No. _____

In The
Supreme Court of the United States

RICHARD STOGSDILL, ET AL,
Petitioners,

v.

THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES COMMISSION,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the lower court's orders dismissing claims alleging violations of the Americans with Disabilities Act and the Rehabilitation Act conflict with *Olmstead v. L. C. by Zimring* and decisions of other circuits because the courts (1) disregarded evidence of the resources of the state and (2) failed to properly shift the burden to DHHS to prove that the modifications Petitioners requested would cause a fundamental alteration in the state's system.

2. Whether Respondent's voluntary conduct or orders of the state court of appeals and DHHS' rulings mooted or precluded Petitioners' federal claims for violations of (1) constitutional and statutory due process rights and (2) provisions of the Medicaid Act alleged in the second amended complaint that are enforceable under Section 1983.

PARTIES TO THE PROCEEDING

RICHARD STOGSDILL AND HIS MOTHER, NANCY STOGSDILL;
ROBERT LEVIN* AND HIS MOTHER; MARY SELF

Petitioners,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

*Died in 2023

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Stogsdill v. South Carolina HHS, 2021 U.S. Dist. LEXIS 192003 (October 5, 2022), is reprinted at App. A16, Docket No 3:12-cv-00007-JFA. Reconsideration denied at *Stogsdill v. S.C. HHS*, 2021 U.S. Dist. LEXIS 251472 (D.S.C., Dec. 21, 2021) reprinted at App. A6, Docket No. 3:12-cv-00007-JFA, reprinted at Appx. A6.

Stogsdill v. South Carolina HHS, 2020 U.S. Dist. LEXIS 269166, 2020 WL 13656416 (D.S.C. October 9, 2020), Docket No. 3:12-cv-00007-JFA, ECF414.

RICHARD STOGSDILL; NANCY STOGSDILL, Parent of Richard Stogsdill, on behalf of themselves and other similarly situated persons; ROBERT LEVIN; MARY SELF, Parent of Robert Levin, on behalf of themselves and other similarly

situated persons, Plaintiffs - Appellants, v. ALEX M. AZAR, II, Secretary of Health and Human Services; ANTHONY KECK; SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; CMS; JOHN DOES 1-20; TIMOTHY HILL, Acting Director for the Center for Medicaid and CHIP Services, Defendants - Appellees.RICHARD STOGSDILL; NANCY STOGSDILL, Parent of Richard Stogsdill, on behalf of themselves and other similarly situated persons; ROBERT LEVIN; MARY SELF, Parent of Robert Levin, on behalf of themselves and other similarly situated persons, Plaintiffs - Appellees, v. SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant - Appellant, and ANTHONY KECK; ALEX M. AZAR II, Secretary of Health and Human Services; CMS; JOHN DOES 1-20; TIMOTHY HILL, Acting Director for the Center for Medicaid and CHIP Services, Defendants, 765 Fed. Appx. 873 (4th Cir. March 12, 2019), Docket No. 17-1880.

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SEBELIUS; CYNTHIA MANN; JOHN DOE 1 THROUGH 20; CMS, Defendants.RICHARD STOGSDILL; NANCY STOGSDILL, Parent of Richard Stogsdill, on behalf of themselves and other similarly situated persons; ROBERT LEVIN; MARY SELF, Parent of Robert Levin, on behalf of themselves and other similarly situated persons, Plaintiffs - Appellees, v. SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant - Appellant, and KATHLEEN SEBELIUS; CYNTHIA MANN; JOHN DOE 1 THROUGH 20; CMS; CHRISTIAN L. SOURA, Defendants, 674 Fed. Appx. 291 (4th Cir. January 5, 2017), Docket Nos. 15-1984, No. 15-1986.

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Richard Stogsdill, Petitioner v. South Carolina Department of Health and Human Services, Respondent, October 8, 2021, Docket No. 21-1608, reprinted at A88.

Richard Stogsdill, Appellant v. South Carolina Department of Health and Human Services, Respondent, March 13, 2013, Docket No. 1O-ALJ-08-0774-AP. ECF72-3.

Richard Stogsdill, Petitioner v. South Carolina Department of Health and Human Services, Respondent, September 4, 2010, Docket No. 10-042.

Richard Stogsdill, Petitioner v. South Carolina Department of Health and Human Services, Respondent, November 16, 2009, Docket No. 09 MISC. 017.

JURISDICTION

The Fourth Circuit entered final judgment on June 6, 2023. App. 1. On August 24, this Court extended the deadline to file until November 3, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

This case involves the interpretation of the Americans with Disabilities Act (ADA) at 42 U.S.C. §§ 12101, 12102, , 12188, 12203, 12205 and regulations at 28 C.F.R. 35.104-35.134; Section 504 of the Rehabilitation Act ("Section 504") at 29 U.S.C. 701. Petitioners also allege violations of the Fourteenth Amendment of the United States Constitution, and the intersection of those federal statutes and regulations with provisions of the Medicaid Act at 42 U.S.C. 1396a(a)(3), 42 U.S.C. 1396a(a)(8) and 42 U.S.C. 1396n(c)(2), which are privately enforceable under Section 1983 of the Civil Rights Act.

Relevant provisions of these statutes and regulations are contained in the Appendix at App. 101.

STATEMENT OF THE CASE

Jurisdiction in the district court was based upon 28 U.S.C. 1331. A timely appeal was made to the Fourth Circuit, which had jurisdiction pursuant to 28 U.S.C. 1291. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

SOUTH CAROLINA HAS NO OLMSTEAD PLAN

In 2000, a task force was established to develop an Olmstead Plan "as recommended by the United States Supreme Court in its recent decision in *Olmstead v. LC.*, 119 S.Ct. 2176 (1999)."[1] But, it is undisputed that South Carolina does not have an *Olmstead* Plan.

MEDICAID WAIVER PROGRAMS

The South Carolina Department of Health and Human Services ("DHHS") is responsible for administering all Medicaid programs in South Carolina. *Doe v. Kidd,* 501 F.3d 348, 351 (4th Cir. 2007). The South Carolina Department of Disabilities and Special Needs ("DDSN") is responsible for administering programs for

[1] See https://dc.statelibrary.sc.gov/bitstream/handle/10827/1229/Executive_Order_2000-26.pdf?sequence=1&isAllowed=y.

individuals with intellectual disabilities, related disabilities (ID/RD) and head and spinal cord injuries (HASCI). Id. DHHS contracts with DDSN and provides federal funding to provide day-to-day management of Medicaid waiver programs that serve persons with intellectual or related disabilities, called the ID/RD Medicaid waiver program, and another program which serves persons with head and spinal cord injuries, called the HASCI (Head and Spinal Cord Injury) program. DHHS remains responsible for policies, rules and regulations on program matters. 42 C.F.R. 431.10(e).

