with a wheelchair and he *again* notified the agencies of his entitlement to residential services be provided in a less restrictive SLP setting (supervised apartment). ECF 250, at 28 of 34.

In a strange response to Kobe's second summary judgment motion, DDSN District Director John King, signed a sworn affidavit dated February 21, 2014, claiming that he had searched DDSN's records and that "no request for SLP services including an apartment had been made to DDSN on behalf of Kobe." ECF 264-1, J.A. 3591-3592. Thus, DDSN argued that summary judgment should be granted to Respondents, because - nearly three years after this lawsuit was filed - DDSN did not even know about Kobe's request and the agency had not yet "reached any conclusion either affirmative or negative about the possibility of an SLP placement for Kobe." ECF 264-1, JA3592.

King's affidavit was clearly contradicted not only by Kobe's original and amended complaints that were served upon DDSN officials, placing Respondents on notice of Kobe's request for placement in a less restrictive setting, but also by Kobe's DDSN approved 2013

Support Plan, the motions for summary judgment Kobe filed in 2012 and, again, in 2014 seeking placement in an apartment setting, affidavits of Kobe and others documenting his requests for placement in an apartment setting, and the communications of Kobe's counsel with Respondents' counsel seeking such placement.

The widespread nature of the delays Kobe experienced in the administrative proceedings were also documented in *Stogsdill v. DHHS,* in an administrative appeal that waiver participant had filed in 2009. See Affidavit at ECF 441-1. On September, 10, 2014, the South Carolina Court of Appeals ruled in that case that the caps DHHS had imposed on home-based services violated the Americans with Disabilities Act. 410 S.C. 273 (S.C.Ct.App. 2014). In that case, the state court adopted the Fourth Circuit's ruling in *Pashby v. Delia,* holding that:

> "budgetary concerns do not alone sustain a fundamental alteration defense. . . . We join the Third, Ninth, and Tenth Circuits in holding that, although budgetary concerns are relevant to the fundamental alteration calculus, financial constraints alone cannot sustain a fundamental alteration defense."

709 F.3d 307, 323-24 (4th Cir. 2013). But, in *Stogsdill*, the South Carolina Court of Appeals ruled that all 42 U.S.C. 1396a(a)(3) required was for the agency to provide a hearing, without consideration of the reasonable promptness mandate of 42 U.S.C. 1396(a)(a)(8) or 42 C.F.R. 431.244(f). Seven years after Stogsdill filed his administrative appeal, the state court finally declined to rule on his reasonable promptness claim. *Stogsdill,* 410 at fn. 6.

Kobe's settled his state law claims against the Babcock Center and the district court granted Respondents' motions for summary judgment on all remaining claims. *Kobe v. Haley*, 2013 U.S. Dist. LEXIS 113193 (D.S.C., Aug. 12, 2013) and 2012 U.S. Dist. LEXIS 112425 (D.S.C., Aug. 10, 2012).

Kobe I Appeal. Kobe filed an appeal in the Fourth Circuit, which dismissed legislative

defendants, but reversed as to Kobe's ADA and Rehabilitation Act claims against the Governor, and the remaining claims in counts one through seven against the other agencies and officials named as individual defendants. *Kobe v. Haley,* 666 F. Appx. 281 (4th Cir. 2016).

In that interlocutory order, the Fourth Circuit did not rule upon Kobe's claim that residential services had not been provided.[4] Instead, in a footnote, the Fourth Circuit stated:

> fn. 21 Appellants offer no challenge to the district court's ruling that their claim that Kobe is entitled to be provided with an SLP is unripe. Nor do they challenge the ruling that Appellants' claim demanding payment for the speech pathologist who evaluated Kobe and provided him with speech services fell outside the scope of their complaint. We therefore do not address those issues.

666 F.Appx. 281, fn. 21 (4th Cir. 2016).

On remand, the district court again granted summary judgment to all Defendants, except the claims against the Governor, which were scheduled for trial. *Kobe v. McMaster,* J.A.49 (S.C.D.C. 2018). Prior to trial, Kobe settled his monetary damages claims against Governor McMaster on July 2, 2018.

Kobe II Appeal. Kobe filed his second appeal to the Fourth Circuit July 31, 2018, and oral arguments were scheduled, but later cancelled due to Covid. The Fourth Circuit subsequently affirmed the decision of the district court without oral arguments. *Kobe v. Buscemi,* 821 Fed. Appx. 180 (4th Cir. July 13, 2020). The Fourth Circuit denied Kobe's motion for en banc hearing in *Kobe v. Buscemi*, 2020 U.S. App. LEXIS 25276 (4th Cir., August 10, 2020).

---

[4] This Court denied Kobe's petition requesting certiorari in *Kobe v. McMaster,*137 S. Ct. 2270, 198 L. Ed. 2d 705 (2017).

E. Reasons for Granting the Petition

A. There is a Persistent Conflict in the Circuits
(1) Reasonable Promptness Claims

This Court should grant a writ of certiorari because there is a significant split among the federal circuits regarding the interpretation and enforceablility of the Medicaid Act's "reasonable promptness mandate" at § 1396a(a)(8), as described below.

First Circuit. Applying this Court's *Blessing v. Freestone* analysis set forth in 520 U.S. 329, 340 (1997), the First Circuit ruled in 2002 in *Bryson v. Shumway* that § 1396a(a)(8) establishes a private right of action to enforce the reasonable promptness provision through a lawsuit brought under § 1983. 308 F.3d 79, 89 (1st Cir. 2002). In *Hawkins v. HHS,* 665 F.3d 25, 34 (1st Cir. 2012), the First Circuit held that "reasonable promptness should be measured from the time that services are requested..." and that "timeliness cannot be measured when services are never measured or performed."

More recently, the First Circuit held in *Rosy D. v. Baker,* 958 F.3d 51 (1st Cir. 2020) that "The regulations and case law related to the Reasonable Promptness Provision do not provide a clear answer to the question of what constitutes a violation of reasponable promptness."

Second Circuit. In *Shakhnes v. Berlin,* 689 F.3d 244, 254 (2d Cir. 2012) the Second Circuit recognized a private right of action to enforce §1396a(a)(8), but held that the 90 day requirement in 42 C.F.R. 431.244(f) only applies to the timeliness requirement for the issuance of a final administrative decision, not the provision of services. That court noted that "deference is owed" to the State Medicaid Manual (SMM) published by CMS (ECF 411-9), and that a remand "is not a substitute for definitive and final administrative action." *Shakhnes,* 689 at 259.

See SMM § 2903.2(A).[5] The Second Circuit acknowledged, however, that agencies must "furnish Medicaid promptly to beneficiaries without any delay caused by the agency's administrative procedures." 42 C.F.R. 435.930(a).

Third Circuit. Applying the *Blessing* test, the Third Circuit recognized a right of action to enforce § 1396a(a)(8) under § 1983 in *Sabree v. Richman*, 367 F.3d 180, 189 (3d Cir. 2004).

Fourth Circuit. In 2007, the Fourth Circuit established a private right of action to enforce 42 U.S.C. 1396a(a)(8) through § 1983 in *Doe v. Kidd I*, ruling that actual services (not just a final decision) must be provided with reasonable promptness:

> 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 348 354 (4th Cir. 2007). The Fourth Circuit held that neither the agencies' attempt to moot Doe's federal lawsuit by terminating her eligibility nor the provision of residential services in a group home successfully mooted Doe's case and that DDSN and DHHS were obligated under the Medicaid Act and its regulations to provide Doe with the needed services in the least restrictive environment. Id. at 359. That court held that the "ongoing failure" of the agencies to provide services in a less restrictive setting "is the same as a failure to provide any services." Id. at 417. Further, the Fourth Circuit noted that Congress did not establish a remedial scheme in the Medicaid Act sufficient to foreclose enforcement under § 1983. Applying this Court's *Blessing*

---

[5] SMM 2903.2(A) provides:

> 2903.2 Hearing Decision And Notification to Claimant (42 CFR 431.232, 233, 244(b)and(d) and 431.245).--
>
> A. General.--A conclusive decision in the name of the State agency shall be made by the hearing authority...Remanding the case to the local unit for further consideration is not a substitute for "definitive and final administrative action."

analysis, the Fourth Circuit ruled that:

> First, the provision is expressly intended to benefit "all" individuals eligible for Medicaid assistance, a group that, the parties do not dispute, includes Doe. See § 1396a(a)(8). Second, the provision is not so "vague and amorphous" that the judiciary cannot competently enforce it: the provision is clear that the standard for informing applicants of their eligibility for Medicaid services is "reasonable promptness" and the relevant federal and state regulations and manuals define reasonable promptness as forty-five days or ninety days, depending on the applicant. See, e.g., 42 C.F.R. § 435.911; South Carolina Medicaid Manual, cited at J.A. 242; United States Department of Health & Human Services Center for Medicaid and State Operations, Olmstead Update No: 4, at J.A. 290. Third, the provision uses mandatory rather than precatory terms: it states that plans "must" provide for assistance that "shall" be delivered with reasonable promptness. See § 1396a(a)(8).

Id. at 356.

In *Doe v. Kidd II,* 419 Fed. Appx. 411, 415-416 (4th Cir. 2011), just two months before Kobe filed this lawsuit, the Fourth Circuit reaffirmed that the Medicaid Act's provisions are "clear" that "[a] State plan for medical assistance must — provide that all individuals wishing to make application for medical assistance under the plans shall have opportunity to do so, and such assistance shall be furnished with reasonable promptness to all eligible individuals."

This Court should note that a finding in *Doe v. Kidd II,* i.e. that the state statute giving the Director of DDSN the authority to determine the setting in which services are provided, was superceded in January, 2014 by CMS regulations at 42 C.F.R. 441.301(c)(4). DHHS acknwledged in its waiver application submitted in 2017 that this federal regulation supercedes the state statute and that now the setting must be "selected by the individual among options including non-disability settings... ECF 412 at J.A. 4366 and 4368.

Despite this ruling, DDSN and DHHS continued to withhold residential habilitation services that court had ordered the agencies to provide in 2011, until 2013 - for two and a half years after the Fourth Circuit reversed the district court and granted Doe's motion for summary

judgment. *Doe v. Kidd III*, 656 Fed. Appx. 643, 650 (4th Cir. 2016). ("In fact, the district court determined that the defendants did not comply with this Court's order - or the Medicaid Act - until August 2013, a full two and a half years after Doe II was decided.").

In *Stogsdill v. DHHS,* 410 S.C. 273, fn. 6 (S.C.Ct.App. 2014), the South Carolina Court of Appeals declined to rule on the plaintiff's § 1396a(a)(8) reasonable promptness claims - more than five years after Stogsdill attempted to enforce that provision in his administrative appeals. That state court ruled that so long as a hearing is provided, Medicaid participants have no remedy for due process violations in state proceedings, regardless of how many years the state takes to issue an administrative decision, declining to consider § 1396a(a)(8).

Fifth Circuit. In *Romano v. Greenstein,* 721 F.3d 373, 377-79 (5th Cir. 2013), the Fifth Circuit found § 1396a(a)(8) to be enforceable under § 1983. That opinion was noted in *Legacy Cmty. Health Servs. v. Smith*, 881 F.3d 358 (5th Cir. 2018).

Then, in a polar opposite decision to *Romano,* in *Thurman v. Med. Transp. Mgmt.*, ___ F.3d ___, 2020 WL 7351089*9 (5th Cir. December 15, 2020), the Fifth Circuit more recently held that § 1396a(a)(8) does not "even come close to establishing the 'unambiguously conferred right' necessary 'to support a cause of action brought under § 1983.'"

Sixth Circuit. In *Waskul v. Washenaw Cty. Cmty. Mental Health,* 979 F.3d 426 (6th Cir. 2020), the Sixth Circuit recently held that the district court erred in dismissing plaintiffs' claims under § 1396a(a)(8) because that statute provided for a private right of action where Congress did not foreclose relief or provide a comprehensive remedial scheme, and the *Blessing* factors pointed in favor of finding an enforceable right:

> Courts can easily determine whether individuals have been given the opportunity to apply for medical assistance by looking to the face of a state's Medicaid plan, records supplied by agencies and recipients, and witness testimony. And the regulations make

> clear that the standard for "reasonable promptness" is within at least forty-five or ninety days, depending on the basis for an individual's application. See 42 C.F.R. § 435.912(c)(3); see also Romano, 721 F.3d at 378-79; Doe v. Kidd, 501 F.3d 348, 356 (4th Cir. 2007); Doe ex rel. Doe v. Chiles, 136 F.3d 709, 716-17 (11th Cir. 1998).

The Sixth Circuit held that exhaustion of administrative remedies is not required. Id.

In *Unan v. Lyon*, 853 F.3d. 279, 284, 294 (6th Cir. 2020), that circuit found a private right of action, reversing the district court's grant of summary judgment on the § 1396a(a)(8) claims.

Seventh Circuit. In *Nasello v. Eagleson*, 977 F.3d 599, 602 (7th Cir. 2020), the Seventh Circuit recognized that other courts of appeals have held that § 1396a(a)(8) can be enforced in private suits, citing *Romano v. Greenstein,* 721 F.3d 373, 377-79 (5th Cir. 2013); *Doe v. Kidd,* 501 F.3d 348, 355-57 (4th Cir. 2007); *Sabree v. Richman,* 367 F.3d 180, 189-93 (3d Cir. 2004); *Bryson v. Shumway,* 308 F.3d 79, 88-89 (1st Cir. 2002); *Doe v. Chiles,* 136 F.3d 709, 715-19 (11th Cir. 1998). But, that court noted that in *Bertrand v. Maram,* 495 F.3d 452 (7th Cir. 2007), the Seventh Circuit expressed "skepticism about this line of decisions, which is hard to reconcile with the Supreme Court's post-Wilder doctrine—and multiple decisions since 2007 (such as Armstrong and Astra USA) make it even harder to imply a private right of action." Id. In *Bertrand,* to avoid creating a conflict among the circuits, the Seventh Circuit "assumed for the sake of argument that such a private right exists and resolved the case for defendants on the merits." The *Nesallo* court took the same path again in 2020 "without suggesting that we would follow the other circuits if push came to shove."[6] 977 F.3d 602.

---

[6]In *Waskul v. Washtenaw Cty. Cmty. Mental Health,* 979 F.3d 426, fn. 11 (Sixth Circuit 2020), a majority of the panel criticized *Nasello's* suggestion that § 1396a(a)(8) does not imply a private right of action, finding that "its reasoning is inconsistent with our caselaw and that of our sister circuits' and [that it] appears to rule out a private right of action even in subsections of the Medicaid Act that the dissent agrees create a private right of action.

Eighth Circuit. The Eighth Circuit has not clearly ruled on the issue of whether § 1396a(a)(8) is enforceable by Medicaid recipients under § 1983. However, the district court adopted its analysis and holding in *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 1006-07, 1022 (D. Minn. 2016), and continued to find that both §§ 1396a(a)(8) and 1396a(a)(3) are privately enforceable. *Murphy v. Harpstead*, 421 F. Supp. 3d 695 (D.Minn. 2019) As the court noted in *Guggenberger*, "[t]he enforceability of a particular Medicaid Act must be independently assessed by the Court; the fact that one provision fails to establish a private cause of action does not govern the enforceability of a separate and distinct provision." 198 F. Supp. 3d at 1006.

Ninth Circuit. The Ninth Circuit does not appear to have ruled directly on the question of whether § 1396a(a)(8) creates a private right of action enforceable under §1983. In *Ball v. Rodgers*, 492 F.3d 1094, 1109 (9th Cir. 2007) in deciding whether 1396a(a)(23) creates a private right of action, the Ninth Circuit noted that "like the language of §§ 1396a(a)(8), 1396a(a)(10), 1396a(a)(23), and 1396d(a)(15), the language of §§ 1396n(c)(2)(C) and (d)(2)(C) satisfies the 'rights-creating' standard set forth in *Gonzaga*, and thus clears the first hurdle of the Blessing framework." But, the district court below had dismissed the plaintiffs claims brought § 1396a(a)(8) and the Medicaid beneficiaries never appealed that decision, so the Ninth Circuit declined to rule upon that question.

Tenth Circuit. In *Okla. Chapter of the Am. Acad. of Pediatrics v. Fogarty*, 472 F.3d 1208, 1212, fn. 1 (10th Cir. 2007), as in *Mandy R. ex rel. Mr. and Mrs. R. v. Owens*, 464 F.3d 1139, 1143 (10th Cir. 2006), the Tenth Circuit assued, without deciding that § 1983 gives the plaintiffs a right of action to enforce the reasonable promptness mandate.

Eleventh Circuit. The Eleventh Circuit held that § 1396a(a)(8) is enforceable by Medicaid recipients under § 1983 in *Doe ex rel. Doe v. Chiles*, 136 F.3d 709, 714 (11th Cir.

1998). The existence of a private right of action to enforce § 1396a(a)(8) was reinforced recently in *Davis v. Carroll,* where that circuit recognized: "To be sure, we have identified "a federal right to reasonably prompt provision of assistance under section 1396a(a)(8) of the Medicaid Act." 805 Fed. Appx. 958, 964 (11th Cir. 2020).

It is notable that the United States Department of Justice filed a statement of interest in the district court in the Florida district court in 2012 in *T.H. v. Dudek*, where DOJ argued:

> Plaintiffs have also stated a valid claim for violation of the "reasonable promptness" provision of the Medicaid Act, which requires that Medicaid-eligible individuals receive medical assistance with reasonable promptness. *See* 42 U.S.C. § 1396a(a)(8). Defendants argue that a "reasonable promptness" claim is available only where there has been an outright denial of all services or extended delay in the provision of medically necessary services. (Defs.' Mot. at 16). State Medicaid programs must, however, provide all medically necessary services with reasonable promptness. *Boulet v. Cellucci*, 107 F. Supp. 2d 61, 79 (D. Mass. 2000) (holding that medical assistance must correspond to the individual's needs and the requirement of reasonable promptness is "not satisfied by other services the plaintiffs are receiving or might be offered"). The provision of some services does not relieve Defendants of their duty to provide all medically necessary services with reasonable promptness. *See id.*; *Rosie D. v. Romney*, 410 F. Supp. 2d 18, 27-28 (D. Mass. 2006) (finding that a violation of the requirement of reasonable promptness may occur where plaintiffs are denied access to services that correspond with their needs).

Case No. 0:12-cv-60460-CIV-ZLOCH, Statement of Interest of DOJ dated June 28, 2012.

D.C. Circuit. In determining that § 1396a(a)(43) "unambiguously confers rights which plaintiffs can enforce," in *Salazar v. District of Columbia,* 729 F. Supp. 2d 257, 267 (D.C.Cir. 2010), the D.C. Circuit noted that "Courts have found that surrounding provisions both do support a private right of action," citing *Sabree*, 367 F.3d at 182. Previously, in *Salazar v. District of Columbia*, 954 F. Supp. 278, 334 (D.C.D.C. 1996), the district court held that the District of Columbia violated the reasonable promptness provision of the Medicaid Act, and that violation was enforceable under 42 U.S.C. § 1983.

§ 1983 Conclusion. This Court should grant the petition for writ of certiorari because

there is a clear split among the circuits as to the enforceability and interpretation of §1396a(a)(8) and resolution is necessary to establish uniform enforcement of the federal Medicaid program. Enforcement is needed to prevent the states from denying, delaying or simply dragging their feet, as Respondents have done in this case, and failing to respond promptly to participant's requests for services in less-profitable non-congregate settings, allowing the state to maintain the status quo and to keep their beds full. These violations have allowed the Respondents to perpetually deny needed services based solely on costs and have forced waiver participants into unsafe congregate residential programs and sheltered workshops. ECF 250-14.

The failure to enforce this provision has resulted in South Carolina treating Medicaid funds as "free money" without a corresponding obligation to provide services in compliance with the Medicaid Act and the integration mandate of the ADA. Enforcement of this section is fiscally sound. The Court should grant certiorari and give affected entities and the Department of Justice the opportunity to weigh in on this important issue.

(2) Civil Conspiracy Claims

This Court has also not ruled upon the issue of whether disabled persons constitute a class entitled to the protection of 42 U.S.C. § 1985(3) and there is a spit among the circuits. As noted by the district court in *Freyre v. Hillsborough County Sheriff's Office*, 2014 WL 6885913*13 (M.D. Fla. 2014): "Circuit courts that have ruled on the question are split, with the Second, Third, and Eighth Circuits holding they are, and the Sixth, Seventh, and Tenth Circuits holding they are not." Id.) In *Henson v. City of Gadsden*, 2014 U.S. Dist. LEXIS 87477, at *8, 2014 WL 2972938 (N.D. Ala. 2014), the court refrained from a "rush to judgment" on the issue.

First Circuit. The First Circuit has not ruled upon the issue , however, the district court in Maine followed the reasoning of the circuits which have found persons who have disabilities

to be protected under § 1985(3). In *Fitzpatrick v. Town of Falmouth,* the district court found that a home-schooled child diagnosed with Asperger's Syndrome who was denied permission to play on the playground during the school day could proceed with his federal conspiracy claim. 321 F. Supp. 2d 119 (D.Me. 2004).

Second Circuit. In *Abrams v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982), the Second Circuit affirmed the lower court's ruling that "mentally retarded" persons constitute a class for purposes of Section 1985(3). *New York v. 11 Cornwell, Co.,* 508 F.Supp. 273 (E.D.N.Y. 1982). As the Second Circuit pointed out, flexibility in interpreting section 1985(3) has been demonstrated in a number of contexts, and since *Griffin v. Breckenridge,* 403 U.S. 88, 91 (1971), courts have been generous in applying § 1985(3) to nonracial classifications, even though some of the classifications would not receive strict scrutiny under the equal protection clause. *Abrams v. 11 Cornwell Company*, 695 F.2d at 42 (collecting cases). The court noted that discrimination against persons who are "mentally retarded" - "people who usually through no fault of their own, but who, from a variety of causes ranging from the congenital to the viral or traumatic cannot help their condition -- is invidious."

Eleven years later, in *Trautz v. Weisman*, the district court for the Eastern District of New York noted that there are no precise parameters defining the boundaries of "class" within the meaning of section 1985(3): "The best that can be said of § 1985(3) jurisprudence thus far is that it has been marred by fits and starts, plagued by inconsistencies, and left in flux by the Supreme Court." 819 F. Supp. 282, 291 (S.D. N.Y. 1993). *The Trautz* court found that:

> The history of discrimination against individuals with disabilities, while less noted than racial or sex discrimination, is no less a story of a group that has traditionally suffered not only physical barriers but the badge of inferiority emplaced by a society that often shuns their presence.

Trautz, 819 F. Supp. at 294-95. The *Trautz* court ruled that "Section § 1985(3) clearly provides a remedy for conspiracies to deprive persons of their rights under the United States Constitution" and that the Supreme Court's ruling in *Griffin v. Breckenridge*, 403 U.S. 88, 102-03(1971) "left open the possibility that § 1985(3) emcompasses more than simply racial animus." Thus, protection under § 1985(3) was extended to the "'discrete and insular' minorities who receive special protection under the equal protection clause because of inherent personal characteristics." *Trautz*, 819 F.Supp. at 292. Like Kobe, the *Trautz* plaintiffs alleged that the defendants "targeted them in their scheme at least in part because of their disability status."

The *Trautz* court considered and analyzed the cases that explicitly held that disabled individuals do not constitute a "class" under § 1985(3). In *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1486-87 (7th Cir. 1985), the Seventh Circuit ruled that the "legislative history of Section 1985(3) does not suggest a concern for the handicapped,"*Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176-77 (10th Cir. 1983), cert. denied, 465 U.S. 1103 (1984). Having considered decisions of other courts, the *Trautz* court concluded that disability "remains an inherent personal characteristic," and that the "fact that an individual may 'overcome' a disability, if able, only underscores the fact that a disability by its very nature is an immutable obstacle often created only by an accident of birth, not unlike race, gender, or national origin, which cannot be erased, but must be surmounted." *Trautz*, 819 F.Supp. at 292.

Trautz also took into consideration *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973), where the Supreme Court ruled that classifications based on gender are inherently invidious:

> ...sex, like race or national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."

Id. at 686. The court distinguished the cases of discrimination against disabled persons who live in a group home from cases "arising in the work setting where disability is sometimes related to a person's ability to perform a given task." Id.

To the extent that cases such as *D'Amato* rely upon conclusions that people with disabilities are not a class historically discriminated against, the Trautz court found them "undercut by the ADA, and history" because:

> One of Congress' avowed purposes was to "invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). HN25 Title II prohibits public entities, see 42 U.S.C. § 12132, and public accommodations, see 42 U.S.C. § 12182, from discriminating against persons by reason of their disabilities.

Because the finding that disabled persons constitute a class covered under Section 1985(3) "does not clearly run afoul of the statute's express language or its present parameters," its application is not limited to cases of racial discrimination. It. That court refused to "graft such a limitation onto it, truncating its sweep, when comparable Reconstruction civil rights legislation such as the equal protection clause of the fourteenth amendment have no such boundaries." Id.

The *Trautz* court declared that to read the ADA and § 1985(3) "in a consistent, harmonious fashion," it must conclude that individuals with disabilities qualify as a protected class under § 1985(3). Like Kobe, the plaintiffs in *Trautz* were "ill equipped to thwart" the defendants' fraudulent schemes "or were "hesitant to complain about their living conditions and treatment." In denying the defendant's motion to dismiss, the court held that "a class of individuals with disabilities may be protected by § 1985(3)." *Trautz,* 819 F.Supp 2d at 293.

In *Bowen v. Rubin*, the New York district court found that persons living in group homes are entitled to protection under § 1985(3). 2002 U.S. Dist. LEXIS 25283 (E.D.N.Y. 2002). The

court found that the "aimed at" requirement of § 1985(3) "does not require an allegation that the defendants knew their conduct violated a particular requirement of law, that is, that they had specific intent to violate the law, but only that the defendants' "purpose" be invidious discrimination against the plaintiffs and that the violation of the predicate right not be merely incidental to the purpose of the defendants." Id. A plaintiff need not prove hatred or malicious motivation to be protected under § 1985(3), but may demonstrate animus "based upon paternalistic concerns for the class discriminated against." Id. As in *Kobe,* the defendants ther had targeted disabled persons living in a group home by very reason of their disability. Id.

Third Circuit. The leading case in the Third Circuit on this issue is *Lake v. Arnold*, where that circuit ruled that a woman with intellectual disabilities represented a "cognizable class entitled to protection" under § 1985(3) for conspiracy where she was deprived of her right to procreate because she was "mentally retarded." *Lake v. Arnold I,* 112 F.3d 682 (3d Cir. 1997). The Third Circuit ruled in that case that "the scope of section 1985(3) is not fixed as of any given point in time, but must be subject to reinterpretation as times and circumstances require." That court explained that: "equality . . . is a frail, tenuous and changing notion, which does not sit still . . . [but] moves in unpredictable waves with the shifting tides of history." *Ken Gormley, Private Conspiracies and the Constitution: A Modern Version of 42 U.S.C. Section 1985(3),* 64 Tex. L. Rev. 527, 550 (1985). In order "[t]o ensure that private conspirators do not strip other citizens of the equal protection of the laws, we must be particularly concerned with those discrete and insular minorities who have traditionally borne the brunt of prejudice in our society." Id. at 575.

The court examined the language and intent of § 1985(3), in light of "recent recognition of current and historic prejudice directed toward the handicapped," and determined that

"[d]iscrimination based on handicap, including mental handicap, like that based on gender, often rests on immutable characteristics which have no relationship to ability." The court declared such discrimination to be "invidious and ...[that] the reach of section 1985(3) is sufficiently elastic that the scope of its protection may be extended." In reaching that conclusion, the court was influenced by Congress' statement in enacting the Americans With Disabilities Act declaring that:

> Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

Id. at 688, citing 42 U.S.C. § 12101(a)(7). Thus, the history of discrimination against persons who have disabilities, "while less noted than racial or sex discrimination, is no less a story of a group that has traditionally suffered not only physical barriers but the badge of inferiority emplaced by a society that often shuns their presence." Id., citing *Trautz*, 819 F. Supp. at 294-95.

Discrimination against persons Kobe, who bear no responsibility for their disability is "incompatible with our ideals of equality." Id. The Third Circuit was convinced that "whatever the outer boundaries of the concept," an animus directed against them includes the elements of a 'class-based invidiously discriminatory' motivation" that entitles disabled persons to protection under 42 U.S.C. 1985(3). Id. at 688.

Fifth Circuit. The Fifth Circuit does not appear to have ruled on the issue of whether persons who have disabilities are protected under §1985(3).

Sixth Circuit. The Sixth Circuit split from other circuits in *Bartell v. Lohiser*, a case involving the parental rights of a person who had intellectual disabilities. 215 F.3d 550, 559 (6th

Cir. 2000). The Six Circuit held that § 1985(3) "does not cover claims based on disability-based discrimination or animus." Id. This ruling was affirmed in 2018 in *Kuerbitz v. Meisner*, 2018 U.S. App. LEXIS 19007 (6th Cir. 2018), without further analysis of *Bartell*.

But, in *Wilson v. Gordan,* Medicaid applicants alleged that delays in processing their applications violated 42 U.S.C.S. § 1396a(a)(8), and the Sixth Circuit held that the case was not mooted when the applicants obtained relief because the "inherently transitory" exception to mootness applied. 822 F.3d 934 (6th Cir. 2016). The Sixth Circuit held that plaintiffs were likely to succeed on the merits.

Seventh Circuit. In *D'Amato v. Wisconsin*, an employee, whose job required him to go into high places, was diagnosed is acrophobia and he brought an action alleging wrongful discharge and violation of § 1985(3). 760 F.2d 1474 (7th Cir. 1985). The Seventh Circuit found no right to enforce § 1985(3) because handicaps are "a condition that may be overcome, depending on the individual and on the handicap" and "the severity with which a handicap affects a person varies from individual to individual."[7] Id.

Eighth Circuit. In *Larson v. Miller*, a young girl with disabilities was allegedly sexually assaulted by a driver of a school bus and the jury returned both compensatory and punitive damages. 55 F.3d 1343 (8th Cir. 1995). The Eighth Circuit initially adopted a broad view of § 1985(3)'s animus requirement, finding that the required animus included women and the disabled. The panel held that "§ 1985(3)'s reach extends beyond racial animus," and that "the statute's legislative history . . . reveals a broader congressional intent to extend § 1985(3)'s sweep

---

[7] The Second Circuit in *People by Abrams v. 11 Cornwell Co.,* 695 F.2d 34, 42-43 (2d Cir. 1982), considered and rejected *D'Amato's* holdings as unconvincing, and the court in *Trautz v. Weisman* case agreed. 819 F.Supp at 293.

to diverse classifications beyond race . . . ," id. at 1351-52. Subsequently, sitting *en banc,* the Eighth Circuit granted rehearing and vacated that panel's decision, without reaching the issue of the scope of animus contemplated in § 1985(3). See generally *Larson ex rel. Larson v. Miller,* 76 F.3d 1446 (8th Cir. 1996). Instead, the *en banc* panel found that the evidence in the case was insufficient to support the jury's verdicts.

Ninth Circuit. The Ninth Circuit does not appear to have ruled on the issue of whether persons who are disabled are entitled to protection under § 1985(3).

Tenth Circuit. In *Cain v. Kansas City*," the Kansas district court declined to enlarge the ambit of § 1985(3) cases to include a conspiracy allegedly motivated by disability discrimination. That court held instead that because "(t)he circuit court cases which have recognized under § 1985, classes which are not racially based, [they] have stayed close to the areas protected by the First Amendment." Id. The Second Circuit criticized this case, finding that the analysis was "scant," and determined it to be "unconvincing" and that it did not foreclose the issue. *Abrams v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982).

Two years later, in 1983, in *Wilhelm v. Continental Title Co.*, 720 F.2d 1173(10th Cir. 1983), the Tenth Circuit again concluded that a class of "handicapped persons" was not in the contemplation of Congress in 1871, so that those persons with disabilities could not be included as a class in what is now § 1985(3). Id., citing *Cain v. Archdiocese of Kansas City, Kansas*, 508 F. Supp. 1021 (D. Kan.).[8]

---

[8]*Wilhelm* was criticized by the Maine district court in *Fitzpatrick v. Town of Falmouth*, 321 F. Supp. 2d 119, 124 (D.C.Me. 2004). In *Trautz v. Weisman,* the district court rejected *Wilhelm* as having "no relevance to the present case which is unrelated to the employment setting." 819 F.Supp. at 293. That court held that "a class of disabled individuals may fall within § 1985(3)'s protective ambit does not clearly run afoul of the statute's express language

Eleventh Circuit. The Eleventh Circuit does not appear to have determined whether persons with disabilities may be protected under § 1985(3), however in *Lyles v. City of Riviera Beach,* 166 F.3d 1332 (11th Cir. 1999), that court held that the "animus" requirement is not limited to "maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women."

In *Freyre v. Hillsborough Co. Sheriff's Office*, 2014 U.S. Dist. LEXIS 66348, fn. 10 (M.D.Fla. 2014), the court ruled that "the question of whether the class of physically handicapped individuals is sufficiently suspect to support a § 1985(3) claim ... need not be reached." That same year, in *Henson v. City of Gadsden,* 2014 U.S. Dist. LEXIS 87477(M.D.Ala. 2014), the plaintiff alleged that he was not hired "on account of his Type I diabetic condition" and that his equal protection rights were protected under 42 U.S.C. § 1985(3). *Henson* acknowledged that:

> The United States Court of Appeals for the Eleventh Circuit has not specifically addressed whether the protected class of disability is covered for the purposes of 42 U.S.C. § 1985(3). The Second and Eighth Circuits have extended 42 U.S.C. § 1985(3)'s protection to disability discrimination; however Plaintiff acknowledges a circuit split exists in that Seventh and Tenth Circuits have not provided such coverage. See Fitzpatrick v. City of Falmouth, 321 F. Supp. 2d 119, 124 (D. Me. 2004). The Eleventh Circuit has only grazed the issue of disability discrimination in light of 42 U.S.C. § 1985(3) in Wilbourne v. Forsyth Cty. Sch. Dist., 306 Fed. Appx. 473, 477-78 (11th Cir. 2009), wherein the claim was dismissed on grounds not related to the issue of coverage.

The district court determined in that case that "there is no reason ...to "rush to judgment" or to attempt to predict what the Eleventh Circuit will ultimately decide about the merits of a

---

or its present parameters." Id. Because the statute's language did not "expressly limit its application to cases of racial discrimination," that district court refused to "graft such a limitation onto it, truncating its sweep, when comparable Reconstruction civil rights legislation such as the equal protection clause of the fourteenth amendment have no such boundaries." Id. at 294.

disability conspiracy claim, especially when that court may expressly address the issue in a published opinion during the pendency of this case." Id.

§ 1985 Summary. The Court should grant certiorari, because there is a split in the circuits on the issue of whether persons who have disabilities are protected against civil conspiracies under § 1985(3). The scope of the protected class is also an issue of tremendous public importance to the most vulnerable citizens of the United States. Kobe does not ask the Court to determine that every person who has a disability is entitled to relief under § 1985. Kobe proposes a narrower class of persons with intellectual or related disabilities living in congregate facilities. The record clearly demonstrates continued pervasive discrimination against persons who have intellectual or related disabilities, as recognized by Congress' extensive findings and purpose set forth in 42 U.S.C. § 12101 passing the ADA. The Director of Protection & Advocacy for South Carolinians with Disabilities, Inc. introduced that organization's report on the conditions of DDSN congregate facilities as follows:

> This report includes one homicide two deaths from choking physical injuries with excruciating pain and other shocking examples of abuse and neglect. The injured individuals include people who are non-verbal and unable to tell their own stories. This report sets out some of the stories from a sample population. Based on the cases we have reviewed we believe that procedures for preventing and investigating the abuse and neglect of individuals with disabilities are totally inadequate. The States out of sight out of mind inadequate response must end now.

J.A. 2489. The affidavit of a former Commissioner of DDSN, Deborah McPherson, signed in 2017, likewise describes systemic abuse, neglect and exploitation in congregate facilities operated by DDSN, some resulting in deaths. ECF 441-2 at 4885-4886.

Recent Congressional Reports demonstrate that these problems are not unique to South Carolina. In December, 2020, Senators Grassley and Wyden released reports of investigations of

abuse and neglect in Medicaid-funded residential services to adults with intellectual and developmental disabilities (I/DD) in their states.[9] The Court should order briefing, giving affected organizations and the United States Department of Justice the opportunity to weigh in on this question of tremendous public importance.

B. The Fourth Circuit's Decision is Factually Wrong and the Fourth Circuit Applied the Wrong Standard in Granting Summary Judgment.

The Fourth Circuit erred in holding that Kobe failed to address the grounds upon which the district court dismissed his case in his opening brief in *Kobe I* and failed to correct the erroneous summary judgment standard applied by the district court. In *Kobe v. Haley*, 2014 U.S. Dist. LEXIS 139172 (D.S.C. 2014), the district court did not mention Kobe in the section discussing ripeness, which addressed and dismissed only Mark's claims. Instead, the court dismissed Kobe's claim for placement in an SLP on the erroneous grounds that he failed to raise that claim until filing his motion for summary judgment:

> As to Kobe's remaining contentions, i.e., his desire to be placed in an SLP and his demand for immediate payment to Ron Kuebler, these claims were not raised until Plaintiffs' motion for partial summary judgment and thus are not properly before the court. Kobe may raise these claims in a separate complaint, should he desire to do so.

Id. That ruling was clearly erroneous, as his requests had been made persistently since 2011, as documented in Kobe's original and amended complaint. ECF 1 and ECF 65. Kobe called this error to the court's attention in his motion to reconsider at ECF 309:

---

[9]Iowa's report is contained at https://www.finance.senate.gov/imo/media/doc/2020-12-03%20FINAL%20Investigative%20Report%20(REM%20Iowa).pdf and Washington's at https://www.finance.senate.gov/imo/media/doc/120220%20Life%20at%20Cypress%20House%20-%20An%20Examination%20of%20Care%20Provided%20by%20MENTOR%20Oregon.pdf.

> In ¶ 280 of Count One Kobe unambiguously complained that Defendants had violated the ADA by denying Kobes request for an ACD and his choice to move to a less restrictive setting.
> In ¶ 281 Plaintiffs complained that Defendants failed to make reasonable modifications in their programs which are necessary for Plaintiffs to receive services in the least restrictive setting.

Kobe reminded the district court that he had specifically alleged in Count Two "the violations that resulted from Defendants' failure to provide a speech device and services in an apartment setting." ECF 309 at 8 and 9 of 21.

Instead of reviewing Kobe's amended complaint, which clearly set forth his requests for placement in an apartment placement, the district court issued *Kobe v. Haley*, 2015 U.S. Dist. LEXIS 198274 (D.S.C. 2015), dismissing Kobe's claims on the different grounds, finding that he did not request such placement until December, 2013. That order states that "According to Plaintiffs, Kobe made a request of the Richland/Lexington Disabilities and Special Needs Board to live in an apartment setting in or around December 2013." That finding was clearly erroneous.

The filing at ECF 279-8 that the district court relied upon in reaching that conclusion contained 34 pages of emails, 26 of which were sent to DHHS counsel in 2011 regarding Kobe's need for a speech device and wheelchair. The last eight pages of ECF 279-8 contained emails between Kobe's counsel, his DDSN case manager, Lynn Lugo, counsel for RichLex and counsel for DHHS sent in 2013. In those emails at J.A. 3797-3804, counsel and the case manager discussed the status of Kobe's request for placement in an apartment setting. But, that 2013 status follow-up was certainly not the first request Kobe made for SLP placement.

DDSN Regional Director, John King, had provided a sworn statement signed on February 14, 2014 claiming that he had searched all of DDSN records and that "there is no evidence regarding if or when the request was forwarded to the Department of Disabilities and

Special Needs (DDSN), or whether DDSN has rendered an unfavorable administrative decision or failed to respond to Kobe's request." ECF 264-1. King's affidavit is clearly contradicted, not only by Kobe's complaint and amended complaint that were served upon DDSN, but also by Kobe's Support Plan that DDSN approved on October 1, 2013, which identified Kobe's desire and need for placement in an apartment setting at ECF 279-6, page 18 of 28. It is notable that this plan was printed on the DDSN computer system on October 21, 2013, as evidenced by the footer. Kobe's support plan should have been the first place King looked when searching DDSN's records for Kobe's requests for services.

The district court applied the wrong summary judgment standard, viewing the evidence in a light most favorable to Respondents and believing the affidavit DDSN Regional Director, John King, instead of viewing the evidence in a light most favorable to Kobe, as required by the Fourth Circuit standard set forth in *Doe v. Kidd*, 501 F.3d 348, 352, (4th Cir. 2007). That ruling required the court to view the facts in a light most favorable to the Plaintiff as the non-moving party and drawing all reasonable inferences in Kobe's favor.[10]

Kobe addressed these errors in his opening brief in the Fourth Circuit (Doc. 66-1) in *Kobe I* at page 51, where he argued:

> The lower court ruled that Defendants still have not ruled upon Kobe's request to receive services in a less restrictive setting, a SLP II. Kobe first requested placement in a less restrictive setting in 2011...This issue is quite simple. 42 U.S.C. 1396a(a)(8) means something.

Page 25 of the opening brief in *Kobe I* also addresses the district court's error: "At every annual plan meeting, Kobe has informed his service coordinator that he does not choose to live in a congregate setting

[10] This district judge should have been familiar with the obligation set forth in § 1396a(a)(8), because the Fourth Circuit three times reversed her rulings in *Doe v. Kidd*, the case that established that Medicaid participants have the right to enforce that statute under § 1983.

and that he wants to move to an apartment." At page 52 of that brief, Kobe referred to the reasonable promptness ruling in *Doe v. Kidd* II, Case No. 10-1191 (4th Cir. March 24, 2011), where the Fourth Circuit ruled that these same Defendants had "abdicated their responsibility to furnish Doe with the necessary services in the least restrictive environment..." Id. In Kobe's Fourth Circuit brief he argued:

> Treating professionals who have worked with Kobe have opined that he is capable of living in an independent apartment with appropriate supports provided.

Kobe explained that his provider had "prepared a budget for services to be provided in an SLP (Supervised Living Program), where Kobe would be integrated with non-disabled persons. The cost of this budget is less than DDSN has paid for other waiver participants served by DDSN." JA 1810. At page 57, Kobe discussed that the state has sufficient resources to provide the care he needs in a less restrictive setting.

Kobe's claim that "At every annual plan meeting, Kobe has informed his case manager that he does not choose to live in a congregate setting and that he wants to move to an apartment" also disputes King's claim of ignorance of Kobe's requests. On page 44 of Kobe's opening brief in *Kobe I*, he argued that:

> Here, as in *Doe*, Plaintiffs have challenged Appellees' failure to provide them with services promptly. Plaintiffs have also alleged other violations of the Medicaid Act, a conspiracy and violation of RICO which the lower court failed to address on the merits of Plaintiffs' claims. Viewing the facts in the light most favorable to Kobe and Mark, Appellees have not yet voluntarily ceased the conduct of failing to provide services with reasonable promptness, failing to establish reasonable standards, failing to provide services in the amount, duration and scope necessary to meet Plaintiffs needs in order to remain in the least restrictive setting...Therefore, the issues presented in Plaintiffs' claims under Counts One through Seven continue to be live and the parties continue to have a legally cognizable interest in the outcome.

66-1, page 25. Kobe again addressed the SLP issue on page 49 of his opening brief:

> But, Kobe still has not been provided with residential services in the least restrictive setting, nor has he been provided with speech services.

