

No. _____

IN THE
Supreme Court of the United States

SHIRLEY CARTER,

Petitioner,

v.

COMMUNITY LIVING CASE MANAGEMENT,
An Oregon nonprofit corporation;
OREGON DEPARTMENT OF HUMAN SERVICES,
Office of Developmental Disabilities Services,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE
OREGON SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

Shirley Carter

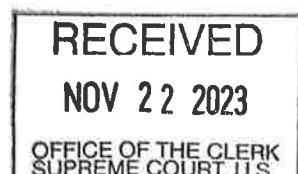
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QUESTIONS PRESENTED

Whether the Medicaid agency Nullified or ignored its Federal and State statutory requirements by withholding attendant care service payment that were reflected in the person-centered service plan under the Home and Community-Based state plan option (community first choice) Waiver constitutes a violation within the meaning of Title XIX of the Social Security Act, as amended, 42 U.S.C. §1396(c); 42 U.S.C. §1396a(a)(30)(A); and within the meaning of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §158(d), 29 U.S.C. §218c

Whether the Medicaid agency's policy and rule is a form of discrimination against the eligible Developmentally Disabled persons within the meaning of Title II of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §12132; and Section 504 of the Rehabilitation Act, 29 U.S.C. §794.

LIST OF PARTIES

Pursuant to Rule 14.1(b), Petitioner states that the parties include:

1. Shirley Carter, Plaintiff and Petitioner;
2. Community Living Case Management, an Oregon nonprofit corporation, Defendant and Respondent;
3. Oregon Department of Human Services, Office of Developmental Disabilities Services, Defendant and Respondent.

TABLE OF CONTENTS

	Page
Question Presented.....	i
List of Parties.....	ii
Table of Contents.....	iii
Appendix.....	iv
Table of Authorities.....	vi
Opinions Below.....	1
Statement of Jurisdiction.....	1
Constitutional and Statutory Provisions.....	
Involved.....	1
Statement of the Case.....	3
A. Factual Background.....	7
B. Legal Questions Presented on Appeal.....	11
C. Court nullified Federal and State Statutory requirements for the person-centered service plan.....	11
D. “Express Notice” or agency policy could modify service provider payments.....	13
E. “Express Notice” or agency policy could take Away beneficiaries’ supported services.....	14
Reasons for Granting Petition	
I. This Court should take review because this Case presents significant constitutional issues regarding state agency’s power to enact rules that contravene or nullify federal regulation.....	17

TABLE OF CONTENTS- Continued

	Page
II. This Court should take review because the Developmentally disabled population are Affected by this decision.....	20
III. This Court Must Resolve the issue does the agency policy and rule stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress or the Federal Law's purpose.....	21
IV. This Court Must Resolve the issue AC and KO, the beneficiaries are required to join in this case as indispensable parties.....	25
V. This Court Must Resolve the issue of Discrimination against the eligible Developmentally Disabled persons when the agency enforced limitations on required services.....	26
Conclusion.....	28

APPENDIX

APPENDIX A - Supreme Court of the State of Oregon,
Order Denying Review, June 29,2023..... App. 1a

APPENDIX B - Court of Appeals of the State of Oregon,
Affirmed Without Opinion, March 15, 2023..... App. 3a

APPENDIX - Continues

APPENDIX C - Court of Appeals of the State of Oregon,
Order Reactivating Case, April 5, 2022..... App. 5a

APPENDIX D - Court of Appeals of the State of Oregon
for Coos County, Second Amended General Judgment,
February 23, 2022..... App. 7a

APPENDIX E - Court of Appeals of the State of Oregon
for Coos County, Second Amended Order for Summary
Judgment, February 23, 2022..... App. 9a

APPENDIX F - List of Statutory Provisions
involved..... App. 13a

APPENDIX G - 2019-2021 Oregon DAS Collective
Bargaining Agreement for Adult Foster Home
Providers, July 1, 2019, Article 9.5(c)..... App. 23a