42 U.S.C. 1396n(c)(2) requires DHHS to provide "necessary safeguards...to protect the health and welfare" of waiver participants and to "assure financial accountability" for Medicaid funds. DHHS' contract with CMS requires it to base claims presented to the federal government upon annual cost reports that must be provided by DDSN. ECF67-2@65-66, 95, ECF110-3@9-10, ECF117-12@36, ECF214-1@5-7.

PETITIONERS

Richard Stogsdill has cerebral palsy, spastic quadriplegia, scoliosis, dysplasia, and severe movement and gastrointestinal disorders. He requires around-the-clock care. Due to his spasticity and size, Richard requires two persons to lift him during daily therapies and whenever he is transported. His 75 year old mother, Nancy Stogsdill, is unable to lift Richard due to back injuries incurred in providing his care.

Robert Levin died in 2023. He suffered severe head and spinal cord injuries when the World Trade Center was attacked, resulting in quadriplegia. Rob was nonverbal, was diagnosed with a post traumatic stress disorder, and required tube feedings. ECF288-8. His mother, Mary Self, is elderly and suffers from health conditions that prohibited her from being able to lift Rob.

RICHARD'S 2009 APPEAL

Richard requested a fair hearing in February, 2009 when his physician determined that the hours he was receiving were not adequate. At the hearing on June 29, 2009, he provided medical evidence supporting his need for additional hours. ECF61-3. DHHS did not present evidence from any medical source. DHHS issued an order on November 16, 2009, directing DDSN to reassess Richard's needs, taking into consideration the opinion of his treating physician. Id.

2010 ID/RD WAIVER AMENDMENTS

On December 1, 2009, letters were sent to waiver participants informing them that CMS had approved changes to the DDSN Medicaid waiver programs to impose caps on services effective January 1, 2010. ECF117-23. Instead of allocating hours annually, allowing families to save up hours to be available for emergencies, hours had to be "used or lost" either weekly (attendant care) or monthly (respite). *Stogsdill v. Azar,* 765 Fed.

Appx. 873 (4th Cir. 2019). The only reason provided was that CMS approved the changes. Id. The notices did not comply with the Medicaid notice requirements at 42 C.F.R. 431.210.[2] Families who received these letters were informed that they could not appeal the reductions, because the changes were "statewide." ECF267-1@7,¶45.

Neither DDSN nor DHHS performed any cost analysis, before or after, to determine if these reductions would actually save the state any money. ECF118-11@5, ECF217@25, 27, 45, ECF217@192-193, ECF219@65, ECF230-16. DHHS did not consult with its medical director to determine the medical consequences of imposing caps on previously uncapped Medicaid waiver services. ECF217@25, 56, ECF219@66.

The sole reason given to DDSN Commissioners and the public for the reductions was budgetary. ECF219@66. DHHS informed the Wall Street Journal that these modifications were unavoidable due to a $563 million deficit in South Carolina's FY 2010 budget. ECF103-6. Governor Sanford reported" that, without these reductions: "It could force legislators to either cut further into the bone in the areas of education, law enforcement and economic development or raise taxes." Id. The South Carolina Court of Appeals confirmed in 2014 that the only justification presented for imposing these caps was budgetary.

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[2] DHHS admitted in the district court that it did not provide notices meeting the requirements of 42 C.F.R. 431.210. When the district judge asked DHHS counsel: "The notice was clearly wrong, just as wrong as it could be, right? DHHS counsel replied "Yes sir. We don't contest that it failed to contain the regulation."

Stogsdill v. DHHS, 410 S.C. 273, 286 (S.C.Ct.App. 2014).

The district court and the Fourth Circuit refused to consider evidence that neither DHHS nor DDSN actually experienced any reduction in available funds when these home-based services were reduced. The district judge actually struck from the record of the bench trial any testimony about "budgetary schemes and financial accountability." ECF247@3.

In 2008, Congress passed Public Law 111-5, the American Recovery and Reinvestment Act (ARRA), which increased the federal contribution to the cost of Medicaid services (FMAP) from 70% to 80%. This reduced South Carolina's required contribution from 30% to 20% of the cost of Medicaid services. ECF219@82. The lower courts refused to consider evidence that South Carolina transferred state funds that had been allocated for Medicaid services to a surplus fund account. ECF331-1@29-30.

Proviso 90.13 in the 2010-2011 State Budget required DHHS to transfer over $225 million into that surplus fund.[3] See ECF103-30@5 (footnote), 116-5@4 (footnote). DDSN was required to transfer $31,508,295 back to the State Treasurer in 2010. ECF118-11@5. By 2013, the State Comptroller reported that its rainy day fund contained more than $281 million. ECF116@1.

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[3] See the CMS document at ECF118-7@26, which informs states that they "are eligible for the increased FMAP only if no amounts attributable directly or indirectly to such increased FMAP are deposited or credited to any reserve or rainy day fund of the state." ARRA at 5001.

Former DDSN Commissioner Deborah McPherson testified that Commissioners were told that these reductions were unavoidable because DDSN projected a $4.5 million deficit in 2010. ECF219@62.

When the 2010 reductions to home-based services were implemented, the average annual cost per ID/RD waiver participant actually *increased* from $37,526 in 2009 to $51,869 in 2010. DHHS projected that the cost of the ID/RD Medicaid waiver program would increase from $225,153,158 annually in 2009 to $278,661,600 in 2010, an increase in costs of more than $50 million, while the services needed by waiver participants like Rob and Richard were reduced. ECF103-8 and 103-9, ECF217@96-97.

Prior to 2010, nursing services were provided in the amount ordered by the treating physician.[4] ECF217@110-111. Since January 1, 2010, nursing services have been capped at 56 hours a week for persons living at home. ECF117-23.