At pages 45-46 of his opening brief in *Kobe I*, Petitioner argued that Respondents had continued

"their practice of violating Plaintiffs' due process rights and the reasonable promptness provision of the Medicaid Act by failing to issue a final administrative decision on all issues appealed within ninety days of the request for a fair hearing has ended and that they will, in the future comply with the reasonable promptness requirements of the Medicaid Act. *Doe v. Kidd I,* 501 F.3d 308 (4th Cir. 2007), cert. denied 128 S.Ct. 1483 (2008).

He argued that Respondents "have failed to demonstrate that no material fact exists to show that other provisions of the Medicaid Act, the ADA and Section 504 have not been violated. (Reasonable standards and amount, duration and scope).

F.R.C.P. Rule 56(a) provides that "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Summary judgment was improper here, because Respondents failed to carry their buden of showing the absence of any genuine issue of fact to counter the extensive evidence showing that Respondents were on notice of Kobe's repeated requests for services and equipment, specifically including placement in an apartment setting, and that those services were not provided with reasonable promptness. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970).

The Fourth Circuit was required to review the district court's summary judgment ruling de novo, viewing the facts in the light most favorable to Kobe as the nonmoving party and drawing all reasonable inferences in his favor, which it failed to do. The Fourth Circuit also found that:

> The record shows that DDSN has denied Kobe's post-litigation requests for an apartment placement because of concerns that his extensive needs could not be met in that setting.

821 F.Appx. 183-184. But, this finding is contradicted by the record and Respondents failed to

provide an evaluation by a single person who examined or knew Kobe and it is contradicted by sworn affidavits of treatment professionals who had treated Kobe for years and testified that he was capable of living in an apartment setting with appropriate supports. ECF 251-3 to 251-6 at J.A. 3122-3128.

A Hope Bridge caregiver testified in her affidavit that "If Kobe was provided the supports he needs, he could live more independently in an apartment setting, where he could be integrated into the community instead of being segregated with only disabled persons." Id. at 3123. The house supervisor at Kobe's group home stated that "If [name redacted] had on-site supports and assistance with getting in and out of bed, dressing and eating, he would be able to live in an apartment" and that he "has the mental capacity to live more independently if he was provided appropriate supports." Id. at 3124.

In any event, the "waiver rule is one of prudence rather than jurisdiction," as the Fourth Circuit noted in *Kobe v. Buscemi,* 821 Fed. Appx. 180, 185 (4th Cir. 2020). Finally, it is evident from the record that Kobe suffered prejudice as as result of being denied equipment he needed and continues to need, as described in Kobe's affidavit at ECF 457-2. This court ruled in *Olmstead* that "unjustified isolation" constitutes discrimination under the integration mandate of the ADA. The record here documents such discrimination prohibited by federal law and other injuries.

CONCLUSION

This petition raises questions of tremendous public importance and there is an urgent need to resolve the conflicts among the circuits to protect the rights of America's most vulnerable citizens and their families, as well as taxpayers who are paying for services the intended beneficiaries are not receiving. For the reasons set forth in this petition, the Court should grant certiorari and order full briefing on these questions.

Respectfully submitted,

PATRICIA L. HARRISON
Counsel of Record
PATRICIA L. HARRISON, ATTORNEY AT LAW
47 Rosemond Road
Cleveland, SC 29635
(864) 836-3572
pharrison@loganharrisonlaw.com

Counsel for Petitioner

APPENDIX A

Kobe v. Buscemi

United States Court of Appeals for the Fourth Circuit

May 15, 2020, Submitted; July 13, 2020, Decided

No. 18-2505

Reporter
821 Fed. Appx. 180 *; 2020 U.S. App. LEXIS 21627 **

KOBE, Plaintiff - Appellant, MARK, JOHN, Plaintiffs, v. BEVERLY ***BUSCEMI***, in her official capacity as Director of the South Carolina Department of Disabilities and Special Needs; KATHI LACY, in her capacities as employee of the South Carolina Department of Disabilities and Special Needs; THOMAS P. WARING, in his capacity as employee of the South Carolina Department of Disabilities and Special Needs; JACOB CHOREY, in his capacity as employee of the South Carolina Department of Disabilities and Special Needs; MARY LEITNER, in her capacity as the Director of the Richland Lexington Disabilities and Special Needs Board; JUDY JOHNSON, in her capacity as the Director of the Babcock Center; THE BABCOCK CENTER; ANTHONY KECK, in his capacity as the former Director of the South Carolina Department of Health and Human Services; EMMA FORKNER, in her capacity as the former Director of the South Carolina Department of Health and Human Services; JOSHUA BAKER, in his capacity as the Director of the South Carolina Department of Health and Human Services; EUGENE A. LAURENT, former Interim Director of the South Carolina Department of Disabilities and Special Needs; STANLEY BUTKUS, former Director of the South Carolina Department of Disabilities and Special Needs; RICHARD HUNTRESS, in his capacity as Commissioner of the South Carolina Department of Disabilities and Special Needs, Defendants — Appellees, and CYNTHIA MANN, Deputy Administrator and Director of the Center for Medicaid, CHIP, and Survey & Certification, CMS; NIKKI HALEY, in her official capacity as Governor and Chairman of the South Carolina Budget and Control Board; ELEANOR KITZMAN, in her official capacity as the Executive Director of the State Budget and Control Board; GLENN F. MCCONNELL, in his official capacity as the President Pro Tempore of the South Carolina Senate; ROBERT W. HARRELL, JR., in his official capacity as the Speaker of the South Carolina House of Representatives; DANIEL COOPER; CONVERSE CHELLIS, in his capacity as former member of the South Carolina Budget and Control Board; MARK SANFORD, in his capacity as former members of the South Carolina Budget and Control Board; HUGH LEATHERMAN, in his capacity as members of the South Carolina Budget and Control Board; RICHARD ECKSTROM, in his capacity as members of the South Carolina Budget and Control Board; CURTIS LOFTIS, as member of the South Carolina Budget and Control Board; BRIAN WHITE, as member of the South Carolina Budget and Control Board; HENRY MCMASTER, in his official capacity as Governor and Chairman of the South Carolina Budget and Control Board; UNNAMED ACTORS ASSOCIATED WITH THE BABCOCK CENTER, Defendants.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: Rehearing denied by, Rehearing denied by, En banc ***Kobe** v. **Buscemi**, 2020 U.S. App. LEXIS 25276 (4th Cir., Aug. 10, 2020)*

Prior History: **[**1]** Appeal from the United States District Court for the District of South Carolina, at Columbia. (3:11-cv-01146-MBS). Margaret B. Seymour, Senior District Judge.

***Kobe** v. McMaster, 2018 U.S. Dist. LEXIS 55500 (D.S.C., Mar. 30, 2018)*

Disposition: AFFIRMED.

Counsel: Patricia Logan Harrison, Cleveland, South Carolina, for Appellant.

William H. Davidson, II, Kenneth P. Woodington, DAVIDSON, WREN & PLYLER, P.A., Columbia, South Carolina, for Appellees ***Buscemi***, Butkus, Chorey, Huntress, Lacy, Laurent, and Waring.

Damon C. Wlodarczyk, RILEY, POPE & LANEY, LLC, Columbia, South Carolina, for Appellees Keck, Forkner, and Soura.

Patrick J. Frawley, DAVIS FRAWLEY, LLC, Lexington, South Carolina, for Appellee Leitner.

Joel W. Collins, Jr., Christian Stegmaier, Meghan Hazelwood Hall, COLLINS & LACY, P.C., Columbia, South Carolina, for Appellees Babcock Center, Unnamed Actors Associated with the Babcock Center and Johnson.

Judges: Before DIAZ and THACKER, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Opinion

[*182] PER CURIAM:

This action was filed in 2011 by "***Kobe***," who used a pseudonym because he feared retaliation.[1] Through a series of orders, the district court eventually ruled against ***Kobe*** on all claims asserted against all defendants. ***Kobe*** appealed, and this court affirmed in part, vacated in part, and remanded for **[**2]** further proceedings. *See* ***Kobe*** *v. Haley, 666 F. App'x 281 (4th Cir. 2016)* ("***Kobe*** *I*"). On remand, the district court rejected all remaining claims except an official-capacity claim against the Governor under the *Americans with Disabilities Act*. That claim was subsequently settled. ***Kobe*** again appeals. After considering the briefs and the voluminous record, we find no reversible error and affirm.

I.

A.

This case involves questions about the provision of Medicaid services to people with intellectual and related disabilities. Although many Medicaid benefits are available only to those in institutions, *42 U.S.C. § 1396n(c)* establishes a Medicaid waiver program (the "Waiver Program") that permits states to provide home- and community-based services to eligible persons with intellectual and related disabilities, so that they may avoid institutionalization. *See* ***Kobe*** *I, 666 F. App'x at 283-84*. The benefits and services that may be provided through the Waiver Program include equipment, assistive technology, and Adult Day Health Care services ("ADHC"), which provide recipients "with medical or therapeutic care as well as social and recreational events and meals." *Id. at 284*.

In South Carolina, the Department of Health and Human Services ("DHHS") is responsible for administering Medicaid benefits and services. **[**3]** DHHS contracts with the South Carolina Department of Disabilities and Special Needs ("DDSN") to operate the benefits and services for Medicaid recipients with intellectual and related disabilities. DDSN in turn contracts with local Disabilities and Special Needs Boards ("DSN Boards"), which contract with private entities to provide Medicaid services.

[*183] The Richland Lexington Disabilities and Special Needs Board ("Rich/Lex Board") is the DSN Board responsible for benefits provided in South Carolina's Richland and Lexington Counties. A service coordinator evaluates each recipient's condition and needs in order to develop a plan of care. "Service coordinators may approve some services themselves, but as to other services, they only make a recommendation to DDSN, which decides whether to approve them." *Id.*

Kobe, who was born with severe cerebral palsy, receives Waiver Program benefits through the Rich/Lex Board. ***Kobe*** is intelligent but cannot speak in a manner intelligible to others. He cannot walk, so he uses a wheelchair. Because of his spasticity, his arms and legs must be strapped to the wheelchair. ***Kobe*** was 29 years old when this action was filed. At that time, he lived in a community **[**4]** training home operated by the Babcock Center and received ADHC services from the Hope Bridge Adult Day Care program. Shortly thereafter, ***Kobe*** moved into a congregate group home operated by United Cerebral Palsy, a private provider.

---

[1] Two other individuals, "Mark" and "John," were also plaintiffs when this action was filed. They have since been dismissed from the action, and ***Kobe*** is the only remaining plaintiff.

Kobe began having problems with his wheelchair in 2008, when he lived at the Babcock Center-operated community home. His plan of care in January 2008 called for a new wheelchair, but he did not receive it until April 2009. The new wheelchair was damaged at least twice, and ***Kobe*** was forced to spend weeks in bed during times that the wheelchair was not functional. ***Kobe*** also had difficulty in obtaining an augmentative communications device ("ACD") that would permit him to communicate with his caregivers. In 2009, DDNS announced changes in the services provided under the Waiver Program, including the elimination of physical therapy, occupational therapy, and speech and language services. In December 2010, ***Kobe***'s service coordinator re-assessed his eligibility for ADHC services and determined that he no longer qualified for the services. ***Kobe*** appealed that decision to the DDSN Director; he continued to receive ADHC benefits during the pendency of the appeal.

Kobe **[**5]** alleged in the complaint that the defendants were attempting to reduce ADHC services to force ADHC recipients to instead attend Work Activity Centers ("WACs") operated by local DSN Boards.[2] According to ***Kobe***, WACs are more restrictive and cannot always adequately support the medical needs of its participants. ***Kobe*** alleged that the defendants misappropriated funds to support the WAC program and financially benefitted from their operation. ***Kobe*** notes that participants in WAC programs are paid less than minimum wage and that DDSN and local DSN Boards may spend the profits generated by WACs without oversight.

This action was filed in May 2011. After the action was commenced, ***Kobe*** received an ACD that uses eye movements to synthesize speech and was sufficient for his needs. ***Kobe***'s administrative appeal of the denial of ADHC benefits was resolved in his favor, and the parties entered into a consent decree in 2012 stating that ***Kobe*** meets the criteria for ADHC services and that he would continue to receive such services through his chosen provider. ***Kobe*** requested and received a new wheelchair in 2013. Also in 2013, ***Kobe***'s plan of care called for him to be placed in a private supervised living **[**6]** placement ("SLP") apartment, something ***Kobe*** had long requested. As of the time of briefing in this appeal, **[*184]** ***Kobe*** remained in the group home. The record shows that DDSN has denied ***Kobe***'s post-litigation requests for an apartment placement because of concerns that his extensive needs could not be met in that setting.

B.

The amended complaint named as defendants the Governor of South Carolina; members and former members of the South Carolina Budget and Control Board; the director and a former director of DHHS; the director and former directors and officials of DDSN; the director of the Rich/Lex Board; and the director and unnamed employees of the Babcock Center. The complaint asserted seven federal causes of action, including claims under the *Americans with Disabilities Act of 1990 ("ADA")*, *see* *42 U.S.C. §§ 12101 et seq.*; section 504 of the Rehabilitation Act of 1973, *see* *29 U.S.C. § 794*; and *42 U.S.C. § 1983*. ***Kobe*** also asserted state law claims for negligence, intentional infliction of emotional distress, and assault and battery against the Babcock Center defendants based on the care he received during the time he lived there.

In 2012, the district court dismissed all claims against the Budget and Control Board defendants. In 2014, the district court granted **[**7]** summary judgment in favor of the defendants on all claims except ***Kobe***'s

---

[2] A WAC is "[a] workshop having an identifiable program designed to provide therapeutic activities for workers with intellectual disability whose physical or mental impairment is so severe as to interfere with normal productive capacity." *S.C. Code Regs. 88-405(K)*.

state-law claims against the Babcock Center defendants.[3] As is relevant to ***Kobe***, the district court concluded that any claims related to his need for a wheelchair and ACD and the possible discontinuation of ADHC services were moot because the wheelchair and ACD had been provided during the course of litigation and ***Kobe*** had never lost ADHC services. In a 2015 order denying the plaintiffs' motion to alter or amend, the district court noted that ***Kobe***'s claims involving his need for placement in an SLP apartment were not ripe.

On ***Kobe***'s appeal, we affirmed in part, vacated in part, and remanded for further proceedings. We affirmed the dismissal of the claims against the Budget and Control Board defendants, but concluded that the district court erred by dismissing on *Eleventh Amendment* grounds the ADA and Rehabilitation Act claims asserted against the Governor. *See* ***Kobe*** *I, 666 F. App'x at 304*.

We agreed with the district court that all claims involving the ADHC claims were moot. *See id. at 297*. However, we disagreed with the district court's conclusion that ***Kobe***'s claims regarding the delays in providing the ACD and a functioning wheelchair were also moot. Given the history **[**8]** of delay in providing those items to ***Kobe***, we held that the "temporary satisfaction of [***Kobe***'s] needs during the pendency of this lawsuit" was not sufficient to carry the defendants' heavy burden of establishing mootness. *Id. at 298*. And because the district court had not sufficiently explained its basis for dismissing the claims, we vacated the district court's dismissal of the federal claims asserted in counts one through seven of the amended complaint and remanded for further consideration of those counts as to the remaining defendants. *See id.*

In the course of our opinion in ***Kobe*** *I*, we observed that the plaintiffs had abandoned their claims for monetary damages during a summary judgment hearing held by the district court in 2014. *See id. at 293 n.19*. As to ***Kobe***'s claims involving placement in an SLP apartment, we explained that the plaintiffs "offer no challenge to the district court's ruling that their claim that ***Kobe*** is entitled to be provided with **[*185]** an SLP is unripe." *Id. at 295 n.21*. Because the plaintiffs did not challenge the ruling, we therefore did not address it. *See id.*

On remand, the district court granted summary judgment in favor of the defendants on all claims except the ADA official-capacity claim asserted **[**9]** against the Governor. (The claim against the Governor was settled after the issuance of the district court's opinion.) This appeal followed.

II.

"A grant of summary judgment is proper when no genuine dispute of material fact exists for trial. In making this determination, we view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor." *Cybernet, LLC v. David, 954 F.3d 162, 168 (4th Cir. 2020)* (citation omitted). Nonetheless, "permissible inferences must still be within the range of reasonable probability, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." *Id.* (internal quotation marks and alteration omitted).

A.

---

[3] ***Kobe***'s state-law claims against the Babcock Center defendants were subsequently settled.

Before considering the district court's rejection of ***Kobe***'s claims, we pause to address the ripeness of ***Kobe***'s claims regarding placement in an SLP apartment.

Much of ***Kobe***'s brief is devoted to the SLP placement issue, and he contends the district court erred by finding the claims unripe. However, the district court made its ripeness ruling in the orders that were at issue in *Kobe I*. Although ***Kobe*** appealed the district court's orders, he did not challenge the **[**10]** determination that the SLP placement claims were not ripe, and we therefore did not address the issue. *See Kobe I, 666 F. App'x at 295 n.21*. Contrary to ***Kobe***'s argument, we did not remand the ripeness question to the district court for reconsideration. Instead, we left the issue as it had been resolved by the district court, because the district court's resolution had not been challenged on appeal. *See Doe v. Chao, 511 F.3d 461, 465 (4th Cir. 2007)* (explaining that "any issue that could have been but was not raised on appeal is waived and thus not remanded") (internal quotation marks omitted). Moreover, because ***Kobe*** did not challenge the ripeness ruling in his first appeal, he cannot challenge it now. *See Omni Outdoor Advert., Inc. v. Columbia Outdoor Advert., Inc., 974 F.2d 502, 505 (4th Cir. 1992)* ("It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.") (internal quotation marks omitted).

Although this waiver rule is one of prudence rather than jurisdiction, there is no basis for departing from the rule in this case. Given the manner in which this case has proceeded, we cannot fault the district court for declining to expand the litigation to include an issue that arose two years after the filing of the complaint. ***Kobe*** remains free, as he **[**11]** has been since the district court first announced its view that the claims were not ripe, to file a separate complaint addressing the SLP apartment placement. But as to the questions raised in this appeal, the SLP claims are not at issue, and ***Kobe*** cannot establish error by complaining about the district court's approach to the SLP claims.

B.

We now turn to ***Kobe***'s challenges to the district court's grant of summary judgment to the defendants on Counts One through Seven of the amended complaint.

[*186] (1)

In Count One, ***Kobe*** asserts that the defendants violated the ADA by denying ADHC services in order to force recipients of Waiver Program benefits into the WACs operated by the defendants. ***Kobe*** alleges that the medical needs of WAC participants cannot always be adequately addressed at the WAC and that forcing ADHC recipients into WACs puts them at risk and violates the ADA's requirement that public services be delivered in "the most integrated setting appropriate to the needs of qualified individuals with disabilities." *Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 592, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999)* (internal quotation marks omitted). In Count Two, ***Kobe*** contends that the same actions violate the similar requirement under *section 504 of the Rehabilitation Act* that services be provided **[**12]** "in the most integrated setting appropriate. . . ." *28 C.F.R. § 41.51(d)*.

We find no error in the district court's grant of summary judgment in favor of the defendants on ***Kobe***'s claims under the ADA and the *Rehabilitation Act*. Accepting as true ***Kobe***'s contentions about the actions of the defendants in creating WACs and attempting to funnel ADHC recipients into the new WACs, we nonetheless conclude that ***Kobe*** has failed to show that he has been affected by the alleged scheme. As we explained in *Kobe I*, any claim that ***Kobe*** might have had based on his service coordinator's initial

decision that ***Kobe*** was not eligible for ADHC services was moot because he prevailed in the administrative appeal and his ADHC services were never interrupted. ***Kobe*** *I, 666 F. App'x at 296-97*. Thus, even if ***Kobe*** is right that forcing someone with his disability into a WAC would violate the ADA and the *Rehabilitation Act*, he is still receiving ADHC services and has not been required to participate in a WAC. Because ***Kobe*** has not established that he suffered an injury under either statute, the district court properly granted summary judgment.

To the extent that ***Kobe*** contends his ADA and Rehabilitation Act claims were also premised on the delay in providing an adequate **[**13]** ACD and in repairing his wheelchair, those claims were likewise properly rejected. Although it took longer than it should have for ***Kobe*** to get the right ACD, and ***Kobe*** had difficulties in the past getting his wheelchair repaired in a timely manner, during the course of his litigation he received a new wheelchair and a proper ACD that was not merely "on loan" to him. Even assuming that the past difficulties could support claims under the ADA or *Rehabilitation Act*, ***Kobe*** during the summary-judgment hearing abandoned his damage claims against all of the defendants still involved in this case, *see* ***Kobe*** *I, 666 F. App'x at 293 n.19*, and he does not seek any other form of relief as to those specific claims.

To the extent that ***Kobe*** contends his ADA and *Rehabilitation Act* claims should not have been dismissed because they encompass his efforts to be placed in an SLP apartment, we disagree for the reasons discussed above. Those claims were not ripe when the action was commenced, and the district court declined to permit litigation of the after-arising issue in this proceeding. Because ***Kobe*** has not shown that he has suffered a presently redressable violation of his rights under the ADA or the *Rehabilitation Act*, the district court **[**14]** properly granted summary judgment in favor of the defendants on those claims.

(2)

The above analysis also shows that the district court properly rejected the claims asserted by ***Kobe*** in Counts Three and Four. *See United States v. Swann, 149 F.3d 271, 277* ***[*187]*** *(4th Cir. 1998)* ("[W]e may affirm the district court's judgment for any reason supported by the record, even if it is not the basis that the district court used."). Those counts assert claims under *42 U.S.C. § 1983* that the defendants violated ***Kobe***'s constitutional and statutory rights through the previously discussed scheme to divert funds for ADHC services into inappropriate WACs. Because ***Kobe*** has not lost ADHC services or been required to attend a WAC, the scheme, regardless of its wisdom or propriety, has not affected ***Kobe***'s constitutional or statutory rights. To the extent the claims are based on the delay in obtaining an appropriate ACD or the damage to ***Kobe***'s wheelchair, ***Kobe*** waived his damages claims and seeks no other remedy.

(3)

Count Five, a conspiracy claim under *42 U.S.C. § 1985(3)*, fares no better. Claims under *section 1985(3)* are limited to private conspiracies predicated on "racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971)*. A conspiracy claim under *section 1985(3)* requires the plaintiff to prove

> (1) a conspiracy **[**15]** of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995). Like the others, Count Five focuses on the WAC scheme and alleges that the defendants used millions of dollars intended to provide service under the Waiver Program to buy real estate for WACs and conspired to deprive ***Kobe*** and others of ADHC services in order to force them to participate in WACs.

Even if the disabled qualify as a class protected under the statute (and we express no opinion on that issue, reserving its resolution for another day), ***Kobe***'s evidence is insufficient to show that the defendants conspired to use the WAC scheme for the purpose of causing injury to the disabled. And as we have explained, ***Kobe*** never lost his ADHC services, so he has not been injured by the alleged conspiracy. The district court therefore properly rejected ***Kobe***'s claim.

(4)

In Count Six, ***Kobe*** alleges that the defendants' failure to comply with the requirements **[**16]** of the *Medicaid Act* violated the *Supremacy Clause*, *see* *U.S. Const., art. VI, cl. 2*. Because "the *Supremacy Clause* is not the source of any federal rights" and "does not create a cause of action," *Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324-25, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015)* (internal quotation marks omitted), the district court properly rejected Count Six.

(5)

Count Seven is a civil RICO claim. *See* *18 U.S.C. §§ 1962*, *1964(c)*. This claim again relies on the defendants' ADHC and WAC-related actions, but also includes wide-ranging allegations of other misconduct by individual defendants. As we have repeatedly explained, ***Kobe*** has not lost ADHC benefits and has not been required to attend a WAC, and he has not shown that he was otherwise personally injured by the conduct about which he complains. ***Kobe***'s RICO claim therefore fails. *See* *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461, 126 S. Ct. 1991, 164 L. Ed. 2d 720* ***[*188]*** *(2006)* ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.").

III.

For the reasons outlined above, we find no reversible error and therefore affirm the district court's order granting summary judgment to the defendants on all remaining claims.

AFFIRMED

End of Document

APPENDIX B

Kobe v. McMaster

United States District Court for the District of South Carolina, Columbia Division

December 19, 2018, Decided; December 19, 2018, Filed

C/A No. 3:11-1146-MBS

Reporter
2018 U.S. Dist. LEXIS 215708 *; 2018 WL 6695716

Kobe, Mark, Plaintiffs, vs. Henry ***McMaster***, in his capacity as Governor[1] of the State of South Carolina, et al., Defendants.

Prior History: *Kobe v. McMaster, 2018 U.S. Dist. LEXIS 55500 (D.S.C., Mar. 30, 2018)*

Counsel: [*1] For ***Kobe***, Plaintiff: Patricia L Harrison, LEAD ATTORNEY, Patricia Logan Harrison Law Office, Columbia, SC.

For Judy Johnson, in her capacity as the Director of the Babcock Center, Unnamed Actors Associated with the Babcock Center, Babcock Center, The, Defendants: Christian Stegmaier, Meghan Hazelwood Hall, LEAD ATTORNEYS, Joel Wyman Collins, Jr, Collins and Lacy, Columbia, SC.

For Henry ***McMaster***, in his official capacity as Governor and Chairman of the South Carolina Budget and Control Board, Defendant: Vance J Bettis, LEAD ATTORNEY, Gignilliat Savitz and Bettis LLP, Columbia, SC.

Judges: Margaret B. Seymour, Senior United States District Judge.

Opinion by: Margaret B. Seymour

Opinion

[1] Governor ***McMaster*** was substituted for former Governor Nikki Haley pursuant to *Fed. R. Civ. P. 25(d)* on July 25, 2017.

ORDER AND OPINION

FACTS AND PROCEDURAL HISTORY

This case has an extensive history. Briefly, Plaintiffs ***Kobe***, Mark, and John[2] filed a complaint on May 11, 2011, and an amended complaint on October 18, 2011. Plaintiffs alleged the following causes of action: Violation of the *Americans With Disabilities Act* (Count One); Violation of Section 504 of the *Rehabilitation Act* (Count Two); Violation of *42 U.S.C. § 1983* (Count Three); Violation of *42 U.S.C. §§ 1983* and *1988* (violation of civil rights) (Count Four); Violation of *42 U.S.C. § 1985(3)* (conspiracy) (Count Five); Violation of the *Supremacy Clause* (Count Six); and Violation **[*2]** of *RICO* (Count Seven).[3]

Of relevance here, the matter came before the court on motions for summary judgment filed by Defendants on January 6, 2014. Plaintiff also filed a motion for summary judgment on January 6, 2014, which was amended on January 22, 2014. Plaintiff contended that the court should resolve the following issues:

> (1) Have the Defendants violated the reasonable standards provision of *42 U.S.C. § 1396a(a)(17)* of the *Medicaid Act* and the *South Carolina Administrative Procedures Act* by failing to establish and utilize reasonable, ascertainable, non-arbitrary standards and procedures to determine eligibility for and the extent of medical assistance provided to Plaintiffs?
>
> (2) Have the Defendants violated the "reasonable promptness" requirement of the Medicaid Act by failing to provide ***Kobe*** with the wheelchair and speech device his physician ordered and by failing to provide residential services in the least restrictive setting within ninety days of those needs being identified?
>
> (3) Have the Defendants violated the integration mandate of the Americans with Disabilities Act by failing to provide ***Kobe*** with a wheelchair, a speech device, speech therapy services and placement in a supervised apartment with **[*3]** necessary support services?

ECF No. 25, 3.[4]

The court issued an order and opinion on September 30, 2014, concluding that Plaintiffs' claims should be dismissed either as moot, not ripe, or because Plaintiffs lacked standing. ECF No. 296. Accordingly, the

---

[2] Plaintiff John was dismissed as a party on July 23, 2013. The court erroneously stated in its order filed September 30, 2014, that Plaintiff Mark was dismissed as a party on July 23, 2013. ECF No. 296.

[3] Plaintiff ***Kobe*** also asserted state law claims against the Babcock Center, a private entity that provides services to persons with disabilities, as follows: Injuries to ***Kobe*** Caused by Babcock Center, Judy Johnson and/or Agents and Employees of The Babcock Center Resulting From Neglect, Deliberate Indifference, Assault and Battery and Intentional Infliction of Emotional Distress (Count Eight). Count Eight was dismissed with prejudice on March 20, 2015.

[4] Plaintiff also asserted an issue regarding ***Kobe***'s compensable injuries. As noted above, this matter was resolved prior to trial.

court granted Defendants' motions for summary judgment. Plaintiffs timely filed a notice of appeal. On December 15, 2016, the Court of Appeals for Fourth Circuit affirmed in part, vacated in part, and remanded the action. ECF No. 368. First, the Fourth Circuit affirmed the court's rulings as to Mark on ripeness grounds. Id. at 33, n.21. Next, the Fourth Circuit affirmed the court's determination that the eligibility to receive ADHC services is moot based on the consent orders entered with these Plaintiffs. Id. at 37.

The Fourth Circuit determined, however, that there was a "pattern of allegedly unreasonable delays and improper denials" with respect to ***Kobe***'s wheelchair and ACD entitlement. The Fourth Circuit found that Defendants "have not met their 'heavy burden' of showing that after this litigation has concluded, ***Kobe*** will not once again find himself without the equipment he needs and without any ability to obtain it without significant delay." Id. at 39. Therefore, **[*4]** the Fourth Circuit vacated the court's order on justiciability grounds, and remanded for further proceedings. Id. In addition, the Fourth Circuit vacated the grant of summary judgment in favor of Defendants on Counts One through Seven and remanded for further consideration of the viability of Plaintiffs' claims against each Defendant. Id. at 40.[5]

The matter again came before the court on Defendants' motions for summary judgment on remand, as well as on cross-motion for summary judgment filed by Plaintiffs. On March 30, ***2018***, the court issued an order granting Defendants' motions and denying Plaintiffs' cross-motion. Mark's claims having been found moot by the Fourth Circuit, the court addressed only ***Kobe***'s claims.[6] The court found, in relevant part, as follows:

> A. Amended Motion for Summary Judgment on Remand filed by Defendants Buscemi, Laurent, Butkus, Huntress, Lacy, Waring, and Chorey (the "DDSN Defendants")
>
> The DDSN Defendants observe that, as to them, Plaintiff has shown no need for prospective injunctive relief and has abandoned any damages claims, such that these Defendants are entitled to dismissal of the case against them in its entirety. As to the merits of Plaintiff's allegations, the **[*5]** DDSN Defendants assert that Counts 1 (ADA) and 2 (Rehabilitation Act) essentially present the same contention that Plaintiff was wrongfully denied ADHC services. As noted hereinabove, the Fourth Circuit has determined this particular contention is moot because Plaintiff did not lose ADHC services and, further, were successful on administrative appeal.
>
> The DDSN Defendants assert that any non-ADA or non-Rehabilitation Act claims against these Defendants in their official capacities are barred by the *Eleventh Amendment*. See *Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989))*. As to Plaintiff's *§ 1983* claims against the DDSN Defendants in their individual capacities (Counts 3, 4), these Defendants argue that Plaintiff failed to show any specific factual allegations of wrongdoing attributable to any of the named DDSN Defendants. Regarding Plaintiff's claim that he was denied a wheelchair and ACD, the DDSN Defendants assert these claims are directed to the DHHS Defendants, Keck and Fortner. Regarding Count 5, the DDSN Defendants asserts that Plaintiff's claims relate to a conspiracy to deny

---

[5] The Fourth Circuit also remanded an order dismissing Defendant Nikki Haley, in her capacity as Governor of South Carolina (currently, Henry ***McMaster***, in his capacity as Governor) on the basis of *Eleventh Amendment* immunity. That dispute was resolved and a stipulation of dismissal filed on July 2, ***2018***. ECF No. 501.

[6] Mark was terminated as a Plaintiff on September 30, 2014.

him ADHC services, and because such services were not denied, "obviously there could not have been a conspiracy to effect such denial." ECF No. 399-1, 11.

Regarding Count 6, the **[*6]** DDSN Defendants note the dearth of factual allegations in the amended complaint under this cause of action, which simply states:

> 376. Defendants have violated the following provisions of the Medicaid Act, in violation of the *Supremacy Clause of the United States Constitution*: reasonable promptness (*42 U.S.C. § 1396a(a)(8)*); free choice (*42 U.S.C. § 1396a(a)(23)*); comparability (*42 U.S.C. § 1396a(a)(10)*); reasonable standards (*42 U.S.C. § 1396a(a)(17)*) and equal access (*42 U.S.C. § 1396a(a)(30)*) provisions of the *Social Security Act*.

ECF No. 65, 64.
The DDSN Defendants assert Plaintiff has set forth no facts showing harm to Plaintiff or specific acts by these Defendants that resulted in violations of enumerated sections of the Medicaid Act and Social Security Act.

Finally, regarding Count 7, the DDSN Defendants contend that Plaintiff has failed to allege (1) one of the "predicate acts" set forth in *18 U.S.C. § 1961(1)*; (2) how, if at all, the purported activities of the criminal enterprise affected interstate or foreign commerce; or (3) any evidence Plaintiff suffered a business or property loss.

In his response in opposition, Plaintiff offers a lengthy recitation of factual allegations and appears to address only the following causes of action as to DDSN: Count 5 (conspiracy to interfere with civil rights); Count 6 (*Supremacy Clause*), and Count 7 (RICO). Plaintiff does not dispute the DDSN **[*7]** Defendants' arguments regarding Counts 1, 2, 3, and 4. The court concludes Plaintiff has abandoned these causes of action as to these Defendants.
Turning to Count 5 (conspiracy to deny civil rights), Plaintiff asserts the following in his response in opposition to the DDSN Defendants' motion for summary judgment:

> Plaintiffs have alleged that they have been deprived of services and needed equipment and due process, liberty and equal protection rights. ***Kobe*** has demonstrated that he has suffered discrimination and [been] injured thereby as a consequence of overt acts committed by the named Defendants in connection with the conspiracy.

ECF No. 436, 34.

Plaintiff's argument is based on his contention that DHHS, DDSN, and other agencies have engaged in wide-spread corruption, negligence, and criminal conduct over the past decade or more. In the court's view, Plaintiff's allegations fail to demonstrate any of the DDSN Defendants' purported mismanagement and falsification of information, if such conduct were to be proven, was motivated by a specific class-based, invidiously discriminatory animus to deprive Plaintiff of his rights. In point of fact, Plaintiff alleges that the "conspiratorial purpose **[*8]** was financial."

Regarding Count 6 (*Supremacy Clause*), Plaintiff states that the "future deterrence of violations is critically important in this case, because Plaintiffs have life long disabilities and their needs will increase as they age. Waiver participants simply cannot afford years of litigation each time they require a wheelchair, a speech device or other medically necessary services." ECF No. 436, 31-32. The *Supremacy Clause* is not the source of any federal rights, and does not create a cause of action.

Armstrong v. Exceptional Child Center, Inc., 135 S. Ct. 1378, 1383, 191 L. Ed. 2d 471 (2015). It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so. Id. Moreover, there is no suggestion in the record by any party of a clash between state and federal law. The gravamen of Plaintiff's complaint is that Defendants have, in varying respects, failed to comply with the mandates set forth in the ADA, Rehabilitation Act, and Medicaid.

Finally, regarding Count 7 (RICO), Plaintiff asserts that he has provided "extensive documentation of conduct of an enterprise (the diversion of funds to DDSN work activity centers) through a pattern of racketeering activity." ECF No. 436, 35. Plaintiff asserts predicate **[*9]** acts to include "obtaining insurance through false pretenses, including money laundering, mail and wire fraud and intimidation of witnesses." Id. While it is true that Plaintiff has made allegations of corruption, his claims are speculative in nature. The court discerns no facts tending to show an enterprise distinct from the persons alleged to have violated *18 U.S.C. § 1962 (c)*. See *Palmetto State Med. Ctr. v. Operation Lifeline, 117 F.3d 142, 148 (4th Cir. 1997)*. Nor has Plaintiff proved that each DDSN Defendant engaged in at least two acts of racketeering activity within a ten-year period, as required by *18 U.S.C. § 1961(5)*. For all these reasons, the DDSN's motion for summary judgment is **granted**.

. . . .

C. Motion to Dismiss and for Summary Judgment filed by Defendant Leitner

Defendant Leitner asserts that she is entitled to summary judgment as to Plaintiff's claim against under Count 3 (*42 U.S.C. § 1983*), the only count in which she is named. See ECF No. 65, ¶ 311. Defendant Leitner notes that the only factual allegations in the amended complaint alleges that on January 5, 2011, she, as Director of the Richland Lexington Disabilities Board, sent a letter to Plaintiff alerting him that a review of ADHC services was forthcoming. Defendant Leitner states that, as discussed above, Plaintiff was never denied ADHC services, **[*10]** and there are no other factual allegations of wrongdoing with respect to her that she violated Plaintiff's constitutional rights. Defendant Leitner also argues that she was not involved in the DHHS denials of Plaintiff's applications for an ACD. According to Defendant Leitner, it was through the Richland Lexington Disabilities Board that an ACD was borrowed for Plaintiff through the University of South Carolina Assistive Technology Program in 2013, and also through the Richland Lexington Disabilities Board that Plaintiff's case manager recently procured an ACD for Plaintiff's permanent use through the South Carolina Vocational Rehabilitation Department. Defendant Leitner contends there is no genuine issue of material fact but that she did not deprive Plaintiff of his constitutional or statutory rights.

In response, Plaintiff asserts, without competent evidence, that Defendant Leitner: (1) has failed to explain why Plaintiff's requests to move to a less restrictive environment were not transmitted to DDSN; (2) "made a conscious decision to inform Judy Johnson that [Plaintiff] intended to move from the Babcock Center, when she was asked not to share that information until the placement **[*11]** had been arranged. Then, she colluded with Johnson in an attempt to enlist [Plaintiff's] mother to prevent him from moving from a group home where he had been abused and neglected"; (3) failed to timely provide Plaintiff with written notices containing all of the information required by *42 C.F.R. § 431.210*, likely because of "collusion with DDSN and DHHS Defendants to attempt to moot [Plaintiff's] lawsuit (by obtaining a 'loaner' device)." ECF No. 435-36. Plaintiff's "unsubstantiated

allegations and bald assertions" are not adequate to defeat summary judgment. See *Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 960 (4th Cir. 1996)*.

Defendant Leitner's motion for summary judgment is **granted**.

D. Motion for Summary Judgment filed by Defendants Keck and Forkner (the "DHHS Defendants")

Plaintiff alleges that the DHHS Defendants failed to provide Plaintiff with an ACD and wheelchair. Plaintiff's allegations arise under the ADA and the Rehabilitation Act (Counts 1, 2), *42 U.S.C. § 1983* (Counts 3, 4), conspiracy (Count 5), and RICO (Count 6).

The DHHS Defendants first contend that Plaintiff cannot show he was excluded from possessing an ACD on the basis of his disability. These Defendants contend that Plaintiff's request was reviewed and it was determined that an ACD with pre-recorded messages, **[*12]** as opposed to the requested ACD that synthesized speech, would provide him with adequate speech support. According to the DHHS Defendants, Plaintiff chose to proceed in this court rather than the administrative appeal process regarding the DHHS Defendants' decision. The DHHS Defendants argue that the evidence shows only a difference of opinion as to the type of ACD that would be appropriate for his condition. The DHHS Defendants further contend this issue is moot because the ACD Plaintiff desired now has been approved and provided to him.
Regarding Plaintiff's wheelchair, the DHHS Defendants state that no request for a wheelchair was made to DHHS to be approved or denied. These Defendants inform the court, however, that Plaintiff submitted a request for a wheelchair on July 24, 2013, which was approved by DHHS on August 2, 2013. The wheelchair has been provided to Plaintiff. The DHHS Defendants assert that this issue also is moot.

As to Plaintiff's *§ 1983*, *§ 1985*, and RICO causes of action, the DHHS Defendants assert that the amended complaint is devoid of any factual allegations regarding actions or omissions by them aside from conclusory statements of wrongdoing, and, further, that any claims revolved around **[*13]** Plaintiff's contentions that Defendants attempted to deprive him of his right to participate in ADHC services. These Defendants also assert that Plaintiff cannot maintain a cause of action under the *Supremacy Clause*.

Plaintiff's specific response in opposition to the DHHS Defendants' motion for summary judgment is that, if there were a difference of professional opinions regarding the type of ACD Plaintiff needed, DHHS should have sent a notice containing all information required by *42 C.F.R. § 431.201* to Plaintiff, and not just to the case manager and provider. Plaintiff fails to state how delivering a copy of any notice to him personally creates an issue of fact that should be submitted to a jury. The DHHS Defendants' motion for summary judgment is **granted** as to Counts 1 (ADA), 2 (Rehabilitation Act), and Counts 3 and 4 (*§ 1983*).

Plaintiff includes the DHHS Defendants in his argument regarding the DDSN Defendants regarding Counts 5 (conspiracy), Count 6 (*Supremacy Clause*), and Count 7 (RICO). For the reasons set forth hereinabove in Section A, the DHHS Defendants' motion for summary judgment is **granted** as to these claims.

The court is mindful that the Fourth Circuit found "pattern of allegedly unreasonable delays and improper denials" with **[*14]** respect to Plaintiff's wheelchair and ACD entitlement, and that the DHHS Defendants need to show "that after this litigation has concluded, [Plaintiff] will not once again find himself without the equipment he needs and without any ability to obtain it without significant delay." The DDHS Defendants represented to the court that an ACD acceptable to Plaintiff as well as a wheelchair have been provided to him on a permanent basis. Plaintiff contends that these Defendants continue to ignore the requirements of *42 U.S.C. § 1396a(a)(8)* and have not provided him with services to be provided in a non-congregate setting; for speech services, including a swallow study, and for a bed that will allow him to raise the elevation of his head to prevent aspiration. According to the DDHS Defendants, these new claims lack factual basis in the record. Moreover, according to the DDHS Defendants, Plaintiff's request for a hospital bed was submitted for authorization on August 6, 2013, approved by these Defendants on August 12, 2013, and paid for by Medicaid on August 23, 2013. The court declines to consider Plaintiff's newly asserted allegations.

E. Motion for summary judgment filed by Defendants Babcock Center and Judy Johnson **[*15]** (the "Babcock Defendants")

The Babcock Defendants first argue that Plaintiff cannot establish the Babcock Defendants violated the ADA (Count 1). The Babcock Defendants state that the only claims involving them revolve around participation in the ADHC program, which issue is moot. Regarding the Rehabilitation Act (Count 2), these Defendants contend that Plaintiff fails to assert any specific actions taken by Johnson, in her individual capacity as she is named, to support his claim that Johnson personally discriminated against him based on his disability.

Regarding Plaintiff's *§ 1983* causes of action (Counts 3, 4), the Babcock Defendants assert that the Babcock Center is not a governmental entity acting under color of state law. In support of their assertion, these Defendants attach to their motion for summary judgment a copy of their business filing with the South Carolina Secretary of State. As to conspiracy to interfere with civil rights (Count 5), the *Supremacy Clause* (Count 6), and violations of RICO (Count 7), the Babcock Defendants make generally the same arguments as the DDSN Defendants and the DHHS Defendants.

In his response in opposition, Plaintiff relies on his recitation of mismanagement and investigation **[*16]** into the Babcock Center, and intimates that the Babcock Defendants possessed a financial incentive to limit expenditures for assistive technology and equipment. The court finds that Plaintiff's argument fails to establish discrimination on the basis of disability. Plaintiff also disputes Defendants' contention that the Babcock Center is not a governmental entity. Although there exist situations when a private organization may be treated as a public entity, see, e.g., *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)*, Plaintiff does not engage in the analysis.