Petitioners participated in an original jurisdiction action filed in the South Carolina Supreme Court in *Karen W. et. al. v. Marshall Sanford, et. al.* ECF108-7 and 103-7. That petition was denied after DHHS informed that Court that if it delayed the implementation of the reductions, DHHS would have to "to discontinue service to nearly 4,000 vulnerable individuals," resulting in

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[4] Former DDSN Finance Officer, Thomas Waring testified that prior to the 2010 amendments: "Nursing outliers are allowed based on physician's orders without question." ECF217@110-111.

the loss of $3.5 million in federal funding each week. ECF118-7@18.

RICHARD'S 2010 ADMINISTRATIVE APPEAL

Richard never received a written notice of these January 1, 2010 reductions, but, DDSN sent his providers a notice in February, 2010 terminating authorizations for his personal care hours and supplies because he "moved out of state." ECF267-6@3, ¶8 and ECF103@6. To prevent these services being terminated, he had to file a second administrative appeal on February 11, 2010. He alleged that DHHS: (1) failed to apply reasonable medical standards, (2) violated Medicaid's notice and reasonable promptness standards, (3) violated of *Olmstead v. L.C.*, 527 U.S. 581 (1999) and CMS directives, and (4) that DHHS failed to use federal stimulus funds to maintain Medicaid services.

The hearing officer informed Petitioners that his jurisdiction was:

> ...limited to whether or not the Agency *applied its policy* correctly to [Richard] based on the waiver as it was renewed January 1, 2010.

(Emphasis added.) ECF118-18@9 and ECF102-5. He refused to allow testimony regarding violations of the ADA, compliance with *Olmstead* or Richard's claims that federal stimulus funds had been misappropriated.

On September 14, 2010, DHHS affirmed the decision of DDSN, finding that the risk of Richard

being institutionalized was "speculative" and affirming the decision to impose the 2010 caps on his services. ECF102-5.

RICHARD'S APPEAL TO THE ADMINISTRATIVE LAW COURT

This forced Richard to file an appeal in the Administrative Law Court (ALC), which affirmed the decision of DHHS. ECF72-3.

FIRST DHHS OIG AUDIT

While these appeals were pending, the United States Department of Health and Human Services Office of Inspector General (DHHS OIG) audited DDSN's 2006-2009 cost reports and concluded that neither DHHS nor DDSN had adequate controls to (1) ensure compliance with applicable Federal law and guidance, or even its own guidance; or (2) to detect errors or misstatements on DHHS cost reports. ECF214-2@12.

FEDERAL COURT PROCEEDINGS

Petitioners filed this lawsuit in the district court in January, 2012. ECF1. They later learned that in 2012, DDSN quit preparing federally mandated cost reports altogether-for programs costing more than $600 million a year. ECF392-1@8, 11.

APPEAL TO THE SOUTH CAROLINA COURT OF APPEALS AND SECOND AMENDED COMPLAINT

Richard filed an appeal to the South Carolina Court of Appeals on April 9, 2013.

On January 2, 2014, Petitioners' filed their second amended complaint alleging violations of the ADA, the Rehabilitation Act and provisions of the Medicaid Act that are enforceable pursuant to Section 1983. ECF72. Richard alleged that DHHS "ignored audits and studies which document that the assurances provided by DHHS are not credible" and that DHHS failed to assure financial accountability of federal Medicaid funds. ECF72, ¶¶241 and 242.

As predicted, Richard's condition worsened. Even after "multiple...recent hospitalizations," DHHS still refused to provide the services his treating physician determined he needed at the time of his February, 2009 appeal. ECF118-16. Richard's physician opined that he was at "high risk for institutionalization" and ordered 56 hours of nursing services for pain management on June 14, 2014. Id.

On September 10, 2014 the state court of appeals issued its order, based on a record that closed in 2010 that did not include evidence of the decline in Richard's medical condition. *Stogsdill v. S.C.H.H.S.*, 410 S.C. 273 (S.C.Ct.App. 2014). The court held that DHHS failed to comply with the federal "written notice" requirements at 42 C.F.R. § 431.210. Id. However, it found that Richard's due process rights were not violated, because he received a hearing and judicial review and

suffered no prejudice. Id.@281-282.

The state court of appeals ruled that DHHS failed to meet its fundamental alteration burden, because the 2010 reductions were based solely on budgetary concerns. Id. 282-285, adopting *Pashby v. Delia*, 709 F.3d 307, 323-24 (4th Cir. 2013). It remanded Richard's 2010 administrative appeal "for an assessment of required hours and services without reference to the caps in the Waiver."[5]

THE FEDERAL COURT DISMISSES RICHARD'S CLAIMS

On November 10, 2014, the district court dismissed all of Stogsdill's claims on the grounds of abstention. *Stogsdill v. Keck*, 2014 U.S.Dist.LEXIS 158974*12-31 (D.S.C. 2014).

DDSN COST REPORTS

In 2014, the South Carolina Legislative Audit (LAC) again reported that DDSN Medicaid cost reports still had not been audited. ECF110-1@79. By 2014, DDSN had accumulated more than $9 million in excess funds.

In April, 2015, the US DHHS OIG issued its audit of DDSN's 2010 cost reports. ECF214-1@2. It again reported that DHHS claimed unallowable costs "because neither the State agency nor the Department had adequate controls to ensure that

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[5] CMS' State Medicaid Manual instructs that "Remanding the case to the local unit for further consideration is not a substitute for "definitive and final administrative action." SMM 2903. App. 142.

the Department followed either applicable federal law and guidance or its own guidance or to detect errors or misstatements on...cost reports." Id. See former DDSN Commissioner's explanation of DDSN funding system at ECF331@49-54.

FEDERAL COURT DISPOSITION OF ROB'S CLAIMS

The district court judge erroneously ruled *sua sponte* that the statute of limitations on Title II ADA claims in South Carolina is one year. ECF77. Rob's case manager, Carmen Hay, testified that he first requested nursing hours in October, 2014.[6] ECF238@43.

At the close of evidence, DHHS moved (1) to amend their answer to assert the affirmative defense of the statute of limitations, (2) to strike any evidence of requests for services made in 2014, and (3) for Judgment as a Matter of Law. *Levin v. S.C. HHS*, 2015 U.S. Dist. LEXIS 31754*3 (March 16, 2015).

The trial judge ruled on March 16, 2015 in favor of DHHS as a matter of law on Rob's ADA and Rehabilitation claims, ruling that the statute of limitations on ADA claims was one year (*13-23) and that Rob was not at risk of institutionalization. Id.