The DHHS Defendants' motion for summary judgment is **granted** as to Counts 1 (ADA), 2 (Rehabilitation Act), and Counts 3 and 4 (*§ 1983*).

Plaintiff includes the Babcock Defendants in his argument regarding the DDSN Defendants and DHHS Defendants regarding Counts 5 (conspiracy), Count 6 (*Supremacy Clause*), and Count 7 (RICO). For the reasons set forth hereinabove in Sections A and D, the Babcock Defendants' motion for summary judgment is **granted** as to these claims.

. . . .

F. Plaintiff's Motion for Partial Summary Judgment

Plaintiff asserts the following issues: (1) Defendants are in violation of the feasible alternatives, comparability and reasonable promptness requirements of the Medicaid Act which are **[*17]** enforceable under *§ 1983*; (2) Defendants are in violation of the integration mandate of the Americans with Disabilities Act.

To the extent Plaintiff raises arguments in tandem with her responses in opposition to Defendants' various motions for summary judgment (excluding Defendant ***McMaster***'s motion to dismiss), his motion for partial summary judgment is **denied** for the reasons set forth hereinabove.

To the extent Plaintiff raises new claims not asserted in the amended complaint, his motion for partial summary judgment is **denied without prejudice** to allow him raise his allegations in a new action.

To the extent Plaintiff raises arguments barred by the mandate rule, his motion for partial summary judgment is **denied**.

To the extent Plaintiff asserts damages claims against Defendants (excluding Defendant ***McMaster***), his motion for partial summary judgment is **denied** for the reasons set forth in the Fourth Circuit's opinion.

To the extent Plaintiff seeks injunctive relief for events occurring after the filing of the amended complaint, his motion for partial summary judgment is **denied without prejudice** to allow him to seek injunctive relief in a new action.

Plaintiff does not dispute the DDSN Defendants' **[*18]** arguments regarding Counts 1, 2, 3, and 4. The court concludes Plaintiff has abandoned these causes of action as to these Defendants.

ECF No. 475.

This matter now is before the court on Plaintiff's motion for reconsideration, which motion was filed on April 27, ***2018***. See *Fed. R. Civ. P. 59(e)*. The DDSN Defendants filed a memorandum in opposition on May 10, ***2018***; Defendant Leitner filed a response in opposition on May 11, ***2018***, the DDHS Defendants filed a response in opposition on May 11, ***2018***; and the Babcock Defendants filed a response in opposition on June 1, ***2018***.[7] Plaintiff filed an omnibus reply to Defendants' responses on June 15, ***2018***.

DISCUSSION

Although *Rule 59* addresses grounds for new trials, some courts have reasoned that the concept of a new trial under *Rule 59* is broad enough to include a rehearing of any matter decided by the court without a jury. 11 Wright & Miller, Federal Practice & Procedure § 2804. Notwithstanding the broad nature of *Rule 59*, motions for reconsideration are disfavored. They are not a matter of routine practice. *Settino v. City of Chicago, 642 F. Supp. 755, 759 (N.D. Ill. 1986)*. Several courts have observed that they are neither

[7] The Governor filed a response on May 11, ***2018***; however, as noted above, the Governor is no longer a party to this action.

expressly cognizable under the Federal Rules of Civil Procedure nor authorized by the local rules of the district court. See, e.g., *Fisher v. Samuels, 691 F. Supp. 63, 74 (N.D. Ill. 1988)*.

Motions **[*19]** for reconsideration are inappropriate merely to introduce new legal theories or new evidence that could have been adduced during the pendency of the prior motion. *Keene Corp. v. International Fidelity Ins. Co., 561 F. Supp. 656 (N.D. Ill.)*, aff'd, *736 F.2d 388 (7th Cir. 1982)*. The Fourth Circuit recognizes only three limited grounds for a district court's grant of a motion under *Rule 59(e)*: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available earlier; or (3) to correct a clear error of law or prevent manifest injustice. *Hutchinson v. Staton, 994 F.2d 1076 (4th Cir. 1993)*. The Fourth Circuit has emphasized that counsel's mere disagreement with the court's ruling does not warrant a *Rule 59(e)* motion. Id. (citing *Atkins v. Marathon LeTourneau Co., 130 F.R.D. 625, 626 (S.D. Miss. 1990))*.

A. Private Attorneys General (ECF No. 493, 1)

Plaintiff contends that the court erred in failing to recognize that "Plaintiffs brought this action in their important role as private attorneys general, not only for themselves, but also for others whose important civil rights continue to be denied." ECF No. 83, 1. However, the Supreme Court has stated that "the Medicaid Act implicitly precludes private enforcement of [*42 U.S.C. 1396a*)], and [parties] cannot . . . circumvent Congress's exclusion of private enforcement." *Armstrong v. Exceptional Child Center, Inc., 135 S. Ct. 1378, 1385, 191 L. Ed. 2d 471 (2015)* (citing *Douglas v. Independent Living Center of Southern Cal., Inc., 565 U.S. 606, 132 S. Ct. 1204, 1212-13, 182 L. Ed. 2d 101 (2012)* (Roberts, C.J., dissenting)). The Court noted that "the sole remedy Congress provided **[*20]** for a State's failure to comply with Medicaid's requirements—for the State's 'breach' of the *Spending Clause* contract—is the withholding of Medicaid funds by the Secretary of Health and Human Services." Id. (citing *42 U.S.C. § 1396c*). The Court explained that the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." Id. (citing *Alexander v. Sandoval, 532 U.S. 275, 290, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001))*. Plaintiff's contention is without merit.

B. Claims for Non-Congregate Placement and Compliance (ECF No. 493, 3)

Plaintiff states that the court erred in determining Plaintiff's requests for noncongregate placement and compliance with the ADA, the Rehabilitation Act, the Medicaid Act, and due process are "new." ECF No. 483, 3. Plaintiff states he has

> consistently complained that Defendants have violated the integration mandate of the ADA and the requirements of the Rehabilitation Act that require services to be provided in the least restrictive setting. [He] presented extensive evidence in the form of affidavits, opinions from other cases, and audits showing that Defendants have failed and continue to fail to comply with the reasonable promptness (*1396a(a)(8)*, reasonable standards (*1396a(a)(17) [sic]*, feasible alternatives (*42 U.S.C. § 1396n(c)(2)*) and **[*21]** comparability (*1396a(a)(10)* mandates of the Medicaid Act.

Id.

Plaintiff contends that Defendants continually ignore the requirements of *42 C.F.R. § 431.200, et seq. Section 431.200* provides:

> This subpart—

(a) Implements *section 1902(a)(3)* of the Act, which requires that a State plan provide an opportunity for a fair hearing to any person whose claim for assistance is denied or not acted upon promptly;

(b) Prescribes procedures for an opportunity for a hearing if the State agency or non-emergency transportation PAHP (as defined in *§ 438.9(a)* of this chapter) takes action, as stated in this subpart, to suspend, terminate, or reduce services, or of an adverse benefit determination by an MCO, PIHP or PAHP under subpart F of part 438 of this chapter; and

(c) Implements *sections 1919(f)(3)* and *1919(e)(7)(F)* of the Act by providing an appeals process for any person who—

(1) Is subject to a proposed transfer or discharge from a nursing facility; or

(2) Is adversely affected by the pre-admission screening or the annual resident review that are required by *section 1919(e)(7)* of the Act.

(d) Implements *section 1943(b)(3)* of the Act and *section 1413* of the Affordable Care Act to permit coordinated hearings and appeals among insurance affordability programs.

Plaintiff's arguments in this section seeks to challenge Defendants' alleged failure to comply **[*22]** with the Medicaid Act. Plaintiff's contentions are without merit for the reasons stated in the previous section.

C. Abandonment of Claims (ECF No. 483, 4)

Plaintiff denies abandoning claims for violation of the ADA and the Rehabilitation Act. Plaintiff contends that he has raised issues relating not only to the denial of service, but Defendants' failure to provide services in a setting less restrictive than a CTH II. ECF No. 483, 6. However, the Fourth Circuit observed that Plaintiff "offer[ed] no challenge to the district court's ruling that their claim that ***Kobe*** is entitled to be provided with an SLP is unripe. Nor do they challenge the ruling that [***Kobe***'s] claim demanding payment for the speech pathologist who evaluated ***Kobe*** and provided him with speech services fell outside the scope of their complaint." ***Kobe*** v. Haley, 666 F. A'ppx 281, 285, n.21 (4th Cir. 2016). Plaintiff's arguments regarding denial of service and failure to provide services in a less restrictive setting are outside the scope of the Fourth Circuit's remand.

Plaintiff contends the court also "erred in failing to address Plaintiff's *§ 1983* claims for violation of the reasonable promptness, reasonable standards, comparability **[*23]** and feasible alternative mandates[.]" ECF No. 483, 6. As the court previously noted, Plaintiff's *§ 1983* claims failed to show any specific factual allegations of wrongdoing attributable to any Defendant. In his motion to alter or amend, Plaintiff again argues, as he did on summary judgment prior to remand, that "Defendants reduced access to services based on blatantly false claims of 'budget reductions' and audits provided by Plaintiffs show that, while reducing services, DDSN and DHHS overbilled the federal government for insurance claims (Medicaid) by tens of millions of dollars," and that Defendants engaged in wire fraud, defrauded the government by filing false claims, and witness tampering. ECF No. 483, 7.

Regarding his conspiracy claim, Plaintiff realleges his assertion that Defendants conspired to "[keep] him in a setting that is more restrictive than his entire treatment team has recommended." Id. at 8. As noted hereinabove, any allegations by Plaintiff that he should be placed in a congregate setting are not ripe. With respect to Plaintiff's ADA cause of action, the court previously noted that Plaintiff cannot show disability discrimination. Plaintiff's own contention is that he cannot receive **[*24]** services requested

because Defendants have surreptitiously diverted Medicaid funds without accountability. Plaintiff's contentions are without merit.

D. Babcock Center (ECF No. 483, 10)

Plaintiff asserts that the court erred in dismissing claims against the Babcock Defendants on the grounds that they did not act under color of state law. Plaintiff contends that the Babcock Defendants participated in a money laundering scheme and that Defendant Johnson joined with other Defendants to attempt to limit Plaintiff's access to assistive technology. However, as the court previously found, Plaintiff provided no analysis in his omnibus response to summary judgment with respect to the factors set forth in *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)*, and other authorities. Plaintiff's contention is without merit.

E. Defendant Leitner (ECF No. 483, 11)

Plaintiff asserts the court erred in ruling that Defendant Leitner was sued only under Count Three. As the court previously observed, the only factual allegation against Defendant Leitner is that on January 5, 2011, she, as Director of the Richland Lexington Disabilities Board, sent a letter to Plaintiff alerting him that a review of ADHC services was forthcoming. As in his motion for summary **[*25]** judgment, Plaintiff contends Leitner cooperated with other Defendants to limit services and force Plaintiff into remaining in an unsafe institution.

The court previously held that Plaintiff's unsubstantiated allegations and bald assertions are not adequate to defeat summary judgment. Plaintiff's contention is without merit.

F. RICO Claims (ECF No. 483, 11)

Plaintiff contends the court erred in failing to address his evidence that he contends "demonstrated patterns of money laundering, diversion of insurance proceeds, intimidation of witnesses and other violations described in Count Seven." ECF No. 483, 12. Plaintiff points the court to no competent evidence in support of his RICO claims. Plaintiff's contention is without merit.

CONCLUSION

Plaintiff has failed to demonstrate an intervening change in controlling law, the existence of new evidence not available earlier, or the need to correct a clear error of law or prevent manifest injustice. Plaintiff merely expresses his disagreement with the court's ruling. Plaintiff's motion to alter or amend (ECF No. 483) is **denied**.

IT IS SO ORDERED.

/s/ Margaret B. Seymour

Senior United States District Judge

Columbia, South Carolina

December 19, ***2018***

End of Document

APPENDIX C

Kobe v. McMaster

United States District Court for the District of South Carolina, Columbia Division

March 30, 2018, Decided; March 30, 2018, Filed

C/A No. 3:11-1146-MBS

Reporter
2018 U.S. Dist. LEXIS 55500 *

Kobe, Mark,[1] Plaintiffs, vs. Henry McMaster, in his capacity as Governor[2] of the State of South Carolina, et al., Defendants.

Subsequent History: Motion denied by *Kobe v. McMaster, 2018 U.S. Dist. LEXIS 215708 (D.S.C., Dec. 19, 2018)*

Affirmed by *Kobe v. Buscemi, 2020 U.S. App. LEXIS 21627 (4th Cir. S.C., July 13, 2020)*

Prior History: *Kobe v. Haley, 666 Fed. Appx. 281, 2016 U.S. App. LEXIS 22283 (4th Cir. S.C., Dec. 15, 2016)*

Counsel: [*1] For Kobe, Plaintiff: Patricia L Harrison, LEAD ATTORNEY, Patricia Logan Harrison Law Office, Columbia, SC.

For Judy Johnson, in her capacity as the Director of the Babcock Center, Unnamed Actors Associated with the Babcock Center, Babcock Center, The, Defendants: Christian Stegmaier, Meghan Hazelwood Hall, LEAD ATTORNEYS, Collins and Lacy, Columbia, SC; Joel Wyman Collins, Jr, Collins and Lacy, Columbia, SC.

For Henry McMaster, in his official capacity as Governor and Chairman of the South Carolina Budget and Control Board, Defendant: Vance J Bettis, LEAD ATTORNEY, Gignilliat Savitz and Bettis LLP, Columbia, SC.

---

[1] Plaintiff Mark filed a motion to withdraw as a party to this action on July 19, 2013. The motion was granted on July 23, 2013.

[2] Governor McMaster was substituted for former Governor Nikki Haley pursuant to Fed. R. Civ. P. 25(d) on July 25, 2017.

Judges: Margaret B. Seymour, Senior United States District Judge.

Opinion by: Margaret B. Seymour

Opinion

ORDER AND OPINION

Plaintiffs Kobe and Mark filed a complaint on May 11, 2011, and an amended complaint on October 18, 2011. Plaintiffs alleged the following causes of action: Violation of the *Americans With Disabilities Act* (Count One); Violation of Section 504 of the Rehabilitation Act (Count Two); violation of *42 U.S.C. § 1983* (Count Three); Violation of *42 U.S.C. §§ 1983* and *1988* (violation of civil rights) (Count Four); Violation of *42 U.S.C. § 1985(3)* (conspiracy) (Count Five); Violation of the *Supremacy Clause* (Count Six); and Violation of *RICO* (Count Seven).[3] The case originally **[*2]** was assigned to the Honorable J. Michelle Childs. It was reassigned to the Honorable Timothy M. Cain on October 18, 2011.

On August 10, 2012, the Honorable Timothy M. Cain dismissed Defendants Nikki Haley, in her official capacity as Governor and Chairman of the South Carolina Budget and Control Board;[4] Curtis Loftis and Brian White, as members of the South Carolina Budget and Control Board; and Daniel Cooper and Converse Chellis, in their capacities as former members of the South Carolina Budget and Control Board, on the grounds of *Eleventh Amendment* immunity as to claims asserted against them in their official capacities. He determined none of them had a special connection to the administration of the state's Medicaid program such than an injunction against them would provide any redress. Judge Cain also found that, to the extent Defendants Cooper and Chellis were sued in their individual capacities, these Defendants had no authority to provide prospective injunctive relief. Judge Cain also determined that Defendants Cooper and Chellis were entitled to legislative immunity. ECF No. 135. On August 12, 2013, Judge Cain dismissed Defendants Hugh Leatherman and Richard Eckstrom, in their capacities as members **[*3]** of the South Carolina Budget and Control Board, on the grounds of *Eleventh Amendment* immunity and legislative immunity. ECF No. 217.

On July 7, 2014, the within action was reassigned to the undersigned. Remaining in the case were Plaintiffs Kobe and Mark, as well as Defendants Anthony Keck, in his capacity as the Director of the South Carolina Department of Health and Human Services; Emma Forkner, in her capacity as the former Director of the South Carolina Department of Health and Human Services; Beverly Buscemi, in her capacity as Director of the South Carolina Department of Disabilities and Special Needs; Eugene A.

---

[3] Plaintiff Kobe also asserted state law claims against the Babcock Center, a private entity that provides services to persons with disabilities, as follows: Injuries to Kobe Caused by Babcock Center, Judy Johnson and/or Agents and Employees of The Babcock Center Resulting From Neglect, Deliberate Indifference, Assault and Battery and Intentional Infliction of Emotional Distress (Count Eight). Count Eight was dismissed with prejudice on March 20, 2015.

[4] Reorganized as the State Fiscal Accountability Authority.

Laurent, former Interim Director of the South Carolina Department of Disabilities and Special Needs; Stanley Butkus, former Director of the South Carolina Department of Disabilities and Special Needs; Richard Huntress, in his capacity as Commissioner of the South Carolina Department of Disabilities and Special Needs; Kathi Lacy, Thomas P. Waring and Jacob Chorey, in their capacities as employees of the South Carolina Department of Disabilities and Special Needs; Mary Leitner, in her capacity as the Director of the Richland Lexington Disabilities and Special Needs Board; the Babcock Center; **[*4]** Judy Johnson, in her capacity as the Director of the Babcock Center; and other Unnamed Actors Associated with the Babcock Center.[5]

FACTS AND PROCEDURAL HISTORY

At the time of filing the amended complaint, Kobe was 29 years old. Kobe is unable to walk or to speak and has a history of convulsions. Kobe attends the Hope Bridge Adult Day Care program and receives Adult Day Health Care (ADHC) services. In December 2010, the Richland-Lexington Disabilities and Special Needs Board was directed by the South Carolina Department of Disabilities and Special Needs (DDSN) to update eligibility of persons using ADHC services. Kobe was informed by the Richland-Lexington Disabilities and Special Needs Board that he no longer was eligible for ADHC services. Kobe appealed the termination of services to DDSN, and Defendant Beverly Buscemi, Director of DDSN, determined on May 11, 2011, that Kobe should continue to receive ADHC services. Despite being successful at the DDSN level, Kobe appealed the termination of services to the South Carolina Department of Health and Human Services (DHHS). The issue was resolved by consent order dated August 9, 2012. There was no lapse in ADHC services for Kobe during this **[*5]** time.

Kobe also alleged that he requested from DHHS an augmentative communications device (ACD) to aid him in communicating. He received an ACD that was not as sophisticated as that prescribed by his treating physician. Kobe further contended that his wheelchair was damaged when he was dropped by employees of the Babcock Center while being loaded into a vehicle, and that the wheelchair was not replaced promptly by DHHS.

Mark also receives ADHC services. Like Kobe, Mark was notified in 2011 that he no longer was eligible for ADHC services. Mark appealed the termination to DDSN, which upheld the termination. However, the issue also was resolved in Mark's favor at the DHHS level by consent order. Mark's ADHC services did not lapse during this time period.

Mark lives with his sister. Mark contended that in 2010 DDSN reduced the number of respite hours to which he is entitled. Mark asserted that he is at risk of institutionalization if his sister is not provided with the support and services that he needs.

The matter came before the court on motions for summary judgment filed by Defendants on January 6, 2014. Plaintiffs also filed a motion for summary judgment on January 6, 2014, which was **[*6]** amended on January 22, 2014. The court held a hearing on September 23, 2014. Plaintiffs contended that the court should resolve the following issues:

---

[5] Defendant former Governor Mark Sanford, in his official capacity as former member of the South Carolina Budget and Control Board, was never served. Accordingly, he was dismissed pursuant to *Fed R. Civ. P. 4(m)* on September 30, 2014.

(1) Have the Defendants violated the reasonable standards provision of *42 U.S.C. § 1396a(a)(17)* of the Medicaid Act and the *South Carolina Administrative Procedures Act* by failing to establish and utilize reasonable, ascertainable, non-arbitrary standards and procedures to determine eligibility for and the extent of medical assistance provided to Plaintiffs?

Plaintiffs stated that the court should "issue a permanent injunction against Defendants denying medical services ordered by Plaintiffs' treating physicians based on binding norms that have not been promulgated as regulations. Plaintiffs requested that Defendants be required to give the deference ordered by the United States Supreme Court to the orders of Plaintiffs' treating physicians. Plaintiffs request that Defendants be prohibited from denying medically necessary services based on amendments made by the agencies without promulgation of regulations."

(2) Have the Defendants violated the "reasonable promptness" requirement of the Medicaid Act by failing to provide Kobe with the wheelchair and speech device **[*7]** his physician ordered and by failing to provide residential services in the least restrictive setting within ninety days of those needs being identified?

Plaintiffs stated that Kobe's physicians have ordered a wheelchair and speech device, but DHHS has failed to provide this equipment with reasonable promptness. Plaintiffs requested the court order Defendants to immediately provide Kobe with (1) a wheelchair to be provided within thirty days without further administrative delays, and (2) a speech device ordered by his physician within thirty days and speech services determined by his physician to be medically necessary, based on the evaluation by his licensed speech and language pathologists.

(3) Have the Defendants violated the integration mandate of the Americans with Disabilities Act by failing to provide Kobe with a wheelchair, a speech device, speech therapy services and placement in a supervised apartment with necessary support services?

Plaintiffs stated: "Kobe requests that this Court issue a declaratory order finding that Defendants have violated the ADA in the operation of their programs and enjoining them from continuing to violate the ADA. He requests that DHHS be ordered **[*8]** to pay for the wheelchair and speech device ordered by his physician to be funded by Defendants. He requests continued speech services to improve his ability to communicate."

The court issued an order and opinion on September 30, 2014, concluding as follows:

A. Mootness

It is well settled that federal courts have no authority to "'give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Int'l Coal. for Religious Freedom v. Maryland, 3 F. App'x 46, 48-49 (4th Cir. 2001)* (quoting *Church of Scientology of Cal. v. United States, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992))*. This is so even though such case presented a justiciable controversy at an earlier point in time and an intervening event rendered the controversy moot. Id. (citing *Calderon v. Moore, 518 U.S. 149, 150, 116 S. Ct. 2066, 135 L. Ed. 2d 453 (1996))*.

In this case, Plaintiffs were informed in 2010 that they no longer qualified for ADHC assistance. However, their ADHC services were never interrupted, and they both prevailed during the

administrative appeals process. Further, it appears that Kobe has received a new wheelchair. The court finds these claims to be moot.

B. Ripeness

The ripeness doctrine aims to "'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies.'" *Pashby v. Delia, 709 F.3d 307, 317 (4th Cir. 2013)* (quoting *Abbott Labs. v. Gardner, 387 U.S. 136, 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)*, abrogated **[*9]** on other grounds by *Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977))*. A claim should be dismissed as unripe if the plaintiff has not yet suffered injury and any future impact "'remains wholly speculative.'" *Doe v. Virginia Dep't of State Police, 713 F.3d 745, 758 (4th Cir. 2013)* (quoting *Gasner v. Bd. of Supervisors, 103 F.3d 351, 361 (4th Cir. 1996))*. In determining ripeness, a court must "'balance the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration. A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties.'" Id. (quoting *Miller v. Brown, 462 F.3d 312, 319 (4th Cir. 2006))*.

Mark's contention that the reduction in his respite hours could lead to the loss of care by his sister is too remote and speculative to be ripe for federal judicial review. See *Charter Fed. Sav. Bank v. Office of Thrift Supervision, 976 F.2d 203, 208-09 (4th Cir. 1992)* ("'[I]n the context of an administrative case, there must be 'an administrative decision [that] has been formalized and its effects felt in a concrete way by the challenging parties.'")(quoting *Pac. Gas & Elec. v. Energy Res. Comm'n, 461 U.S. 190, 200, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983))*.

C. Standing to Invoke Injunctive Relief

To satisfy Article III's case-or-controversy standing requirements, a plaintiff must show (1) he has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged **[*10]** action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (4th Cir. 2000)* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. The standing question is whether the plaintiff has "'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)* (quoting *Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962))*. Further, "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Id. at 499* (citing cases). In addition, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Id. (citing cases). "Without such limitations—closely related to Art[icle] III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more **[*11]** competent to address the questions and even though

> judicial intervention may be unnecessary to protect individual rights." *Id. at 500* (citing *Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974)* ("The desire to obtain sweeping relief cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks.") (quoting *McCabe v. Atchison, T. & S. F. R. Co., 235 U.S. 151, 164, 35 S. Ct. 69, 59 L. Ed. 169 (1914)*).
>
> As can readily be discerned from the allegations set forth hereinabove, and further as argued in the hearing, Plaintiffs allege systemic failures within the DHHS and DDSN systems and ask the court to intervene in the administration and operation of these agencies of the State of South Carolina. In particular, Plaintiffs seek to have the court oversee DHHS's promulgation of regulations that Plaintiffs contend would force compliance with federal Medicaid law. While Plaintiffs' allegations of wholesale mismanagement and, indeed, criminal conduct within DHHS, DDSN, and the Babcock Center are sobering,"[i]t is an established principle . . . that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately **[*12]** in danger of sustaining a direct injury as a result of that action." *Lujan, 504 U.S. at 574-76*. Plaintiffs show no cognizable particularized injury. Plaintiffs lack standing to seek injunctive relief on behalf of others regarding the allegations of mishandling of funds and exploitation set forth in the amended complaint.

ECF No. 296.

Plaintiffs timely filed a notice of appeal. On December 15, 2016, the Court of Appeals for the Fourth Circuit affirmed in part, vacated in part, and remanded the action. ECF No. 368. First, the Fourth Circuit affirmed the court's rulings as to Mark on ripeness grounds. Id. at 33, n.21. Next, the Fourth Circuit affirmed the court's determination that the eligibility to receive ADHC services is moot based on the consent orders entered into with these Plaintiffs. Id. at 37.

The Fourth Circuit determined, however, that there was a "pattern of allegedly unreasonable delays and improper denials" with respect to Kobe's wheelchair and ACD entitlement. The Fourth Circuit found that Defendants "have not met their 'heavy burden' of showing that after this litigation has concluded, Kobe will not once again find himself without the equipment he needs and without any ability to obtain it without significant delay." Id. at 39 **[*13]** . Therefore, the Fourth Circuit vacated the court's order on justiciability grounds, and remanded for further proceedings. Id. In addition, the Fourth Circuit determined that, since the case continues to present justiciable issues, it would vacate the grant of summary judgment against Plaintiffs on Counts One through Seven and remand for further consideration of the viability of each of Plaintiffs' claims against each Defendant. Id. at 40.

Finally, the Fourth Circuit turned to Judge Cain's order dismissing Defendant Haley on the basis of *Eleventh Amendment* immunity.[6] The Fourth Circuit found that Judge Cain properly ruled Defendant Haley lacked the special relation to the administration of the South Carolina's Medicaid program such that no effective prospective relief would be available as against her. However, the Fourth Circuit found that Plaintiffs had not specifically waived their claim against Defendant Haley for damages. As a result, the

---

[6] The Fourth Circuit observed that Plaintiffs had not appealed the dismissal of Defendants Loftis, White, and Sanford. The Fourth Circuit also noted that Plaintiffs offered no specific challenge to the dismissal of Leatherman, Eckstrom, Chellis, and Cooper regarding prospective relief, and that Plaintiffs abandoned any claims for damages as to these Defendants. Accordingly, the orders granting these Defendants' motions to dismiss remain in effect. ECF No. 368, 40, 43 & 55.

Fourth Circuit vacated the dismissal of Count One as against Defendant Haley. The Fourth Circuit noted that no party had addressed the application of *United States v. Georgia, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006)*, with respect to whether Congress validly abrogated South Carolina's *Eleventh Amendment* immunity as to claims arising out of *Title II of the ADA*. The test under Georgia instructs the lower courts to:

> [D]etermine . . . on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the *Fourteenth Amendment*; and (3) insofar as such misconduct violated Title II but did not violate the *Fourteenth Amendment*, **[*14]** whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

546 U.S. at 159.

Thus, the Fourth Circuit held that dismissing Counts One and Two against Defendant Haley on *Eleventh Amendment* grounds was premature. ECF No. 368, 50.

* * *

This matter now is before the court on the following motions:

1. Motion for summary judgment on remand filed by Defendants Buscemi, Butkus, Chorey, Huntress, Lacy, Laurent, and Waring on April 28, 2017, and amended on August 8, 2017. Plaintiff Kobe filed responses in opposition on September 14, 2017 and September 17, 2017, and amended October 3, 2017, to which these Defendants filed a reply on October 17, 2017.
2. Motion to dismiss filed by Defendant McMaster (formerly Haley) on May 1, 2017, and amended on July 21, 2017. Plaintiff Kobe filed responses in opposition on September 14, 2017 and September 17, 2017, and amended October 3, 2017, to which Defendant McMaster filed a reply on August 16, 2017.

3. Motion for summary judgment filed by Defendant Leitner on August 11, 2017. Plaintiff Kobe filed responses in opposition on September 14, 2017 and September 17, 2017, and amended October 3, 2017, to which Defendant Leitner filed a reply on October **[*15]** 27, 2017.
4. Motion for summary judgment filed by Defendants Forkner and Keck on August 11, 2017. Plaintiff Kobe filed responses in opposition on September 14, 2017 and September 17, 2017, and amended October 3, 2017, to which Defendants Forkner and Keck filed a reply on October 17, 2017.
5. Third motion for summary judgment filed by Defendants Babcock Center and Johnson on August 11, 2017. Plaintiff Kobe filed responses in opposition on September 14, 2017 and September 17, 2017, and amended October 3, 2017, to which these Defendants filed a reply on October 27, 2017.

6. Motion for summary judgment filed by Kobe on August 21, 2017, to which Defendant McMaster filed a response in opposition on September 8, 2017; Defendants Forkner and Keck on September 13, 2017, Defendants Buscemi, Butkus, Chorey, Huntress, Lacy, Laurent, and Waring on September 14, 2017; Defendants the Babock Center and Johnson on September 14, 2017; and Defendant Leitner on September 14, 2017. Plaintiff filed replies to responses of Defendants McMaster; Fortner and Keck; Buscemi, Butkus, Chorey, Huntress, Lacy, Laurent, and Waring on October 27, 2017; and replies to responses of Defendants Leitner; and Babock Center **[*16]** and Johnson on October 28, 2017.

7. Motion to strike Plaintiff's motion for summary judgment filed by Defendants Babcock Center and Johnson on October 27, 2017. Plaintiff filed a response in opposition on November 13, 2017, to which these Defendants filed a reply on November 29, 2017.

PLAINTIFFS' CAUSES OF ACTION[7]

COUNT ONE

VIOLATION OF THE AMERICANS WITH DISABILITIES ACT

260. Plaintiffs and Class Members[8] adopt and restate the allegations set forth above in this complaint.

261. It is undisputed that Plaintiffs are qualified individuals with disabilities who have physical and/or mental impairments that substantially limit one or more of their major life activities, including, but not limited to one of more of the following: thinking, walking, communicating, learning, working, caring for themselves and concentrating. See *42 U.S.C. § 12102*.

262. The treating professionals of the State have determined that community-based treatment is appropriate for the Plaintiffs and Class Members; they do not oppose community placement and their needs can be reasonably accommodated without fundamentally altering the nature of how the State delivers services.

263. Public entities, like the SCBCB, the South Carolina General Assembly, **[*17]** SCDHHS, SCDDSN, the Babcock Center and local DSN Boards are required by federal law to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, except where the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. *28 CFR § 35.130(b)(7)*.

264. Defendants who were members of the South Carolina Budget and Control Board in 2009 violated the ADA by failing to insure that the funds paid to SCDDSN were spent appropriately for services Plaintiffs and Class Members need, despite repeated warnings from the South Carolina Legislative Audit Council, federal and state audits showing that SCDDSN was spending those funds to purchase real estate to force waiver participants into WAC's to profit the State.

265. Defendants have failed to consider the State's obligations under the ADA in allocating funds necessary to provide necessary community based services to Plaintiffs and Class Members to allow them to receive services in the most integrated setting appropriate to their treatment needs.

266. Defendants have failed to consider their obligations **[*18]** to the Plaintiffs and Class Members under the ADA by expending tens of millions of dollars unnecessarily to purchase and renovate real

[7] Excluding Count Eight, which has been resolved.

[8] Plaintiffs elected not to proceed with a class action.

property used as WAC's which properties are being utilized to financially exploit persons who have disabilities.

267. Defendants have acted to terminate the ADHC services of the Plaintiffs and Class Members and to reduce other services needed by Medicaid waiver participants which are necessary to allow them to live in the least restrictive setting.

268. These actions were taken without conducting a cost analysis to determine the cost of alternative services, including, but not limited to the cost of WAC services and the real estate funded by SCDDSN.

269. In doing so, Defendants have been indifferent to the medical, emotional and other treatment needs of the Plaintiffs and Class Members and to the full costs of operating the WAC's owned by local DSN Boards.

270. The treating physicians of the Plaintiffs and Class Members have determined that ADHC services are medically necessary and the Defendants have failed to give deference to the treatment orders of their treating physicians in violation of the mandate of the United States Supreme Court in *Olmstead v. L.C. 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999)*.

271. Under **[*19]** the "integration mandate" of Title II of the ADA, Defendants must administer long-term care services in a manner that provides services to individuals who have disabilities in the most integrated setting appropriate to their needs.

272. Services provided in WAC's are not appropriate to the needs of the Plaintiffs and Class Members.

273. The actions taken by Defendants discriminate against persons whose physicians have determined that they require ADHC, by denying services that are appropriate to their needs.

274. The State's unjustified attempts to force these persons into WAC's place them at risk of institutionalization, including hospitals, nursing homes and ICF/MR's and it constitutes a form of discrimination based on disability which is prohibited by Title II, *42 U.S.C. § 12101(a)(2)*, *(5)*.

275. The arbitrary determinations made by DSN Service Coordinators, who are acting on directives from Defendant Kathi Lacy and other individual Defendants for economic gain, will force the Plaintiffs and Class Members into inappropriate placements where their health and safety will be endangered at greater costs to taxpayers of the State.

276. The services Plaintiffs and Class Members request are not unreasonable, given the **[*20]** demands on the State's health care budget and the resources available to pay for these services and the ADHC services Plaintiffs request cost less than placement in a hospital or an SCDDSN Regional Center.

277. The Plaintiffs' needs can be reasonably accommodated, as has been demonstrated by their continuous care in the community while receiving ADHC services for many years.

278. Providing the ADHC services Plaintiffs request would not place an unreasonable burden on the State nor would it force the state to fundamentally alter the nature of its programs.

279. ADHC services ordered by Plaintiffs's and Class Members' physicians can be provided without undue burden to the state, taking into consideration its obligation to provide health care and services with an "even hand."

280. Defendants have further violated the ADA by denying Kobe's requests for an ACD and his choice to move to a less restrictive setting and by reducing Mark's respite services, which are all needed for him to remain out of an institutional setting.

281. Defendants have failed to make reasonable modifications to the programs operated by SCDDSN which are necessary for Plaintiffs to receive services in the least restrictive **[*21]** setting.

282. The failure to offer Plaintiffs and Class Members services, including, but not limited to ADHC services, to allow Plaintiffs to live in integrated home and community based settings constitutes unlawful discrimination in violation of Title II of the ADA and its implementing regulations at *28 C.F.R. § 35.130(d)*.

283. Defendants have failed to exercise their discretion in a non-discriminatory manner by denying Plaintiffs necessary funds used to provide the ADHC services they require to live the least restrictive setting.

284. The willful and intentional acts of the individual Defendants have placed the Plaintiffs and Class members at risk and caused them to experience extreme emotional distress and fear of retaliation for filing this lawsuit in violation of the andti-retaliation provisions of the ADA.

285. Plaintiffs request a finding that Defendants have violated the ADA and its implementing regulations and an order requiring that Defendants pay attorney fees, expenses and costs and damages in such amount as the Court shall determine to be just and fair.

COUNT TWO VIOLATION OF *SECTION 504 OF THE REHABILITATION ACT*

286. Plaintiffs adopt and restate the allegations set forth above in this complaint.

287. *Section 504* of the Rehabilitation Act of **[*22]** 1973 provides, "no otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. *29 U.S.C. § 794(a)*,

288. "Program or activity' includes a department, agency, special purpose district, or other instrumentality of a State or local Government. *29 U.S.C. § 794(b)(1)(A)*.

289. The Medicaid Waiver programs administered by SCDDSN are "programs or activities" provided by the State of South Carolina.

290. "Recipient" of federal financial assistance also includes any public or private agency or other entity to which Federal financial assistance is extended directly or through another recipient. *28 C.F.R. § 41.3(d)*.

291. SCDHHS, SCDDSN, local DSN Boards and the Babcock Center are all recipients of federal financial assistance.

292. Regulations implementing Section 504 require a recipient of federal financial assistance to administer its services, programs, and activities in the "most integrated setting appropriate" to the needs of qualified individuals with disabilities. *28 C.F.R. § 41.51(d)*.

293. Federal Medicaid funds account for a majority (nearly 80% when this lawsuit **[*23]** was filed) of the cost of the home and community based waiver programs administered by SCDDSN.

294. Defendants and their contracting agencies and organizations are recipients of Federal financial assistance under *Section 504* and its implementing regulations.

295. Plaintiffs are "qualified persons with disabilities" within the meaning of *Section 504* because they have physical and/or mental impairments that substantially limit one or more major life activities, and they meet the essential eligibility requirements for the home and community based waiver programs administered by SCDDSN. See *29 U.S.C. § 705(9)*.

296. The treating physicians of the Plaintiffs and Class Members have determined that ADHC services are provided in the "most integrated setting appropriate" to their medical needs as qualified individuals with disabilities. *28 C.F.R. § 41.51(d)*.

297. The South Carolina Budget and Control Board failed to insure that the funds allocated to SCDDSN were spent as appropriated by the General Assembly to provide services, despite warnings from the South Carolina Legislative Audit Council that SCDDSN was spending those funds improperly for the purchase of real estate.

298. Defendants have threatened to terminate funds necessary for Plaintiffs and Class **[*24]** Members to receive services in the most integrated setting appropriate to meet their needs in order to financially exploit them.

299. Defendants have failed to make reasonable modifications to home and community based waiver programs to allow Plaintiffs and Class Members to receive ADHC services and other home and community based waiver services so that they can successfully live in the least restrictive setting appropriate to their needs.

300. Failure to provide services in the least restrictive setting appropriate to the needs of Plaintiffs and Class Members and forcing them to attend WAC's, where they will be financially exploited, constitutes unlawful segregation in violation of *Section 504* of the Rehabilitation Act and its implementing regulations at *28 C.F.R. 41.51(d)*.

301. The individual Defendants, Buscemi, Lacy, Waring, Huntress, Chorey and Johnson have acted willfully together and with others in intentional disregard of the federal rights of the Plaintiffs and Class Members in willful and intentional violation of *Section 504*.

302. Defendants have also utilized criteria and methods of administration that subject Plaintiffs to discrimination on the basis of disability, including risk of unnecessary institutionalization, **[*25]** by (1) failing to assess properly the services and supports that would enable Plaintiffs to live in the least

restrictive setting, (2) failing to ensure that Plaintiffs have access to Medicaid-covered services that will meet their needs in the community, and (3) compelling health care providers to reduce or eliminate recommended ADHC services, thereby violating *Section 504* and its implementing regulations.

303. Because of the willful and intentional acts of the individual Defendants, the Plaintiffs and Class Members have experienced extreme emotional distress due to fear of loss of services which their physicians have determined to be medically necessary and fear of harm if they are forced to attend a WAC.

304. Class Members have been subjected to extreme emotional distress when they were forced to attend WAC's with little to no notice or opportunity to appeal these decisions.

305. Plaintiffs have experienced fear of retaliation for filing this lawsuit and for advocating for their rights.

306. Defendants have violated *Section 504* by failing to provide Kobe with an ACD and services in an apartment setting and they have violated Mark's right to receive respite services at the pre-January 1, 2010 level and other **[*26]** cost effective home and community based waiver services that allow waiver participants to live in the least restrictive setting.

307. Plaintiffs and Class Members request a finding that Defendants have violated *Section 504* and its implementing regulations and that Defendants pay attorney fees, expenses and costs and such other damages to the Plaintiffs and Class Members, including damages for emotional distress, in such amount as the Court shall determine to be just and fair.

308. Plaintiffs and Class Members are entitled to reasonable legal fees, costs and expenses of this litigation.

COUNT THREE VIOLATION OF *42 U.S.C. § 1983*

309. Plaintiffs adopt and restate the allegations set forth in the paragraphs above.

310. At all relevant times herein, Plaintiffs and Class Members have had a right under the *Medicaid Act* to receive ADHC.

311. Defendants Haley, Sanford, Cooper, Eckstrom, Chellis, Leatherman, Forkner, Keck, Butkus, Laurent, Buscemi, Lacy, Waring, Chourey, Huntress, Johnson and Leitner are persons who, acting under color of law, have violated the civil rights of the Plaintiffs and Class Members by violating provisions of the Medicaid Act and the constitutional rights of the Plaintiffs and Class Members.

312. Defendants **[*27]** Butkus, Laurent, Buscemi, Lacy, Waring, Huntress, Chorey and Johnson and others who will be identified during discovery schemed to divert funds from ADHC services to WAC's and to deny the rights of Plaintiffs and Class Members to these and other Medicaid services needed to live in the least restrictive setting.

313. Acting under the color of law, Defendants worked a denial of the rights and privileges of Plaintiffs and Class Members which are secured by the United States Constitution or by Federal law

and which are guaranteed by the *Fourth*, *Fifth*, and *Fourteenth Amendments to the Constitution of the United States*, to wit, they have denied their right to life, liberty and the pursuit of happiness by denying ADHC services ordered by their physicians in order to effectively force them into unsafe and inappropriate WAC's.

314. As a result of the concerted unlawful and malicious conduct of Defendants Forkner, Buscemi, Lacy, Waring, Chorey, Huntress and Johnson, Plaintiffs and Class Members have been deprived of their rights to equal protection of all the laws and to due process of law, their right to property interests in Medicaid benefits, and the due course of justice has been impeded, in violation of the *Fourth*, *Fifth*, and *Fourteenth Amendments of the Constitution of the United States* and *42 U.S.C. § 1983*.

315. Individual Defendants Buscemi, Lacy, **[*28]** Waring, Chorey, Huntress and Johnson have neglected the needs of Plaintiffs and Class Members and they have done so with evil motives and intents and their actions have involved reckless and callous indifference to the rights of the Plaintiffs and other Class Members.

316. Defendants Johnson and other employees of the Babcock Center have caused Kobe to suffer physical injury and mental anguish and their actions have resulted in unrepairable damage to his wheelchair.

317. In order to prevent Kobe from exercising his right of free speech, Defendants have violated his right to receive an ACD (assistive communications device) with reasonable promptness, as is required by *42 U.S.C. § 1396a(a)(8)*.

318. Defendants have recklessly and callously refused to provide Kobe with the supports he would need to live in a less restrictive setting.

319. Defendants have recklessly and callously reduced the respite services Mark needs to remain in the home of his sister and they have threatened to terminate ADHC services of waiver participants across the State.

320. All of the Defendants have acted with reckless or callous indifference to the federally protected rights of Plaintiffs and Class Members, thereby placing the health and **[*29]** even the very lives of Plaintiffs and Class Members at risk.

321. Plaintiffs and Class Members and their families have been subjected to fear of harm, shock, and emotional scarring, as well as fear of reprisal and of bodily harm, which are all compensable as emotional distress, and other damages.

322. Plaintiffs and Class Members demand judgment for the violation of their civil rights against all the Defendants, jointly and severally, for actual, general, special, compensatory damages in an amount to be determined by a jury and further demands judgment against all Defendants, jointly and severally, for punitive damages in an amount to be determined by the jury, plus the costs of this action, including attorney's fees, and such other relief deemed to be just, fair, and appropriate.