Five months after Dr. Amin faxed his order for nursing services to his case manager, and eight months after his mother filed her declaration with

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[6] Rob's mother filed a declaration on July 30, 2014 that put DHHS on notice of Rob's need for nursing services. ECF103-29@3,¶32.

the court regarding the need for nursing services, the court held that because DHHS still had not made a decision as to whether to allow or deny the request, his claims were not "ripe," *27-28.

The court also erroneously shifted the burden to prove that Rob's requests for modifications were reasonable, disregarding the fact that South Carolina does not have an Olmstead Plan, as well as the resources of the state, ruling that:

> Plaintiffs have not met their burden of establishing by a preponderance of the evidence that SCDHHS' reduction in services under the Medicaid waiver program has placed Levin at serious risk of institutionalization."[1]*35.

The district court held a separate trial on Rob's Section 1983 claims. On July 28, 2015, it ruled in *Levin v. DHHS*, 2015 U.S. Dist. LEXIS 98114* 37 (D.S.C. July 28, 2015) that DHHS violated 42 U.S.C. § 1396n(c)(2)(C) by "failing to advise Plaintiffs of the feasible alternative of nursing services..." Id. The court held that "SCDHHS has an ongoing obligation to inform waiver participants of the feasible alternatives available under the program..." and that "...it is apparent that SCDHHS failed to advise Self of the feasible alternatives under the waiver program.." Id. at 36-37.

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[1] To qualify for HASCI, the participant must meet nursing home level of care.

The court struck from the record any testimony or evidence related to Richard and testimony related to budgetary schemes, financial accountability or the ID/RD Medicaid waiver program. Id.@fn. 5. See also *Levin v. S.C. HHS*, 2015 U.S. Dist. LEXIS 51429 (D.S.C. April 20, 2015).

THE STOGSDILL ASSESSMENT

In September, 2014, the state court of appeals ordered DDSN to assess Richard's needs without regard to the waiver caps. It was not until July 28, 2015, the same day that the federal court dismissed Rob's claims, that DHHS issued the first medical assessment of Richard. DHHS reported in the the "Stogsdill Assessment" that "it is unclear whether Mr. Stogsdill's needs are being met at this time..." *Stogsdill*, 410 S.C.@286-12, ECF287-12 and 325-5@3. This review was based upon selected records that DHHS counsel had provided to its medical director, who prepared the assessment without contacting Richard's treating physician or case manager during the course of the assessment. ECF267-6.

FIRST APPEAL TO THE FOURTH CIRCUIT

Petitioners noticed the appeal to the Fourth Circuit on August 26, 2015, and DHHS filed a cross appeal challenging the ruling that DHHS violated 42 U.S.C. 1396n(c)(2). *Stogsdill v. S.C. HHS*, 674 Fed. Appx. 291, 292 (4th Cir. 2017).

SOUTH CAROLINA SUPREME COURT

On April 9, 2015, the state supreme court granted Richard's petition for *certiorari,* but only on the issue of whether DHHS violated the South Carolina Administrative Proceedings Act. After oral arguments, that court dismissed Richard's appeal on January 20, 2016 as improvidently granted. 415 S.C. 242 (2016). ECF325-5.

PETITION TO UNITED STATES SUPREME COURT

This Court denied Richard's petition seeking review of that state court order on October 3, 2016. *Stogsdill v. S.C. HHS*, 137 S. Ct. 278 (2016).

On October 27, 2016, without explanation or medical assessment, DHHS increased Richard's personal care attendant hours from 55 to 148 hours a week, but denied his request to increase nursing hours as his physician ordered in 2014. DDSN did not provide a written notice complaint with 42 C.F.R. 431.210. ECF267-6.

As Rob's treating physician had predicted, on December 31, 2016, he aspirated and spent months in the hospital and no nursing home would accept him. ECF286-7.

FIRST REMAND BY THE FOURTH CIRCUIT

On January 5, 2017, the Fourth Circuit remanded, because the district judge failed to rule upon Petitioners' ADA anti-retaliation claims. In its order, the Fourth Circuit held that the 2010 reductions were made "for what [DHHS] describes

as budgetary reasons." *Stogsdill v. S.C. HHS,* 674 Fed. Appx. 291-292 (4th Cir. 2017).

DENIAL OF EMERGENCY RELIEF

The district court denied Rob's January 6, 2017 emergency motion (ECF278-5) for additional nursing and attendant hours, despite receiving medical evidence of his deteriorating condition in the hospital. ECF267 with exhibits.

ROB'S 2017 STATE ADMINISTRATIVE APPEAL

While Rob was hospitalized in 2017, DDSN terminated his eligibility for the HASCI waiver. ECF286-1, 2 and 4@5, ECF267. The director of DDSN denied Rob's request for reconsideration, addressing only the termination of Rob's waiver eligibility. DDSN still would not increase Rob's hours above the caps established in 2010. ECF286-2. On February 8, 2017, he filed a request for a fair hearing, setting forth claims for violation of due process rights, the ADA and the Medicaid Act. ECF286-4, ECF286-5.

A hearing was held on April 14, 2017, but it was not until June 26, 2017-four months later-that DHHS issued an order affirming the decision deny his request for nursing and additional attendant hours. This forced Rob's mother to file a notice of appeal in the state ALC.

DISTRICT COURT TRIAL OF ADA RETALIATION CLAIMS

The district court held a five day bench trial in May and June, 2017 limited to consideration of Petitioners' ADA retaliation claims. It again applied the erroneous one-year statute of limitations and refused to reconsider its determination that Rob was not at risk of institutionalization, even though he had been hospitalized since December 2016. ECF267 with exhibits.

The court ruled in favor of DHHS on all anti-retaliation claims. *Stogsdill v. S.C.H.H.S.,* 2017 U.S. Dist. LEXIS 115895 (D.S.C. 2017).

Appellants filed a second notice of appeal in the Fourth Circuit on July 27, 2017 and DHHS cross appealed the judgment granting Rob's claim for alleging violation of 42 U.S.C. 1396n(c)(2). ECF346, 352.

ALC DENIAL OF ROB'S APPEAL

The ALC affirmed the decision of DHHS on June 20, 2018, without explanation or providing the independent assessment Rob requested.

Soon thereafter, DHHS increased his nursing and attendant care hours to the number his treating physician had ordered, based upon a two page "assessment" that Mary and Rob's physician filled out. ECF368-1. That assessment asked, for example, if Mary could "talk and sing" while performing light activities. Id.