323. Punitive damages are recoverable in a *42 U.S.C. § 1983* suit where defendant's conduct is motivated by an evil motive or intent, or where it involves reckless or callous indifference to plaintiff's federally protected rights.

COUNT FOUR VIOLATION OF *42 U.S.C. §§ 1983* and *1988* (violation of civil rights)

324. The Plaintiffs and Class Members repeat and reallege and incorporate by reference the allegations set forth above with the same force and **[*30]** effect as if herein set forth.

325. At all relevant times herein, Plaintiffs and Class Members had a right under the Medicaid Act, the ADA and *Section 504* to receive ADHC services and other home and community based services which are necessary for them to live in the least restrictive setting. 326.The Defendants are persons who, acting under color of law, have violated the civil rights of the Plaintiffs and Class Members by denying their rights to receive these services and attempting to force them into WAC's, where their health and safety will be jeopardized and their life and liberty will not be protected.

327. Defendants and other persons who may be identified during discovery, have caused Plaintiffs and Class Members to be denied services, including, but not limited to ADHC services, which they are entitled to receive to enable them to live in the least restrictive setting.

328. Defendants have failed to assure that funding necessary to protect the health and welfare of Plaintiffs and Class Members, as is required by the Medicaid Act and its regulations, has been spent as allocated and intended to provide ADHC and other home and community based waiver services.

329. All of the Defendants have failed to act with reasonable **[*31]** promptness upon findings of the South Carolina Legislative Audit Counsel showing that funds allocated for community based services have been diverted instead to purchase unnecessary real estate, thus allowing DDSN to continue the unbridled spending of taxpayer dollars to purchase more real estate instead of using available resources in compliance with the ADA, *Section 504* and the Medicaid Act to prevent hospitalization and institutionalization and to allow waiver participants to function with the most independence possible.

330. Defendants have violated the rights of Plaintiffs and Class Members to life and liberty in violation of the due process requirements of the United States Constitution by attempting to force them into WAC's for the financial benefit of state agencies, local DSN Boards and the Babcock Center and by refusing to provide other medically necessary services, as determined by their treating physicians.

331. Defendants have violated the free choice of providers granted to Plaintiffs and Class Members by the Medicaid Act, instead, attempting to force them to use inappropriate services provided by the Babcock Center, SCDDSN and its local Boards. 332.Defendants along with other persons **[*32]** who may be identified during discovery, have schemed to divert funds from ADHC services to WAC's so as to financially benefit the Babcock Center and local DSN Boards and to exploit the Plaintiffs and Class Members in conscious disregard for their rights and privileges which are secured by the United States Constitution or by Federal law and which are guaranteed by the *Fourth*, *Fifth*, and *Fourteenth Amendments to the Constitution of the United States*.

333. Defendants have failed to inform Plaintiffs and Class Members of other feasible Medicaid services which they are entitled to receive with reasonable promptness as is required by the Medicaid Act and its regulations.

334. Defendants have failed to establish reasonable standards for the operation of the Medicaid waiver programs administered by SCDDSN pursuant to *42 U.S.C. § 1396a(a)(17)* and other federal laws and regulations and they have failed to require SCDDSN to promulgate regulations as required by the South Carolina Administrative Procedures Act to establish reasonable and fair rules for the provision of services to Plaintiffs and Class Members.

335. As a result of these practices, policies for waiver programs and services are set by Defendants without meaningful public review or meaningful public input.

336. Defendants have violated **[*33]** the free choice of providers of Plaintiffs and Class Members by failing to inform them of feasible alternatives and by obstructing their choices of providers while attempting to maintain the monopoly of services provided by SCDDSN, its local DSN Boards and the Babcock Center in violation of *42 U.S.C. § 1396a(a)(23)*.

337. Defendants have violated the equal access provisions of the Medicaid Act by failing to make services available to waiver participants as they are available to the general public.

338. Specifically, and in addition to the violations described above, Defendants have violated Kobe's civil rights which are enforceable under *42 U.S.C. § 1983* because they have failed to protect him from abuse and neglect, have failed to provide him with an augmentative communications device (ACD) and residential services in a less restrictive and more integrated setting with reasonable promptness.

339. Kobe is unable to communicate verbally because of his profound speech impediment due to cerebral palsy, but he would be able to communicate using augmentative communications device (ACD) which would allow him to speak using eye control, head tracking and multiple types of switches which can be attached to his wheelchair headrest. 340.As **[*34]** the federal district court recognized in ordering the state to pay for an ACD for a Medicaid participant with disabilities similar to Kobe's, in *Fred C. v.Texas Health and Human Services Com'n:* "The inability to speak can be the single most devastating aspect of any handicap." *988 F.Supp. 1032 (W.D.Tex. 1997)*.

341. Defendants have failed to provide Kobe with a functional wheelchair with reasonable promptness, in violation of *42 U.S.C. § 1396a(a)(8)*.

342. DHHS has failed to provide Kobe with medically necessary services and equipment with reasonable promptness, as is required by *42 U.S.C. § 1396a(a)(8)*, the ADA and *Section 504*.

343. In *Meyers v. Reagan*, the Eighth Circuit, found the plaintiff to be entitled to Medicaid funding for an ACD because the primary goal of Medicaid is to provide services to help the recipient "attain or retain capability for independence or self-care." *Id.* at 243 (citing *42 U.S.C. § 1396*).

344. Medicaid regulations specifically state that the benefits provided must include services recommended "for maximum reduction of physical or mental disability and restoration of a recipient to his best possible function level." *42 C.F.R. § 440.130(d) (1996)*.

345. In order for Kobe to be restored to his best possible function level, it is necessary for him to be able to communicate effectively with others. See *Fred C. v. Texas Health and Human Services Com'n, 988 F.Supp. 1032 (W.D.Tex. 1997)*.

346. **[*35]** This equipment is needed in order for Kobe to communicate with other persons in order to be more fully integrated into the community and to communicate his needs clearly with his health care providers.

347. These ACD's are funded by Medicaid in at least 47 states.

348. *42 U.S.C. § 1396a(a)(8)* requires the State to provide Medicaid services and equipment with reasonable promptness and Medicaid regulations require the State to establish reasonable standards, as required by *42 U.S.C. § 1396a(a)(17)*, and to communicate those standards promptly to Medicaid participants.

349. Medicaid regulations require SCDDSN and SCDHHS to establish eligibility for Medicaid funded devices within 90 days of the request and to provide a notice of a right to a fair hearing when such requests are denied or the device is not provided with reasonable promptness.

350. There is no other method for Kobe to communicate effectively other than using an ACD and providing an ACD would not fundamentally alter the State's programs.

351. On January 1, 2010, Defendants eliminated speech and language therapy as a ID/RD Medicaid waiver service based on false claims of a lack of funding, making it nearly impossible for Kobe and other persons who need ACD's to receive the speech **[*36]** assessment needed to obtain an order for the devices.

352. Termination of speech and language, physical therapy and occupational therapy has jeopardized the health and well being of waiver participants in violation of the Medicaid Act, which requires them to assure CMS that their health and welfare be protected.

353. Kobe will need speech therapy to learn to use the device and to communicate his needs using the device.

354. Mark has been denied needed respite services based on DDSN's and DHHS' false claims of inadequate funding which were sent via U.S. Mail to CMS.

355. Upon information and belief, SCDDSN has continued to bill Medicaid the same amount, or more, for respite services, despite having shifted the costs of liability insurance, worker's comp and unemployment to the families of waiver participants.

356. As a result of Defendants' concerted unlawful and malicious conduct, Plaintiffs and Class Members have been deprived of their rights to equal protection of all the laws and to due process of law, to their right to property interests in Medicaid benefits, and the due course of justice has been impeded, in violation of the *Fourth*, *Fifth*, and *Fourteenth Amendments of the Constitution of the United States* and *42 U.S.C. § 1983*.

357. Plaintiffs and Class Members have been **[*37]** subjected to fear of harm, shock, and emotional scarring, which are all compensable as emotional distress, and other damages.

358. Defendants Butkus, Forkner, Laurent, Buscemi, Lacy, Waring, Chorey and Johnson have acted with an evil motive or intent to deny services Plaintiffs and Class Members are entitled to receive in order to financially benefit themselves and their organizations.

359. The Defendants have acted with reckless or callous indifference to the federally protected rights of Plaintiffs and Class Members, causing funding allocated to provide Medicaid services to "lapse" or to be paid to a rainy day account, thus losing hundreds of millions of matching federal dollars.

360. Wherefore, Plaintiffs and Class Members demand judgment for the violation of their civil rights against all the Defendants, jointly and severally, for actual, general, special, compensatory damages in the amount determined by a jury and further demands judgment against all defendants, jointly and severally, for punitive damages in an amount to be determined by the jury, plus the costs of this action, including attorney's fees, and such other relief deemed to be just, fair, and appropriate.

361. Plaintiffs **[*38]** and Class Members request punitive damages, as awarded by a jury, because these Defendants' conduct has been motivated by an evil motive or intent, and it has involved reckless or callous indifference to plaintiffs' federally protected rights.

COUNT FIVE VIOLATION OF *42 U.S.C. § 1985(3)* (conspiracy)

362. The Plaintiffs and Class Members repeat and reallege and incorporate by reference the allegations set forth above with the same force and effect as if herein set forth herein.

363. The individual Defendants Buscemi, Forkner, Lacy, Waring, Chorey and Johnson, together with other unnamed persons who may be identified during discovery, have acted in their individual and official capacities, under color

> of law to participate in a conspiracy for the purpose of depriving the Plaintiffs and Class Members, either directly or indirectly, the equal protection of the laws or of equal privileges and immunities under the laws.

364. These Defendants committed overt acts in furtherance of the conspiracy, thereby injuring the Plaintiffs and depriving them of services which constitute a property right, in order to deprive them of constitutionally protected rights and privileges.

365. The conspiratorial purpose was financial **[*39]** and Defendants have acted in concert to deny the civil rights of the Plaintiffs and other Class Members by attempting to prevent them from receiving ADHC services and other waiver services they are entitled to receive in furtherance of the monopoly maintained by the Babcock Center, SCDDSN and its local DSN Boards.

366. The first steps in the conspiracy were taken when DDSN spent millions of dollars which had been allocated by the General Assembly to provide Medicaid waiver services to persons who have disabilities to purchase real estate used as WAC's instead.

367. Instead of requiring the Defendants to use funds paid by the state and federal governments to provide appropriate services, Defendants allowed SCDDSN to use these funds to continue to purchase real estate that is unnecessary, and indeed is, in some cases, harmful to Participants and Class Members.

368. The individual Defendants named in this Court have been working in concert since 2005 to use funds allocated for services in ways not intended by the legislature, using those funds to purchase unnecessary real estate in furtherance of the illegal monopoly of DSN Boards (and entities like the Babcock Center which are treated by **[*40]** DDSN as a local Board).

369. The individual Defendants have acted in concert to divert funds to WAC's operated by local DSN Boards and the Babcock Center and to deny ACHC benefits to which Plaintiffs and Class Members are entitled to receive as a result of their disabilities.

370. Actions taken by the Defendants have proximately caused injury to Plaintiffs by denying services which they need to live in the least restrictive setting in the community.

371. Instead, Defendants have redirected state and federal funds to be used for improper purposes without regard for the negative consequences to the intended beneficiaries.

372. Defendants, acting under color of state law, have acted in concert to deprive Plaintiffs of benefits which they are entitled to receive under the reasonable promptness (*42 U.S.C. §1396a(a)(8)*), free choice (*42 U.S.C. §1396a(a)(23)*); comparability (*42 U.S.C. §1396a(a)(10)*); reasonable standards (*42 U.S.C. § 1396a(a)(17)*) and equal access (*42 U.S.C. §1396a(a)(30)*) provisions of the Social Security Act.

373. Plaintiffs and Class Members request damages to be determined by a jury, an injunction and payment of legal fees, costs and expenses.

COUNT SIX VIOLATION OF *SUPREMACY CLAUSE*

374. The Plaintiffs and Class Members repeat and reallege and incorporate by reference the allegations set forth above with **[*41]** the same force and effect as if herein set forth.

375. States are not required to participate in Medicaid waiver programs, but once they accept Medicaid funds, states are required to comply with all federal laws, rules and regulations.

376. Defendants have violated the following provisions of the Medicaid Act, in violation of the *Supremacy Clause of the United States Constitution*: reasonable promptness (*42 U.S.C. §1396a(a)(8)*), free choice (*42 U.S.C. § 1396a(a)(23)*); comparability (*42 U.S.C. § 1396a(a)(10)*); reasonable standards (*42 U.S.C. § 1396a(a)(17)*) and equal access (*42 U.S.C. §1396a(a)(30)*) provisions of the Social Security Act.

377. Plaintiffs and Class Members pray for an order requiring Defendants to immediately comply with the Medicaid Act and to pay for attorney fees, costs and expenses of this action and to pay the Plaintiffs and Class Members such amounts as the Court shall determine to be just.

COUNT SEVEN VIOLATION OF RICO

378. Plaintiffs reallege and incorporated by reference the paragraphs contained above.

379. Defendants Haley, Sanford, Butkus, Laurent, Forkner, Lacy, Waring, Chourey and Johnson, together with other persons who will be identified during discovery, have engaged in enterprises to operate WAC's in order to financially exploit Plaintiffs Members by paying them subminimum wages so as to profit their agencies or themselves. **[*42]**

380. These Defendants, together with persons who will be identified during discovery, have diverted Medicaid and state taxpayer funds to these "industrial centers" or WAC's which constitute an enterprise for purposes of RICO.

381. In furtherance of this scheme, Defendants have engaged in wire fraud through the use of telephones and email and have used the United States Mail.

382. SCDDSN has received income from WAC's and the Babcock Center and other named defendants have received income from these enterprises, as well as funds from SCDDSN to purchase real estate in furtherance of this scheme.

383. Upon information and belief, Defendant Lacy and others who will be identified during discovery have retaliated against persons who have exposed the misappropriation of funds by SCDDSN and by its officials, including retaliation against persons who were listed as witnesses in federal trials and she has participated in schemes to remove SCDDSN Commissioners who have inquired into this enterprise.

384. Upon information and belief, these Defendants, acting together with other persons who will be identified during discovery, have obstructed investigations of SCDDSN, local DSN Boards and the Babcock **[*43]** Center and have provided false and/or misleading information to state and federal investigators.

385. In violation of *18 U.S.C. § 1503*, Defendants Johnson and Lacy have impeded the investigations of deaths and serious injuries occurring at WAC's or as a result of the failure to supervise persons at WAC's.

386. In violation of *18 U.S.C. § 1512*, Defendants Johnson and Lacy, together with other persons who will be identified during discovery, have knowingly used intimidation, threatened or corruptly persuaded other persons, or attempted to do so; or have engaged in misleading conduct toward other persons in an attempt to influence, delay, or prevent the testimony of those persons in an official proceeding or to cause the persons to withhold testimony, or withhold a record, document, or other object, from an official proceeding or to alter, destroy, mutilate, or conceal an object with the intent to impair the object's integrity or availability for use in an official proceeding.

387. Upon information and belief, in violation of U.S.C. *§ 1512*, Defendants Johnson and Lacy have tampered with witnesses and threatened persons who have attempted to expose this scheme.

388. Upon information and belief, in violation of U.S.C. *§ 1513*, these Defendants **[*44]** have used the United States Mail in furtherance of these schemes.

389. These Defendants have benefitted financially through increases in their salaries at taxpayer expense, at the same time that waiver services provided to severely disabled persons were being reduced due to "budget reductions" and contractual arrangements.

390. Upon information and belief, these Defendants have invested ill gotten funds in real estate used for the purpose of operating WAC's and have used funds which should have been spent providing waiver services to increase salaries of SCDDSN officials.

391. Property rights (i.e. Medicaid benefits) of the Plaintiffs have been denied by Defendants by attempting to force them to attend WAC's where they are not safe and their medical needs would not be met.

392. Upon information and belief, these Defendants, together with other persons who will be identified during discovery, appear to have engaged in money laundering and interference with commerce by establishing and maintaining a monopoly of services provided by the Babcock Center, SCDDSN and local DSN Boards while attempting to drive Helping Hands, Hope Bridge and other private providers of ADHC services out of business. **[*45]**

393. Medicaid is an insurance program and these Defendants have filed false claims for reimbursement for Medicaid services in excess of the cost of those services, including, but not limited to paying DSN Boards and the Babcock Center millions of dollars for "vacant beds."

394. These individual Defendants have transferred or obtained taxpayer funds by false pretenses.

395. These Defendants have fraudulently converted the money they were in lawful possession of with fraudulent intent.

396. Defendants have knowingly or willfully made false or fraudulent statements or representations in or with reference to applications for insurance (Medicaid).

397. These Defendants have knowingly and willingly presented or caused to be presented statements to an insurer, a reinsurer, a producer, a broker or any agent thereof, knowing that the statement conceals or omits facts, or contains false or misleading information concerning a fact material to an application for Medicaid reimbursement.

398. These Defendants have presented or caused to be presented statements as a part of, or in support of, a claim for payment or other benefits (Medicaid), knowing that the statement conceals or omits facts, or contains **[*46]** false or misleading information concerning facts material to that claim. 399. These Defendants have assisted, aided, abetted, solicited and conspired with other persons to present or cause to be presented claims to an insurer, a reinsurer, a producer, a broker or any agent thereof, knowing that the statements concealed or omitted facts, or have provided false or misleading information concerning facts material to an application for insurance reimbursement or other benefits under such a policy.

400. These Defendants have acted or failed to act with the intent of defrauding or deceiving an insurer, a reinsurer, producer, a broker or any agent thereof, to obtain insurance reimbursements under Medicaid, which is prohibited by RICO.

401. These Defendants have acted to assist, conspire with or urge other persons to commit acts r omissions through deceit, misrepresentation or other fraudulent means.

402. These Defendants have accepted proceeding or other benefits under policies of insurance (the ID/RD Medicaid waiver document), knowing that the proceeds or other benefits are derived from acts or omissions.

403. These Defendants have employed persons to procure clients, patients or other persons **[*47]** who obtain services or benefits under a policy of insurance (Medicaid) for the purpose of engaging in acts or omissions which violate the rights of the Plaintiffs.

404. Upon information and belief, these Defendants have acted in concert to manipulate or othewise effect evaluations of medical necessity in violation of the South Carolina Medical Practice Act so as to deny payment for services which the treating physicians of the waiver participants have determined to be medically necessary.

405. The purposes of these evaluations conducted by Kathi Lacy, Judy Johnson, Jacob Chourey and others under their supervision and control has been to deny needed Medicaid services and to defraud state taxpayers through the operation of WAC's, so as to financially exploit persons who have disabilities.

406. Plaintiffs are entitled to treble damages and Defendants should be required to repay all ill gotten gains for debts "forgiven," for real estate purchased with funds allocated to provide services to ID/RD Medicaid waiver participants and other improper uses of federal and state funds alleged herein.

407. Plaintiffs pray for payment of legal fees, costs and expenses of this action due to Defendants' **[*48]** violation of RICO. ECF No. 65, 45-69.

APPLICABLE LAW

A. Title II of the Americans With Disabilities Act ("ADA"), *42 U.S.C. §§ 12131-12165* and Rehabilitation Act.

Title *42, United States Code, Section 12132* provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.
> A "public entity" means
> (A) any State or local government;
> (B) any department, agency, special purpose district, or other instrumentality of State or States or local government; and
>
> (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in *section 24102(4)* of Title 49).

42 U.S.C. 12131(1).

Similarly, *29 U.S.C. § 794* of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States, as defined in *section 705(20)* of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal **[*49]** Service.
> A "program or activity" means all of the operations of--
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or
>
> (B) a local educational agency (as defined in *section 7801* of Title 20), system of career and technical education, or other school system;
> (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—
> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
> (ii) which is principally engaged in the business of providing education,health care, housing, social services, or parks and recreation; or
>
> (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, **[*50]** partnership, private organization, or sole proprietorship; or
>
> (4) any other entity which is established by two or more of the entities described in *paragraph (1)*, *(2)*, or *(3)*; any part of which is extended Federal financial assistance.

29 U.S.C. § 794(b).

To establish an ADA /Rehabilitation Act violation, Plaintiff must show: (1) that he has a disability; (2) that he is otherwise qualified for the employment or benefit in question; and (3) that he was excluded from the employment or benefit due to discrimination solely on the basis of the disability. *Rogers v. Dep't of Health and Env. Control, 985 F. Supp. 635 (D.S.C. 1997)* (quoting *Adamczyk v. Chief, Baltimore County Police Dep't, 952 F. Supp. 259, 263 (D. Md. 1997))*.

B. Violation of Constitutional Rights.

Title *42, United States Code, Section 1983* provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

To state a claim under *42 U.S.C. § 1983*, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United **[*51]** States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *Mills v. Greenville Cnty., 586 F. Supp. 2d 480, 485* (D.S.C. 2008 (citing *West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988))*.

To establish supervisory liability under *§ 1983*, a plaintiff must show: (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices"; and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. *Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994)* (citing cases).

C. Conspiracy To Interfere with Civil Rights.

Title *42, United States Code, Section 1985(3)* provides:

> If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such **[*52]** State . . . the equal protection of the laws; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

To state such a claim under *42 U.S.C. § 1985(3)*, a plaintiff must prove the following:

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

A Society Without A Name v. Virginia, 655 F.3d 342, 346 (citing *Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995))*. Moreover, the plaintiff must show "an agreement or a meeting of the minds by the defendants to violate the plaintiff's constitutional rights." Id. (citing *Simmons, 47 F.3d at 1377*).

D. *Supremacy Clause*

The *Supremacy Clause, Art. VI, cl. 2*, reads:

> This Constitution, and the Laws of the **[*53]** United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The *Supremacy Clause* allows a plaintiff to seek declaratory and injunctive relief when federal law preempts state regulation. *United States v. South Carolina, 720 F.3d 518, 526 (4th Cir. 2013)* (citing cases).

E. Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962*.

In *U.S. Airline Pilots Ass'n v. Awappa, LLC, 615 F.3d 312 (4th Cir. 2010)*, the Fourth Circuit stated:

To state a civil RICO claim, a plaintiff must allege that the defendants engaged in, or conspired to engage in, a "*pattern* of racketeering activity." *18 U.S.C. § 1962* (emphasis added). "Racketeering activity" includes "extortion," defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Id. *§§ 1951(b)(2)* (defining extortion), 1961(1) (defining "racketeering activity" to include the offenses enumerated in *§ 1951*).

. . . .

> A "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of [the RICO **[*54]** statute] and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." *18 U.S.C. § 1961(5)*. To demonstrate a pattern of such activity, the plaintiff must show "continuity plus relationship," i.e., "that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity."

Id. at 318 (citations omitted)

"In order for a civil RICO claim to survive a *Rule 12(b)(6)* motion to dismiss, plaintiff must allege '(1) conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering.'" *Chambers v. King Buick GMC, LLC, 43 F. Supp. 3d 575, 588 (D. Md. 2014)* (quoting *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*). Additionally, a plaintiff must plead proximate cause, i.e., that he was injured in his business or property "by reason of" the RICO violation. *Id. at 588* (quoting *Hemi Group, LLC v. City of New York, 559 U.S. 1, 6, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010)*).

F. Motions to Dismiss

To survive a motion to dismiss under *Rule 12(b)(6)*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). A claim has facial plausibility when "the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." Id. However, a complaint that pleads facts **[*55]** merely consistent with the liability does not sufficiently show the claim as plausible on its face. Id. When analyzing a matter under *Rule 12(b)(6)*, the court should first accept as true all of the allegations contained in a complaint. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. Second, the court must determine, drawing on its judicial experience and common sense, if a claim "states a plausible claim for relief." Id. The plaintiff's claims must be alleged with enough specificity to nudge the plaintiff "across the line from conceivable to plausible." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 256 (4th Cir. 2009)* (quoting *Twombly, 550 U.S. at 570*).

G. Motions for Summary Judgment

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed R. Civ. P. 56(a)*. A fact is "material" if proof of its existence or non-existence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A genuine question of material fact exists where, after reviewing the record as a whole, the court finds that a reasonable jury could return a verdict for the nonmoving party. *Newport News Holdings Corp. v. Virtual City Vision, 650 F.3d 423, 434 (4th Cir. 2011)*.

DISCUSSION

A. Amended Motion for Summary Judgment on **[*56]** Remand filed by Defendants Buscemi, Laurent, Butkus, Huntress, Lacy, Waring, and Chorey (the "DDSN Defendants")

The DDSN Defendants observe that, as to them, Kobe has shown no need for prospective injunctive relief and has abandoned any damages claims, such that these Defendants are entitled to dismissal of the case against them in its entirety. As to the merits of Kobe's allegations, the DDSN Defendants assert that Counts One (ADA) and Two (Rehabilitation Act) essentially present the same contention that Kobe was wrongfully denied ADHC services. As noted hereinabove, the Fourth Circuit has determined this particular contention is moot because Kobe did not lose ADHC services and, further, was successful on administrative appeal.

The DDSN Defendants assert that any non-ADA or non-Rehabilitation Act claims against these Defendants in their official capacities are barred by the *Eleventh Amendment*. See *Will v. Michigan Dep't of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989))*. As to Kobe's *§ 1983* claims against the DDSN Defendants their individual capacities (Counts Three, Four), these Defendants argue that Kobe failed to show any specific factual allegations of wrongdoing attributable to any of the named DDSN Defendants. Regarding Kobe's claim that he was denied a wheelchair and ACD, **[*57]** the DDSN Defendants assert these claims are directed to the DHHS Defendants, Keck and Fortner. Regarding Count Five, the DDSN Defendants assert that Kobe's claims relate to a conspiracy to deny him ADHC services, and because such services were not denied, "obviously there could not have been a conspiracy to effect such denial." ECF No. 399-1, 11.

Regarding Count Six, the DDSN Defendants note the dearth of factual allegations in the amended complaint under this cause of action, which simply states:

> 376. Defendants have violated the following provisions of the Medicaid Act, in violation of the *Supremacy Clause of the United States Constitution*: reasonable promptness (*42 U.S.C. § 1396a(a)(8)*); free choice (*42 U.S.C. § 1396a(a)(23)*); comparability (*42 U.S.C. § 1396a(a)(10)*); reasonable standards (*42 U.S.C. § 1396a(a)(17)*) and equal access (*42 U.S.C. § 1396a(a)(30)*) provisions of the Social Security Act.

ECF No. 65, 64.

The DDSN Defendants assert Kobe has set forth no facts showing harm to Kobe or specific acts by these Defendants that resulted in violations of enumerated sections of the Medicaid Act and Social Security Act.

Finally, regarding Count Seven, the DDSN Defendants contend that Kobe has failed to allege (1) one of the "predicate acts" set forth in *18 U.S.C. § 1961(1)*; (2) how, if at all, the purported activities of the criminal enterprise affected interstate or foreign **[*58]** commerce; or (3) any evidence Kobe suffered a business or property loss.

In his response in opposition, Kobe offers a lengthy recitation of factual allegations and appears to address only the following causes of action as to DDSN: Count Five (conspiracy to interfere with civil rights); Count Six (*Supremacy Clause*),[9] and Count Seven (RICO). Kobe does not dispute the DDSN Defendants' arguments regarding Counts One, Two, Three, and Four. The court concludes Kobe has abandoned these causes of action as to these Defendants.

Turning to Count Five (conspiracy to deny civil rights), Kobe asserts the following in his response in opposition to the DDSN Defendants' motion for summary judgment:

> Plaintiffs have alleged that they have been deprived of services and needed equipment and due process, liberty and equal protection rights. Kobe has demonstrated that he has suffered has suffered discrimination and [been] injured thereby as a consequence of overt acts committed by the named Defendants in connection with the conspiracy.

ECF No. 436, 34.

Kobe's argument is based on his contention that DHHS, DDSN, and other agencies have engaged in wide-spread corruption, negligence, and criminal conduct over the past decade or **[*59]** more. In court's view, Kobe's allegations fail to demonstrate any of the DDSN Defendants' purported mismanagement and falsification of information, if such conduct were to be proven, was motivated by a specific class-based, invidiously discriminatory animus to deprive Kobe of his rights.

Regarding Count Six (*Supremacy Clause*), Kobe states that the "future deterrence of violations is critically important in this case, because Plaintiffs have life long disabilities and their needs will increase as they age. Waiver participants simply cannot afford years of litigation each time they require a wheelchair, a speech device or other medically necessary services." ECF No. 436, 31-32. The *Supremacy Clause* is not the source of any federal rights, and does not create a cause of action. *Armstrong v. Exceptional Child Center, Inc., 135 S. Ct. 1378, 1383, 191 L. Ed. 2d 471 (2015)*. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so. Id. Moreover, there is no suggestion in the record by any party of a clash between state and federal law. The gravamen of Kobe's complaint is that Defendants have, in varying respects, failed to comply with the mandates in federal law in the form of the ADA, Rehabilitation Act, **[*60]** and Medicaid.

Finally, regarding Count Seven (RICO), Kobe asserts that he has provided "extensive documentation of conduct of an enterprise (the diversion of funds to DDSN work activity centers) through a pattern of racketeering activity." ECF No. 436, 35. Kobe asserts predicate acts to include "obtaining insurance through false pretenses, including money laundering, mail and wire fraud and intimidation of witnesses." Id. While it is true that Kobe has made allegations of corruption, his claims are speculative in nature. The court discerns no facts tending to show an enterprise distinct from the persons alleged to have violated *18*

---

[9] The DDSN Defendants contend Plaintiff abandoned Count Six. The court will construe Plaintiff's discussion regarding *Eleventh Amendment* immunity as responding to the DDSN Defendants' argument regarding the *Supremacy Clause*.

U.S.C. § 1962 (c). See *Palmetto State Med. Ctr. v. Operation Lifeline, 117 F.3d 142, 148 (4th Cir. 1997)*. Nor has Kobe proved that each DDSN Defendant engaged in at least two acts of racketeering activity within a ten-year period, as required by *18 U.S.C. § 1961(5)*.

For all these reasons, the DDSN's motion for summary judgment is **granted**.

B. Motion to Dismiss filed by Defendant McMaster

Defendant McMaster first asserts that Kobe fails to state a facially plausible claim under Iqbal. Defendant McMaster asserts that the amended complaint includes no allegations against the governor in Counts 1 and 2 (ADA, Rehabilitation Act). This Defendant further observes that there are no allegations **[*61]** that the governor acted with deliberate indifference to any claimed violation of Kobe's rights under the ADA and/or Rehabilitation Act. Defendant McMaster further argues that Kobe's remaining factual premises for the ADA and Rehabilitation Act involve the failure to provide him with an ACD and a functioning wheelchair with reasonable promptness. Defendant McMaster notes that the duty to provide these devices arises from the Medicaid Act, and the Fourth Circuit has held that the governor is not liable in an official capacity for a violation of the Medicaid Act.

Defendant McMaster next contends that the governor is not a "program or activity" subject to suit under the Rehabilitation Act, nor a "public entity" subject to suit under the ADA, and thus entitled to *Eleventh Amendment* immunity in her official capacity. As encouraged by the Fourth Circuit, Defendant McMaster discusses the application of *United States v. Georgia, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006)*, to the within action. Defendant McMaster notes that Kobe must show his ADA claim independently violates the *Fourteenth Amendment* before state sovereign immunity is abrogated as to the governor. This Defendant asserts that Kobe has "failed to allege *that*, much less *how*, the Governor violated [his] *Fourteenth Amendment* rights. Nor could [he] do so, **[*62]** because the basis for [his] Title II claim is alleged violations of the Medicaid law and implementing regulations which [he] maintain[s] contravene Title II's 'integration' mandate and *Olmstead v. L.C., 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999)*." ECF No. 388-1, 11. Defendant McMaster argues that violation of the Medicaid Act is not a violation of the *Fourteenth Amendment*, and, absent a corresponding constitutional violation, the governor is entitled in his official capacity to *Eleventh Amendment* immunity from suit. See *Wessel v. Glendening, 306 F.3d 203 (4th Cir. 2002)*.

Next, Defendant McMaster asserts there exists no case or controversy and, as a result, Kobe lacks standing. Defendant McMaster relies on *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)*, wherein the Court explained:

> Our cases have established that the "irreducible constitutional minimum" of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. Where . . . a case is at the pleading stage, the plaintiff must "clearly . . . allege facts demonstrating" each element.

(Citations omitted).

Defendant McMaster argues that the amended **[*63]** complaint does not clearly allege facts demonstrating each element of standing with respect to the governor, and, even assuming Kobe could

demonstrate the first and third elements, Kobe cannot establish that any alleged injury he suffered is fairly traceable to the governor.

Finally, Defendant McMaster contends that legislative immunity bars the purported ADA and Rehabilitation Act claims to the extent Kobe seeks damages from the governor for the Budget and Control Board's 2009 vote to authorize DDSN's Commission to use excess debt service funds for purposes other than funding Medicaid. Defendant McMaster states that state law authorizes DDSN to apply to the Budget and Control Board for capital improvements of residential treatment centers or community facilities, and provides that the Budget and Control Board could issue capital improvement bonds for such improvements pursuant to *S.C. Code Ann. § 44-20-1120 to - 1160*. Under *S.C. Code Ann. § 44-20-1170*, DDSN is required to repay its obligations on outstanding capital improvement bonds from its revenue. Any revenues in excess of the payment due may be transferred to the local disabilities and special needs boards for improvements at the local level. See id. *§ 44-20-1170(B)*. Thus, according to Defendant **[*64]** McMaster, any decisions regarding budgetary priorities and policy positions falls within the broad sweep of legislative immunity.

In response to Defendant McMaster's motion to dismiss, Kobe reiterates his contentions that Defendants have engaged in misappropriation, corruption, fabrication of budgetary shortfalls, and improper diversion of funds to DDSN. Kobe next asserts that the Governor's Office is a "public entity" within the meaning of the ADA because an action against the governor in his official capacity is a claim against the state. Contrary to Defendant McMaster's contention that duties to Kobe to provide him with an ACD and a functioning wheelchair arise under the Medicaid Act, Kobe relies on *28 C.F.R. § 35.160* as providing an independent obligation under the ADA to provide him with a speech device, speech services, and other services in the least restrictive setting in a timely manner. *Section 35.160* provides, in relevant part:

> (a)(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.
>
> . . . .
>
> (b)(1) A public entity shall furnish appropriate auxiliary **[*65]** aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.
>
> (2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

Kobe also asserts that the governor is a "program or activity" within the meaning of the Rehabilitation Act because the office accepts federal funds through the Developmental Disabilities Act to operate a program to advocate for persons who have disabilities **[*66]** and require long term care.

Regarding the Fourth Circuit's invocation of *United States v. Georgia, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006)*, Kobe asserts that: (1) the state has violated the ADA by refusing to provide services

he needs to live outside of a congregate residential setting and to provide needed auxiliary aids, such as an ACD and functioning wheelchair, and that he was retaliated against when reports of neglect were lodged; (2) Defendants violated his constitutional rights by: not promptly providing an ACD or functional wheelchair, failing to provide notices or hearings, denying him reasonably safe conditions of confinement, retaliating against him when reports of neglect were made by persons from his ADHC facility, all of which violated his rights to privacy and rights under the *First*, *Fifth*, and *Fourteenth Amendments*; and (3) his claims under Title II of the ADA that do not violate the *Fourteenth Amendment* survive because the ADA Amendments Act of 2008 indicated Congress's intent that the ADA abrogate sovereign immunity.

As to Defendant McMaster's contention that Kobe's complaint fails to state a claim upon which relief can be granted, Kobe argues that the governor was responsible for providing regulatory oversight, policy development, monitoring of state finances, purchasing, personnel, and real property transactions **[*67]** involving state and federal funds, which funds, according to Kobe, were misused. Kobe contends that his injuries are fairly traceable to former governors who "totally abdicated their responsibilities under the ADA and the Rehabilitation Act and violated [Kobe's] Constitutional rights," ECF No. 404, 27, by engaging in "schemes intended to divert funds allocated by the General Assembly to provide services in the least restrictive setting, instead to purchase real estate used to buy and renovate more facilities to house congregate sheltered workshops," id. at 28. Kobe suggests that the governors, including Defendant Haley and former Governor Mark Sanford, may have been active participants in a money laundering scheme. Id. at 33. Finally, Kobe asserts that the governor is not protected by legislative immunity because the acts complained of were illegal and not within the scope of the governor's authority.

As a threshold matter, the court must determine whether Congress has validly abrogated *Eleventh Amendment* immunity with respect to Title II of the ADA and the Rehabilitation Act. Applying *Georgia*, Kobe has identified a violation of the ADA in the failure to provide him with assistive devices to which he is entitled. Kobe **[*68]** has further asserted that the violation of the ADA violated his constitutional rights to life, liberty, and property, and to equal protection. Specifically, Kobe contends that he is unable to communicate with others without the ACD, which prevents him from access to the public services he is entitled. Kobe also contends that his rights to reasonably safe conditions of confinement, freedom from bodily restrains, and to training have been disregarded. The court concludes that Governor McMaster is not entitled to sovereign immunity with respect to Kobe's claims for monetary damages.

A review of the majority of the allegations of Counts One and Two reflect Kobe's claims of misappropriate of funds and the potential loss of ACHD services. The Fourth Circuit has affirmed the court's finding that Kobe lost no ACHD services and prevailed on administrative review. Only paragraph 280 of Count One (ADA) and paragraph 306 of Count Two (Rehabilitation Act) mention Defendants' failure to provide Kobe with an ACD or other assistive devices. For purposes of Defendant McMaster's motion to dismiss, setting aside other arguments raised by the parties, the court will assume that the governor is a public **[*69]** entity subject to damages under Title II of the ADA or the Rehabilitation Act. The question becomes, then, whether the governor intentionally or with deliberate indifference failed to provide meaningful access or reasonable accommodation to Kobe by denying him the use of an ACD. See *Adams v. Montgomery College (Rockville), 834 F. Supp. 2d 386, 393-94 (D. Md. 2011)* (noting that "'the majority of circuits that have resolved the question have held that damages may be awarded if a public entity intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons'") (internal quotations omitted) (quoting *Paulone v. City of Frederick, 787 F. Supp. 2d 360, 373-75 (D. Md. 2011)*). "Defendants intentionally violate the ADA and the

Rehabilitation Act by demonstrating deliberate indifference when they '[have] notice of the potential risk of their decision, and clearly [refuse] the accommodation knowingly.'" *Id. at 394* (quoting *Proctor v. Prince George's Hosp. Ctr., 32 F. Supp. 2d 820*, 829 D. Md. 1998)). A defendant need not show discriminatory animus to recover damages under Title II of the ADA or *§ 504* of the Rehabilitation Act. Id. (citing *Paulone, 787 F. Supp. 2d at 373-74*). Rather, compensatory damages are available for failure to accommodate a plaintiff if a defendant "'acted knowingly, voluntarily, and deliberately,'" even if the violations resulted from mere "'thoughtlessness and indifference' **[*70]** rather than because of any intent to deny [a p]laintiff's rights." Id. (quoting *Proctor, 32 F. Supp. 2d at 828*).

In this case, Kobe contends that Governors Sanford and Haley were notified of his need for the equipment, but abdicated their obligations under the ADA and Rehabilitation Act to remedy the alleged violations. The court concludes that at least some of Kobe's allegations nudge the complaint across the line from conceivable to plausible with respect to the narrow issue of whether the governor is liable for damages under the ADA and Rehabilitation Act for the failure to provide Kobe with the assistive devices he requires. Defendant McMaster's *Rule 12(b)(6)* motion is **denied**.

C. Motion to Dismiss and for Summary Judgment filed by Defendant Leitner

Defendant Leitner asserts that she is entitled to summary judgment as to Kobe's claim under Count Three (*42 U.S.C. § 1983*), the only count in which she is named. See ECF No. 65, ¶ 311. Defendant Leitner notes that the only factual allegations in the amended complaint alleges that on January 5, 2011, she, as Director of the Richland Lexington Disabilities Board, sent a letter to Kobe alerting him that a review of ADHC services was forthcoming. Defendant Leitner states that, as discussed above, Kobe **[*71]** was never denied ADHC services, and there are no other factual allegations of wrongdoing with respect to her that she violated Kobe's constitutional rights. Defendant Leitner also argues that she was not involved in the DHHS denials of Kobe's applications for an ACD. According to Defendant Leitner, it was through the Richland Lexington Disabilities Board that an ACD was borrowed for Kobe through the University of South Carolina Assistive Technology Program in 2013, and also through the Richland Lexington Disabilities Board that Kobe's case manager recently procured an ACD for Kobe's permanent use through the South Carolina Vocational Rehabilitation Department. Defendant Leitner contends there is no genuine issue of material fact that she did not deprive Kobe of his constitutional or statutory rights.

In response, Kobe asserts, without competent evidence, that Defendant Leitner: (1) has failed to explain why Kobe's requests to move to a less restrictive environment were not transmitted to DDSN; (2) "made a conscious decision to inform Judy Johnson that [Kobe] intended to move from the Babcock Center, when she was asked not to share that information until the placement had been arranged. **[*72]** Then, she colluded with Johnson in an attempt to enlist [Kobe's] mother to prevent him from moving from a group home where he had been abused and neglected"; (3) failed to timely provide Kobe with written notices containing all of the information required by *42 C.F.R. § 431.210*, likely because of "collusion with DDSN and DHHS Defendants to attempt to moot [Kobe's] lawsuit (by obtaining a 'loaner' device)." ECF No. 435-36. Kobe's "unsubstantiated allegations and bald assertions" are not adequate to defeat summary judgment. See *Evans v. Tech. Application & Serv. Co., 80 F.3d 954, 960 (4th Cir. 1996)*.

Defendant Leitner's motion for summary judgment is **granted**.

D. Motion for Summary Judgment filed by Defendants Keck and Forkner (the "DHHS Defendants")

Kobe alleges that the DHHS Defendants failed to provide Kobe with an ACD and wheelchair. Kobe's allegations arise under the ADA and the Rehabilitation Act (Counts One, Two, 2), *42 U.S.C. § 1983* (Counts Three, Four), conspiracy (Count Five), and RICO (Count Six).[10]

The DHHS Defendants first contend that Kobe cannot show he was excluded from possessing an ACD on the basis of his disability. These Defendants contend that Kobe's request was reviewed and it was determined that an ACD with pre-recorded messages, as opposed to the requested ACD that synthesized **[*73]** speech, would provide him with adequate speech support. According to the DHHS Defendants, Kobe chose to proceed in this court rather than the administrative appeal process regarding the DHHS Defendants' decision. The DHHS Defendants argue that the evidence shows only a difference of opinion as to the type of ACD that would be appropriate for his condition. The DHHS Defendants further contend this issue is moot because the ACD Kobe desired now has been approved and provided to him.

Regarding Kobe's wheelchair, the DHHS Defendants state that no request for a wheelchair was made to DHHS to be approved or denied. These Defendants inform the court, however, that Kobe submitted a request for a wheelchair on July 24, 2013, which was approved by DHHS on August 2, 2013. The wheelchair has been provided to Kobe. The DHHS Defendants assert that this issue also is moot.

As to Kobe's *§ 1983*, *§ 1985*, and RICO causes of action, the DHHS Defendants assert that the amended complaint is devoid of any factual allegations regarding actions or omissions by them aside from conclusory statements of wrongdoing, and, further, that any claims revolved around Kobe's contentions that Defendants attempted to deprive him of his right **[*74]** to participate in ADHC services. These Defendants also assert that Kobe cannot maintain a cause of action under the *Supremacy Clause*.

Kobe's specific response in opposition to the DHHS Defendant's motion for summary judgment is that, if there were a difference of professional opinions regarding the type of ACD Kobe needed, DHHS should have sent a notice containing all information required by *42 C.F.R. § 431.206* to Kobe, and not just to the case manager and provider. *Section 431.206* provides:

> (b) The agency must, at the time specified in *paragraph (c)* of this section, inform every applicant or beneficiary in writing -
> (1) Of his or her right to a fair hearing and right to request an expedited fair hearing;
> (2) Of the method by which he may obtain a hearing;
>
> (3) That he may represent himself or use legal counsel, a relative, a friend, or other spokesman; and
>
> (4) Of the time frames in which the agency must take final administrative action, in accordance with *§ 431.244(f)*.

The court discerns no requirement that notice be provided directly to an applicant or beneficiary. Kobe was represented by counsel who advocated on his behalf to obtain the preferred ACD. Kobe fails to state how delivering a copy of any notice to him personally creates an issue of fact that should **[*75]** be submitted to a jury. The DHHS Defendants' motion for summary judgment is **granted** as to Counts One (ADA), Two (Rehabilitation Act), and Counts Three and Four (*§ 1983*).

---

[10] The amended complaint also contains allegations that Kobe was denied ADHC services, in violation of his constitutional rights. Kobe's allegations regarding ADHC services are moot, for the reasons set forth hereinabove.

Kobe includes the DHHS Defendants in his argument regarding the DDSN Defendants as to Counts Five (conspiracy), Count Six (*Supremacy Clause*), and Count Seven (RICO). For the reasons set forth hereinabove in Section A, the DHHS Defendants' motion for summary judgment is **granted** as to these claims.

The court is mindful that the Fourth Circuit found "pattern of allegedly unreasonable delays and improper denials" with respect to Kobe's wheelchair and ACD entitlement, and that the DHHS Defendants need to show "that after this litigation has concluded, [Kobe] will not once again find himself without the equipment he needs and without any ability to obtain it without significant delay." The DDHS Defendants represent to the court that an ACD acceptable to Kobe as well as a wheelchair have been provided to him on a permanent basis. Kobe contends that these Defendants continue to ignore the requirements of *42 U.S.C. § 1396a(a)(8)* and have not provided him with services to be provided in a non-congregate setting; for speech services, including a swallow study, and for a bed **[*76]** that will allow him to raise the elevation of his head to prevent aspiration. According to the DDHS Defendants, these new claims lack factual basis in the record. Moreover, according to the DDHS Defendants, Kobe's request for a hospital bed was submitted for authorization on August 6, 2013, approved by these Defendants on August 12, 2013, and paid for by Medicaid on August 23, 2013. The court declines to consider Kobe's newly asserted allegations at this stage of the proceedings.

E. Motion for summary judgment filed by Defendants Babcock Center and Judy Johnson (the "Babcock Defendants")

The Babcock Defendants first argue that Kobe cannot establish they violated the ADA (Count One). The Babcock Defendants state that the only claims involving them revolve around participation in the ADHC program, which issue is moot. Regarding the Rehabilitation Act (Count Two), these Defendants contend that Kobe fails to assert any specific actions taken by Johnson, in her individual capacity as she is named, to support his claim that Johnson personally discriminated against him based on his disability.

Regarding Kobe's *§ 1983* causes of action (Counts 3, 4), the Babcock Defendants assert that the Babcock Center **[*77]** is not a governmental entity acting under color of state law. In support of their assertion, these Defendants attach to their motion for summary judgment a copy of their business filing with the South Carolina Secretary of State. As to conspiracy to interfere with civil rights (Count Five), the *Supremacy Clause* (Count Six), and violations of RICO (Count Seven), the Babcock Defendants make generally the same arguments as the DDSN Defendants and the DHHS Defendants.

In his response in opposition, Kobe relies on his recitation of mismanagement and investigation into the Babcock Center, and intimates that the Babcock Defendants possessed a financial incentive to limit expenditures for assistive technology and equipment. The court finds that Kobe's argument fails to establish discrimination on the basis of disability. Kobe also disputes the Defendants' contention that the Babcock Center is not a governmental entity. Although there exist situations when a private organization may be treated as a public entity, see, e.g., *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)*, Kobe does not engage in the analysis.

The Babcock Defendant's motion for summary judgment is **granted** as to Counts One (ADA), Two (Rehabilitation Act), and Counts Three and Four (*§ 1983*).

Kobe **[*78]** includes the Babcock Defendants in his argument regarding the DDSN Defendants and DHHS Defendants as to Count Five (conspiracy), Count Six (*Supremacy Clause*), and Count Seven

(RICO). For the reasons set forth hereinabove in Sections A and D, the Babcock Defendants' motion for summary judgment is **granted** as to these claims.

F. Motion to Strike Kobe's Response in Opposition to Motions for Summary Judgment

The Babcock Defendants contend that Kobe's omnibus response in opposition to Defendants' motions for summary judgment (excluding Defendant McMaster's motion to dismiss) should be stricken as unresponsive and relying on matters outside the record. The Babcock Defendants also assert that Kobe is attempting to relitigate matters in contravention of the Fourth Circuit's opinion. The court, having addressed the motions for summary judgment, denies the motion to strike as **moot**.

G. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs posit the following issues: (1) Defendants are in violation of the feasible alternatives, comparability and reasonable promptness requirements of the Medicaid Act that are enforceable under *§ 1983*; (2) Defendants are in violation of the integration mandate of the Americans with Disabilities **[*79]** Act.

To the extent Plaintiffs raise arguments in tandem with their responses in opposition to Defendants' various motions for summary judgment (excluding Defendant McMaster's motion to dismiss), the motion for partial summary judgment is **denied** for the reasons set forth hereinabove.

To the extent Plaintiffs raise new claims not asserted in the amended complaint, the motion for partial summary judgment is denied without prejudice to allow him to raise his allegations in a new action.

To the extent Plaintiffs raise arguments barred by the mandate rule, the motion for partial summary judgment is denied.

To the extent Plaintiffs assert damages claims against Defendants (excluding Defendant McMaster), the motion for partial summary judgment is denied for the reasons set forth in the Fourth Circuit's opinion.

To the extent Plaintiffs seek injunctive relief for events occurring after the filing of the amended complaint, his motion for partial summary judgment is denied without prejudice to allow him to see injunctive relief in a new action.

CONCLUSION

For the reasons stated, the motion for summary judgment of the DDSN Defendants (ECF Nos. 376, 399), Defendant Leitner (ECF No. 400), the DHHS Defendants **[*80]** (ECF No. 402), and the Babcock Center Defendants (ECF No. 403) are **granted**. The motion to dismiss filed by Defendant McMaster (ECF Nos. 379, 388) is **denied**. Plaintiff's motion for partial summary judgment (ECF No. 411) is **denied** as set forth above. The Babcock Center Defendants' motion to strike (ECF No. 453) is **denied as moot**. To the extent not inconsistent with this order, the court restates its conclusions as contained in its September 30, 2014 order.

IT IS SO ORDERED.

/s/ Margaret B. Seymour

Senior United States District Judge

Columbia, South Carolina

March 30, 2018

End of Document

APPENDIX D

Kobe v. McMaster

Supreme Court of the United States

June 19, 2017, Decided

No. 16-8701.

Reporter
2017 U.S. LEXIS 3941 *; 137 S. Ct. 2270; 198 L. Ed. 2d 705; 85 U.S.L.W. 3587; 2017 WL 1365709

Kobe, Petitioner v. Henry ***McMaster***, Governor of South Carolina, et al.

Prior History: ***Kobe*** *v. Haley, 666 Fed. Appx. 281, 2016 U.S. App. LEXIS 22283 (4th Cir. S.C., Dec. 15, 2016)*

Judges: [*1] Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

End of Document

APPENDIX E

Kobe v. Haley

United States Court of Appeals for the Fourth Circuit

September 22, 2016, Argued; December 15, 2016, Decided

No. 15-1419

Reporter
666 Fed. Appx. 281 *; 2016 U.S. App. LEXIS 22283 **; 2016 WL 7240174

KOBE; MARK, Plaintiffs - Appellants, and JOHN, Plaintiff, v. NIKKI HALEY, in her official capacity as Governor and Chairman of the South Carolina Budget and Control Board; CHRISTIAN SOURA, in his capacity as the Director of the South Carolina Department of Health and Human Services: ANTHONY KECK, in his capacity as the former Director of the South Carolina Department of Health and Human Services; BEVERLY BUSCEMI, in her official capacity as Director of the South Carolina Department of Disabilities and Special Needs; RICHARD HUNTRESS, in his capacity as Commissioner of the South Carolina Department of Disabilities and Special Needs; KATHI LACY; THOMAS P. WARING; JACOB CHOREY, in their capacities as employees of the South Carolina Department of Disabilities and Special Needs; MARY LEITNER, in her capacity as the Director of the Richland Lexington Disabilities and Special Needs Board; JUDY JOHNSON, in her capacity as the Director of the Babcock Center; DANIEL COOPER; CONVERSE A. CHELLIS, III, HUGH LEATHERMAN; RICHARD ECKSTROM; CURTIS LOFTIS; BRIAN WHITE, in their capacities as former members of the South Carolina Budget and Control Board; EMMA FORKNER, in her capacity as the former Director of the South Carolina Department of Health and Human Services; EUGENE A. LAURENT, former Interim Director of the South Carolina Department of Disabilities and Special Needs; STANLEY BUTKUS, former Director of the South Carolina Department of Disabilities and Special Needs; UNNAMED ACTORS ASSOCIATED WITH THE BABCOCK CENTER; THE BABCOCK CENTER, Defendants - Appellees, and CYNTHIA MANN, Deputy Administrator and Director of the Center for Medicaid, CHIP, and Survey & Certification, CMS; ELEANOR KITZMAN, in her official capacity as the Executive Director of the State Budget and Control Board; MCCONNELL F. GLENN, in his official capacity as the President Pro Tempore of the South Carolina Senate; ROBERT W. HARRELL, JR., in his official capacity as the Speaker of the South Carolina House of Representatives; MARK SANFORD, in his capacity as a former member of the South Carolina Budget and Control Board, Defendants.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: US Supreme Court certiorari denied by ***Kobe*** *v.* ***McMaster****, 137 S. Ct. 2270, 198 L. Ed. 2d 705, 2017 U.S. LEXIS 3941, 2017 WL 1365709 (U.S., June 19, 2017)*

Summary judgment granted by, Motion denied by, Partial summary judgment denied by, Motion denied by, As moot *Kobe v. McMaster, 2018 U.S. Dist. LEXIS 55500 (D.S.C., Mar. 30, 2018)*

Prior History: **[**1]** Appeal from the United States District Court for the District of South Carolina, at Columbia. Margaret B. (3:11-cv-01146-MBS). Seymour, Senior District Judge.

Kobe v. Haley, 2013 U.S. Dist. LEXIS 113193 (D.S.C., Aug. 12, 2013)
Kobe v. Haley, 2012 U.S. Dist. LEXIS 112425 (D.S.C., Aug. 10, 2012)

Disposition: AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Counsel: ARGUED: Patricia L. Harrison, PATRICIA LOGAN HARRISON LAW OFFICE, Columbia, South Carolina, for Appellants.

Damon C. Wlodarczyk, RILEY, POPE & LANEY, LLC, Columbia, South Carolina; Vance J. Bettis, GIGNILLIAT, SAVITZ & BETTIS, Columbia, South Carolina, for Appellees.

ON BRIEF: William H. Davidson, II, Kenneth P. Woodington, DAVIDSON & LINDEMANN, P.A., Columbia, South Carolina, for Appellees Buscemi, Butkus, Chorey, Huntress, Lacy, Laurent & Waring.

Patrick J. Frawley, DAVIS FRAWLEY, LLC, Lexington, South Carolina, for Appellee Leitner.

Joel W. Collins, Jr., Christian Stegmaier, Meghan Hazelwood Hall, COLLINS & LACY, P.C., Columbia, South Carolina, for Appellees Babcock Center, Unnamed Actors Associated with the Babcock Center & Johnson.

Robin L. Jackson, SENN LEGAL, LLC, Charleston, South Carolina, for Appellees Chellis & Cooper. Leslie A. Cotter, Jr., Sheila M. Bias, RICHARDSON, PLOWDEN & ROBINSON, P.A., Columbia, South Carolina, for Appellees Leatherman & Eckstrom.

Judges: Before TRAXLER, DIAZ, **[**2]** and THACKER, Circuit Judges.

Opinion

[*283] PER CURIAM:

"***Kobe***" and "Mark" ("Appellants")[1] appeal district court orders dismissing certain defendants and then granting summary judgment to others in an action primarily pertaining to the administration of a South Carolina Medicaid waiver program. Because we conclude that the district court erred in determining that no justiciable issues remain in this case, we vacate the grant of summary judgment against Appellants on Counts One through Seven. We also vacate the dismissal of Counts One and Two against Governor Nikki Haley in her official capacity. Otherwise, we affirm.

I.

The Medicaid program, *42 U.S.C.A. §§ 1396*, *1396a-v*, established as part of the *Social Security Act in 1965*, "is a cooperative federal-state public assistance program that makes federal funds available to **[*284]** states electing to furnish medical services to certain impoverished individuals." *Mowbray v. Kozlowski, 914 F.2d 593, 595 (4th Cir. 1990)*; see also *Harris v. McRae, 448 U.S. 297, 301, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980)*. The state agency responsible for administering and supervising Medicaid in South Carolina is the South Carolina Department of Health and Human Services ("DHHS"). See *Doe v. Kidd, 501 F.3d 348, 351 (4th Cir. 2007)*. DHHS, in turn, contracts with the South Carolina Department of Disabilities and Special Needs ("DDSN") to operate South Carolina's treatment and training **[**3]** programs for people with intellectual and related disabilities. DDSN is a seven-member commission that is appointed by the Governor with the advice and consent of the Senate. DDSN contracts with local Disabilities and Special Needs Boards ("DSN Boards"), which contract with private entities to provide Medicaid services.

The Richland Lexington Disabilities and Special Needs Board ("Rich/Lex") is "the administrative, planning, coordinating, and service delivery body" for DDSN services that are provided in South Carolina's Richland and Lexington Counties. *S.C. Code § 44-20-385*. It is funded by DDSN and follows DHHS's and DDSN's policies and procedures.

At issue in this case is the Medicaid waiver program created by *42 U.S.C. § 1396n(c)*, which allows states to waive the requirement that aid recipients must live in an institution to receive particular Medicaid services. This case concerns home and community-based services that South Carolina provides through a Medicaid waiver program for eligible persons with disabilities so that they may live in the community and avoid institutionalization (the "ID/RD waiver").[2] As is relevant in this case, among the several types of

---

[1] Appellants are using pseudonyms to protect themselves from possible retaliation.

[2] "ID/RD" stands for "intellectual disabilities/related disabilities." Although the ID/RD waiver was previously known as the Mentally Retarded/Related Disabilities waiver, see *Stogsdill v. South Carolina Dep't of Health and Human Servs., 410 S.C. 273, 763 S.E.2d 638, 639 n.1 (S.C. Ct. App. 2014)*, the South Carolina General Assembly amended various South Carolina code sections to replace the former terms

services provided through the ID/RD waiver are Adult Day Health **[**4]** Care services ("ADHC"), respite care, and equipment and assistive technology. ADHC provides individuals with medical or therapeutic care as well as social and recreational events and meals. Respite care is "[s]ervice[] provided to individuals unable to care for themselves [that is] furnished on a short-term basis because of the absence or need for relief of those persons normally providing the care." J.A. 2894.

Administration of the ID/RD waiver services generally involves a service coordinator for each recipient, typically at the county level. The service coordinator's role is to evaluate the individual's condition and needs, including information from that person's doctors and other medical professionals, and to work with the individual's family members in order to develop a plan of care. Service coordinators may approve some services themselves, but as to other services, they only make a recommendation to DDSN, which decides whether to approve them. See generally *42 C.F.R. § 440.169*.

Appellants contend that for many years, DDSN has failed to spend monies appropriated by the General Assembly for the services the appropriations were intended to fund. Appellants maintain that the problem has been compounded **[**5]** because the failure to spend the appropriated funds **[*285]** caused them to miss out on the federal matching funds that spending the funds would have generated.

In late 2009, several events occurred that Appellants point to as causing a reduction of services provided under the ID/RD waiver, purportedly for budgetary reasons.[3] After the General Assembly adjourned in 2009, DDSN announced that the Centers for Medicare and Medicaid Services ("CMS") had approved requested changes to the ID/RD Waiver, effective January 1, 2010. The changes included the elimination of physical therapy, occupational therapy, and speech and language services "since they [we]re covered under regular Medicaid." J.A. 2607. Also, respite hours were limited to 68 hours per month unless one of three specific conditions were present, in which case, the client could receive up to 240 hours per month upon DDSN approval.[4]

Appellants contend that although government officials represented that the waiver changes were motivated by budget concerns, in fact the changes increased costs significantly. They further maintain that notwithstanding the claims of budgetary restraints, DHHS actually had more funding than it even needed to avoid reducing the services it had previously been providing.

"mental retardation" and "mentally retarded" with the terms "intellectual disability" and "person with intellectual disability." See 2011 S.C. Act No. 47, § 13 (eff. June 7, 2011).

[3] Because we are reviewing orders granting motions to dismiss and motions for summary judgment, we describe the facts in the light most favorable to Appellants. For purposes of this appeal, there is no material difference in the facts we consider regarding the different motions.

[4] The three conditions were as follows:

> 1. Caregiver has been hospitalized or is receiving medical treatment causing the caregiver to be away from home for lengthy periods during the day for which respite takes the place of the caregiver to protect the health, safety, and welfare of the waiver participant.
>
> 2. The waiver participant is medically complex or severely **[**6]** disabled to the extent that the caregiver must provide him /her constant hands on/direct care and supervision for which the caregiver is not paid for 16 hour[s] of a 24-hour day.
>
> . . . .
>
> 3. If support center services are unavailable to a participant age 12 to exiting high school and the primary caregiver works fulltime during the summer months of June, July, and August.

J.A. 2608.

The waiver amendments were not the only cause of reductions in DDSN's expenditures on ID/RD waiver services. In December 2010, DDSN inst ructed the four local service coordinators in Richland and Lexington Counties to complete new assessments for ADHC service recipients in light of the requirement that ADHC services are available only if the participants either have a medically complex condition or require extensive assistance with functional activities or tasks **[**7]** (the "medically complex/extensive assistance requirement").[5] Rich/Lex, in turn, in formed affected consumers of the impending reassessments.[6]

Appellants allege that the effort to reduce expenditures on ID/RD waiver services was part of a plan to force them to attend Work Activity Centers ("WACs") operated by local DSN Boards. A WAC is "[a] work shop having an identifiable program designed to provide therapeutic **[*286]** activities for workers with intellectual disability whose physical or mental impairment is so severe as to interfere with normal productive capacity." *S.C. Code Regs. 88-405(K)*. Appellants contend that having more service recipients attend WACs financially benefited DDSN as well as local DSN Boards. They emphasize that the profits generated by WACs are paid to DDSN and may be spent at DDSN's discretion without oversight by its governing board or the General Assembly. Meanwhile, Appellants maintain that individuals working in WACs are paid less than minimum wage, their medical needs may not be properly attended to, and they are at risk for abuse and neglect. Appellants additionally allege that forcing ADHC recipients to attend a WAC set to open soon in Columbia, South Carolina, was the true motivation behind **[**8]** DDSN's attempt to terminate the ADHC services of many disabled persons in Richland and Lexington Counties.

Also at issue in this case are expenditures of DDSN funds approved by the South Carolina Budget and Control Board ("BCB"). Composed of the Governor, State Treasurer, Comptroller General, Chairman of the Senate Finance Committee, and Chairman of the House Ways and Means Committee, the BCB, at the time of the events at issue in this case, acted as "an executive body dealing primarily with the fiscal affairs of the State government." *State ex rel. McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406, 406-407 (S.C. 197 7)*. However, the BCB was abolished effective July 1, 2015. See South Carolina Restructuring Act of 2014, S.C. Act No. 121 (S. 22) (2014).

In late 2009, DDSN requested and received BCB approval for the transfer of nearly $6 million from an excess funds account containing $7.8 million. From the requested funds, $2.6 million was to purchase buildings to be used as WACS for two DSN boards and the Babcock Center;[7] $3,244,738 was to be used for a statewide accounting system; and $100,000 was for the improvement of DDSN's Medicaid billing system. Appellants contend the transfer of these funds, which the General Assembly had intended would be spent on ID/RD waiver **[**9]** services, essentially gave the BCB control over the $3,244,738. Further, Appellants maintain that by not spending the funds on services, DDSN missed the opportunity to receive matching funds from the federal government.

---

[5] Appellees contend that this step was prompted when DDSN officials noticed in late 2010 and early 2011 that service coordinators in several counties were approving ADHC services for a greater proportion of individuals than were generally being approved in other counties.

[6] Also, in December 2010, DDSN requested reevaluation of the medical justification for provision of assistive technology and specialized medical equipment for particular consumers whose costs were particularly high.

[7] The "Babcock Center is a private, non-profit corporation based in Columbia that provides housing and other services for people with autism, [intellectual disabilities], head or spinal injuries, or related disabilities." *Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 638 S.E.2d 650, 654 (S.C. 2006)*.

Kobe

Kobe has been disabled since birth due to severe cerebral palsy. He is intelligent but cannot walk, nor can he speak in a way that others can understand him. His arms and legs are strapped to his wheelchair with Velcro to keep him from hurting himself due to his spasticity. At the time this suit was filed in 2011, he was 39 years old and he lived in a community training home at the Babcock Center. ***Kobe***'s physician has determined that he needs ADHC services, and ***Kobe*** has attended the Hope Bridge Adult Day Care program for many years.

In December 2010, after the aforementioned decision by DDSN to have Rich/Lex's service coordinators reassess the eligibility of persons using ADHC services, ***Kobe***'s service coordinator determined that he no longer satisfied the medically complex/extensive assistance requirement and **[*287]** thus was no longer eligible to continue to receive ADHC services. ***Kobe*** appealed the decision to the DDSN Director. He continued to receive ADHC during the pendency **[**10]** of his appeal.

Kobe also maintains that the government has not consistently provided him with a functioning wheelchair. In early 2008 his then-current wheelchair was causing him to develop painful ulcers on his buttocks. He asserts that although a wheelchair was inserted into his plan of care in January 2008, he did not actually receive the wheelchair he needed until April 2009. Then shortly thereafter, his new wheelchair was damaged and the headrest needed to be replaced. As a result, he spent weeks in bed while his wheelchair was not functional and he was unable to attend Hope Bridge.

Kobe was injured and his wheelchair further damaged on December 28, 2010, when ***Kobe*** was dropped from a van as he was being transported between Hope Bridge and the Babcock Center. His broken wheel chair prevented him from attending Hope Bridge from December 28, 2010, until January 18, 2011. Even after his return, the wheelchair remained damaged and malfunctioned in ways that sometimes left him "in bed for days." J.A. 3656.

Kobe's efforts to obtain the equipment he needs to communicate also have often been unsuccessful. Since 2009, ***Kobe*** has been requesting help in improving his reading skills, but he has **[**11]** not been provided adult education classes, because he did not have a device to help him communicate. An investigation by the Lieutenant Governor's Office in the summer of 2010 into a report by Hope Bridge staff that ***Kobe*** was being neglected at the Babcock Center revealed that ***Kobe*** needed an augmentative communications device ("ACD") in order to communicate his needs to the staff. And the Lieutenant Governor's Office notified DDSN of this need in October 2010.[8] ***Kobe***'s doctors ordered speech evaluations on December 7, 2010, and on January 13, 2011, and he received an evaluation in March 2011 from the Palmetto Health Rehab Center. He tried a number of different speech devices and experienced great success with the "Tobii C12 with eye Control," which allowed him to synthesize speech with eye movements. Such a device would enable him to communicate with staff so as to receive proper care and make his own appointments.

Mark

[8] ***Kobe*** identified several specific health problems that he has suffered as a result of not being able to communicate properly.

Mark has Down Syndrome and, although he is an adult, he functions at the level of a two-year-old. Since his father died, he has lived with his adult sister in her home and requires constant supervision.

Like ***Kobe***, Mark receives ADHC services and he attends Hope Bridge. Also **[**12]** like ***Kobe***, Mark was notified in 2011, following Rich/Lex's reassessments, that he no longer was eligible for ADHC services, although his services continued during the pendency of the appellate process. Mark appealed the eligibility decision to the DDSN Director, but the Director upheld the decision. He therefore appealed that decision to DHHS.

Important to Mark's sister's continued ability to care for him in her home is Mark's entitlement to respite care. Mark is concerned that if his sister were to become ill and require hospitalization for several weeks, rendering her unable to care for him, the new caps would prevent him from **[*288]** receiving the number of respite care hours he would need and could require him to enter an institution to receive the care he would need.

Lawsuit

Appellants brought this action in May 2011 in federal district court, and filed an amended complaint in October 2011.[9] Appellants' amended complaint alleges many overlapping causes of action primarily asserting, under various theories, that they were deprived of services they were entitled to receive in a timely fashion.[10] These services included ADHC for both Appellants, ***Kobe***'s wheelchair and ACD and physical, occupation, **[**13]** and speech and language therapy, and Mark's respite hours. Several claims challenge the BCB's alleged failure in 2009 "to insure that the funds paid to [DDSN] were spent appropriately for services Plaintiffs . . . need, despite repeated warnings from the South Carolina Legislative Audit Council, federal and state audits showing that [DDSN] was spending those funds to purchase real estate to force waiver participants into WAC's to profit the State." J.A. 220, see J.A. 225, 228, 231.

The amended complaint asserts causes of action for violation of the *Americans with Disabilities Act of 1990 ("ADA")*, see *42 U.S.C. §§ 12101 et seq.* (Count One); violation of *Section 504 of the Rehabilitation Act of 1973*, see *29 U.S.C. § 794* (Count Two); violation of *42 U.S.C. § 1983* (Count Three); violation of *42 U.S.C. § 1983* and *1988* (Count Four);[11] commission of a conspiracy in violation of *42 U.S.C. 1985(3)* (Count Five); violation of the *Supremacy Clause* (Count Six); and violation of the *Racketeer Influenced and Corrupt Organizations Act ("RICO")*, see *18 U.S.C. §§ 1503*, *1512*, *1513* (Count Seven). ***Kobe*** also asserted state law claims for negligence, intentional infliction of emotional distress, and assault and

[9] Originally there was a third plaintiff, who was eventually voluntarily dismissed from the suit.

[10] Among other theories, Appellants alleged that Appellees have failed to give deference to the treating orders of their physicians; endangered their right to receive services in the most integrated setting appropriate, and failed to establish reasonable standards and promulgate regulations for operating the waiver program.

[11] Counts Three and Four included allegations of violations of Appellants' rights under the *Fourth*, *Fifth*, and *Fourteenth Amendments to the United States Constitution*, as well as the *Medicaid Act*, see *42 U.S.C. § 1396 et seq.*

battery against the Babcock Center and other Appellees in regard to his care during the time he lived there (Count Eight).[12]

[*289] As is relevant here, **[**14]** the amended complaint requests that the district court:

- "Issue an order of protection prohibiting [DDSN] and its agents and employees from retaliating against the Plaintiffs or their families."
- "Assume jurisdiction over this action and maintain continuing jurisdiction until the Defendants are in full compliance with every order of [the district court.]"

- "Issue an injunctive order declaring that Defendants' policies, practices, acts and omissions, as set forth above, violate Plaintiff[s'] rights under the *ADA* and *Section 504 of the Rehabilitation Act* and the *Medicaid Act*."
- "[Issue] an order prohibiting the Defendants from reducing ADHC services and requiring Defendants to provide such additional services as shall be medically necessary, as shall be determined by [Plaintiffs'] treating physicians, so as to allow Plaintiffs . . . to live in the most integrated settings possible . . . ."

- "So long as the cost of these services is less than the cost of ICF/MR services, [issue] . . . an order requiring Defendants to provide Medicaid waiver services as shall be determined by the treating physicians to be necessary absent review and an order from the [district court] during this litigation." **[**15]**
- "[Disgorge from] Defendants and their associated enterprises or organizations . . . ill gotten gains."

J.A. 244-45. The amended complaint also requests actual and punitive damages and attorneys' fees and costs.[13]

Events Subsequent to the Filing of this Lawsuit

In May 2011, ***Kobe*** moved out of the Babcock Center to a congregate group home operated by United Cerebral Palsy, a private provider. However, ***Kobe*** has stated that he "want[s] to live in [his] own

---

[12] The amended complaint named numerous state officials and others as defendants (collectively, "Appellees"). The defendants can be divided into several categories. There are DHHS Directors — Emma Forkner and Anthony Keck ("the DHHS Appellees"); DDSN Directors and other DDSN officials — Beverly Buscemi, Eugene Laurent, Stanley Butkus, Kathi Lacy, Richard Huntress, Thomas Waring and Jacob Chorey ("the D DSN Appellees"); the Director of Rich/Lex — Mary Leitner; the Director of the Babcock Center, Judy Johnson, as well as other unnamed actors associated with the Babcock Center (collectively, "the Babcock Center Appellees"); and the Governor and other members of the BCB (the "BCB Members").

The BCB Members included Governor Haley, who assumed office in January 2011 as Governor of South Carolina and Chairman of the BCB; former Governor Mark Sanford, who preceded Governor Haley as Governor and BCB Chairman; former State Representative Daniel Cooper, who served as a BCB member by virtue of his service as Chairman of the Ways and Means Committee of the South Carolina House of Representatives until January 2011; former State Treasurer Converse Chellis, who served as a BCB member by virtue of his position as State Treasurer until January 2011; State Senator Hugh Leatherman, who served as a BCB member by virtue of his position as Chairman of the Finance Committee of the South Carolina Senate until the BCB was abolished in 2014; and State Treasurer Curtis Loftis and Representative Brian White, who succeeded Chellis and Cooper, respectively, and both of whom served as BCB Members until the BCB was abolished in 2014.

Governor Haley, Loftis, and White were sued solely in their official capacities, while the other Appellees were sued in both their individual and official capacities.

[13] The amended complaint contains class action allegations in the body of the complaint. However, Appellants sought no class certification and have conceded that this action is not being brought on behalf of others.

apartment in the community instead of living in a home with three other people who have disabilities." J.A. 3655.

Kobe's troubles obtaining and maintaining a working wheelchair continued after filing this suit. ***Kobe***'s plan of care as of May 12, 2011, included the need for a new wheelchair or a repair of the one he had been using. Weeks passed, however, and he did not receive a new one.

Kobe's struggles to obtain the Tobii ACD continued as well. As of June 7, 2011, his plan of care included the Tobii C12 ACD. Nevertheless, once more than a year had passed after ***Kobe***'s speech evaluation, ***Kobe*** was told that he would need a new evaluation because the first one was not sufficiently recent.

Kobe received another evaluation, during which he tried several **[**16]** ACDs that did not work for him due to his spasticity. The evaluator again determined that he needed the Tobii device. ***Kobe***'s treating physician signed an order requesting the device, certifying it as medically necessary, and ***Kobe*** requested it from DHHS. DHHS initially **[*290]** denied his request on August 23, 2011, on the basis that ***Kobe*** had not provided adequate documentation of medical need. As of the filing of the amended complaint in October 2011, ***Kobe*** still had not received the device he had requested.

As for ***Kobe***'s pending appeal of his service coordinator's decision that he no longer qualified for ADHC services, on May 11, 2011 — the same day Appellants filed their original complaint — DDSN's Director reversed the service coordinator's decision, determining that ***Kobe*** indeed did satisfy the then-existing requirements. As the result of this reversal, ***Kobe***'s ADHC services never lapsed.

Despite obtaining a reversal of the decision that he was no longer eligible for ADHC, ***Kobe*** appealed to DHHS. in his appeal, ***Kobe*** complained that he had not received written notice of the intent to reduce or eliminate his services. He also complained that DHHS had failed to provide him "with speech and language **[**17]** services, physical therapy, occupational therapy, adult companion services and with an appropriate communications device or to notify him of all feasible alternatives under the [ID/RD] Medicaid waiver." J.A. 2533. The appeal was resolved in mid-October 2011 according to the following terms provided in an August 9, 2012, consent order:

> 1. The Parties agree that [***Kobe***] meets criteria for and is appropriate for [ADHC]. Waiver participants are evaluated yearly under *42 CFR §441.302(c)(2)*.
>
> 2. As an [ID/RD] Waiver Participant, [***Kobe***] will be allowed to continue to receive ADHC offered by the [ID/RD] Waiver, provided by the qualified provider of his choice.

J.A. 2458.

Mark's appeal to DHHS regarding his ADHC eligibility was also resolved in mid-October 2011 by agreement. An August 2012 consent order memorializing the agreement contained language identical to that of ***Kobe***'s and thus established that Mark satisfied the medically complex/extensive assistance requirement. Like ***Kobe***'s ADHC services, Mark's never lapsed.

Shortly after resolving Appellants' administrative appeals, DHHS eliminated the medically complex/extensive assistance requirement that had been the basis for Appellants' service coordinators' initial decisions **[**18]** ("the 2011 Policy Change").

Motions to Dismiss and for Summary Judgment

As the present lawsuit continued, Governor Haley, Loftis, White, Cooper, and Chellis filed motions to dismiss the claims against them, arguing they were entitled to dismissal for a variety of reasons. See *Fed. R. Civ. P. 12(b)(1)*, *(6)*. They all maintained they were entitled to dismissal on the basis of *Eleventh Amendment* immunity of all claims asserted against them in their official capacities.

In their memoranda opposing dismissal of these defendants on the basis of *Eleventh Amendment* immunity, Appellants relied primarily on the Ex Parte Young exception to *Eleventh Amendment* immunity. See *Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*. They asserted that as to Loftis, White, Cooper, and Chellis, Appellants were seeking prospective relief only. See J.A. 781 ("Plaintiffs . . . seek only prospective relief against Defendants Loftis and White."); J.A. 1086 ("All of the relief requested by the Plaintiffs as to Defendant Cooper is prospective."); J.A. 1115 ("Only prospective relief, and attorneys fees, are requested from [Chellis].").

Considering the various motions, the district court dismissed all claims against Haley, Cooper, Loftis, Chellis, and White. **[*291]** Regarding the claims asserted against them in their official capacities, the district court **[**19]** concluded that these defendants were entitled to *Eleventh Amendment* immunity as a matter of law. The court ruled that the Ex Parte Young exception did not apply to requests for redress for violations that occurred wholly in the past, including those relating to the BCB's involvement in the use of funds from the excess fund to purchase real estate. Regarding prospective relief for ongoing violations, the court concluded that none of these defendants had the requisite special connection to the administration of the state's Medicaid program such that an injunction against them would provide Appellants any effective redress. And to the extent the defendants were sued in their individual capacities, the court ruled that there could be no prospective relief; the court reasoned that even should an injunction be entered against them, they did not occupy any positions through which they could remedy Appellants' claimed injuries. The court also ruled that they were entitled to legislative immunity.

Leatherman and Eckstrom subsequently filed a motion to dismiss or for summary judgment, advancing arguments similar to those of the other BCB Members. Appellants opposed the motion, but, as they had regarding Loftis, **[**20]** White, Cooper, and Chellis, they abandoned any claims for retrospective relief against these defendants. See J.A. 2240 ("[T]he only relief [Appellants] request from [Leatherman and Eckstrom] is injunctive relief."). The district court granted the motion, ruling that Leatherman and Eckstrom were entitled to *Eleventh Amendment* immunity because the Ex Parte Young exception did not apply since Appellants could not obtain any prospective injunctive relief against Leatherman and Eckstrom and because Appellants alleged no ongoing violation of the law. The court also ruled Leatherman and Eckstrom were entitled to legislative immunity to the extent they were sued in their individual capacities.

The case then proceeded against the remaining defendants. After discovery had been completed, Appellants and the remaining defendants filed cross-motions for summary judgment.[14] As is relevant to this appeal, several of the defendants maintained that the claims in this suit were no longer justiciable. The DDSN Appellees, in particular, contended that several events mooted Appellants' claims. They argued

[14] The parties had once previously filed cross-motion s for summary judgment. The district court denied those motions without prejudice so as to allow Defendants to engage in discovery regarding certain witnesses that Plain tiffs had only recently identified.

that the 2011 Policy Change mooted any issue about Appellants' entitlement to prospective relief protecting their right to receive **[**21]** ADHC. The DDSN Appellees also argued that the reversal by their Director of the determination that ***Kobe*** was not eligible for ADHC, at a time when the Director was not even aware of the existence of the lawsuit, mooted any claim regarding the service coordinator's original decision. The Babcock Center Appellees also argued that Appellants failed to forecast evidence of proper damages to meet RICO's standing requirements.

In support of their motion for partial summary judgment, Appellants contended they were entitled to summary judgment on several individual issues relating to the merits of their claims. And, in opposition to the remaining Appellees' summary judgment motions, Appellants maintained, as is pertinent here, that the "voluntary cessation" exception to the mootness doctrine prevented the 2011 Policy Change from mooting the claims concerning their ADHC eligibility, ***Kobe***'s equipment needs, **[*292]** and the provision of in-home services to Mark.

Additional Developments Regarding ***Kobe***'s Attempts to Obtain an ACD

DHHS formally denied ***Kobe***'s request for the Tobii device on November 14, 2011. DHHS's response stated that the reason for the denial was that ***Kobe*** was not involved in educational **[**22]** endeavors but instead needed to communicate only in order to express health and well-being needs, comfort and discomfort, and to conduct normal speech.[15] On that basis, DHHS decided that an ACD with pre-recorded messages, as opposed to an ACD that synthesized speech, would be adequate for him. Rather than engage in what they expected would be a lengthy administrative appeal process, Appellants decided to litigate ***Kobe***'s claims regarding his entitlement to the ACD in the current lawsuit.

Nearly two years after DHHS had denied his request, in the summer of 2013, Rich/Lex was "able to secure a Tobii unit for '***Kobe***' through the University of South Carolina Assistive Technology Exchange Program" (the "USC Program"). J.A. 2558. There is no dispute that the "Tobii C-15 Eye Gaze unit" the USC Program provided "allows [***Kobe***] to communicate by shifting his eye gaze to letters on a board" and thus is sufficient to meet ***Kobe***'s needs. J.A. 2558. However, as of January 2, 2014, the unit was not attached to ***Kobe***'s damaged wheelchair. ***Kobe*** therefore could not effectively use the device when he left his home. By the time of the September 23, 2014, summary judgment hearing, ***Kobe*** had finally received a **[**23]** new wheelchair, but the ACD had not yet been attached.

Kobe describes the ACD that the USC Program has allowed him to use as a "loaner," and he States that "it does not belong to [him] and [he is] afraid that they will take it back once this lawsuit is over." Appellants' brief at 25 (internal quotation marks omitted); J.A. 3654. However, Rich/Lex's representative stated in a January 2014 affidavit that "[t]he arrangement with the USC Program is that '***Kobe***' can keep the . . . device so long as he continues to use it." J.A. 2558. The representative added in a later affidavit that the USC Program director had stated that "the device was ***Kobe***'s as long as he uses it" and if ***Kobe*** "ever stops using it — which is unlikely — [the USC Program] would probably like it back so someone else would be able to benefit from it; but there is no express agreement or contract to that effect, and the device is not 'on loan' to ***Kobe***." J.A. 4440.

---

[15] Appellants express frustration with DHHS's position in light of their allegation that ***Kobe*** had been denied educational opportunities because he did not have a speech device.

Considering the cross-motions for summary judgment from the remaining parties, the district court[16] granted summary judgment against Appellants on all claims (except for Count Eight, asserting state law claims against the Babcock Center Appellees), and denied Appellants' **[**24]** motion.[17] The district court's decision was based on a combination of three grounds relating to justiciability: (1) that ***Kobe***'s entitlement to a wheelchair was mooted when he received a functioning chair during this case, (2) that Mark's claim to **[*293]** additional respite care hours was not ripe because the possibility that the new caps would cause him to be institutionalized was only speculative, and (3) that Appellants lacked standing to seek injunctive relief from the "allege[d] systemic failures within the DHHS and DDSN systems" and the alleged "mishandling of funds and exploitation" because they did not show a particular cognizable injury or an immediate threat of injury from that alleged conduct, J.A. 4432. the district court, noting that "***Kobe***'s ACD device was not installed on his wheelchair at the time of the hearing and thus [was] not accessible to him[,] . . . order[ed] that the ACD device be properly affixed to ***Kobe***'s wheelchair no later than ten (10) days from the date of en try of th[e] order." J.A. 4433 (emphasis omitted). The device has since been installed.

Appellants subsequently filed a motion to alter or amend, challenging the grant of summary judgment on a variety of grounds. See *Fed. R. Civ. P. 59 (e)*. As is relevant **[**25]** here, they contended that the district Court ignored much of the factual predicate supporting several of their claims and failed to explain its decision to dismiss several other claims. They specifically emphasized the court's failure to address their claims that Appellees failed to provide ***Kobe*** a wheelchair and ACD with reasonable promptness. Regarding justiciability, Appellants argued that the district court failed to recognize that they were among the intended beneficiaries of the DHHS funds used to purchase real estate. They contended that their challenges to illegal policies were ripe because the administrative decisions at issue had already been finalized.

Before the court ruled on that motion, the parties settled Count 8, regarding injuries ***Kobe*** allegedly suffered while living at the Babcock Center, and the claim was dismissed by a consent order.

The court later denied Appellants' *Rule 59(e)* motion. Regarding a contention by Appellants that the court had not addressed ***Kobe***'s claim that he was entitled to be placed in a Supervised Living Program ("SLP") apartment,[18] the district court concluded that such a claim was not ripe because "[t]here is no evidence regarding if or when [any request made by **[**26]** ***Kobe*** to Rich/Lex] was forwarded to [DDSN], or whether DDSN has rendered an unfavorable administrative decision or failed to respond to ***Kobe***'s request." J.A. 4495.

II.

Appellants first argue that the district court erred in granting summary judgment against the then-remaining defendants on justiciability grounds on Counts One through Seven.[19] Appellees, on the other hand, maintain that the district court properly ruled that no live controversy remains in this case.

---

[16] The case had been reassigned to a different district judge in July 2014.

[17] The district court also dismissed former Governor Sanford since there was no evidence that he was ever served with copies of the summons and complaint. See *Fed. R. Civ. P. 4(m)*.

[18] An SLP would be a less-restrictive setting than the one ***Kobe*** currently lives in.

[19] At the summary judgment hearing, Appellants abandoned any damages claims against the remaining defendants.

Appellees argue that because no justiciable issues remain, we need not even address the Appellants' arguments regarding the dismissal of the BCB Members from the case. We therefore begin our analysis with these justiciability questions. See *Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986)* ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under re view." (internal quotation marks omitted)).

[*294] We review de novo a district court's ruling concerning subject-matter jurisdiction. See *Simmons v. United Mortg. & Loan Inv., LLC, 634 F.3d 754, 762 (4th Cir. 2011)*. "We review a district court's decision to grant summary judgment de novo, applying the same legal standards as the district court, and viewing all facts and reasonable inferences therefrom in the light **[**27]** most favorable to the nonmoving party." *T-Mobile Ne., LLC v. City Council of Newport News, 674 F.3d 380, 384-85 (4th Cir. 2012)* (internal quotation marks omitted). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*.