SECOND APPEAL TO THE FOURTH CIRCUIT

At oral argument in the Fourth Circuit, DHHS waived its cross appeal of the district court's Judgment finding that DHHS violated 42 U.S.C. 1396n(c)(2). *Stogsdill v. Azar*, 765 Fed. Appx. @881-882 (4th Cir. 2019). Despite Rob having been hospitalized for months and that no nursing home would accept him, on March 12, 2019, the Fourth Circuit reversed (1) the district court's erroneous *sua sponte* one-year statute of limitations ruling and (2) the lower court's ruling that dismissed Richard's claims on the grounds of abstention. Id.

The Fourth Circuit also shifted the buden of proof to Rob, ruling that he "failed to show the risk of institutionalization required to prevail on his ADA and Rehabilitation Act claims..." Id.@879. It also affirmed dismissal of Rob's due process claims. Id.@880.

2019 DRAFT MERCER REPORT

DHHS hired Mercer Consulting to analyze DDSN's payment system. Mercer reported in its draft report in 2019 that DDSN had not filed federally mandated cost reports since 2012 for any of its Medicaid-funded programs. ECF385-3 and ECF385-4.

The Mercer report confirmed that the agencies did not have a "needs assessment tool" to determine allocation of services and that "This results in inconsistencies around participant funding band assignments and potential disparity

around access to services for participants and families." ECF385-3@18. The need for a standardized assessment tool has been repeatedly identified as a deficiency, at least since 2010. ECF110-3@21, 25, 28, ECF117-20@6.

RICHARD'S 2019 STATE ADMINISTRATIVE APPEAL

On November 11, 2019, Richard requested a fair hearing challenging DHHS' continued denial of the number of nursing hours ordered in 2014 by his treating physician. ECF103-24. DDSN approved only 14 hours a week of the 56 hours a week his physician ordered. He also appealed the ongoing failure to comply with notice requirements at 42 C.F.R. 431.210. ECF103-24. Richard alleged violations of his "right to due process...the failure to establish reasonable standards, to provide services, equipment and decisions with reasonable promptness and to give appropriate weight to the opinions of treating physicians and other examining medical professionals." He complained that these violations are ongoing and have been subject to repetition, yet they have evaded review. Id.

On November 22, 2019, DDSN denied Richard's request for additional nursing hours, without consulting his treating physician. In disregard for the order of the South Carolina Court of Appeals, DDSN still had not determined his need for services without consideration of "the restrictions of the 2010 Waiver." *Stogsdill,* 410 S.C. at 286.

DDSN had provided only 14 hours of nursing services, despite his physician ordering 56 since 2014. It again denied his request for those hours without contacting his physician, and again failed to provide a notice meeting the requirements of 42 C.F.R. 431.210. ECF388-6. The decision also failed to address altogether Richard's request for the stander or any other grounds in his notice. This forced Richard into yet another fair hearing appeal at DHHS. ECF385-8.

On January 20, 2020, DHHS agreed to settle that appeal by consent. ECF380-1. The carefully crafted order specifically excluded settlement of matters pending in the federal court. and DHHS acknowledged that hearing officers do not have jurisdiction over matters involving claims brought pursuant to the ADA, the Rehabilitation Act, the Medicaid Act or Constitutional violations. ECF380-1. The order explicitly reserved Richard's rights to litigate those issues in the federal court. Id.

DHHS agreed to provide all nursing hours ordered by Richard's physician that had been included in his Support Plan since 2014. Id. The order also required DHHS to provide the stander, which had been determined to be medically necessary by MUSC in May, 2018. ECF380-1, ECF367-3.

RICHARD'S 2020 TRIAL IN THE DISTRICT COURT

Disregarding Richard's reservation of rights in the 2020 state consent order, on July 6, 2020, the district court ruled that all of Richard's federal claims were either mooted by that order or

precluded, except for claims for equipment. ECF395.

DHHS contracts with a private entity, KePro, to approve requests for equipment/supplies. ECF316@113-114. Only providers may submit a request to KePro to determine "medical necessity." Doc. 34-3@2291-302.

DDSN will not consider a request for equipment or supplies until the provider completes the KePro appeal and KePro has determined that the item is not "medically necessary." Id. But, DDSN's "Specialized Medical Equipment, Supplies and Assistive Technology Manual" requires that the item must be "reasonable and medically necessary" for DDSN to pay for it. ECF412-1 at 3.

The district court held a four day bench trial in July and August, 2021, limited to issues related to the provision of equipment. *Stogsdill v. South Carolina HHS*, 2021 U.S. Dist. LEXIS 192003 (D.S.C. October 5, 2021).

The October 5, 2021 order dismissing Richard's remaining claims described "the byzantine process used to request medical equipment and the inevitable delay caused by trudging through the various pitfalls along the way" and the "the labyrinthine system used to request medical equipment, supplies, and services..." Id.@10-11.

CATHETER APPEAL

After the district court granted judgment to DHHS on all of Petitioner's due process and Medicaid Act claims, but before the third notice of appeal was filed in the Fourth Circuit, DHHS and DDSN quit paying for Richard's catheter supplies. Again, no notice was provided prior to stopping

payment. 42 C.F.R. 431.211. See ECF485 with exhibits. The notice provided on September 17, 2021 did not contain information required by 42 C.F.R. 431.210 and it contained an September 17, 2021. The notice provided an effective date of September 15, two days *before* the date of the notice. ECF485-4.

REASONS FOR GRANTING THE PETITION

1. Whether the lower court's orders dismissing claims alleging violations of the Americans with Disabilities Act and the Rehabilitation Act conflict with *Olmstead v. L. C. by Zimring* and decisions of other circuits because the courts (1) disregarded evidence of the resources of the state and (2) failed to properly shift the burden to DHHS to prove that the modifications Petitioners requested would cause a fundamental alteration in the state's system.

In *Olmstead v. L. C. by Zimring,* 527 U.S. 581 (1999) this Court established criteria to determine whether violation of the integration mandate of Title II of the ADA and Section 501 of the Rehabilitation Act has occurred. ADA regulations require states to "administer services, programs and activities in the most integrated setting appropriate to the needs of the qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (the "integration mandate") at App. 107. The Rehabilitation Act also requires recipients of federal funds to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 CFR §

41.51(d) (1998). *Olmstead,* 527 U.S. at 592.

The district court dismissed all of the Richard's claims in 2014 on the grounds of abstention. It struck from the record at the close of Rob's trials any testimony related to (1) Richard, (2) budgetary schemes or (3) financial accountability.

That court clearly disregarded this Court's unequivocable ruling that in determining whether an accommodation is reasonable, courts must take into consideration "the resources available to the State and the needs of others with mental disabilities." Olmstead, 527 U.S.@607.

The courts below also disregarded the significance of the undisputed fact that South Carolina has not enacted an Olmstead Plan. Id.@606. Throughout the litigation, the lower courts have disregarded the that the state's failure to have an Olmstead Plan shifts the burden to the state to prove that providing the requested accommodation would cause a fundamental alteration in its system.

The district court dismissed the Stogsdill's ADA claim in 2014, without consideration of whether the ongoing denials, delays, reductions and terminations of services violated this Court's integration mandate. 527 U.S. 591

The district court disregarded this Court's criteria established in Olmstead, by imposing the burden on the state to prove that providing the requested services would cause a fundamental alteration to its system. On October 5, 2021 at *78 the court ruled that:

> At no point did Plaintiffs present any evidence or argument that Richard was discriminated against because of his disability. At no point

> did Plaintiffs argue that Richard's risk of institutionalization increased because of a failure to provide the requested equipment. Accordingly, Plaintiffs have failed to show a violation of § 504.

Interpreting the ADA and Rehabilitation Act in *Olmstead,* this Court ruled that states must provide services in the most integrated setting when:

> (1) the State's treatment professionals determine that such placement is appropriate,
> (2) the affected persons do not oppose such treatment, and
> (3) the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

Id.@607.

It is undisputed here that the State's treatment professionals have determined that placement in the community was appropriate, as both Rob and Richard had received DDSN Medicaid waiver services in that setting for many years. It is also unmistakable that Petitioners did not object to receiving treatment outside of an institutional setting.

The third prong, shifts the burden onto the state to prove that the modifications requested cannot be "reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." Id.

The lower courts' failure to shift to DHHS the burden of proving that the modifications requested are unreasonable, conflicts not only with this Court's decision in *Olmstead,* but also with decisions of a majority of the circuits.[7]

The D.C. Circuit ruled in *Brown v. District of Columbia*, 928 F.3d 1070, 1077-1078 (D.C. 2019) that the state must take into account the resources available to the State and the needs of others with mental disabilities, explaining that "[i]t is the state's burden to prove that the proposed changes would fundamentally alter their programs." Citing *Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003).

In *Frederick L. v. Dep't of Pub. Welfare of Pa.*, 364 F.3d 487, 495 (3d Cir. 2004) the court recognized that the Rehabilitation Act requires "not simply an assessment of the cost the accommodation in relation to the recipient's overall budget," but a "case-by-case analysis" of other factors, including the size of the budget and the nature and cost of the accommodation needed." 28 CFR § 42.511(c) and 45 CFR § 84.12(c). Id. Citing *Olmstead* at 606 fn.16.

That circuit ruled that the state may satisfy its fundamental alteration burden by demonstrating that it has an effectively working Olmstead Plan, (which South Carolina does not have). Id. at 494. See also *Harrison v. Young,* 48 F.4th 331, 342 (5th Cir. 2022); *Waskul v. Washtenaw Cty. Cmty. Mental*

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[7] The dissent in *Pashby v. Delia*, 709 F.3d@ 334 complained that the majority did not give sufficient consideration to "the allocation of available resources" and its "responsibility...for the care and treatment of a large and diverse population of persons with disabilities." Citing *Olmstead* at 604.

Health, 979 F.3d 426, 464 (6th 2020) (the government "must show that alteration of the budget methodology generally would be inequitable.")

The Seventh Circuit put it this way:

> In the end, the question under the ADA is a simple one: what effect will changing the state's practices have on the provision of care to the developmentally disabled, *taking into account the resources available to the state* and the need to avoid discrimination?

Steimel v. Wernert, 823 F.3d 902, 915 (7th Cir. 2016)(Emphasis added.) In that case, the court likewise recognized that "It is the state's burden to prove that the proposed changes would fundamentally alter their programs." Id. 916. See *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 611 (7th Cir. 2004) (citing 28 C.F.R. § 35.130(b)(7)). See also *Vaughn v. Walthall,* 968 F.3d 814, 819 (7th Cir. 2020), and *M.R. v. Dreyfus*, 697 F.3d 706, 736 (9th Cir. 2012).

The Tenth Circuit ruled that the state may not focus upon short-term fiscal constraints to establish a fundamental-alteration defense. *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1183 (10th Cir. 2003) ("the mere fact that a program is optional does not support a fundamental-alteration defense.") Id.@1182. See also *United States v. Sec'y Fla. Agency for Health Care Admin.*, 21 F.4th 730, 732 (11th Cir. 2021) (alleging that "Florida administered and funded its Medicaid program in such a way that the children can receive the services only in institutionalized settings.")

In this case, both the state court of appeals and the Fourth Circuit found that the sole justification provided by DDSN for the 2010 reductions in services was budgetary. *Richard Stogsdill v. DHHS*, 410 S.C. 73 (S.C.Ct.App. 2014) and *Stogsdill v. S.C. HHS,* 674 Fed. Appx.@291-292. But the lower courts have stubbornly refused to consider the resources available to the state or the fact that hundreds of millions of dollars paid to DDSN and DHHS in 2010 for Medicaid services was diverted for other purposes in the year that services were reduced claiming to experience a budget reduction.

DHHS has continued to impose the arbitrary caps established in 2010 and to require that hours be allocated on a weekly or monthly basis, despite building up massive reserve funds. All the while DHHS has been requiring severely disabled waiver participants and their aging parents to endure what seems to be perpetual appeals just to prevent their services from being reduced or terminated. ECF 485 with exhibits.

Petitioners presented undisputed evidence that state funds already paid to DDSN and DHHS to provide Medicaid services were diverted in 2010 to a state surplus fund account. ECF 331-1@29-30, ECF103-30@5 (footnote), 116-5@4 (footnote), ECF118-11@5, ECF103-6. By 2013, the State Comptroller reported that its rainy day fund contained more than $281 million, yet DHHS continues to impose limitations enacted in 2010. ECF116@1.