In order for the federal Courts to have jurisdiction, plaintiffs must possess standing under *Article III, § 2 of the Constitution*. See *David v. Alphin, 704 F.3d 327, 333 (4th Cir. 2013)*. Article III standing, in turn, has three "irreducible minimum requirements":

> (1) an injury in fact (i.e., a 'concrete and particularized' invasion of a 'legally protected interest');
>
> (2) causation (i.e., a 'fairly ... trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant); and
>
> (3) redressability (i.e., it is 'likely' and not merely 'speculative' that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Pender v. Bank of Am. Corp., 788 F.3d 354, 365 (4th Cir. 2015) (quoting *Sprint Commc'ns Co., L.P. v. APCC Serv., Inc., 554 U.S. 269, 273-74, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008)*). Regarding the injury-in-fact prong, "[a]n allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014)* (internal quotation marks omitted).

"To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time **[**28]** the complaint is filed." *Arizonans for Official English v. Arizona, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)* (internal quotation marks omitted). Accordingly, a case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin, 568 U.S. 165, 133 S. Ct. 1017, 1023, 185 L. Ed. 2d 1 (2013)* (some internal quotation marks omitted).

Another "Article III threshold question" is whether a "dispute is ripe for adjudication." *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne, LLC, 713 F.3d 187, 198 (4th Cir. 2013)*. "A claim should be dismissed as unripe if the plaintiff has not yet suffered injury and any future impact remains wholly speculative." *Doe v. Virginia Dep't of State Police, 713 F.3d 745, 758 (4th Cir. 2013)* (internal quotation marks omitted). "The basic rationale of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over

administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Pacific Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n, 461 U.S. 190, 200, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983)* (internal quotation marks omitted). When determining ripeness, we traditionally consider"(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Cooksey v. Futrell, **[*295]** 721 F.3d 226, 240 (4th Cir. 2013)* (internal quotation marks omitted). "A case is fit for adjudication when the action in controversy **[**29]** is final and not dependent on future uncertainties "; conversely, a claim is not ripe when "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[20] *Scoggins v. Lee's Crossing Homeowners Ass'n, 718 F.3d 262, 270 (4th Cir. 2013)* (internal quotation marks omitted). The hardship prong, on the other hand, "is measured by the immediacy of the threat and the burden imposed on the plaintiffs." *Miller v. Brown, 462 F.3d 312, 319 (4th Cir. 2006)* (alterations and internal quotation marks omitted).

Regarding the district court's conclusion that events during the pendency of this case have put an end to any live controversy, Appellants contend that the record, viewed in the light most favorable to them, demonstrates that:

> Appellees have not yet voluntarily ceased the conduct of failing to provide services with reasonable promptness, failing to establish reasonable standards, failing to provide services in the amount, duration and scope necessary to meet Plaintiffs['] needs in order [for them to be able] to remain in the least restrictive setting.

Appellants' brief at 44. They also contend that the caps affecting the amount of respite care Mark can receive have not been eliminated. They argue that even to the extent that Appellees have voluntarily ceased some of the complained-of **[**30]** conduct by confirming their eligibility for ADHC or providing them with requested services and equipment, exceptions to the mootness doctrine apply. And they maintain that the district court failed to explain how its conclusions regarding justiciability justified granting summary judgment on their various claims.

We will address these seriatim, beginning with the issues relating to Appellants' eligibility to receive ADHC, and then moving to those pertaining to ***Kobe***'s requests for particular equipment and services. Then, finally, we will address the district court's implicit conclusion that the justiciability issues warranted granting summary judgment against Appellants on each of the first seven counts.[21]

---

[20] A fit case would ideally present "purely legal" issues. See *Miller v. Brown, 462 F.3d 312, 319 (4th Cir. 2006)*.

[21] In their initial brief, Appellants do not challenge the district court's ruling that their challenge to the respite-hours caps was not ripe because they had not shown that Mark had in fact been affected by the caps or that there was any nonspeculative possibility that he would be affected in the future. For the first time, in their reply brief, Appellants offer a cursory challenge to that conclusion, suggesting that if his circumstances were to change such that his sister became physically incapacitated or otherwise unable to care for him for an extended period, then the caps could prevent him from receiving the respite care he would need and could even result in his institutionalization. Even if the issue were properly before us, Appellants have done nothing to demonstrate that the prospect of such a change in circumstances was anything more than speculative. Nor have they identified any immediate hardship Mark would suffer from being unable to resolve the legality of the new limits in this suit. We conclude therefore that they have failed to satisfy their burden of showing that their challenges to the new respite-hour limitations are ripe. See *Miller, 462 F.3d at 319* ("The burden of proving ripeness falls on the party bringing suit.").

Appellants offer no challenge to the district court's ruling that their claim that ***Kobe*** is entitled to be provided with an SLP is unripe. Nor do they challenge the ruling that Appellants' claim demanding payment for the speech pathologist who evaluated ***Kobe*** and provided him with speech services fell outside the scope of their complaint. We therefore do not address those issues.

[*296] We start with Appellants' argument that their claims remain justiciable to the extent they concern the termination of their eligibility to receive ADHC services. Appellants contend that despite the fact that they prevailed during the administrative appeal process regarding termination of their AD HC services, the claims relating to those services continue to pre sent a live controversy and should not be dismissed as moot.[22]

"It is well settled that [the] defendant's voluntary cessation **[**31]** 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 Envtl. Servs., Inc., 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* (internal quotation marks omitted) ; see *Knox v. Service Emps. Int'l Union, Local 1000, 567 U.S. 298, 132 S. Ct. 2277, 2287, 183 L. Ed. 2d 281 (2012)* ("The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed."). Without that rule, "courts would be compelled to leave the defendant free to return to his old ways." *City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 n.10, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982)* (alterations and internal quotation marks omitted). The party asserting mootness bears "[t]he 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Wall v. Wade, 741 F.3d 492, 497 (4th Cir. 2014)* (quoting *Laidlaw, 528 U.S. at 189*).

Additionally, "[a] case that would otherwise be moot is not so if the underlying dispute is 'capable of repetition, yet evading review.'" *Stop Reckless Economic Instability Caused by Democrats v. FEC, 814 F.3d 221, 229 (4th Cir. 2016)* (quoting *Southern Pac. Term. Co. v. ICC, 219 U.S. 498, 515, 31 S. Ct. 279, 55 L. Ed. 310 (1911))*. The Supreme Court has explained

> that in the absence of a class action, the "capable of repetition, yet evading review" doctrine [is] limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated **[**32]** prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

Weinstein v. Bradford, 423 U.S. 147, 149, 96 S. Ct. 347, 46 L. Ed. 2d 350 (1975) (per curiam).

Appellants argue, essentially, that Appellees' reversal of their service coordinators' decisions that they were no longer eligible for ADHC services was a voluntary cessation of Appellees' challenged conduct. Appellants maintain that Appellees have not met their "heavy burden" of showing that, if Appellants' claims are dismissed, Appellees would not simply reverse course a gain after this litigation regarding Appellants' eligibility for ADHC. See *Pashby v. Delia, 709 F.3d 307, 316 (4th Cir. 2013)*. We disagree.

Assuming that when this suit was initiated Appellants had standing to challenge their service coordinator's initial decision that they were no longer eligible to receive ADHC, the claims regarding their eligibility became moot once Appellants obtained a reversal of the decision through the administrative **[*297]** appeal process without ever having their ADHC discontinued. The reversals were "not . . . voluntary cessation[s] within the meaning of that doctrine, but w[ere] instead the result of [Appellants'] successful

---

[22] Appellants argue that at this stage they are entitled to an award of attorneys' fees regarding claims in which Appellees have voluntarily ceased their allegedly wrongful conduct. However, Appellants do not identify any ruling by the district court addressing the fee issue, and we decline to address the attorneys'-fee issue in the first instance.

administrative appeal[s]." *Oregon Nat. Res. Council, Inc. v. Grossarth, 979 F.2d 1377, 1379 (9th Cir. 1992)* (holding that action challenging United States Forest **[**33]** Service's approval of a timber sale became moot when challenged sale was halted as a result of an administrative appeal). Cf. *ACLU of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44, 55 (1st Cir. 2013)* ("The voluntary cessation doctrine does not apply when the voluntary cessation of the challenged activity occurs because of reasons unrelated to the litigation." (internal quotation marks omitted)); *Sze v. INS, 153 F.3d 1005, 1008 (9th Cir. 1998)* (similar).

Appellants' argument that their challenges regarding their ADHC eligibility fit within the capable-of-repetition exception fail as well. Appellants offer no argument as to why such claims would inherently be too short in duration to be able to be fully litigated, and we know of no reason that they would be. See *Weinstein, 423 U.S. at 149*. We therefore conclude that the district court correctly determined that Appellants' challenges regarding their eligibility for ADHC services are moot.

We reach the opposite conclusion, however, concerning Appellants' claims regarding Appellees' responses to ***Kobe***'s needs for particular equipment and technology. Appellants allege, under various legal theories, that Appellees wrongfully failed to promptly provide ***Kobe*** with the equipment he needed, particularly a functioning wheelchair and the ACD he requested. Appellants argue that even if Appellees' **[**34]** conduct during this case has satisfied ***Kobe***'s needs for the time being, neither Appellees nor the district court offer any suggestion as to how Appellees have carried the heavy burden of showing that the complained-of pattern of allegedly unreasonable delays and improper denials will not resume after this case is completed. In fact, Appellees have not even made that showing with regard to the specific items that are the subject of ***Kobe***'s claims.

Kobe's future prospects with regard to the ACD seem especially uncertain. DHHS denied his request for the ACD his doctor ordered, and while the USC Program, apparently at Rich/Lex's request, has now voluntarily allowed ***Kobe*** to use a satisfactory ACD, there is no indication that DHHS has ever altered its decision that ***Kobe*** is not legally entitled to such a device. If, after this case is completed, the USC Program requests return of the ACD or if ***Kobe*** needs it adjusted, repaired, or replaced, he could well be met with the same sort of allegedly improper delays and denials that he claims repeatedly occurred before he decided to press his claims in court.[23] Cf. *Pashby, 709 F.3d at 316* (holding that state agency's "voluntar[y] reinstate[ment]" of benefits after agency had previously announced that **[**35]** recipients no longer met the eligibility requirements for those benefits did not moot suit challenging the termination of the benefits when agency "remain[ed] free to reassess the [recipients'] needs and cancel their [benefits] at any time"). And ***Kobe*** certainly has reason to be concerned in light of the many problems he has had obtaining reasonably prompt responses from Appellees regarding his allegedly often-nonfunctional wheelchair, the condition of which is also **[*298]** critical to his quality of life. In sum, Appellees have not met their "heavy burden" of showing that after this litigation has concluded, ***Kobe*** will not once again find himself without the equipment he needs and without any ability to obtain it without significant delay. We therefore conclude that to the extent Appellants challenge Appellees' response to ***Kobe***'s need for equipment, his challenges are not mooted by Appellees' temporary satisfaction of his needs during the pendency of this lawsuit. Accordingly, we vacate the district court's order granting summary judgment

[23] In fact, it was only by virtue of an order of the district court in this case that Appellees even attached the device to ***Kobe***'s wheelchair so that it would be accessible to him outside of his house.

against Appellants on justiciability grounds, and remand for further proceedings consistent with this opinion.

In addition to arguing that this case presented a live **[**36]** controversy, Appellants contend that the district court erred in failing to explain its decision not to address the merits of several of their claims. Indeed, the district court did not explain in any detail how its conclusions regarding justiciability justified granting summary judgment on each of Appellants' first seven claims. Because we hold that this case in fact continues to present justiciable issues, we vacate the grant of summary judgment against Appellants on Counts One through Seven and remand to the district court for further consideration of the viability of each of Appellants' claims against each of the Appellees. To the extent that the district court concludes on remand that any particular Appellees are entitled to prevail as a matter of law on any particular claims, the court should fully explain its analysis.[24]

III.

We now turn to Appellants' argument that the district court erred in dismissing the official-capacity claims against several of the BCB Members — Governor Haley, Leatherman, Eckstrom, Chellis, and Cooper — on the basis of *Eleventh Amendment* immunity.[25]

The *Eleventh Amendment to the United States Constitution* provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced **[**37]** or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Eleventh Amendment* immunity protects unwilling states from suit in federal court. See *Will v. Michigandep't of State Police, 491 U.S. 58, 70, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)*; *Edelman v. Jordan, 415 U.S. 651, 662-63, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974)*.[26] "State officers acting in their official capacity are also entitled to *Eleventh Amendment* protection, because 'a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.'" *Lytle v. Griffith, 240 F.3d 404, 408 (4th Cir. 2001)* (quoting *Will, 491 U.S. at 71*).

The Supreme Court, however, delineated an exception to the application of the *Eleventh Amendment* in Ex parte Young. That exception "permits a federal court to issue prospective, injunctive relief against a state officer to prevent ongoing violations of federal law, on the rationale that **[*299]** such a suit is not a suit against the state for purposes of the *Eleventh Amendment*." *McBurney v. Cuccinelli, 616 F.3d 393, 399 (4th Cir. 2010)*. "Ex parte Young requires a 'special relation' between the state officer sued and the challenged [provision] to avoid the *Eleventh Amendment's* bar." *Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 331 (4th Cir. 2001)* (quoting *Ex Parte Young, 209 U.S. at 157*); see also *DeBauche v. Trani, 191 F.3d 499, 505 (4th Cir. 1999)* (explaining that the Ex Parte Young exception "applies only when there is an ongoing violation of federal law that can be cured by prospective relief"). This requirement "protects a state's *Eleventh Amendment* immunity while, at the same time, ensuring that, in the event **[**38]** a plaintiff sues a state official in his individual capacity to enjoin unconstitutional action,

---

[24] We express no view on any issue not addressed in this opinion, whether related to justiciability or otherwise.

[25] Appellants do not appeal the dismissal of Loftis, White, or Sanford.

[26] Although the language of the *Eleventh Amendment* does not explicitly apply to suits brought against a state by one of its own citizens, the Amendment has been construed to bar such suits. See *Equity in Athletics, Inc. v. Department of Educ., 639 F.3d 91, 107 n. 12 (4th Cir. 2011)*.

any federal injunction will be effective with respect to the underlying claim." *McBurney, 616 F.3d at 399* (alteration and internal quotation marks omitted).

Here, the district court concluded that none of the prospective relief Appellants sought from the BCB Members fit within the Ex Parte Young exception because these defendants had no "control or enforcement rights over any agency regarding the Plaintiffs' ADHC or other Medicaid services" and thus that "impos[ing] a prospective injunction on [Loftis and White] would have no effect whatsoever." J.A. 1136; see J.A. 1134 ("[T]o impose a prospective injunction on Governor Haley to cure any alleged Medicaid violations would have no effect."); J.A. 1136 ("Plaintiffs would not be able to obtain any prospective injunctive relief from Defendant Cooper in his official capacity as he is no longer a member of the [BCB] and would have no authority to provide such relief."); J.A. 1140 ("Defendant Chellis is not involved in any ongoing constitutional deprivations and could not provide Plaintiffs, should they prevail, with the prospective injunctive relief they seek."); J.A. 2372 ("Plaintiffs **[**39]** would not be able to obtain any prospective injunctive relief from [Leatherman and Eckstrom] in their official capacities as they would not have any control or enforcement rights over any agency regarding the Plaintiffs' ADHC or other Medicaid services."). Appellants offer no specific challenge to the district court's conclusions regarding Leatherman, Eckstrom, Chellis, and Cooper. And, especially in light of the fact that the BCB is now abolished, with its responsibilities having been transferred to the Governor, there would be no basis to challenge the court's conclusion regarding these Appellees.

However, Appellants do challenge the district court's analysis concerning Governor Haley. In arguing that Governor Haley bears the necessary relationship to the ongoing violations they allege, they note that Appellees "have refused to restore service levels of waiver participants to the pre-2010 level, . . . refused to pay for ***Kobe***'s speech services, refused to acknowledge ***Kobe***'s right under the *Medicaid Act* and *ADA* to a speech device and have refused to provide funding for ***Kobe*** to live outside of a congregate setting." Appellants' brief at 35. What Appellants fail to appreciate, however, **[**40]** is that Governor Haley is not an official with responsibility for these decisions, nor does she have the authority to change them. South Carolina has designated DHHS to administer and supervise Medicaid. See *S.C. Code § 44-6-30*; see also *42 C.F.R. § 431.10* (providing that each state's Medicaid plan must designate a single state agency to administer the Medicaid plan). And DHHS "may not delegate, to other than its own officials, the authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters." *42 C.F.R. § 431.10(e)*. Although Governor Haley appoints DHHS's Director, **[*300]** see *S.C. Code § 44-6-10*, she has no direct authority to administer South Carolina's Medicaid plans; rather, she is limited to reviewing and commenting on proposed plans, see *42 C.F.R. § 430.12(b)*.

In arguing that injunctive relief against Governor Haley could nevertheless remedy the ongoing violations that they allege, Appellants argue that Governor Haley "is the single most influential individual in the State with the power to influence the General Assembly to establish a budget and to promulgate regulations to bring DDSN and DHHS into compliance." Appellants' brief at 36. But the fact that a governor, by virtue of her office, may have political influence over those who are **[**41]** responsible for ongoing violations and have the authority to end them does not give the governor the "special relation" needed to make her a proper defendant under Ex Parte Young. Cf. *Waste Mgmt. Holdings, 252 F.3d at 331* ("The fact that [a governor] has publicly endorsed and defended the challenged statutes does not alter our analysis [holding that the governor lacks the special relation required under Ex Parte Young to be sued regarding the statutes].). Rather, a more direct connection is required. The district court therefore

properly ruled that Appellants' claims against Governor Haley did not fit within the Ex Parte Young exception.

Appellants next assert that regardless of whether their claims fit with in Ex Parte Young, Governor Haley, Leatherman, Eckstrom, Chellis, and Cooper were not entitled to be dismissed regarding Counts One and Two on *Eleventh Amendment* grounds. Concerning Count One, Appellants contend that Congress validly abrogated South Carolina's *Eleventh Amendment* immunity as to claims alleging violations of *Title II of the ADA*. As for Count Two, Appellants argue that South Carolina waived its *Eleventh Amendment* immunity by accepting federal financial assistance for its Medicaid program. We address these arguments in turn.[27]

In their initial **[**42]** brief to us, Appellants argued that the district court erred in dismissing Count One as against these Appellees on *Eleventh Amendment* immunity grounds, maintaining that Congress validly abrogated the States' *Eleventh Amendment* immunity for claims alleging a violation of *Title II of the ADA*. Appellants relied on our decision in *Constantine v. Rectors, George Mason Univ., 411 F.3d 474, 486 (4th Cir. 2005)*, holding that "the accommodation requirement of *Title II*, as it applies to cases involving the administration of higher education programs, represents a congruent and proportional response to a history and pattern of unconstitutional **[*301]** disability discrimination by States and non state government entities." See also *id. at 484-90*. They also drew support from the Supreme court's decision in *Tennessee v. Lane, 541 U.S. 509, 533-34, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004)*, which held that "*Title II*, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the *Fourth Amendment*."

In their initial brief, Appellees denied that Constantine and Lane conclusively demonstrated that Congress validly abrogated the States' immunity for the type of claim at issue here. See Appellees' Brief at 36 (Constantine "holds only that *Title II of the ADA* validly abrogated *Eleventh Amendment* immunity 'as it applies to public higher **[**43]** education.'") (quoting *Constantine, 411 F.3d at 490*)). Notwithstanding their argument that Constantine and Lane did not conclusively resolve the abrogation issue, Appellees offered no argument that Congress had not in fact validly abrogated the States' *Eleventh Amendment* immunity.

Additionally, in their initial briefs to us, neither party discussed or even cited the Supreme court's decision in *United States v. Georgia, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006)*. In Georgia, the Supreme Court noted that in prior decisions the Court had been split regarding whether Congress had the power under § 5 of the Fourteenth Amendment to abrogate states' sovereign immunity for conduct that did not actually violate the Constitution. See *id. at 158-59*. The Georgia Court specifically held that "insofar

---

[27] Although Appellants opposed dismissal of these Appellees *Eleventh Amendment* immunity grounds, it does not appear that they specifically argued that Congress validly abrogated the States' immunity with regard to the *ADA* claim or that South Carolina waived immunity to *Rehabilitation Act* claims by virtue of accepting Medicaid funds. Rather, Appellants focused their *Eleventh Amendment* arguments on the application of the Ex Parte Young exception. Nevertheless, Appellees do not assert that Plaintiffs have waived these arguments by failing to raise them earlier. See *Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991)* ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.") ; *Dan Ryan Bldrs., Inc. v. Crystal Ridge Dev., Inc., 783 F.3d 976, 980 (4th Cir. 2015)* ("[T]he Supreme Court has long recognized that a court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief." (alteration and internal quotation marks omitted)).

as *Title II* creates a private cause of action for damages against the States for conduct that actually violates the *Fourteenth Amendment*, *Title II* validly abrogates state sovereign immunity." *Id. at 159*. To give guidance to lower courts determining whether the *Eleventh Amendment* bars an *ADA Title II* claim, the Supreme Court provided a three-part test:

> [D]etermine . . . on a claim-by-claim basis, (1) which aspects of the state's alleged conduct violated *Title II*; (2) to what extent such misconduct also violated the *Fourteenth Amendment*; and (3) insofar as such misconduct violated *Title II* but did not violate the *Fourteenth Amendment*, whether Congress's **[**44]** purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

Id.; see *Babcock v. Michigan, 812 F.3d 531, 534-35 (6th Cir. 2016)*; see also *Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988)* (It is a "fundamental and longstanding principle of judicial restraint . . . that courts avoid reaching constitutional questions in advance of the necessity of deciding them."); *Lors v. Dean, 746 F.3d 857, 864 (8th Cir. 2014)* (noting that "the constitutional question of whether *Title V of the ADA* was a valid abrogation of sovereign immunity may be avoided altogether if the district court correctly determined that the [*ADA*] claim fails on the merits").[28] Because neither the parties nor the district court had addressed Georgia in their briefs, we requested that the parties file supplemental briefs explaining the impact of Georgia on the present case.

In their supplemental brief, Appellants suggest that in light of the district court's **[*302]** failure to apply the Georgia framework, "their claims for injunctive relief and damages should be reassessed by the district court, with instructions to apply the test set forth in Georgia, except for those claims which [the Fourth Circuit] may elect to grant summary judgment in favor of the plaintiffs." Appellants' Supp. Brief at 15. Appellees, in their supplemental brief, do not deny **[**45]** that the Georgia framework governs the analysis of the abrogation issue to the extent that Appellants assert a claim for money damages. Nor do they explain how that analysis should apply to the facts of this case. They contend that Georgia cannot affect the outcome of this appeal because none of the claims here are justiciable — an argument we have now rejected — and because any *ADA* liability would be duplicative of liability under the *Rehabilitation Act* to the extent that *Eleventh Amendment* immunity is not available.

In light of the existence of the unresolved issue of whether Congress has validly abrogated the States' *Eleventh Amendment* immunity for *Title II* claims of the type asserted here, we hold that dismissing Count One on *Eleventh Amendment* grounds, without utilizing the Georgia framework, was premature. Particularly since Appellees have not yet made any argument regarding how the Georgia framework would apply to the facts before us, we decline to apply Georgia in the first instance.

Appellees also argue that regardless of whether Congress validly abrogated South Carolina's *Eleventh Amendment* immunity regarding the type of claim asserted in Count One, we should affirm the dismissal of the BCB Members in light of the fact that no effective prospective **[**46]** relief was available as against these Appellees — as we have already discussed — and because Appellants have abandoned any claims for damages asserted against these Appellees.

---

[28] Although *Eleventh Amendment* immunity is designed "to protect the State from being subject to suit at all[,] the Georgia protocol may require the State to defend litigation before obtaining a ruling on immunity." *Buchanan v. Maine, 469 F.3d 158, 172 n.8 (1st Cir. 2006)*.

We agree that Appellants abandoned any claim for damages in regard to their claims against Leatherman, Eckstrom, Chellis, and Cooper when they submitted memoranda to the district court explicitly representing that they were not seeking damages from them. See J.A. 1086 ("All of the relief requested by the Plaintiffs as to Defendant Cooper is prospective."); J.A. 1115 ("Only prospective relief, and attorneys fees, are requested from [Chellis]."); J.A. 2240 ("[T]he only relief [Appellants] request from [Leatherm an and Eckstrom] is injunctive relief."). We therefore affirm the dismissal of Counts One and Two against these Appellees — the individual-capacity claims as well as the official-capacity claims — on this basis.

We do not agree, however, that Appellants have abandoned their claims for money damages against Governor Haley (in her official capacity). In her memoranda to the district court supporting her motion to dismiss, Governor Haley suggested that Appellants were seeking money damages in their claims against **[**47]** her. See J.A. 290 ("If a plaintiff seeks only retrospective relief (such as monetary damages), then Ex Parte Young is not an available means of bringing suit against the state official."). It is true that Appellants' primary response was that the prospective relief fit within the Ex Parte Young requirements. But unlike they did with regard to the other BCB Members, Appellants did not specifically deny Governor Haley's contention that they sought retrospective relief as well. Indeed, they argued that Governor Haley could be liable for the past actions of others, suggesting that at least part of the relief they were claiming was retrospective. See, e.g., J.A. 387 ("Plaintiffs have presented evidence that Haley and her predecessor, Mark Sanford, had actual **[*303]** or, at least constructive, knowledge of the violations alleged in the amended complaint."). On reply, Appellees argued that Appellants had "failed to present any opposition" to the argument that they did not seek injunctive relief against Governor Haley except with regard to Count Six. J.A. 717.

In further support of their abandonment proposition, Appellees point to a statement by Appellants' counsel, made to the district court on September **[**48]** 23, 2014, that Appellants' lawsuit was not requesting damages other than against the Babcock Center. As Appellants point out, however, this statement was made well after Governor Haley — and the other BCB Members — had been dismissed. And at oral argument before us Appellants' counsel denied that her statement was intended to encompass the claims asserted against the BCB Members. In our view, counsel's ambiguous statement made at the summary-judgment hearing is simply not clear enough to constitute an abandonment of Appellants' damage claims asserted against Governor Haley in her official capacity. See *Doe v. Kidd, 501 F.3d 348, 354 (4th Cir. 2007)* ("Federal law is well-settled that waiver is the voluntary and intentional relinquishment of a known right, and courts have been disinclined lightly to presume that valuable rights have been conceded in the absence of clear evidence to the contrary." (alteration and internal quotation marks omitted)). Cf. *Santos v. Frederick Cty. Bd. Of Comm'rs, 725 F.3d 451, 463 (4th Cir. 2013)* (holding that counsel's ambiguous statement during argument on summary judgment motion did not constitute waiver); *Feikema v. Texaco, Inc., 16 F.3d 1408, 1417 (4th Cir. 1994)* (holding no waiver of claim for damages when, although "[t]he principal aim" of the arguments opposing the motion to dismiss were directed at "whether they could obtain injunctive **[**49]** relief," the record was ambiguous regarding whether they intended to continue to pursue a damages claim). We thus decline to affirm the dismissal of Count One as against the Governor in her official capacity on this basis but rather vacate the dismissal of that count against the Governor.

Regarding Count Two, Appellants maintain that states waive *Eleventh Amendment* immunity against suit under *§ 504 of the Rehabilitation Act* by accepting federal financial assistance, as South Carolina did here with regard to Medicaid. See *Constantine, 411 F.3d at 490-96*. For their part, Appellees do not dispute

that South Carolina has waived any *Eleventh Amendment* immunity regarding Count Two, but they argue that the district court properly ruled that the BCB Members were not named as defendants in Count Two. See Appellees' brief at 36-37 ("States do waive their *Eleventh Amendment* immunity under the *Rehabilitation Act* by accepting funds, see *Constantine, 411 F.3d at 490-96*, but Plaintiffs' *Rehabilitation Act* claim is not asserted against any of the BCB Members."). We do not read the district court opinions as reaching that conclusion, however. It is true that in the parts of the district court's opinions describing the different counts in the complaint, the district court did not identify the BCB Members as defendants. **[**50]** Later in its opinions, though, the court appeared to recognize that Count Two named the BCB Members. See J.A. 1135 (noting that those "who were members of the [BCB]" were named as defendants in Count Two); J.A. 2371 (noting that Leatherman and Eckstrom were named as defendants in Count Two). In any event, review of the amended complaint shows that the BCB Members were among the defendants as to Count Two. See J.A. 225 (allegation in Count Two of amended complaint that BCB "failed to insure that the funds allocated to [DDSN] **[*304]** were spent as appropriated by the General Assembly to provide services, despite warnings from the South Carolina Legislative Audit Council that [DDSN] was spending those funds improperly for the purchase of real estate"). We therefore vacate the dismissal of Governor Haley as a defendant regarding Count Two.

IV.

In sum, for the foregoing reasons, we vacate the district court order granting summary judgment against Appellants on Counts One through Seven on justiciability grounds, and remand for further proceedings consistent with this opinion. We also vacate the district court order to the extent that it dismisses Counts One and Two against Governor Haley on the basis **[**51]** of *Eleventh Amendment* immunity. However, we affirm the dismissal of the official- and individual-capacity claims against Leatherman, Eckstrom, Chellis, and Cooper.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

End of Document

APPENDIX F

Kobe v. Haley

United States District Court for the District of South Carolina, Greenville Division

August 12, 2013, Decided; August 12, 2013, Filed

C/A No. 3:11-1146-TMC

Reporter
2013 U.S. Dist. LEXIS 113206 *; 2013 WL 4067921

Kobe, Mark, and John, Plaintiffs, v. Nikki ***Haley***, in her capacity as Governor and Chairman of the South Carolina Budget and Control Board; Daniel Cooper, Converse Chellis and Mark Sanford, in their capacities as former members of the South Carolina Budget and Control Board; Hugh Leatherman and Richard Eckstrom, in their capacities as members of the South Carolina Budget and Control Board; Curtis Loftis and Brian White, as members of the South Carolina Budget and Control Board, Anthony Keck, in his capacity as the Director of the South Carolina Department of Health and Human Services, Emma Forkner, in her capacity as the former Director of the South Carolina Department of Health and Human Services, Beverly Buscemi in her capacity as Director of the South Carolina Department of Disabilities and Special Needs, Eugene A. Laurent, former Interim Director of the South Carolina Department of Disabilities and Special Needs; Stanley Butkus, former Director of the South Carolina Department of Disabilities and Special Needs; Richard Huntress, in his capacity as Commissioner of the South Carolina Department of Disabilities and Special Needs; Kathi Lacy, Thomas P. Waring and Jacob Chorey, in their capacities as employees of the South Carolina Department of Disabilities and Special Needs, Mary Leitner, in her capacity as the Director of the Richland Lexington Disabilities and Special Needs Board; the Babcock Center, Judy Johnson, in her capacity as the Director of the Babcock Center and other Unnamed Actors Associated with the Babcock Center, Defendants.

Prior History: *Kobe v. Haley, 2012 U.S. Dist. LEXIS 112425 (D.S.C., Aug. 10, 2012)*

Counsel: [*1] For ***Kobe***, Mark, Plaintiffs: Patricia L Harrison, LEAD ATTORNEY, Patricia Logan Harrison Law Office, Columbia, SC.

For Anthony Keck, in his capacity as the Director of the South Carolina Department of Health and Human Services, Emma Forkner, in her capacity as the former Director of the South Carolina Department of Health and Human Services, Defendant: Damon C Wlodarczyk, Nikole Deanna Haltiwanter, Roy F Laney, Riley Pope and Laney, Columbia, SC.

For Beverly Buscemi, in her official capacity as Director of the South Carolina Department of Disabilities and Special Needs, Richard Huntress, in his capacity as Commissioner of the South Carolina Department

of Disabilities and Special Needs, Kathi Lacy, in their capacities as employees of the South Carolina Department of Disabilities and Special Needs, Thomas P Waring, in their capacities as employees of the South Carolina Department of Disabilities and Special Needs, Jacob Chorey, in their capacities as employees of the South Carolina Department of Disabilities and Special Needs, Eugene A Laurent, former Interim Director of the South Carolina Department of Disabilities and Special Needs, Stanley Butkus, former Director of the South Carolina **[*2]** Department of Disabilities and Special Needs, Defendants: Kenneth Paul Woodington, LEAD ATTORNEY, Davidson Morrison and Lindemann, Columbia, SC; David Allan DeMasters, William Henry Davidson, II, Davidson and Lindemann, Columbia, SC.

For Mary Leitner, in her capacity as the Director of the Richland Lexington Disabilities and Special Needs Board, Defendant: Patrick John Frawley, LEAD ATTORNEY, Nicholson Davis Frawley Anderson and Ayer, Lexington, SC; Erica M Parker, Davis Frawley Anderson McCauley Ayer Fisher and Smith, Lexington, SC.

For Judy Johnson, in her capacity as the Director of the Babcock Center, Unnamed Actors Associated with the Babcock Center, Babcock Center, The, Defendants: Christian Stegmaier, LEAD ATTORNEY, Joel Wyman Collins, Jr, Collins and Lacy, Columbia, SC.

Judges: Timothy M. Cain, United States District Judge.

Opinion by: Timothy M. Cain

Opinion

OPINION & ORDER

In their Amended Complaint, Plaintiffs seek actual and punitive damages, and declaratory and injunctive relief for violations of Title II of the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12132*; *Section 504* of the Rehabilitation Act of 1973 ("*Section 504*"); the Medicaid Act; and *42 U.S.C. §§ 1983* and *1985*. (ECF No. 65 - Am. Compl. **[*3]** at 3). This matter is before the court on several summary judgment motions (ECF Nos. 146, 147, 151, 152, and 155), Defendants' Joint Motion to Exclude Witnesses and Strike Exhibits to Plaintiffs' Motion for Summary Judgment (ECF No. 173), and Defendants' Joint Motion to Strike Certain Exhibits to Plaintiff's Memoranda in Opposition to Defendants' Summary Judgement Motions (ECF No. 190). The court denies Defendants' Joint Motions to Exclude Witnesses and Strike Exhibits (ECF Nos. 173 and 190) and the pending summary judgment motions (ECF Nos. 146, 147, 151, 152, and 155) are denied without prejudice.

Discussion

On December 28, 2012, Plaintiffs filed a partial summary judgment motion and attached thirty-six exhibits. (ECF No. 155). In their motions to strike exhibits and exclude witnesses, Defendants seek to exclude certain witnesses and strike thirty-one of these exhibits on the ground that Plaintiffs failed to disclose certain fact and expert witnesses and produce documents in their discovery responses. [1] Additionally, Defendants seek to exclude the unsworn statement of Plaintiff ***Kobe***, which Plaintiffs attached as an exhibit to Plaintiffs' Memoranda in Opposition to Defendants' Summary **[*4]** Judgment Motions. (ECF Nos. 179-2, 180-2, and 181-2).

1. Motion to Strike Exhibits (ECF No. 173)

a) Exhibits tied to alleged expert witnesses

Pursuant to the Amended Scheduling Order and a subsequent extension (ECF Nos. 133 and 139), by October 12, 2012, Plaintiffs were to "file and serve a document identifying by full name, address, and telephone number each person whom Plaintiff(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information" as required by *Fed.R.Civ.P. 26(a)(2)*. Plaintiffs were also "to file and serve affidavits of records custodian witnesses proposed to be presented by affidavit **[*5]** at trial no later than November 16, 2012." (ECF No. 133). Plaintiffs did not identify any expert witnesses or file and serve any affidavits of records custodian witnesses by the appropriate deadlines. Plaintiffs identified sixty fact witnesses, including six witnesses Defendants contend should have been designated as expert witnesses pursuant to *Fed.R.Civ.P. 26(a)(2)*.

Rule 26(a)(2)(B) provides that an expert witness must be identified and provide a written report if he or she "is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." *Fed.R.Civ.P. 26(a)(2)(B)*. In 2010, *Rule 26* was amended to add *subsection (C)*, which states:

> (C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:
>
> > (I) the subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*; and (ii) a summary of the facts and opinions to which the witness is expected to testify.

Fed.R.Civ.P. 26(a)(2)(C). According to the Advisory Committee **[*6]** Notes, this amendment was enacted to "resolve[ ] a tension that has sometimes prompted courts to require reports under *Rule 26(a)(2)(B)* even from witnesses exempted from the report requirement." *Fed.R.Civ.P. 26* advisory committee's notes. "Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony." *Id.*

---

[1] Defendants additionally seek to have stricken an exhibit to Plaintiff's Memorandum Opposing Defendants DDSN Summary Judgment Motion (ECF No. 181-3) on the same grounds. (ECF No. 190 at 2). This exhibit contains the records of the Office of the State Long Term Care Ombudsman Program relating to one of the Plaintiffs, which includes reports prepared by Carol Niederhauser and Tonya Bradford. (ECF No. 181-3). As to this specific exhibit, Defendants incorporated their arguments from their Motion to Exclude. (ECF No. 173).

The six witnesses Defendants contend should have been identified as expert witnesses are: Heather Gardner, June Maranville, Sarah Scarborough, Dr. Johan Hernandez, Sandra Ray, and Lee Mole. In their Responses to Defendant Buscemi's First Set of Interrogatories, Plaintiffs listed these witnesses as fact witnesses and provided the following summaries:

1) Heather Gardner "will testify about ***Kobe***'s condition and his need for an adaptive communications device, her qualifications as a speech pathologist and the requirements for determination of the medical necessity of a synthesized speech device." (ECF No. 173-4 at 3).

2) June Maranville, a speech pathologist, "is expected to testify about ***Kobe***'s need for a speech device." (ECF No. 173-4 at 3).

3) Sarah Scarborough "is expected to testify about the speech evaluation **[*7]** of ***Kobe*** conducted in 2002 and his inability to effectively utilize the less sophisticated device provided due to physical limitations." (ECF No. 173-4 at 21).

4) Dr. Johan Hernandez

> is expected to testify about medical treatment provided to ***Kobe*** and report of seizures after falling from van in wheelchair and hitting his head. He is also expected to testify about ***Kobe***'s need for adult day health care services and other matters related to his condition. He is also expected to testify about one or more other individuals who have been injured in Babcock Center residential or day programs.

(ECF No. 173-4 at 22).

5) Sandra Ray

> is expected to testify about matters related to risk management and the barriers to competition inherent in DDSN's prospective payment system to the Babcock Center and local DSN boards. She is expected to testify about matters related to the LAC audit of SCDDSN and retaliation against persons who criticize DDSN. She is expected to testify about medical necessity and service coordination in South Carolina. Ms. Ray is expected to testify about the need for adaptive speech devices and to provide services in the least restrictive to comply with the ADA and *Section 504*. Ms. **[*8]** Ray is expected to testify about risk management as it relates to decubitus ulcers.

(ECF No. 173-4 at 4).

6) Lee Mole "is expected to testify about ***Kobe***'s condition and his need for a speech device and new wheelchair. He is also expected to testify about the least restrictive setting that would allow ***Kobe*** to interact more frequently with non-disabled persons." (ECF No. 173-4 at 7-8).

Defendants contend that these witnesses are to testify as to medical observations, diagnoses, and treatments, as well as legal opinions as to compliance with federal regulations. In response, Plaintiffs contends these witnesses were not retained or specifically employed to provide expert testimony, and therefore are not required to provide expert reports pursuant to *Rule 26(a)(2)(B)*. However, Plaintiffs' argument that these witnesses were not retained or employed to give expert testimony is not determinative of whether disclosure and reports are required under *Rule 26*.

A fact witness is a witness whose testimony is in the form of an opinion and must be: "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining

a fact in issue; and (c) **[*9]** not based on scientific, technical, or other specialized knowledge within the scope of *Rule 702*." *Fed.R.Evid. 701*. [2]

As noted above, the Advisory Committee Notes to *Rule 26 (a)(2)(C)* state that it "include[s] physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under *Rule 26(a)(2)(A)* and provide the disclosure required under *Rule 26(a)(2)(C)*." After the 2010 Amendments, **[*10]** courts have continued to "adhere to traditional tests for determining when a Treating Physician is considered to be a full-blown expert and when he is considered to be more akin to a percipient witness with professional expertise." *Kondragunta v. Ace Doran Hauling & Rigging Co., No. 1:11-cv-01094-JEC, **2013** U.S. Dist. LEXIS 39143, **2013** WL 1189493, at *10 (N.D. Ga. Mar.21, **2013**)*. In *Kondragunta*, the court engaged in an in-depth analysis of post-amendment case law and held:

> [I]f a physician's opinion regarding causation or any other matter was formed and based on observations made during the course of treatment, then no Subsection B report is required, albeit the Subsection C report discussed above will be required. If, however, the physician's opinion was based on facts gathered outside the course of treatment, or if the physician's testimony will involve the use of hypotheticals, then a full subsection B report will be required.

*Id. **2013** U.S. Dist. LEXIS 39143, [WL] at * 12* (internal citations omitted). *See Thomas v. Consolidated Rail Corp., 169 F.R.D. 1, 2 (D. Mass. 1996)* ("Many courts, however, have recognized the unfairness of permitting a party to employ a physician who treated an injured party to provide testimony beyond simply the care of the **[*11]** plaintiff to classic expert opinion regarding causation and prognosis."); *Brown v. Best Foods, 169 F.R.D. 385, 388 (N.D. Ala.1996)* ("To the extent the treating physician testifies only as to care and treatment of his/her patient, the physician is not considered a specially retained expert [for whom *Rule 26(a)(2)(B)* disclosures are required].").

Applying the traditional test, the court finds that these six witnesses do not appear to be experts requiring a *Rule 26(a)(2)(B)* written report. In reviewing the summaries of these witnesses' anticipated testimony, the court notes that these witnesses are not testifying only as to their care and treatment of Plaintiffs; they are also providing what appears to be some expert testimony under *Rules 702* and *703*. Therefore, the court concludes that these witnesses are "hybrid witnesses." *See, e.g., Wake v. Nat'l R.&R. Passenger Corp., **2013** U.S. Dist. LEXIS 43392, **2013** WL 1316431 (D. Md. **2013**)*. "To the extent that a witness's opinion is based on facts learned or observations made 'in the normal course of duty,' the witness is a

---

[2] *Rule 702* provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed.R.Evid. 702. *Rule 703* provides, in pertinet part: "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." *Fed.R.Evid. 703*.

hybrid witness (i.e., a hybrid of an expert and a fact witness) and need not submit an expert report" under *Rule 26(a)(2)(B)*. *Vigilant Ins. Co. V. McKenney's, Inc., 2011 U.S. Dist. LEXIS 62342, 2011 WL 2415004, * 4 (D.S.C. 2011)*. **[*12]** However, hybrid witnesses are subject to *Rule 26(a)(2)(C)* requirements and "must submit a report regarding any opinions formed specifically in anticipation of the litigation, or otherwise outside the normal course of a duty." *Id.* Therefore, these witnesses must be identified as such witnesses under *Rule 26(a)(2)(A)*, and provide the disclosure required under *Rule 26(a)(2)(C)*. [3]

Complying with *Rule 26* is " 'not merely an aspiration' as 'the expert witness discovery rules are designed to allow both sides in a case to prepare their cases adequately and to prevent surprise.'" *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., No. 6:07 -cv-222-Orl-35KRS, 2009 U.S. Dist. LEXIS 36246, 2009 WL 1043974, at *3 (M.D. Fla. Apr.17, 2009)* (*quoting* *Reese v. Herbert, 527 F.3d 1253, 1266 (11th Cir. 2008))*. Generally, "[i]f a party fails to provide information or identify a witness as required by *Rule 26(a)* **[*13]** or *(e)*, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial." *Fed.R.Civ.P. 37(c)*. [4] Despite a failure to disclose the identity of a witness, a party may "[e]scape from the [*Rule 37*] sanction" if it shows "that the failure to disclose is substantially justified or harmless." *Fed.R.Civ.P. 37(c)(1)*. In determining whether nondisclosure of a witness is substantially justified or harmless, courts should consider:

> (1) the surprise to the party against whom the witness was to have testified; (2) the ability of the party to cure that surprise; (3) the extent to which allowing the testimony would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

Southern States Rack & Fixture v. Sherwin-Williams Co., 318 F.3d 592, 597 (4th Cir. 2003)).