Respondents failed to meet their burden to show that the requested modifications are unreasonable. Petitioners presented evidence that

Respondents have not contradicted showing that when these reductions and limitations on home-based services were imposed in 2010, the cost of the ID/RD waiver program increased by more than $50 million, resulting in the state having less money to spend providing services to other disabled persons.[8]

The change from an annual to a weekly/monthly allocation scheme increases the risk of institutionalization when the primary caregiver gets sick or needs to attend to other obligations outside of the home.

This Court should grant the petition to resolve the split between the decisions of the Fourth Circuit and those of the DC, First, Third, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits on this important issue.

2. Whether Respondent's voluntary conduct, orders of the state court of appeals or DHHS' rulings have mooted or precluded Petitioners' federal claims of violations of (1) constitutional and statutory due process rights and (2) provisions of the Medicaid Act alleged in the second amended complaint that are enforceable under Section 1983.

PRECLUSION

The Fourth Circuit reversed the district court's dismissal of Richard's claims in *Stogsdill v. Azar,* 765 Fed.Appx.@881. The Full Faith and Credit

[8] As in *Steimel*, DHHS waived its "fundamental alteration" defense.

Act, 28 U.S.C.S. § 1738, required the district court to give full faith and credit to the state court of appeals' findings that: (1) DHHS violated the notice requirements of 42 C.F.R. 431.210 in 2010, (2) Richard is at risk of institutionalization, and (3) that the sole reason for the modifications imposed in 2010 was budgetary.

DUE PROCESS AND MEDICAID ACT CLAIMS

On the second remand from the Fourth Circuit, on March 23, 2020, the district court ruled that all of the Stogsdills' claims for violation of the Medicaid Act had been dismissed "alongside Levin's identical claims in this court's November 10, 2014, order," and that its 2014 order was somehow "not disturbed on appeal." ECF381@5 and 6. But, the Fourth Circuit clearly reversed the district court's dismissal of Stogsdill's claims in *Stogsdill v. Azar*, 765 F.Appx.@873.

By order dated July 6, 2020, the district court ruled that: "Richard is receiving all of the care hours requested and any future corrections in the administration would have no effect on him. ECF395@13. Consequently, his claims regarding service hours are moot."

On October 5, 2021, the district court ruled that the only violation of the reasonable promptness mandate was a short delay in providing a water walker. *Stogsdill v. South Carolina HHS*, 2021 U.S. Dist. LEXIS 192003*81.

The order states:

> Given that DHHS was, and continues to be, bound by applicable Medicaid statutes and

> regulations, including the reasonable promptness mandate, ordering DHHS to process Richard's future requests in a reasonably prompt manner would serve no useful purpose and be completely superfluous.

Id.

Petitioner calls this Court's attention to page 4 of that Consent Order , wherein DHHS agreed that the appeal was settled "without prejudice to Petitioner's right to raise issues not resolved in this order in any other forum...including actions brought in state or federal courts. Id. Respondent also agreed that "All other claims pursuant to the U.S. Constitution, the Medicaid Act, [the] ADA, the Rehabilitation Act and various state and federal cases are not a part of this agreement." Id. DHHS agreed that Richard's services would not be reduced "unless his condition improves as evidence by the standard assessment procedures, and a determination that these services and supplies are no longer medically necessary..." Id.

Then, after the district court granted judgment to DHHS on all of Petitioner's due process and Medicaid Act claims, but before the third notice of appeal was filed in the Fourth Circuit, DHHS and DDSN quit paying for Richard's catheter supplies, again without providing prior notice. 42 C.F.R. 431.211. See ECF485 with exhibits. When a notice was finally provided, it contained a termination date two days *before* the date of the notice. ECF485-4. The agencies quit paying for these supplies in violation of its agreement not to reduce Richard's services or supplies. ECF485-8@4, ¶4.

Richard was then forced into filing yet another administrative appeal on August 14, 2021, which was settled by the Consent Order dated October 8, 2021, reproduced at App. 88-100. In that Consent Order, DHHS agreed that:

> 8. The jurisdiction of DHHS hearing officers is limited to appeals regarding the termination, suspension or denial of services, but hearing officers do not have jurisdiction over claims of violations of due process, other provisions of the Medicaid Act, or the Americans with Disabilities Act or the Rehabilitation Act. Specifically, DHHS hearing officers do not have jurisdiction over claims alleging violations of the due process or reasonable promptness provisions contained in the Medicaid Act.
>
> 9. This Settlement Agreement fully resolves Petitioner's appeal of the termination of services before the Division of Appeals and Hearings, without any prejudice to Petitioner's claims pending in the federal court.

The settlement agreement provides that it was made:

> …without prejudice to Petitioner's right to raise or continue litigation involving issues not resolved in this order in any other forum and without requiring

> Petitioner to exhaust administrative remedies, including actions brought in state or federal courts.

Reproduced at App. A95.

The decisions of the district court at ECF395 (dated July 6, 2021), ECF474 (dated October 5, 2021 and reproduced at App. A16), and ECF487 (dated December 21, 2021 and reproduced at App. A6) that were affirmed by the Fourth Circuit on June 6, 2023 (reproduced at App. A1), are in conflict with this Court's decisions in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* 528 U.S. 167, 189 (2000), because subsequent events have not "made it absolutely clear" that DHHS' violation of Richard's constitutional and statutory rights "could not reasonably be expected to recur." Id.

The lower courts' decisions also conflict with this Court's ruling in *Knox v. Service Employees,* 567 U. S. 298, 307 (2012) holding that "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," which is exactly what has happened in this case. Without this 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 (1982). 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," but that is exactly what DHHS has done by continuing to reduce Stogsdill's services. *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014).

The decisions of the district court also conflict with this Court's ruling in *Goldberg v. Kelly*, 397 U.S. 254, 270 (1976), wherein this Court established a right to an evidentiary hearing before services are terminated. This Court held that right to be especially important where "the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." Id. This is "even more important where the evidence consists of the testimony of individuals ...who...might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." Id. This Court "has been zealous to protect these rights from erosion" in cases like this one "where administrative . . . actions were under scrutiny." Id.