Here, these factors weigh against excluding these witnesses. While Plaintiffs did not identify **[*14]** or file the required disclosures, Defendants were aware of these six witnesses and the Plaintiffs can cure their failure to comply with *Rule 26(a)(2)(C)*. Further, in regard to the second factor, as no trial date has been set, it is not at such a late date that it would be impossible to cure any prejudice before trial. *See, e.g.*, *Richardson v. Korson, 905 F. Supp. 2d 193, 2012 WL 5907379, at *7 (D.D.C. 2012)* ("Where there is sufficient time to provide the prejudiced party with an opportunity to cure the prejudice of the untimely report, a court may permit submission of the report."). In regard to the third factor, the evidence is clearly very important to Plaintiffs' case. As to the last factor, Plaintiffs clearly misunderstand the requirements of *Rule 26(a)(2)(C)*, and while such a misinterpretation does not excuse the nondisclosure, it is a reasonable

---

[3] The disclosures required by *Rule 26(a)(2) (C)* for expert witnesses not filing reports include "the subject matter on which the witness is expected to present evidence under *Federal Rule of Evidence 702*, *703*, or *705*" and "a summary of the facts and opinions to which the witness is expected to testify." *Fed.R.Civ.P. 26(a)(2)(C)*.

[4] Additionally, "the court may issue any just orders, including those authorized by *Rule 37(b)(2)(A)(ii)-(vii)*, if a party or its attorney . . . fails to obey a scheduling or other pretrial order." *Fed.R.Civ.P. 16(f)(1)*.

explanation. [5] Further, the court notes again that these witnesses were disclosed - albeit only as fact witnesses.

Most courts in similar situations have permitted the non-compliant party an opportunity to provide the required report and the moving party an opportunity to depose the witness. *See* *Kondragunta .v Ace Doran Hauling & Rigging Co., **2013** U.S. Dist. LEXIS 39143, **2013** WL 1189493, *8 (N.D. Ga. **2013**)*(citing cases). Accordingly, as to the six individuals listed above, Plaintiffs are to provide and file the proper reports required pursuant to *Rule 26(a)(2)(C)* within thirty days. Plaintiffs are required to summarize the facts to which the witnesses are expected to testify. [6] Thereafter, Defendants will have forty-five days to depose these witnesses. If Plaintiffs fail to cure this deficiency, Plaintiffs will not be allowed to use these six witnesses "to supply evidence on a motion, at a hearing, or at a trial."

Furthermore, the court reiterates that based upon the summaries of these six witnesses' testimony provided to Defendants and the arguments presented on this motion, the court has concluded these witnesses are hybrid witnesses, and, therefore, these treating medical providers may only base their opinions on information learned during the actual treatment of Plaintiffs. *See* *Ace American Ins. Co. v. McDonald's Corp., 2012 U.S. Dist. LEXIS 89726, 2012 WL 2523883, *5 n.1 (D. Md. 2012)*(unreported). If Plaintiffs intend to use any medical provider's opinion which is based on facts gathered **[*17]** outside the course of treatment or involves the use of hypotheticals, a full *Rule 26 (a)(2)(B)* report will be required whether the experts are paid or not. *See* *Kondragunta, **2013** U.S. Dist. LEXIS 39143, **2013** WL 1189493, * 12*. [7]

In light of this ruling reopening discovery on a limited basis, the pending motions for summary judgement (ECF Nos. 146, 147, 151, 152, and 155) are premature and are denied without prejudice. The parties shall submit an amended scheduling order in compliance with this order.

b. Other exhibits

---

[5] Some court have held that "counsel's misinterpretation of the rule's requirements does not substantially justify Plaintiff's failure to comply." *Anderson v. Bristol, Inc., 936 F. Supp. 2d 1039, **2013** U.S. Dist. LEXIS 48708, **2013** WL 1339372, *15 (S.D. Iowa **2013**)*(noting the **[*15]** amendment had taken effect a year and a half before Plaintiff filed expert disclosures and by that time there were a number of court decisions on the amendment). Here, the amendment had been in effect for almost two years by the time Plaintiffs filed their disclosures on November 25, 2012.

[6] Plaintiffs' argument that Defendants had access to Plaintiffs' medical records and could simply review the records (ECF No. 194 **[*16]** at 2, 5-6, 10, 14) is not sufficient to comply with *Rule 26(a)(2)(C)*'s requirements. *Flonnes v. Prop. & Cas. Ins. Co. of Hartford, **2013** U.S. Dist. LEXIS 74018, **2013** WL 2285224 (D. Nev. **2013**)* (holding that simply producing medical records is not sufficient to satisfy the requirements of *Rule 26(a)(2)(C)*); *Kondragunta, **2013** U.S. Dist. LEXIS 39143, **2013** WL 1189493* ("The reader of plaintiff's disclosure has no idea what opinion the doctor will offer or on what facts the doctor will base that opinion. Further, the fact that plaintiff provided all his medical records to the defendants does not mean that plaintiff has fulfilled the 'summary of the facts and opinions' prong of *Rule 26(a)(2)(C)*.").

[7] In response to one of the pending summary judgment motions, Plaintiffs state that their "decision to rely upon the fact witnesses identified in their interrogatories (many of whom are experts in their fields), rather than paying large sums to experts who have no independent knowledge of the needs of the Plaintiffs in the complaint does not warrant dismissal under *Rule 41(b)*." (ECF No. 158 at 5). The court is concerned that some of the testimony from these six witnesses may involve expert testimony. For example, Plaintiffs stated: Ray "is expected to testify about the need for adaptive speech devices and to provide services in the least restrictive to comply with the ADA and Section 504. Ms. Ray is expected to testify about risk management as it relates to decubitus ulcers." (ECF No. 173-4 at 4). If Plaintiffs intend to use Ray to testify about her opinion, which is based upon facts gathered outside the course of Plaintiffs' treatment, she would be considered an expert witness and Plaintiffs **[*18]** must comply with *Rule 26 (a)(2)(B)*.

Attached to their memorandum in support of their summary judgment motion, Plaintiffs filed thirty-six exhibits. (ECF No. 155). Defendants seek to exclude all of the exhibits, except Exhibits 9, 32, 34, 35, and 36, based upon Plaintiffs' failure to identify witnesses whose statements are contained in these exhibits and Plaintiffs' failure to produce these documents. Plaintiffs respond that all of their exhibits are hearsay exceptions. Although the pending summary judgment motions are denied without prejudice mooting this motion, the court addresses some of the parties' arguments in order to provide some direction to the parties.

The parties have briefed two entirely different issues. Defendants contend that Plaintiffs' exhibits are inadmissible because the individuals who created the information were not identified as witnesses and the documents were not produced **[*19]** in response to Defendants' Request for Production of Documents. (ECF Nos. 173 at 4; 199 at 4). Plaintiffs do not directly respond to this argument and instead relay how the exhibits are admissible. [8] Even were the court to find Plaintiffs complied with *Rule 26* or that the failure of Plaintiffs to comply with *Fed.R.Civ.P. 26(a)* was substantially justified or harmless, Plaintiffs' arguments regarding the admissibility of some of the exhibits are insufficient.

A party is precluded from using depositions, declarations, or documents in support of their Summary Judgment Motion and in Opposition to Defendants' Motions for Summary Judgment that were not properly disclosed or identified in discovery or that do not conform with the requirements of *Fed.R.Civ.P. 56(c)* **[*20]** to defeat summary judgment. *Bailey v. Fairfax County, 2011 U.S. Dist. LEXIS 95281, 2011 WL 3793329 (E.D. Va. 2011)*. Moreover, *Rule 56(c)(1)* mandates that a party asserting that a fact is genuinely disputed must support that assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." *Fed.R.Civ.P. 56(c)*.

Until recently, unauthenticated documents were precluded from consideration at the summary judgment stage. *See, e.g.*, *Orsi v. Kirkwood, 999 F.2d 86, 92 (4th Cir. 1993)* (unsworn, unauthenticated documents cannot be considered on a motion for summary judgment). However, the 2010 amendments to *Rule 56(c)(2)*, "'eliminated the unequivocal requirement that documents submitted in support of a summary judgment motion must be authenticated.'" *Brown v. Siemens Healthcare Diagnostics, Inc., 2012 U.S. Dist. LEXIS 106569, 2012 WL 3136457, at *6 (D. Md. July 31, 2012)* (*quoting* *Akers v. Beal Bank, 845 F.Supp.2d 238, 243 (D.D.C. 2012)*). Instead of a clear bright-line rule that all documents must be authenticated at the summary judgment **[*21]** stage, *Rule 56(c)(2)* now prescribes a "multi-step process by which a proponent may submit evidence, subject to objection by the opponent and an opportunity for the proponent to either authenticate the document or propose a method to doing so at trial." *ForeWord Magazine, Inc. v. OverDrive, Inc., No. 10-cv-1144, 2011 U.S. Dist. LEXIS 125373, 2011 WL 5169384, at *2 (W.D. Mich. Oct. 31, 2011)*. Importantly, "the objection [now] contemplated by the amended Rule is not that the material 'has not' been submitted in admissible form, but that it 'cannot' be." *Ridgell v. Astrue, No. DKC 10-3280, 2012 U.S. Dist. LEXIS 28141, 2012 WL 707008, at *9 (D. Md. Mar. 2, 2012)* (*quoting* *Foreword Magazine, 2011 U.S. Dist. LEXIS 125373, 2011 WL 5169384, at *2)*.

---

[8] Plaintiffs seems to argue that these documents fall outside the scope of *Rule 26* because the documents were not in their possession, custody, or control. (ECF No. 199 at 5)("nearly all of these records come from Defendants' own files."). In reply, Defendants do not address this argument, but rather concentrate on whether these documents should be excluded because they were created by individuals not disclosed as witnesses. (ECF No. 199).

> If an objection is made to an exhibit, the proponent of the exhibit has two options. One possibility is to correct the problem leading to the objection. . . . In the alternative, the proponent can explain how the contents of the exhibit will be submitted at trial so that the information is admissible.

*Mitchell, 842 F. Supp. 2d 1316, 2012 WL 310824, at *3*.

In arguing that the exhibits are admissible, Plaintiffs contend that the exhibits are admissible as hearsay exceptions. For example, Plaintiffs state that some of the exhibits (Exhibits 1, 3, 4, 5, 6, 7, 9, **[*22]** 10, 11, 12, 13, 14, 15, 16, and 17) are medical records regularly kept in the ordinary course of business, and therefore admissible under *Fed.R.Evid 803 (4)* and *(6)*. (ECF No. 194 at 17). [9] However, Plaintiffs' mere assertion that the records are regularly kept in the ordinary course of business would not render the documents admissible at trial. Plaintiffs fail to assert that each of the conditions of *Rule 803(6)* is met and fail to state which of their witnesses would certify or testify to the conditions. *See* *Fed.R.Evid. 803(6)*. Further, as to some of Plaintiffs' exhibits (Exhibits 18, 19, and 20), there is nothing to demonstrate that the writings are what they claim to be nor has a proper witness been identified who might testify as to these documents. *See* *Fed.R.Evid. 901*. Moreover, these documents are not self-authenticating. See *Fed.R.Evid. 902*.

Plaintiffs contend that Exhibit 8 qualifies as a "learned treatise." (ECF No. 194 at 18). However, such evidence is admissible only if "the statement is called to the attention of an expert **[*23]** witness on cross-examination or relied on by the expert on direct examination" **and** the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice." *Fed.R.Evid. 803(18)*. Simply, saying it is a learned treatise does not establish how it is admissible. Moreover, Plaintiffs have not identified any expert witnesses through which this treatise could be admitted. *See* *Mugavero v. Arms Acres, Inc., 2009 U.S. Dist. LEXIS 56214, 2009 WL 1904548, *7 (S.D.N.Y. 2009)*(holding "*Rule 803(18)* contemplates the admission of statements in treatises only through the testimony of an expert witness."). Further, the court notes that such a treatise "may be read into evidence but not received as an exhibit." *Fed.R.Evid. 803(18)*.

Exhibits 18, 24, 25, 26, and 27 "contain emails sent to, copied to or received from counsel for Defendants' attorneys. (ECF No. 194 at18). Plaintiffs contend these emails are admissible under *Fed. R.Evid. 801(d)(2)(D)* "because they were made by Defendants' agents or employees on matters within the scope of that relationship." (ECF No. 194 at 18-19). However, reviewing these emails, it appears they were sent during negotiations about **[*24]** the claims involved in this action and would not be admissible pursuant to *Fed.R.Evid. 408*.

2. Motion to Strike Plaintiff's Unsworn Statement (ECF No. 190)

Defendants also filed a motion to Strike Plaintiff's Unsworn Statement. (ECF No. 190). Although the pending summary judgment motions are denied without prejudice mooting this motion, the court also briefly addresses this motion to provide some direction to the parties.

---

[9] Plaintiffs also contend Exhibits 29 and 30 are business records, but again has not stated though which of her witness these exhibits would be admitted.

As noted above, Plaintiffs attached a statement from Plaintiff ***Kobe*** as an exhibit to their Memoranda in Opposition to Defendants' Summary Judgment Motions. (ECF Nos. 179-2, 180-2, and 181-2). The statement consists of thirty-one paragraphs and concludes with the date and ***Kobe***'s signature. (ECF No. 179-2 at 4, 180-2 at 4, and 181-2 at 4). The statement also contains Laura M. Cole's signature under a declaration that she "went to the home of ***Kobe*** and personally witnessed him putting his mark on this statement." *Id.* Additionally, Plaintiffs' attorney, Patricia L. Harrison, signed the statement in what appears to be her capacity as a notary public under the following statement:

> I met with ***Kobe*** today and reviewed this statement with him and a staff member. Although he has **[*25]** trouble communicating, staff had helped him make a statement and he indicated that it is true. Laura M. Cole personally delivered this statement to ***Kobe*** and swore before me that she witnessed him sign it.

Id.

Defendants contends that Plaintiff ***Kobe***'s declaration should be stricken as it is not a properly notarized affidavit nor does it not comply with *§ 1746*. In response, Plaintiffs argues that Defendants are on a quest to derail their lawsuit with "technical nitpicking." (ECF No. 201 -Pls.' Response to Mot. to Strike at 2). Plaintiffs also attached a second notarized statement signed by Plaintiff ***Kobe*** in an effort to cure any defects with the original statement. (ECF No. 201- 1).

The amended statement begins with, "Now comes ***Kobe***, who swears and affirms under penalty of perjury that: . . ." (ECF No. 201-1 at 1). And ends with the following sentence: "I have reviewed this statement and it is true to the best of my knowledge and information and I understand that there are penalties for providing false information to the court." *Id.* at 3. Further, John N. Harrison, presumably a notary, signed the statement as it having been sworn to him on February 19, ***2013***. [10] *Id.*

In regard to summary judgment motions, the court can consider "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," that a reasonable jury would be unable to reach a verdict for the non-moving party. *See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

> An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant **[*27]** or declarant is competent to testify on the matters stated.

Fed.R.Civ.P. 56(c)(4). Pursuant to *28 U.S.C. § 1746*:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or

---

[10] There is no notation **[*26]** as to John Harrison's title or the expiration of his commission. *S.C. Code Ann. § 26-1-60* provides, in pertinent part that:

> Each notary public shall have a seal of office, which shall be affixed to his instruments of publications and to his protestations. He shall indicate below his signature the date of expiration of his commission. But the absence of such seal or date prior to and after May 30, 1968 shall not render his acts invalid *if his official title be affixed thereto.*

(emphasis added). Without Harrison's official title, the court questions whether the notarization is valid. However, in light of the court's determination that the affidavit substantially complies with *§1746*, this issue need not be addressed.

> proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
> . . .
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
> (Signature)".

28 U.S.C. § 1746.

Kobe's revised affidavit substantially complies with the requirements of **[*28]** *§ 1746*. *See Smith v. Psychiatric Solutions, Inc., 2009 U.S. Dist. LEXIS 27608, 2009 WL 903624, at *5 (N.D.Fla. Mar. 31, 2009)* (stating that the language, "true and accurate to the best of my knowledge and belief," complies with *§ 1746*, "[s]o long as the declaration contains the phrase 'under penalty of perjury' and states that the document is true"). As the amended affidavit substantially complies with *§ 1746*, the court does not see any basis for striking it. [11]

Conclusion

Based on the foregoing, Defendants' Motions to Strike (ECF Nos. 173 and 190) are **DENIED.** However, as to the six hybrid witnesses, Plaintiffs are to provide and file the proper reports required pursuant to *Rule 26(a)(2)(C)* within thirty days. Thereafter, Defendants shall have forty-five days to depose these witnesses. Based on this ruling, the pending Motions for Summary Judgment (ECF Nos. 146, 147, 151, 152, and 155) are premature and are **DENIED [*29] without prejudice**. The parties shall submit an amended scheduling order in compliance with this order by August 26 ***2013***.

IT IS SO ORDERED.

/s/ Timothy M. Cain

United States District Judge

Anderson, South Carolina

August 12, ***2013***

End of Document

[11] However, the court stresses that "[a]dherence to rules is not an optional exercise in nitpickiness. Rules help cases proceed in an orderly fashion and ensure procedural fairness." *United States Commodity Futures Trading Com'n v. Lake Shore Asset Management Ltd., 540 F.Supp.2d 994 , 1016-17 (N.D. Ill. 2008)*.

APPENDIX G

Kobe v. Haley

United States District Court for the District of South Carolina, Greenville Division

August 10, 2012, Decided; August 10, 2012, Filed

C/A No. 3:11-1146-TMC

Reporter
2012 U.S. Dist. LEXIS 112425 *; 2012 WL 3269221

Kobe, Mark, and John, Plaintiffs, v. Nikki ***Haley***, in her capacity as Governor and Chairman of the South Carolina Budget and Control Board; Daniel Cooper, Converse Chellis and Mark Sanford, in their capacities as former members of the South Carolina Budget and Control Board; Hugh Leatherman and Richard Eckstrom, in their capacities as members of the South Carolina Budget and Control Board; Curtis Loftis and Brian White, as members of the South Carolina Budget and Control Board, Anthony Keck, in his capacity as the Director of the South Carolina Department of Health and Human Services, Emma Forkner, in her capacity as the former Director of the South Carolina Department of Health and Human Services, Beverly Buscemi in her capacity as Director of the South Carolina Department of Disabilities and Special Needs, Eugene A. Laurent, former Interim Director of the South Carolina Department of Disabilities and Special Needs; Stanley Butkus, former Director of the South Carolina Department of Disabilities and Special Needs; Richard Huntress, in his capacity as Commissioner of the South Carolina Department of Disabilities and Special Needs; Kathi Lacy, Thomas P. Waring and Jacob Chorey, in their capacities as employees of the South Carolina Department of Disabilities and Special Needs, Mary Leitner, in her capacity as the Director of the Richland Lexington Disabilities and Special Needs Board; the Babcock Center, Judy Johnson, in her capacity as the Director of the Babcock Center and other Unnamed Actors Associated with the Babcock Center, Defendants.

Subsequent History: Related proceeding at *Jimmy v. Buscemi, 2013 U.S. Dist. LEXIS 31541 (D.S.C., Mar. 7, 2013)*

Summary judgment granted by, Dismissed by, in part ***Kobe** v. **Haley**, 2013 U.S. Dist. LEXIS 113193 (D.S.C., Aug. 12, 2013)*

Motion to strike denied by, Summary judgment denied by, Without prejudice ***Kobe** v. **Haley**, 2013 U.S. Dist. LEXIS 113206 (D.S.C., Aug. 12, 2013)*

Summary judgment granted by, Summary judgment denied by, in part, Motion denied by, As moot ***Kobe** v. **Haley**, 2014 U.S. Dist. LEXIS 139172 (D.S.C., Sept. 30, 2014)*

Motion denied by, Request denied by, As moot ***Kobe** v. **Haley**, 2015 U.S. Dist. LEXIS 198274 (D.S.C., May 7, 2015)*

Affirmed in part and vacated in part by ***Kobe** v. **Haley**, 666 Fed. Appx. 281, 2016 U.S. App. LEXIS 22283, 2016 WL 7240174 (4th Cir. S.C., Dec. 15, 2016)*

Counsel: **[*1]** For ***Kobe***, Mark, John, Plaintiffs: Patricia L Harrison, LEAD ATTORNEY, Patricia Logan Harrison Law Office, Columbia, SC.

For Nikki ***Haley***, in her official capacity as Governor and Chairman of the South Carolina Budget and Control Board, Defendant: Vance J Bettis, LEAD ATTORNEY, Gignilliat Savitz and Bettis LLP, Columbia, SC; Shahin Vafai, Gignilliat Savitz and Bettis, Columbia, SC.

For Anthony Keck, in his capacity as the Director of the South Carolina Department of Health and Human Services, Defendant: Damon C Wlodarczyk, Nikole H Boland, Roy F Laney, Riley Pope and Laney, Columbia, SC.

For Beverly Buscemi, in her official capacity as Director of the South Carolina Department of Disabilities and Special Needs, Richard Huntress, in his capacity as Commissioner of the South Carolina Department of Disabilities and Special Needs, Kathi Lacy, in their capacities as employees of the South Carolina Department of Disabilities and Special Needs, Thomas P Waring, in their capacities as employees of the South Carolina Department of Disabilities and Special Needs, Jacob Chorey, in their capacities as employees of the South Carolina Department of Disabilities and Special Needs, Eugene A Laurent, former **[*2]** Interim Director of the South Carolina Department of Disabilities and Special Needs, Stanley Butkus, former Director of the South Carolina Department of Disabilities and Special Needs, Defendants: Kenneth Paul Woodington, LEAD ATTORNEY, Davidson Morrison and Lindemann, Columbia, SC; William Henry Davidson, II, Davidson and Lindemann, Columbia, SC.

For Mary Leitner, in her capacity as the Director of the Richland Lexington Disabilities and Special Needs Board, Defendant: Patrick John Frawley, LEAD ATTORNEY, Nicholson Davis Frawley Anderson and Ayer, Lexington, SC; Erica M Parker, Davis Frawley Anderson McCauley Ayer Fisher and Smith, Lexington, SC.

For Judy Johnson, in her capacity as the Director of the Babcock Center, Unnamed Actors Associated with the Babcock Center, Babcock Center, The, Defendants: Christian Stegmaier, LEAD ATTORNEY, Joel Wyman Collins, Jr, Collins and Lacy, Columbia, SC.

For Daniel Cooper, Converse Chellis, in their capacities as former members of the South Carolina Budget and Control Board, Defendants: Robin Lilley Jackson, Sandra Jane Senn, LEAD ATTORNEYS, Senn Legal, Charleston, SC.

For Hugh Leatherman, in their capacities as members of the South Carolina Budget **[*3]** and Control Board, Richard Eckstrom, in their capacities as members of the South Carolina Budget and Control Board, Defendants: Leslie Arlen Cotter, Jr, LEAD ATTORNEY, Richardson Plowden and Robinson, Columbia,

SC.

For Curtis Loftis, as members of the South Carolina Budget and Control Board, Brian White, as members of the South Carolina Budget and Control Board, Defendants: Shahin Vafai, LEAD ATTORNEY, Gignilliat Savitz and Bettis, Columbia, SC; Vance J Bettis, Gignilliat Savitz and Bettis LLP, Columbia, SC.

For Emma Forkner, in her capacity as the former Director of the South Carolina Department of Health and Human Services, Defendant: Damon C Wlodarczyk, LEAD ATTORNEY, Nikole H Boland, Roy F Laney, Riley Pope and Laney, Columbia, SC.

Judges: Timothy M. Cain, United States District Judge.

Opinion by: Timothy M. Cain

Opinion

ORDER

In their Amended Complaint, Plaintiffs seek actual and punitive damages, and declaratory and injunctive relief for violations of Title II of the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12132*; *Section 504* of the Rehabilitation Act of 1973 ("*Section 504*"); the Medicaid Act; [1] and *42 U.S.C. §§ 1983* and *1985*. (Dkt. # 65 - Am. Compl. at 3). [2] This matter is before the court on four **[*4]** separate motions to dismiss filed by Defendants Nikki ***Haley*** (Dkt. # 73), Curtis Loftis and Brian White (Dkt. # 99), Daniel Cooper (Dkt. # 123), and Converse Chellis (Dkt. # 125). Plaintiffs have filed responses opposing the motions and Defendants have filed replies. These motions are now ripe for ruling.

I. Background/Procedural History

Plaintiffs in this action are three individuals who have varying degrees of mental and/or physical disabilities. [3] Because of their disabilities, Plaintiffs receive Adult Day Health Care Services ("ADHC")

[1] Title XIX of the Social Security Act, *42 U.S.C. §§ 1396-1396v*, is known as the Medicaid Act.

[2] Plaintiffs numbered the paragraphs 1-45 on the first seven pages of the Amended Complaint and then on page eight started back at one. Also, in their prayer for relief, the paragraph numbers start over beginning with one on page seventy of the Amended Complaint. Therefore, to avoid confusion, the court has referred to the pages of the Amended Complaint, rather than the numbered paragraphs.

and other home and community based services. (Am. Compl. at 2). These services are provided to Plaintiffs through a Medicaid waiver program for persons with disabilities, the **[*5]** Mental Retardation/Related Disabilities ("MR/RD waiver"). *Id.* [4] The South Carolina Department of Health and Human Services ("SCDHHS") contracts with the South Carolina Department of Disabilities and Special Needs ("SCDDSN") to operate the MR/RD waiver program and SCDSSN contracts with local Disabilities and Special Needs ("DSN") Boards. [5] The local DSN Boards in turn contract with private entities to actually provide the ADHC services. The majority of SCDDSN's funding comes through SCDHHS from Medicaid.

Plaintiffs allege that SCDDSN, in violation of state and federal law, notified Plaintiffs of its termination or intent to terminate their ADHC services in an effort to force Plaintiffs to attend Work Activity Centers ("WAC") operated by local DSN Boards for the financial gain of SCDDSN and the local DSN Boards. Specifically, Plaintiffs allege that in 2009 after announcing reductions in MR/RD waiver services due to a budget deficit at SCDDSN, the South Carolina Budget and Control Board ("SCBCB") voted in September 2009 to transfer $2.8 million from a $7 million "reserve" account to **[*7]** "three agencies it treated as local DSN Boards" to purchase WACs in exchange for Defendant Eugene Laurent's agreement to transfer $3.2 from this fund for the SCBCB to spend on a statewide computer project. (Am. Compl. at 23). [6] Plaintiffs also allege the SCBCB voted to spend $7.8 million from the "excess funds" held by SCDSSN to purchase real estate knowing that on January 1, 2010, services would be reduced due to "false claims of 'budget deficits.'" (Am. Compl. at 24).

In addition to actual and punitive damages, Plaintiffs seek declaratory and injunctive relief finding Defendants have violated the ADA, *Section 504 of the Rehabilitation Act*, and the Medicaid Act, and prohibiting the Defendants from reducing ADHC services. (Am. Compl. at 70, 71). Further, Plaintiffs seek an order "requiring Defendants to provide such additional services as shall be medically necessary, as shall be determined by their treating physicians, so as to allow Plaintiff and Class Members to live in the most integrated settings possible in order to prevent regression and to allow them to function with the most independence possible." *Id.* Finally, Plaintiffs **[*8]** seek an "order requiring Defendants to provide Medicaid waiver services as shall be determined by the treating physicians to be necessary absent review . . . " as long as the cost of theses services is less than cost of the ICF/MR services. (Am. Compl. at 71).

II. Standard of Review[7]

---

[3] Plaintiffs state they are bringing this action as a class action pursuant to *Rule 23, Fed. R. Civ. P.* (Am. Compl. 2, 8-10). However, this action has not been declared a class action and, at this time, there has been no motion filed seeking to certify this action as such.

[4] The court notes that 2011 South Carolina Laws Act No. 47, § 13 (eff. June 7, 2011), amends various South Carolina code sections such that the terms "intellectual disability" and "person with intellectual disability" are to replace and have the same meanings as the former terms "mental retardation'" and "mentally retarded." However, federal laws and regulations still use the nomenclature "mental retardation." The court **[*6]** will use the MR/RD terminology which was in effect at the time this case was filed and is used by the parties in their pleadings and memoranda.

[5] The SCDDSN provides services to individuals with head and spinal cord injuries and those with developmental disabilities, such as mental retardation and autism. *S.C. Code Ann. § 44-21-10*. SCDDSN is led by a director appointed by the South Carolina Commission on Disabilities and Special Needs ("Commission"). *S.C. Code Ann. §§ 44-20-220* and *44-20-230*. The Commission is an advisory board consisting of seven members appointed by the Governor. *S.C. Code Ann. § 44-20-225*.

[6] At that time, Laurent was the Interim Director of the SCDDSN.

A motion made pursuant to *Rule 12(b)(1) of the Federal Rules of Civil Procedure* challenges the court's jurisdiction over the subject matter of the plaintiff's complaint. When the court's subject matter jurisdiction is challenged, the plaintiff bears the burden of proof. *Richmond, F. & P. R. Co. v. United States, 945 F.2d 765, 768 (4th Cir.1991)*. **[*9]** When ruling on a 12(b)(1) motion, the Court considers the pleadings, and it may also consider evidence outside of the pleadings without necessarily converting the motion to one for summary judgment. *Evans v. B.F. Perkins Co., a Div. of Standex Intern. Corp., 166 F.3d 642, 647 (4th Cir. 1999)* (*citing Richmond, F. & P. R. Co., 945 F.2d at 768*). The moving party will prevail as a matter of law if material jurisdictional issues are not in dispute. *Id.*

The purpose of a motion to dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* is to test the sufficiency of the Plaintiff's Complaint. *Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999)*. In evaluating a motion to dismiss under *Rule 12(b) (6)*, the "court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff . . . ." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009)* (citations omitted). The court, however, need not accept as true "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement." *Id.* The complaint must contain sufficient well-pled facts to "state **[*10]** a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. There must be "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (*citing Twombly, 550 U.S. at 555*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Twombly, 550 U.S. at 556*.

III. Discussion

In their Amended Complaint, Plaintiffs allege eight causes of action: 1) Violations of the ADA against Defendants who were members of the SCBCB in 2009 (Am. Compl. 45-50); 2) Violations of *Section 504* against individual Defendants Buscemi, Lacy, Waring, Huntress, Chorey, and Johnson (Am. Compl. 50-53); 3) Violations of *42 U.S.C. § 1983* against individual Defendants ***Haley***, Sanford, Cooper, Eckstrom, Chellis, Leatherman, Forkner, Keck, Butkus, Laurent, Buscemi, Lacy, Waring, Chorney, Huntress, Johnson, and Leitner (Am. Compl. 53-56); 4) Violations of *42 U.S.C. §§1983* and *1988* against all Defendants (Am. Compl. 56-62); [8] 5) Violations of *42 U.S.C. § 1983* (Conspiracy) against Defendants Buscemi, Forkner, **[*11]** Lacy, Waring, Chorey, and Johnson (Am. Compl. 62-64); 6) Violation of the *Supremacy Clause* against all Defendants (Am. Compl. 64); 7) Violation of RICO against Defendants ***Haley***, Sanford, Butkus, Laurent, Forkner, Lacy, Waring, Chorey, and Johnson (Am. Compl. 64-69); and 8) Neglect, Deliberate Indifference, Assault and Battery, and Intentional Infliction of Emotional Distress

---

[7] Defendants have filed these motions pursuant to *Rule 12(b)(1)* and *12(b)(6), Fed. R. Civ. P.* The Fourth Circuit has not resolved which of these rules applies to a motion to dismiss based on *Eleventh Amendment* immunity. *See Andrews v. Daw, 201 F.3d 521, 525 n. 2 (4th Cir. 2000)* (holding cases are unclear as to whether a dismissal on *Eleventh Amendment* immunity grounds is a dismissal for failure to state a claim under *Rule 12(b)(6)* or a dismissal for lack of subject matter jurisdiction under *Rule 12(b)(1)*). However, the court would reach the same conclusion under either rule.

[8] Under this cause of action, Plaintiffs also specifically allege Defendants Butkus, Forkner, Laurent, Buscemi, Lacy, Waring, Chorey, and Johnson "have acted with an evil motive or intent to deny services to Plaintiffs." (Am. Compl. at 61).

against Defendants Babcock Center, Johnson, and the agents and employees of the Babcock Center in regard to the care of only Plaintiff ***Kobe*** (Am. Compl. 69-70).

Reviewing the allegations of the Amended Complaint, only Defendants Curtis Loftis and Brian White are being sued solely in their official capacities. (Am. Compl. at 5). The remaining individual Defendants, Mark Sanford, Hugh Leatherman, Daniel Cooper, Richard Eckstrom, Converse Chellis, Anthony Keck, Emma Forkner, Beverly Buscemi, Stanley Butkus, Eugene Laurent, Richard Huntress, Kathi Lacy, Thomas P. Waring, Judy Johnson, **[*12]** Jacob Chorey, and Mary Leitner are specifically being sued in both their individual and official capacities. (Am. Compl. 5-8). [9] While there are no specific allegations in the Amended Complaint as to the capacity in which Defendant ***Haley*** is being sued, Plaintiffs state in their memorandum that Governor ***Haley*** is being sued only in her official capacity. (Dkt. # 81 - Pls.' Mem. Opp. Mot. to Dismiss at 4). The court will address each motion in turn.

1. Defendant *Haley*'s Motion to Dismiss[10]

As noted above, Defendant ***Haley*** is being sued solely in her official capacity as Governor of South Carolina and Chairman of the SCBCB. Governor ***Haley*** has filed a motion to dismiss on the ground that Plaintiffs' claims against her are barred by the *Eleventh Amendment*. Plaintiffs contend that Governor ***Haley*** is not entitled to *Eleventh Amendment* immunity because she has supervisory responsibility over DHHS and DDSN and she is responsible for the acts of former Governor Mark Sanford. (Dkt. # 81-Pls.' Mem. Opp. Mot. to Dismiss at 7). For the reasons discussed below, the court grants Governor ***Haley***'s Motion to Dismiss.

The *Eleventh Amendment* bars suits against a State in federal court. [11] Additionally, the *Eleventh Amendment* "does not permit judgments against state officers declaring that they violated federal law in the past." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993)*. **[*14]** However, *Eleventh Amendment* immunity is not absolute. *See* *Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990)*.

In *Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*, the Supreme Court recognized a narrow exception for claims brought against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief.

---

[9] The court notes that the caption of the Amended Complaint is somewhat misleading as it lists most of the Defendants as being sued in their capacities as members of the SCBCB. It does not state any of the Defendants are being sued in their individual capacities.

[10] The court notes Plaintiffs argue that the court should not dismiss Plaintiffs' claims pending a decision by the Supreme Court in *Douglas v. Independent Living Centers, U.S. , 132 S.Ct. 1204, 182 L.Ed.2d 101 (**2012**)*. (Dkt. # 81 - Pls.' Mem. Opp. Mot. to Dismiss at 19-20). That case was decided on February 22, ***2012***, and thus the request to postpone a resolution of the instant motion is now moot. Moreover, *Douglas* is wholly inapplicable. In **[*13]** *Douglas* the Supreme Court remanded the action to the Ninth Circuit to address whether a plaintiff may bring a *Supremacy Clause* challenge where the allegedly non-compliant state law has been approved by CMS. The action before this Court does not challenge a state statute, let alone one that has been approved by CMS.

[11] The *Eleventh Amendment* provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002). The *Ex parte Young* exception creates a fiction by allowing a person to enjoin future state action by suing a state official for prospective injunctive relief rather than the state itself. The *Ex parte Young* exception "applies only when there is an ongoing violation of federal law that can be cured by prospective relief. It does not apply when the alleged violation of federal law occurred entirely in the past." *Debauche v. Trani, 191 F.3d 499, 505 (4th Cir. 1999)*.

> *Ex* ***[*15]*** *parte Young* requires a "special relation" between the state officer sued and the challenged statute to avoid the *Eleventh Amendment's* bar. *Ex parte Young, 209 U.S. at 157, 28 S.Ct. 441*. "General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." *Children's Healthcare is a Legal Duty, Inc. v. Deters, 92 F.3d 1412, 1416 (6th Cir.1996)* (internal quotation marks omitted). Thus, "[t]he mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute." *Shell Oil Co. v. Noel, 608 F.2d 208, 211 (1st Cir.1979)*.

Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 331 (4th Cir. 2001). As long as the state official "has some connection with the enforcement of the act," that official is an "appropriate defendant." *Shell Oil v. Noel, 608 F.2d 208, 211 (1st Cir.1979)*. "It is a question of federal jurisdictional law whether the connection is sufficiently intimate to meet the requirements of *Ex parte Young*." *Id.*

Here, Governor ***Haley*** contends that the *Ex parte Young* exception does not apply for two **[*16]** reasons: (1) she has no connection with the challenged acts; and (2) Plaintiffs are seeking retrospective, not prospective, relief in their claims against her. Plaintiffs argue Governor ***Haley*** is liable due to her supervisory responsibility over the SCDHHS and SCDDSN and her enforcement authority as governor to appoint and remove the Director of DHHS and members of the SCDDSN Commission. Further, Plaintiffs contend that Governor ***Haley***'s name is on the SCDHHS letterhead, the SCDHSS is part of her cabinet, Governor ***Haley*** personally sought out and hired the SCDHHS's director, and Governor ***Haley*** has stated in the media that she is working closely with the director to provide as much healthcare for South Carolinians for as little as possible. (*Id.* at 12-13). Finally, Plaintiffs argue that Governor ***Haley*** joined thirty-one other governors in writing to the President for Medicaid reform which Plaintiffs contend calls for elimination of "'excessive constraints' which Congress enacted to protect Plaintiffs and providers in exchange for federal funding." (Dkt. # 81 - Pls.' Mem. at 13 and Ex. 16 and 17). [12]

While Defendant ***Haley*** as the Governor of South Carolina has the power to appoint and general supervisory authority, neither appointment power nor general supervisory power over persons responsible

---

[12] Plaintiffs also cite to numerous other cases in support of their argument that ***Haley*** is **[*17]** not entitled to *Eleventh Amendment* immunity, including *Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979)*, and *Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990)*. However, these cases are inapplicable here. In *Kimble*, in the context of *Eleventh Amendment* immunity, the court addressed whether the relief being sought was prospective or retrospective. In *Wilder*, the Supreme Court held only that state officials could be sued under *§ 1983* for violations of the Medicaid Act. *See Fla. Ass'n of Rehabilitation Facilities, Inc. v. State of Fla. Dept. of Health & Rehabilitative Servcs., 225 F.3d 1208, 1226 n. 13 (11th Cir. 2000)* (holding the Court in *Wilder* did not address any *Eleventh Amendment* issue and only addressed the question of whether the Boren Amendment is enforceable in an action by health care providers under *§ 1983*). Governor ***Haley*** is not disputing that there exists a private cause of action under *§ 1983* against state officials for violations of the Medicaid Act nor is she arguing that a governor cannot be sued for such violations for prospective relief. Rather, she contends that she does not have the requisite connections to the alleged actions in this case to apply the *Ex* ***[*18]*** *parte Young* exception to *Eleventh Amendment* immunity. (Def.'s Reply Mem. 4).

for enforcing a challenged provision will subject an official to suit. [13] *Waste Mgmt. Holdings, 252 F.3d at 331* (holding an official's general authority to enforce the laws of a state is not sufficient to make a government official a proper party in an action challenging a law). *See also Kuck v. Danaher, 822 F. Supp. 2d 109 (D. Conn. 2011)*(citing *Kelly v. Burks, 414 F.Supp.2d 681, 686 (E.D. Ky. 2006)*; *D.G. ex rel. Stricklin v. Henry, 591 F. Supp. 2d 1186, 1189 (N.D. Okla. 2008)* (holding despite governor's power to make appointments to the entity that acted unconstitutionally, the governor is not responsible for actually administering the foster case system); *LensCrafters, Inc. v. Sundquist, 184 F. Supp. 2d 753, 757-59 (M.D.Tenn. 2002)* (finding *Eleventh Amendment* bars suit against governor when only nexus between governor and challenged action by board was governor's power to make appointments to board); *Sweat v. Hull, 200 F. Supp. 2d 1162, 1175-76 (D. Ariz. 2001)* **[*19]** (dismissing claim against Governor who signed allegedly unconstitutional bill into law and appointed the cabinet official responsible for enforcing that law).

Furthermore, the remaining factors which Plaintiffs contend provide a nexus are also insufficient. A governor's name on the letterhead of an agency is really nothing more than a formality or acknowledgment of the structure of the state's government. Furthermore, Governor ***Haley***'s general policies or opinions on budgetary or political matters also do not provide a sufficient nexus. *Waste Mgmt. Holdings, 252 F.3d at 331* ("The fact that [governor] has publicly endorsed and defended the challenged statutes does not alter our analysis.").

Plaintiffs also contend Governor ***Haley*** is responsible for "the **[*20]** personal acts of [former] Governor Sanford" in an alleged conspiracy to terminate Plaintiffs' ADHC in order to benefit a Lexington County corporation. (Pls.' Mem. Opp. Mot to Dismiss at 3, 4). Plaintiffs allege that former Governor Sanford as chairman of the SCBCB was involved in a scheme to divert funds from an excess fund account to purchase three workshops which caused the State to lose more that $10 million in matching Medicaid funds. (Dkt. # 81- Pls.' Mem. Opp. Motion to Dismiss at 7). [14]

The United States Supreme Court has established that the *Ex parte Young* exception only applies to prospective injunctive relief. *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993)*. Retrospective relief, on the other hand, is barred by the *Eleventh Amendment*. *Green v. Mansour, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985)*. Likewise, a declaratory judgment against state officials declaring that **[*21]** they violated federal law in the past constitutes retrospective relief, and is barred by the *Eleventh Amendment*. *Id. at 67*. Governor ***Haley*** is entitled to *Eleventh Amendment* immunity for Plaintiffs' claims based upon former Governor's Sanford's prior acts for which Plaintiffs are seeking only retrospective relief.

Moreover, as a practical matter, to impose a prospective injunction on Governor ***Haley*** to cure any alleged Medicaid violations would have no effect. The hearing and notice requirements set forth in 42 C.F.R. §

---

[13] Plaintiffs cite to several cases discussing when supervisory liability may be imposed for constitutional injuries: *Shaw v. Stroud, 13 F.3d 791 (4th Cir. 1994)*, and *Slakan v. Porter, 737 F.2d 368 (4th Cir. 1984)*. (Pls.' Mem. at 8). These cases and others discussing supervisory liability in the context of a *§ 1983* action are simply not applicable to the specific issue raised in this motion to dismiss based upon *Eleventh Amendment* immunity.

[14] The *Ex Parte Young* exception does not apply to actions against state officials seeking to compel compliance with state law. *Antrican v. Odom, 290 F.3d 178 (4th Cir. 002)*. Accordingly, if Plaintiffs are seeking a declaration that Defendants violated any state law, they are unable to do so.