One example of DHHS' violation of the reasonable promptness mandate at 42 U.S.C. 1396a(a)(8) is the delay in providing nursing services. Richard and Rob filed declarations on July 30, 2014 notifying DHHS of their needs for nursing services and complaining that DHHS failed to inform them of the feasible alternative of receiving nursing services at home. ECF103-24 and ECF103-29. Nursing services were not provided to Rob until 2018 and Respondent never provided a written notice to either of them explaining the reasons for denying nursing services or the regulations DHHS relied upon, as required by 42 C.F.R. 431.210. ECF368-1. The number of hours ordered by Richard's treating physician in 2014 were not provided until after this Court dismissed his petition for *certiorari* in October, 2016. ECF267-6. See ECF

In *Lisnitzer v. Zucker,* 983 F.3d 578, 580 (2d Cir. 2020), the court ruled that "final administrative

action," as used in § 431.244(f), requires the state to make a final determination "ordinarily within 90 days of an applicant's fair hearing request."42 C.F.R. § 431.244(f)(1)(ii).

The Court should grant the petition because the decisions below conflict with the decisions of this Court related to mootness, this Court's ruling in *Goldberg v. Kelly*, requiring an evidentiary hearing before terminating benefits, and the Second Circuit decision in *Lisnitzer* related to fair hearing decisions. The courts below in this case have decided an important question of federal law that should be settled by this Court.

REASONABLE PROMPTNESS CLAIMS

The state court of appeals specifically declined to consider Richard's claim that DHHS violated 42 U.S.C. 1396a(a)(8) by failing to provide services and a final administrative order with reasonable promptness, thus there could be no preclusive effect on those claims. *Stogsdill,* 410 S.C.@fn. 6.

The district court ruled that the 90 day clock does not start until DDSN determines that it has whatever it needs to make a decision.

In an unpublished decision, the Fourth Circuit affirmed the district court's ruling that the 90 day standard of promptness does not start until DDSN determines that it has all the information it needs to make a decision. *Stogsdill v. DHHS*, 2021 U.S. Dist. LEXIS192003 (D.S.C. October 5, 2021). App. @ 62-67. The 90 day clock stops when the agency approves payment, whether or not the participant actually received the equipment or not. Id.

That ruling make a nullity out of the Reasonable Promptness mandate at 42 U.S.C. 1396a(a)(8). It also conflicts with 42 CFR 435.912(c)(3), which requires a determination of eligibility not to exceed—

> (i) Ninety days for applicants who apply for Medicaid on the basis of disability; and
> (ii) Forty-five days for all other applicants.

The Fourth Circuit in a published decision applied this regulation in determining whether DHHS provided a participant with a Medicaid waiver service (residential habilitation) in *Doe v. Kidd I*, 501 F.3d 348, 356 (4th Cir. 2007).

The lower courts' rulings also conflict with that of the Sixth Circuit in *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 979 F.3d 426, holding that "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." 42 C.F.R. § 435.912(c)(3). It also conflicts with the published ruling of the Fourth Circuit in *Doe v. Kidd I*, 501 F.3d@356 (4th Cir. 2007).

42 U.S.C. 1396n(c)(2) CLAIMS

There can be no preclusive effect on claims not alleged or ruled upon in the state proceedings, such as claims alleging violation of the feasible alternatives and financial accountability regulations at 42 U.S.C. 1396n(c)(2).

Richard was not given a "full and fair" opportunity to litigate his federal claims in the

administrative proceedings, as evidenced by the 2010 transcript at ECF118-18, wherein the hearing officer threatened to shut down the hearing if Richard attempted to present testimony related to his federal claims. *Taylor v. Sturgell,* 553 U.S. 880, 892 (2008). The hearing officer ruled that his jurisdiction was limited to determine whether the action taken by DHHS was in compliance with the agency's own policies. ECF102-5@12.

DHHS fair hearing orders have consistently ruled that:

> The jurisdiction of DHHS hearing officers is limited to appeals regarding the termination, suspension or denial of services, but hearing officers do not have jurisdiction over claims of violations of due process, other provisions of the Medicaid Act, or the Americans with Disabilities Act or the Rehabilitation Act. Specifically, DHHS hearing officers do not have jurisdiction over claims alleging violations of the due process or reasonable promptness provisions contained in the Medicaid Act.

The lower court's failure to consider Stogsdill's claim that DHHS failed to inform him of feasible alternatives under the waiver conflicts with its own ruling that Rob prevailed on his 42 U.S.C. 1396n(c)(2) claim for violation of the feasible alternatives provision of the Medicaid Act. *Levin v. S.C. HHS,* 2015 U.S. Dist. LEXIS 98114*36-39 (D.S.C. July 28, 2015).

In that order, the court not only declined to consider testimony related to the claims of Richard

Stogsdill, which documented a pattern and practice of failing to provide services with reasonable promptness and lack of financial accountability, but it also *sua sponte* excluded testimony bearing on issues related to budgetary schemes and financial accountability."[9]

The court granted DHHS' motion to strike all testimony related to Rob's 2014 requests for nursing, even though his case manager testified that the need for those services was discussed at his October, 2014 plan meeting. It granted the motion to strike because his neurologist could not remember at trial the date he wrote an order for nursing and his case manager testified that the request was delayed because a release was not signed. Id.*23-28. But, the court disregarded Exhibit 221-4, which contains the order of his primary care physician, Dr. Amin, dated October 28, 2014, which was faxed to his DDSN case manager on that date at 7:22 p.m.

The Court should grant the petition, because the lower court's rulings in this case conflict with the rulings of the Sixth Circuit in *Waskul*, 979 F.3d@453 (6th Cir. 2020) and *Wood v. Tompkins*, 33 F.3d 600, 611 (6th Cir. 1994) and the Ninth Circuit in *Ball v. Rodgers*, 492 F.3d 1094, 1107 (9th Cir. 2007) involving violations of 42 U.S.C. 1396n(c)(2).

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[9] The Court dismissed Petitioner's Medicaid Act claims in Claim 5 because those claims had to be brought pursuant to Section 1983, but paragraph 243 of that cause of action states: "Through their actions, Defendants have violated 42 U.S.C. § 1983...by implementing state and local policies which clearly conflict with the clear requirements of the Medicaid Act."

CONCLUSION

To qualify for either of the Medicaid waiver programs here, the individual must not only be severely disabled, so that he meets institutional level of care, but must be impoverished. Waiver participants, who struggle every day just to have their basic needs met cannot afford the cost, both financial and emotional of endless appeals. For the reasons set forth above, Petitioners respectfully pray that this Court will grant the petition.

Respectfully submitted,

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