431 are placed upon the state Medicaid agency and not the governor. Each state's Medicaid plan must specify a single state agency designated to administer the Medicaid plan, and this agency cannot delegate its authority to exercise discretion in the administration or supervision of the plan. *42 C.F.R. § 431.10(a)* and *(e)*. In South Carolina, the South Carolina Department of Health and Human Services ("SCDHHS") is the state agency designated to administer and supervise the Medicaid plan. *S.C. Code Ann. § 44-6-30(1)*. Further, while *42 C.F.R. § 430.12* provides the governor is to review and comment on a state's Medicaid plan, this does not create any enforcement rights in the **[*22]** governor and as Plaintiffs allege in their Amended Complaint, "SCDDSN is responsible, under contract with SCDHHS, for the day-to-day operations of the Medicaid waiver programs in the State . . . " (Am. Compl. at 5-6). Accordingly, Defendant ***Haley***'s Motion to Dismiss is granted and she is dismissed from this action. [15]

2. Defendants Loftis and White's Motion to Dismiss

Similarly, to Defendant ***Haley***, in their Motion to Dismiss, Defendants Loftis and White contend, inter alia, that as members of the SCBCB, they have no special relation to the acts challenged by Plaintiffs and therefore they are entitled to *Eleventh Amendment* immunity. (Dkt. # 99). Plaintiffs name these two Defendants as successors of former SCBCB members Defendants Converse Chellis and Daniel Cooper. (Am. Compl. at 5).

As noted above, in Count One, Plaintiffs allege Defendants who were members of the SCBCB violated the ADA by failing to insure that SCDDSN funds were spent appropriately for services provided to Plaintiffs. **[*23]** (Am. Compl. at 46). In Count Two, Plaintiffs allege these Defendants have violated *Section 504* by failing to insure that the funds allocated to the SCDDSN were spent appropriately. (Am. Compl. at 51). In Counts Three and Four, Plaintiffs allege claims pursuant to *42 U.S.C. § 1983* for violations of the ADA, Medicaid, and the *Section 504* for diverting funds from SCDDSN. (Am. Compl. at 56-57). [16] Plaintiffs' claims against these two individual Defendants revolve around the SCBCB's vote in 2009 to allow SCDSSN to purchase real estate with funds from an excess account. It is undisputed that Defendants Loftis and White were not members of the SCBCB when these alleged acts occurred and are being sued only in their official capacities as successors to the former SCBCB members.

As noted above, the *Ex parte Young* exception only applies to prospective injunctive relief and a declaratory judgment against state officials declaring that they violated federal law in the past **[*24]** constitutes retrospective relief, and is barred by the *Eleventh Amendment*. Defendants Loftis and White are entitled to *Eleventh Amendment* immunity for Plaintiffs' claims based upon the actions of former members of SCBCB for which Plaintiffs are seeking only retrospective relief. Furthermore, as for any prospective relief, as discussed in regard to Governor ***Haley***, these Defendants as members of the SCBCB do not have any control or enforcement rights over any agency regarding the Plaintiffs' ADHC or other Medicaid services. Therefore, to impose a prospective injunction on these two Defendants would have no effect whatsoever. Accordingly, Defendants Loftis and White's Motion to Dismiss is granted and these Defendants are dismissed from this action.

---

[15] Because the court concludes that Governor ***Haley*** is entitled to *Eleventh Amendment* immunity and should be dismissed, the court declines to address the other grounds Defendant ***Haley*** raises for dismissal.

[16] The court notes that in Count Three while Plaintiffs list various individual Defendants and make allegations against them, none of the allegations in Count Three specifically refer to these two Defendants. (Am. Compl. at 53-56).

3. Defendant Cooper's Motion to Dismiss

As noted above, Defendant Cooper is sued in both his individual and official capacities. Plaintiffs' claims against Defendant Cooper involve allegations regarding his past conduct when he was a member of the SCBCB. In his motion to dismiss, Defendant Cooper contends, inter alai, that he is entitled to legislative and *Eleventh Amendment* immunity. Plaintiffs contend that they are not suing Cooper in his legislative **[*25]** capacity. Plaintiffs also contend that because the unauthorized actions of the individual SCBCB members were not within the sphere of legitimate legislative activities, Cooper is not entitled to legislative immunity. (Pls.' Mem. Opp. Mot. to Dismiss 2, 7). Plaintiffs specifically state that "[a]ll of the relief requested by the Plaintiffs as to Defendant Cooper is prospective" (Dkt. # 124 - Pls.' Mem. Opp. Mot. to Dismiss at 12),

As to Plaintiffs' claims against Cooper in his official capacity, the *Eleventh Amendment* bars these claims. As stated above, the *Ex parte Young* exception to *Eleventh Amendment* immunity only applies to prospective injunctive relief. Plaintiffs would not be able to obtain any prospective injunctive relief from Defendant Cooper in his official capacity as he is no longer a member of the SCBCB and would have no authority to provide such relief. *Kuck, 822 F.Supp.2d 109, 148*. [17] Furthermore, Plaintiffs also cannot obtain prospective injunctive relief from Cooper in his individual capacity as he would not have the authority to provide such relief in his individual capacity. *See DeLoreto v. Ment, 944 F.Supp. 1023, 1031 (D.Conn.1996)* (finding that "injunctive relief **[*26]** of reinstatement could only be awarded against Defendants in their official capacities. Clearly, in their individual capacities they have no authority to reinstate Plaintiffs."); *see also Smith v. Plati, 56 F.Supp.2d 1195, 1203 (D.Colo.1999)* (dismissing claims against state official in his individual capacity because the relief plaintiff requested could only be obtained against the defendant in his official capacity). All of Plaintiffs' claims against Cooper should be dismissed as Cooper would have absolutely no role to play in regard to providing Plaintiffs with any prospective injunctive relief. [18] Accordingly, Cooper's motion to dismiss is granted.

As an additional ground for dismissal, the court finds Cooper is entitled to legislative immunity for all of Plaintiffs' claims against him in his individual capacity. In *Bogan v. Scott-Harris, 523 U.S. 44, 53-54, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998)*, the Supreme Court held that city council members were entitled to absolute immunity from *§ 1983* liability for "actions taken in the sphere of legitimate legislative activity." The Court found that the council's action in eliminating certain services was legislative in substance because their action "reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents." *Id. at 55-56*. This absolute legislative immunity does not apply only to legislators. *Id. at 55*. The Supreme Court acknowledged that executive branch officials are entitled to legislative immunity when they perform legislative functions such as making discretionary policy decisions that implicate budgetary priorities and the provision of public services. *Id. at 55-56*. [19] "Whether an act is legislative turns on the **[*28]** nature of the act, rather than on

---

[17] Moreover, as discussed herein, a current member of the SCBCB would not have any control or enforcement rights over any agency regarding the Plaintiffs' ADHC or other Medicaid services.

[18] Additionally, as to allegations regarding members of the SCBCB, Plaintiffs do not allege ongoing violations of the law, a failure which is fatal to their request for injunctive relief. *See Merryfield v. Jordan, 431 Fed. Appx. 743, 746 (10th Cir. 2011)* (noting that a plaintiff may seek prospective injunctive relieve against state officials in federal court **[*27]** only when he alleges ongoing violations of federal law, and not where he merely alleges prior violations).

the motive or intent of the official performing it." *Bogan, 523 U.S. at 54*. Legislative immunity only extends to defendants sued in their individual capacities. *Doe v. Pittsylvania County, Va., 842 F.Supp.2d 906 (W.D.Va. **2012**)*.

Recently, the Fourth Circuit Court of Appeals addressed legislative immunity in *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cty., 684 F.3d 462, 470 (4th Cir. **2012**)*. In *Kennsington*, local volunteer fire and rescue departments and several former administrative employees sued the county, county council, and county officials contending that funding for the administrative personnel in the departments was eliminated in retaliation for the departments' opposition to legislation which would have enacted an ambulance fee. The Fourth Circuit Court of Appeals noted that legislative acts are ones which generally bear the marks of public decisionmaking by observing formal legislative procedures. The court held that, despite allegations **[*29]** of an improper retaliatory motive, the county officials were entitled to legislative immunity for enacting a facially valid budget which eliminated the funding for the administrative support positions. *Id.* Further, the court emphasized that while the county reduced the departments' budgets, it was the departments which decided how to address the shortfall and terminated the individual administrative personnel. *Id. at 469, 472*.

Here, the acts of the SCBCB are "ones which generally bear the marks of public decisionmaking by observing formal legislative procedures." The SCBCB had the authority to take the action which it did [20] and reviewing the minutes of the SCBCB meeting, the process appears facially to have been proper. [21] The minutes from the meeting show that proper notice was provided of the meeting pursuant to *S.C. Code Ann. § 30-4-80*, the meeting was an open meeting, and the funds were expended pursuant to *S.C. Code Ann. § 44-20-1170* with the approval of the DSSN Board. [22] Further, it was the DSSN Boards which have reduced or attempted to reduce the services provided to Plaintiffs. Based on the foregoing, the court concludes that, Defendant Cooper is entitled to legislative immunity. **[*30]** Here, voting to approve SCDDSN's purchase of real estate with excess debt service funds was clearly a facially valid legislative

---

[19] Legislative immunity applies to claims for declaratory and injunctive relief, as well as claims for damages. *Supreme Court of Virginia v. Consumers Union of the U.S., Inc., 446 U.S. 719, 732-33, 100 S. Ct. 1967, 64 L. Ed. 2d 641 (1980)*.

[20] Plaintiffs themselves allege in their complaint that the SCBCB is responsible for "purchasing, personnel and real property transactions involving state and federal funds." (Am. Compl. at 4).

[21] Typically on a motion to dismiss, a court cannot consider documents that are not expressly incorporated into the complaint, but there are exceptions for "official public records, documents central to plaintiff's claim, and documents sufficiently referred to in the complaint so long as the authenticity of these documents is not disputed." *See Witthohn v. Fed. Ins. Co., 164 Fed. Appx. 395, 396, 2006 WL 228621, at *1 (4th Cir. 2006)* (unpublished). Here, the court considers the minutes of the SCBCB meeting as it is central to plaintiffs' claims. Furthermore, both Plaintiffs and one of the Defendants have attached the minutes as an exhibit to their memoranda (Dkt. # 81- Pls.' Mem. Opp. Mot. to Dismiss Ex. 8; 126 - Def. Cooper's Reply Mem. **[*31]** Ex. A) and its authenticity has not been questioned.

[22] *Section 44-20-1170 (B)* provides:

> If the accumulation of revenues of the commission in the special fund exceeds the payment due or to become due during the then current fiscal year and an additional sum equal to the maximum annual debt service requirement of the obligations for a succeeding fiscal year, the State Budget and Control Board may permit the commission to withdraw the excess and apply it to improvements that have received the approval of the board or to transfer the excess out of the special fund for contract awards to local disabilities and special needs boards for needed improvements at the local level and for nonrecurring prevention, assistive technology, and quality initiatives at the regional centers and local boards.

action. Accordingly, based on the foregoing, Defendant Cooper's Motion to Dismiss is granted and he is dismissed from this action. [23]

4. Defendant Chellis' Motion to Dismiss

As stated above, Defendant Chellis is being sued in both his individual and official capacities. Plaintiffs state that they are suing Chellis for only prospective **[*32]** relief and attorney's fees. (Dkt. # 127 - Pls.' Mem. Opp. Mot. to Dismiss at 4). [24] In his Motion to Dismiss, Defendant Chellis, a former South Carolina State Treasurer and former member of the SCBCB, contends, inter alia, that Plaintiffs' claims against him are barred by legislative and *Eleventh Amendment* immunity. For the same reasons as Defendant Cooper, the court finds that Defendant Chellis is entitled to legislative and *Eleventh Amendment* immunity and likewise the court notes that even if it could award Plaintiffs prospective injunctive relief against this Defendant, such injunctive relief would be ineffective. Defendant Chellis is not involved in any ongoing constitutional deprivations and could not provide Plaintiffs, should they prevail, with the prospective injunctive relief they seek. The undisputed fact is that, as a former SCBCB member, he would have absolutely no role to play in regard to providing Plaintiffs with any prospective relief. Accordingly, Defendant Chellis' Motion to Dismiss is granted and he is dismissed from this action. [25]

IV. Conclusion

Based on the foregoing, Defendants' Motions to Dismiss (Dkt. # 75, 99, 123, and 125) are **GRANTED** and Defendants ***Haley***, Loftis, White, Cooper, and Chellis are dismissed from this action.

IT IS SO ORDERED.

/s/ Timothy M. Cain

United States District Judge

Greenville, South Carolina

August 10, ***2012***

End of Document

---

[23] Because the court concludes that Defendant Cooper is entitled to legislative and *Eleventh Amendment* immunity and should be dismissed, the court declines to address the other grounds he raises for dismissal.

[24] Plaintiffs in their response, citing to their response to Defendant Loftis and White's Motion to Dismiss, state that they alleged that **[*33]** "Chellis failed to assure that appropriations of money and the application thereof appeared on the Treasury books." (Dkt. # 127 - Pls.' Mem. Opp. Mot. to Dismiss at 3). While Plaintiffs may have raised this allegation in their memorandum, they did not make any such allegations in their Amended Complaint. In fact, in their Amended Complaint, Plaintiffs allege only that they are suing Chellis for actions taken as a member of the SCBCB. (Am. Compl. 5, 23-24, 46,). While Chellis was a member of the SCBCB because he was the State Treasurer, there are no separate allegations regarding Chellis and his duties as State Treasurer.

[25] Because the court concludes that Defendant Chellis is entitled to legislative and *Eleventh Amendment* immunity and should be dismissed, the court declines to address the other grounds he raises for dismissal.

APPENDIX H

Kobe v. Buscemi

United States Court of Appeals for the Fourth Circuit

August 10, 2020, Filed

No. 18-2505

Reporter
2020 U.S. App. LEXIS 25276 *

KOBE, Plaintiff - Appellant; MARK, JOHN, Plaintiffs v. BEVERLY ***BUSCEMI***, in her official capacity as Director of the South Carolina Department of Disabilities and Special Needs; KATHI LACY, in her capacities as employee of the South Carolina Department of Disabilities and Special Needs; THOMAS P. WARING, in his capacity as employee of the South Carolina Department of Disabilities and Special Needs; JACOB CHOREY, in his capacity as employee of the South Carolina Department of Disabilities and Special Needs; MARY LEITNER, in her capacity as the Director of the Richland Lexington Disabilities and Special Needs Board; JUDY JOHNSON, in her capacity as the Director of the Babcock Center; THE BABCOCK CENTER; ANTHONY KECK, in his capacity as the former Director of the South Carolina Department of Health and Human Services; EMMA FORKNER, in her capacity as the former Director of the South Carolina Department of Health and Human Services; JOSHUA BAKER, in his capacity as the Director of the South Carolina Department of Health and Human Services; EUGENE A. LAURENT, former Interim Director of the South Carolina Department of Disabilities and Special Needs; STANLEY BUTKUS, former Director of the South Carolina Department of Disabilities and Special Needs; RICHARD HUNTRESS, in his capacity as Commissioner of the South Carolina Department of Disabilities and Special Needs, Defendants - Appellees and CYNTHIA MANN, Deputy Administrator and Director of the Center for Medicaid, CHIP, and Survey & Certification, CMS; NIKKI HALEY, in her official capacity as Governor and Chairman of the South Carolina Budget and Control Board; ELEANOR KITZMAN, in her official capacity as the Executive Director of the State Budget and Control Board; GLENN F. MCCONNELL, in his official capacity as the President Pro Tempore of the South Carolina Senate; ROBERT W. HARRELL, JR., in his official capacity as the Speaker of the South Carolina House of Representatives; DANIEL COOPER; CONVERSE CHELLIS, in his capacity as former member of the South Carolina Budget and Control Board; MARK SANFORD, in his capacity as former members of the South Carolina Budget and Control Board; HUGH LEATHERMAN, in his capacity as members of the South Carolina Budget and Control Board; RICHARD ECKSTROM, in his capacity as members of the South Carolina Budget and Control Board; CURTIS LOFTIS, as member of the South Carolina Budget and Control Board; BRIAN WHITE, as member of the South Carolina Budget and Control Board; HENRY MCMASTER, in his official capacity as Governor and Chairman of the South Carolina Budget and Control Board; UNNAMED ACTORS ASSOCIATED WITH THE BABCOCK CENTER, Defendants

Prior History: [*1] 3:11-cv-01146-MBS.

Kobe *v.* ***Buscemi****, 2020 U.S. App. LEXIS 21627 (4th Cir. S.C., July 13, 2020)*

Counsel: For ***Kobe***, Plaintiff - Appellant: Patricia L. Harrison, Patricia Logan Harrison Attorney at Law, Cleveland, SC.

For BEVERLY ***BUSCEMI***, in her official capacity as Director of the South Carolina Department of Disabilities and Special Needs, KATHI LACY, in her capacities as employees of the South Carolina Department of Disabilities and Special Needs, THOMAS P. WARING, in their capacities as employees of the South Carolina Department of Disabilities and Special Needs, JACOB CHOREY, in his capacity as employee of the South Carolina Department of Disabilities and Special Needs, EUGENE A. LAURENT, former Interim Director of the South Carolina Department of Disabilities and Special Needs, STANLEY BUTKUS, former Director of the South Carolina Department of Disabilities and Special Needs, RICHARD HUNTRESS, in his capacity as Commissioner of the South Carolina Department of Disabilities and Special Needs, Defendant - Appellee: William Henry Davidson II, Kenneth Paul Woodington, Davidson, Wren & Plyler, PA, Columbia, SC.

For MARY LEITNER, in her capacity as the Director of the Richland Lexington Disabilities and Special Needs Board, Defendant - Appellee: Patrick John Frawley, Kenneth **[*2]** Paul Woodington, Davis Frawley, Llc, Lexington, SC.

For JUDY JOHNSON, in her capacity as the Director of the Babcock Center, Babcock Center, Defendant - Appellee: Joel Wyman Collins Jr., Meghan Hazelwood Hall, Esq., Christian Stegmaier, Esq., Collins & Lacy, PC, Columbia, SC.

For ANTHONY KECK, in his capacity as the former Director of the South Carolina Department of Health and Human Services, EMMA FORKNER, in her capacity as the former Director of the South Carolina Department of Health and Human Services, JOSHUA BAKER, in his capacity as the Director of the South Carolina Department of Health and Human Services, Defendant - Appellee: Damon C. Wlodarczyk, Esq., Riley, Pope & Laney, Llc, Columbia, SC.

For Unnamed Actors Associated With The Babcock Center, Defendant: Joel Wyman Collins Jr., Meghan Hazelwood Hall, Esq., Collins & Lacy, PC, Columbia, SC.

Opinion

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under *Fed. R. App. P. 35* on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Diaz, Judge Thacker, and Senior Judge Traxler.

For the Court

End of Document

APPENDIX I

APPENDIX I

CONSTITUTION, STATUTES AND REGULATIONS

United States Constitution Fourteenth Amendment

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code of Laws

Rehabilitation Act

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 USCS § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to

such committees.

29 U.S.C. § 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5 (f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 501 of this Act [29 USCS § 791], to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 USCS § 794].

(b) In any action or proceeding to enforce or charge a violation of a provision of this title [29 USCS §§ 790 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Medicaid Act

42 U.S.C. 1396a(a)

(a) Contents. A State plan for medical assistance must—

(1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;...

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

(5) either provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan; or provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan...

(8) provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals;

(19) provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients;...

42 U.S.C. 1396n(c)

Waiver respecting medical assistance requirement in State plan; scope, etc.; "habilitation services" defined; imposition of certain regulatory limits prohibited; computation of expenditures for certain disabled patients; coordinated services; substitution of participants.

(1) The Secretary may by waiver provide that a State plan approved under this title [42 USCS §§ 1396 et seq.] may include as "medical assistance" under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the

Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan. For purposes of this subsection, the term "room and board" shall not include an amount established under a method determined by the State to reflect the portion of costs of rent and food attributable to an unrelated personal caregiver who is residing in the same household with an individual who, but for the assistance of such caregiver, would require admission to a hospital, nursing facility, or intermediate care facility for the mentally retarded.

(2) A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that—

(A) necessary safeguards (including adequate standards for provider participation) have been taken to protect the health and welfare of individuals provided services under the waiver and to assure financial accountability for funds expended with respect to such services;

42 U.S.C. 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial

capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable...

42 U.S.C. 1985(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws;... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Americans with Disabilities Act

42 U.S.C. § 12101. Findings and purpose

(a) Findings. The Congress finds that—

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and,

despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions

of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this Act—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12102. Definition of disability

As used in this Act:

(1) Disability. The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities.

(A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating,

and working.

(B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment. For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability. The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active....

(2) State. The term “State” means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

42 U.S.C. § 12131. Definition

As used in this title:

(1) Public entity. The term “public entity” means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act [49 USCS § 24102(4)].

(2) Qualified individual with a disability. The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132. Discrimination

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12133. Enforcement

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 USCS § 12132].

42 U.S.C. § 12134. Regulations

(a) In general. Not later than 1 year after the date of enactment of this Act [enacted July 26, 1990], the Attorney General shall promulgate regulations in an accessible format that implement this subtitle. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 223, 229, or 244 [42 USCS § 12143, 12149, or 12164].

(b) Relationship to other regulations. Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) shall be consistent with this Act and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 504.

(c) Standards. Regulations under subsection (a) shall include standards applicable to facilities and vehicles covered by this subtitle, other than facilities, stations, rail passenger cars, and vehicles covered by subtitle B. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504(a) of this Act [42 USCS § 12204(a)].

Federal Regulations

Americans with Disabilities Act

28 C.F.R. § 35.130 General prohibitions against discrimination

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)

(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability —

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections —

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7)

(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(ii) A public entity is not required to provide a reasonable modification to an individual who meets the definition of "disability" solely under the "regarded as" prong of the definition of "disability" at § 35.108(a)(1)(iii).

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated

setting appropriate to the needs of qualified individuals with disabilities.

(e)

(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

(i) Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted a reasonable modification that was denied to an individual without a disability.

Medicaid Act Regulations

42 C.F.R. § 431.10 Single State agency

(a) Basis, purpose, and definitions.

(1) This section implements section 1902(a)(4) and (5) of the Act.

(2) For purposes of this part—

Appeals decision means a decision made by a hearing officer adjudicating a fair hearing under subpart E of this part....

Medicaid agency is the single State agency for the Medicaid program.

(b) Designation and certification. A State plan must—

(1) Specify a single State agency established or designated to administer or supervise the administration of the plan; and

(2) Include a certification by the State Attorney General, citing the legal authority for the single State agency to—

(i) Administer or supervise the administration of the plan; and

(ii) Make rules and regulations that it follows in administering the plan or that are binding upon local agencies that administer the plan.

(3) The single State agency is responsible for determining eligibility for all individuals applying for or receiving benefits in accordance with regulations in part 435 of this chapter and for fair hearings filed in accordance with subpart E of this part.

(c) Delegations. (1) Subject to the requirement in paragraph (c)(2) of this section, the Medicaid agency—

(i)(A) May, in the approved state plan, delegate authority to determine eligibility for all or a

defined subset of individuals to—

(1) The single State agency for the financial assistance program under title IV-A (in the 50 States or the District of Columbia), or under title I or XVI (AABD), in Guam, Puerto Rico, or the Virgin Islands;

(2) The Federal agency administering the supplemental security income program under title XVI of the Act; or ...

(2) The Medicaid agency may delegate authority to make eligibility determinations or to conduct fair hearings under this section only to a government agency which maintains personnel standards on a merit basis.

(3) The Medicaid agency—

(i) Must ensure that any agency to which eligibility determinations or appeals decisions are delegated—

(A) Complies with all relevant Federal and State law, regulations and policies, including, but not limited to, those related to the eligibility criteria applied by the agency under part 435 of this chapter; prohibitions against conflicts of interest and improper incentives; and safeguarding confidentiality, including regulations set forth at subpart F of this part.

(B) Informs applicants and beneficiaries how they can directly contact and obtain information from the agency; and

(ii) Must exercise appropriate oversight over the eligibility determinations and appeals decisions made by such agencies to ensure compliance with paragraphs (c)(2) and (c)(3)(i) of this section and institute corrective action as needed, including, but not limited to, rescission of the authority delegated under this section....

(d) Agreement with Federal, State or local entities making eligibility determinations or appeals decisions. The plan must provide for written agreements between the Medicaid agency and the Exchange or any other State or local agency that has been delegated authority under paragraph (c)(1)(i) of this section to determine Medicaid eligibility and for written agreements between the agency and the Exchange or Exchange appeals entity that has been delegated authority to conduct Medicaid fair hearings under paragraph (c)(1)(ii) of this section. Such agreements must be available to the Secretary upon request and must include provisions for:

(1) The relationships and respective responsibilities of the parties, including but not limited to the respective responsibilities to effectuate the fair hearing rules in subpart E of this part;

(2) Quality control and oversight by the Medicaid agency, including any reporting requirements needed to facilitate such control and oversight;

(3) Assurances that the entity to which authority to determine eligibility or conduct fair hearings will comply with the provisions set forth in paragraph (c)(3) of this section.

(4) For appeals, procedures to ensure that individuals have notice and a full opportunity to have their fair hearing conducted by either the Exchange or Exchange appeals entity or the Medicaid agency.

(e) Authority of the single State agency. The Medicaid agency may not delegate, to other than its own officials, the authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters.

42 C.F.R. § 431.205 Provision of hearing system

(a) The Medicaid agency must be responsible for maintaining a hearing system that meets the requirements of this subpart.

(b) The State's hearing system must provide for -

(1) A hearing before -

(i) The Medicaid agency; or

(ii) For the denial of eligibility for individuals whose income eligibility is determined based on the applicable modified adjusted gross income standard described in§ 435.911(c) of this chapter, the Exchange or Exchange appeals entity to which authority to conduct fair hearings has been delegated under § 431.10(c)(1)(ii), provided that individuals who have requested a fair hearing are given the choice to have their fair hearing conducted instead by the Medicaid agency; at state option the Exchange or Exchange appeals entity decision may be subject to review by the Medicaid agency in accordance with § 431.10(c)(3)(iii); or

(2) An evidentiary hearing at the local level, with a right of appeal to the Medicaid agency.

(c) The agency may offer local hearings in some political subdivisions and not in others.

(d) The hearing system must meet the due process standards set forth in Goldberg v. Kelly, 397 U.S. 254 (1970), and any additional standards specified in this subpart.

(e) The hearing system must be accessible to persons who are limited English proficient and persons who have disabilities, consistent with § 435.905(b) of this chapter.

(f) The hearing system must comply with the United States Constitution, the Social Security Act, title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Age Discrimination Act of 1975, and section 1557 of the Affordable Care Act and implementing regulations.

§ 431.206 Informing applicants and beneficiaries

(a) The agency must issue and publicize its hearing procedures.

(b) The agency must, at the time specified in paragraph (c) of this section, inform every applicant or beneficiary in writing -

(1) Of his or her right to a fair hearing and right to request an expedited fair hearing;

(2) Of the method by which he may obtain a hearing;

(3) That he may represent himself or use legal counsel, a relative, a friend, or other spokesman; and

(4) Of the time frames in which the agency must take final administrative action, in accordance with § 431.244(f).

(c) The agency must provide the information required in paragraph (b) of this section -

(1) At the time that the individual applies for Medicaid;

(2) At the time the agency denies an individual's claim for eligibility, benefits or services; or denies a request for exemption from mandatory enrollment in an Alternative Benefit Plan; or takes other action, as defined at § 431.201; or whenever a hearing is otherwise required in accordance with § 431.220(a);

§ 431.210 Content of notice

A notice required under § 431.206 (c)(2), (c)(3), or (c)(4) of this subpart must contain -

(a) A statement of what action the agency, skilled nursing facility, or nursing facility intends to take and the effective date of such action;

(b) A clear statement of the specific reasons supporting the intended action;

(c) The specific regulations that support, or the change in Federal or State law that requires, the action;

(d) An explanation of -

(1) The individual's right to request a local evidentiary hearing if one is available, or a State agency hearing; or

(2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and

(e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

42 C.F.R. § 431.220 When a hearing is required

(a) The State agency must grant an opportunity for a hearing to the following:

(1) Any individual who requests it because he or she believes the agency has taken an action erroneously, denied his or her claim for eligibility or for covered benefits or services, or issued a determination of an individual's liability, or has not acted upon the claim with reasonable promptness including, if applicable -

(i) An initial or subsequent decision regarding eligibility;

(ii) A determination of the amount of medical expenses that an individual must incur in order to establish eligibility in accordance with § 435.121(e)(4) or § 435.831 of this chapter; or

(iii) A determination of the amount of premiums and cost sharing charges under subpart A of part 447 of this chapter;

(iv) A change in the amount or type of benefits or services; or

42 C.F.R. § 431.244 Hearing decisions

(a) Hearing recommendations or decisions must be based exclusively on evidence introduced at the hearing....

(f) The agency must take final administrative action as follows:

(1) Ordinarily, within 90 days from:

(i) The date the enrollee filed an MCO, PIHP, or PAHP appeal, not including the number of days the enrollee took to subsequently file for a State fair hearing; or

(ii) For all other fair hearings, the date the agency receives a request for a fair hearing in accordance with § 431.221(a)(1).

(2) As expeditiously as the enrollee's health condition requires, but no later than 3 working days after the agency receives, from the MCO, PIHP, or PAHP, the case file and information for any appeal of a denial of a service that, as indicated by the MCO, PIHP, or PAHP—

(i) Meets the criteria for expedited resolution as set forth in 438.410(a) of this chapter, but was not resolved within the timeframe for expedited resolution; or

(ii) Was resolved within the timeframe for expedited resolution, but reached a decision wholly or partially adverse to the enrollee.

(3) In the case of individuals granted an expedited fair hearing in accordance with § 431.224(a)—

(i) For a claim related to eligibility described in § 431.220(a)(1), or any claim described in § 431.220(a)(2) (relating to a nursing facility) or § 431.220(a)(3) (related to preadmission and annual resident review), as expeditiously as possible and, effective no later than the date described in § 435.1200(i) of this chapter, no later than 7 working days after the agency receives a request for expedited fair hearing; or

(ii) For a claim related to services or benefits described in § 431.220(a)(1) as expeditiously as possible and, effective no later than the date described in § 435.1200(i) of this chapter, within the time frame in paragraph (f)(2) of this section.

(iii) For a claim related to services or benefits described in § 431.220(a)(4), (5) or (6), in accordance with the time frame in paragraph (f)(2) of this section.

(4)

(i) The agency must take final administrative action on a fair hearing request within the time limits set forth in this paragraph except in unusual circumstances when—

(A) The agency cannot reach a decision because the appellant requests a delay or fails to take a required action; or

(B) There is an administrative or other emergency beyond the agency's control.

(ii) The agency must document the reasons for any delay in the appellant's record.

(g) The public must have access to all agency hearing decisions, subject to the requirements of subpart F of this part for safeguarding of information.

42 C.F.R. § 440.169 Case management services

(a) Case management services means services furnished to assist individuals, eligible under the State plan who reside in a community setting or are transitioning to a community setting, in gaining access to needed medical, social, educational, and other services, in accordance with § 441.18 of this chapter.

(b) Targeted case management services means case management services furnished without regard to the requirements of § 431.50(b) of this chapter (related to statewide provision of services) and § 440.240 (related to comparability). Targeted case management services may be offered to individuals in any defined location of the State or to individuals within targeted groups specified in the State plan.

(c) [Reserved]

(d) The assistance that case managers provide in assisting eligible individuals obtain services includes -

(1) Comprehensive assessment and periodic reassessment of individual needs, to determine the need for any medical, educational, social, or other services. These assessment activities include the following:

(i) Taking client history.

(ii) Identifying the needs of the individual, and completing related documentation.

(iii) Gathering information from other sources, such as family members, medical providers, social workers, and educators (if necessary) to form a complete assessment of the eligible individual.

(2) Development (and periodic revision) of a specific care plan based on the information collected through the assessment, that includes the following:

(i) Specifies the goals and actions to address the medical, social, educational, and other services needed by the eligible individual.

(ii) Includes activities such as ensuring the active participation of the eligible individual and working with the individual (or the individual's authorized health care decision maker) and others to develop those goals.

(iii) Identifies a course of action to respond to the assessed needs of the eligible individual.

(3) Referral and related activities (such as scheduling appointments for the individual) to help the eligible individual obtain needed services, including activities that help link the individual with medical, social, and educational providers or other programs and services that are capable of providing needed services to address identified needs and achieve goals specified in the care

plan.

(4) Monitoring and follow-up activities, including activities and contacts that are necessary to ensure that the care plan is effectively implemented and adequately addresses the needs of the eligible individual and which may be with the individual, family members, service providers, or other entities or individuals and conducted as frequently as necessary, and including at least one annual monitoring, to help determine whether the following conditions are met:

(i) Services are being furnished in accordance with the individual's care plan.

(ii) Services in the care plan are adequate.

(iii) There are changes in the needs or status of the eligible individual. Monitoring and follow-up activities include making necessary adjustments in the care plan and service arrangements with providers.

(e) Case management may include contacts with non-eligible individuals that are directly related to the identification of the eligible individual's needs and care, for the purposes of helping the eligible individual access services, identifying needs and supports to assist the eligible individual in obtaining services, providing case managers with useful feedback, and alerting case managers to changes in the eligible individual's needs.

42 C.F.R. § 441.18 Case management services

(a) If a State plan provides for case management services (including targeted case management services), as defined in § 440.169 of this chapter, the State must meet the following requirements:

(1) Allow individuals the free choice of any qualified Medicaid provider within the specified geographic area identified in the plan when obtaining case management services, in accordance

with § 431.51 of this chapter, except as specified in paragraph (b) of this section.

(2) Not use case management (including targeted case management) services to restrict an individual's access to other services under the plan.

(3) Not compel an individual to receive case management services, condition receipt of case management (or targeted case management) services on the receipt of other Medicaid services, or condition receipt of other Medicaid services on receipt of case management (or targeted case management) services.

(4) Indicate in the plan that case management services provided in accordance with section 1915(g) of the Act will not duplicate payments made to public agencies or private entities under the State plan and other program authorities;

(5) [Reserved]

(6) Prohibit providers of case management services from exercising the agency's authority to authorize or deny the provision of other services under the plan.

(7) Require providers to maintain case records that document for all individuals receiving case management as follows:

(i) The name of the individual.

(ii) The dates of the case management services.

(iii) The name of the provider agency (if relevant) and the person providing the case management service.

(iv) The nature, content, units of the case management services received and whether goals specified in the care plan have been achieved.

(v) Whether the individual has declined services in the care plan.

(vi) The need for, and occurrences of, coordination with other case managers.

(vii) A timeline for obtaining needed services.

(viii) A timeline for reevaluation of the plan.

(8) Include a separate plan amendment for each group receiving case management services that includes the following:

(i) Defines the group (and any subgroups within the group) eligible to receive the case management services.

(ii) Identifies the geographic area to be served.

(iii) Describes the case management services furnished, including the types of monitoring.

(iv) Specifies the frequency of assessments and monitoring and provides a justification for those frequencies.

(v) Specifies provider qualifications that are reasonably related to the population being served

...

42 C.F.R. § 441.301 Contents of request for a waiver

(a) A request for a waiver under this section must consist of the following:

(1) The assurances required by § 441.302 and the supporting documentation required by § 441.303....

(b) If the agency furnishes home and community-based services, as defined in § 440.180 of this subchapter, under a waiver granted under this subpart, the waiver request must -

(1) Provide that the services are furnished -

(i) Under a written person-centered service plan (also called plan of care) that is based on a person-centered approach and is subject to approval by the Medicaid agency.

(ii) Only to beneficiaries who are not inpatients of a hospital, NF, or ICF/IID; and

(iii) Only to beneficiaries who the agency determines would, in the absence of these services, require the Medicaid covered level of care provided in -

(A) A hospital (as defined in § 440.10 of this chapter);

(B) A NF (as defined in section 1919(a) of the Act); or

(C) An ICF/IID (as defined in § 440.150 of this chapter);

(2) Describe the qualifications of the individual or individuals who will be responsible for developing the individual plan of care;

(3) Describe the group or groups of individuals to whom the services will be offered;

(4) Describe the services to be furnished so that each service is separately defined. Multiple services that are generally considered to be separate services may not be consolidated under a single definition. Commonly accepted terms must be used to describe the service and definitions may not be open ended in scope. CMS will, however, allow combined service definitions (bundling) when this will permit more efficient delivery of services and not compromise either a beneficiary's access to or free choice of providers.

(5) Provide that the documentation requirements regarding individual evaluation, specified in § 441.303(c), will be met; and

(6) Be limited to one or more of the following target groups or any subgroup thereof that the State may define:

(i) Aged or disabled, or both.

(ii) Individuals with Intellectual or Developmental Disabilities, or both.

(iii) Mentally ill.

(c) A waiver request under this subpart must include the following -

(1) Person-centered planning process. The individual will lead the person-centered planning process where possible. The individual's representative should have a participatory role, as needed and as defined by the individual, unless State law confers decision-making authority to the legal representative. All references to individuals include the role of the individual's representative. In addition to being led by the individual receiving services and supports, the person-centered planning process.

(i) Includes people chosen by the individual.

(ii) Provides necessary information and support to ensure that the individual directs the process to the maximum extent possible, and is enabled to make informed choices and decisions.

(iii) Is timely and occurs at times and locations of convenience to the individual.

(iv) Reflects cultural considerations of the individual and is conducted by providing information in plain language and in a manner that is accessible to individuals with disabilities and persons who are limited English proficient, consistent with § 435.905(b) of this chapter.

(v) Includes strategies for solving conflict or disagreement within the process, including clear conflict-of-interest guidelines for all planning participants.

(vi) Providers of HCBS for the individual, or those who have an interest in or are employed by a provider of HCBS for the individual must not provide case management or develop the person-centered service plan, except when the State demonstrates that the only willing and qualified entity to provide case management and/or develop person-centered service plans in a geographic area also provides HCBS. In these cases, the State must devise conflict of interest protections including separation of entity and provider functions within provider entities, which

must be approved by CMS. Individuals must be provided with a clear and accessible alternative dispute resolution process.

(vii) Offers informed choices to the individual regarding the services and supports they receive and from whom.

(viii) Includes a method for the individual to request updates to the plan as needed.

(ix) Records the alternative home and community-based settings that were considered by the individual.

(2) The Person-Centered Service Plan. The person-centered service plan must reflect the services and supports that are important for the individual to meet the needs identified through an assessment of functional need, as well as what is important to the individual with regard to preferences for the delivery of such services and supports. Commensurate with the level of need of the individual, and the scope of services and supports available under the State's 1915(c) HCBS waiver, the written plan must:

(i) Reflect that the setting in which the individual resides is chosen by the individual. The State must ensure that the setting chosen by the individual is integrated in, and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community to the same degree of access as individuals not receiving Medicaid HCBS.

(ii) Reflect the individual's strengths and preferences.

(iii) Reflect clinical and support needs as identified through an assessment of functional need.

(iv) Include individually identified goals and desired outcomes.

(v) Reflect the services and supports (paid and unpaid) that will assist the individual to achieve identified goals, and the providers of those services and supports, including natural supports. Natural supports are unpaid supports that are provided voluntarily to the individual in lieu of 1915(c) HCBS waiver services and supports.

(vi) Reflect risk factors and measures in place to minimize them, including individualized back-up plans and strategies when needed.

(vii) Be understandable to the individual receiving services and supports, and the individuals important in supporting him or her. At a minimum, for the written plan to be understandable, it must be written in plain language and in a manner that is accessible to individuals with disabilities and persons who are limited English proficient, consistent with § 435.905(b) of this chapter.

(viii) Identify the individual and/or entity responsible for monitoring the plan.

(ix) Be finalized and agreed to, with the informed consent of the individual in writing, and signed by all individuals and providers responsible for its implementation.

(x) Be distributed to the individual and other people involved in the plan.

(xi) Include those services, the purpose or control of which the individual elects to self-direct.

(xii) Prevent the provision of unnecessary or inappropriate services and supports.

(xiii) Document that any modification of the additional conditions, under paragraph (c)(4)(vi)(A) through (D) of this section, must be supported by a specific assessed need and justified in the person-centered service plan. The following requirements must be documented in the person-centered service plan:

(A) Identify a specific and individualized assessed need.

(B) Document the positive interventions and supports used prior to any modifications to the person-centered service plan.

(C) Document less intrusive methods of meeting the need that have been tried but did not work.

(D) Include a clear description of the condition that is directly proportionate to the specific assessed need.

(E) Include a regular collection and review of data to measure the ongoing effectiveness of the modification.

(F) Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.

(G) Include informed consent of the individual.

(H) Include an assurance that interventions and supports will cause no harm to the individual.

(3) Review of the Person-Centered Service Plan. The person-centered service plan must be reviewed, and revised upon reassessment of functional need as required by § 441.365(e), at least every 12 months, when the individual's circumstances or needs change significantly, or at the request of the individual.

(4) Home and Community-Based Settings. Home and community-based settings must have all of the following qualities, and such other qualities as the Secretary determines to be appropriate, **based on the needs of the individual as indicated in their person-centered service plan:**

(i) The setting is integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS.

(ii) The setting is selected by the individual from among setting options including non-disability specific settings and an option for a private unit in a residential setting. The setting options are identified and documented in the person-centered service plan and are based on the individual's needs, preferences, and, for residential settings, resources available for room and board.

(iii) Ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.

(iv) Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact.

(v) Facilitates individual choice regarding services and supports, and who provides them.

(vi) In a provider-owned or controlled residential setting, in addition to the qualities at § 441.301(c)(4)(i) through (v), the following additional conditions must be met:

(A) The unit or dwelling is a specific physical place that can be owned, rented, or occupied under a legally enforceable agreement by the individual receiving services, and the individual has, at a minimum, the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity. For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law.

(B) Each individual has privacy in their sleeping or living unit:

(1) Units have entrance doors lockable by the individual, with only appropriate staff having keys

to doors.

(2) Individuals sharing units have a choice of roommates in that setting.

(3) Individuals have the freedom to furnish and decorate their sleeping or living units within the lease or other agreement.

(C) Individuals have the freedom and support to control their own schedules and activities, and have access to food at any time.

(D) Individuals are able to have visitors of their choosing at any time.

(E) The setting is physically accessible to the individual.

(F) Any modification of the additional conditions, under § 441.301(c)(4)(vi)(A) through (D), must be supported by a specific assessed need and justified in the person-centered service plan. The following requirements must be documented in the person-centered service plan:

(1) Identify a specific and individualized assessed need.

(2) Document the positive interventions and supports used prior to any modifications to the person-centered service plan.

(3) Document less intrusive methods of meeting the need that have been tried but did not work.

(4) Include a clear description of the condition that is directly proportionate to the specific assessed need.

(5) Include regular collection and review of data to measure the ongoing effectiveness of the modification.

(6) Include established time limits for periodic reviews to determine if the modification is still necessary or can be terminated.

(7) Include the informed consent of the individual.

(8) Include an assurance that interventions and supports will cause no harm to the individual.

(5) Settings that are not Home and Community-Based. Home and community-based settings do not include the following:

(i) A nursing facility;

(ii) An institution for mental diseases;

(iii) An intermediate care facility for individuals with intellectual disabilities;

(iv) A hospital; or

(v) Any other locations that have qualities of an institutional setting, as determined by the Secretary. Any setting that is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment, or in a building on the grounds of, or immediately adjacent to, a public institution, or any other setting that has the effect of isolating individuals receiving Medicaid HCBS from the broader community of individuals not receiving Medicaid HCBS will be presumed to be a setting that has the qualities of an institution unless the Secretary determines through heightened scrutiny, based on information presented by the State or other parties, that the setting does not have the qualities of an institution and that the setting does have the qualities of home and community-based settings.