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Accuardi v. Shaughnessy</i> 347 U.S. 260, 265-67 (1958).....	17
<i>Armstrong v. Exceptional Child Ct., Inc.</i> 575 U.S. ____ (2015)	24
<i>Beltran v. Meyers</i> 677 F.2d 1317, 1322 (9 th Cir 1982).....	16
<i>Beltran v. Meyers</i> 131 S. Ct. 992 (2011).....	16
<i>Brand Energy Services, LLC v. OR-OSHA</i> 261 Or App 210, 215 n 5, 323 Ped 356 (2014).....	19
<i>Cal Pharmacists Ass’n v. Maxwell-Jolly</i> 596 F.3d 1098, 1113 (9 th Cir. 2010).....	17
<i>Cal Pharmacists Ass’n v. Maxwell-Jolly</i> 131 S. Ct. 992 (2011)	17
<i>City of Arlington v. Fed Comm’ns Comm’n</i> 569 U.S. 290, 296 (2013).....	26
<i>Clinton et al v. DHHS et al</i> Case No. 1:10CV123, DC of NC.....	28
<i>D.P. et al v. School Board of Palm Beach</i> Case No. 9:21-CV-81099-AMC, Doc 198 DC of FL	15,16
<i>Dunakin v. Quigley</i> 99 F. Supp 3d 1297, 1319-20 (W.D. Wash 2015).	28
<i>Ex Parte Young</i> 209 U.S. 123-156 (1908).....	24

TABLE OF AUTHORITIES- Continues

	Page
CASES:	
<i>Gade v. National Solid Wastes Management Assn.</i> 505 U.S. 88, 108 (1992).....	24
<i>Gafur v. Legacy Good Samaritan Hospital</i> 344 Or 525, 533, 185 Ped 446 (2008).....	19
<i>Henrietta D v. Bloomberg</i> 331 F.3d 261, 272 (2 nd Cir 2003).....	28
<i>Hines v. Davidowitz</i> 312 U.S. 52, 67 (1941).....	25
<i>Hunt v. Amico Properties, L.P.</i> 814 F.3d 1213, 1226 (11 th Cir 2016).....	15
<i>Indep. Living Ctr. Of S. Cal., Inc. v. Maxwell-Jolly</i> 572 F.3d 644, 658 (9 th Cir 2009).....	16
<i>K.O., A.C. v. DHS</i> Case No. A168335.....	8,13
<i>Lane et al v. Kitbaber et al</i> No. 3:2012CV00138, Doc 40 (D. Or 2012).....	20
<i>Lane et al v. Kitbaber et al</i> No. 3:2012CV00138, Doc 34 (D. Or 2012).....	20
<i>Lopez v. Heckler</i> 713 F.2d 1432, 1437 (9 th Cir 1983).....	17
<i>Maryland v. Louisiana</i> 451 U.S., at 746 (1981).....	24
<i>M.R., et at v. Dreyfus</i> No. 11-35026 (9 th Cir 2012).....	16,22,28
<i>Mutual Pharmaceutical Co. v. Bartlett</i> 570 U.S. ___, ___ - ___ (2013)(Slip Op. at 13-14).....	24

TABLE OF AUTHORITIES- Continues

	Page
CASES:	
<i>Mutual Pharmaceutical Co. v. Bartlett</i> 570 U.S. 472 (2013).....	24
<i>Nelson v. INS</i> 232 F.3d 258, 262 (1 st Cir 2000).....	17,19
<i>Oil Refining Co. v. Environmental Quality Comm Cite</i> As 361 Or 1 (2017).....	18
<i>Okorn v. Dept of Rev.</i> 312 Or 152, 155, 818 Ped 928 (1991).....	18
<i>Olmstead v. L.C.</i> 527 U.S. 581, 600 (1999).....	16,20,23,27
<i>Olmstead v. L.C.</i> 527 U.S. at 597-98, 600-01 (1999).....	23
<i>Pashby v. Delia</i> 709 F.3d 307, 321 (4 th Cir 2013).....	28
<i>Rodde v. Bonita</i> 357 F.3d 988, 009-99 (9 th Cir. 2004).....	17
<i>Ross v. Oregon</i> 227 U.S. 150, 162-163 (1913).....	17
<i>Stanley, Adm. V. Mueller</i> 211 Or. 198, 315 P.2d at 125 (1957).....	20
<i>Stanley, Adm. V. Mueller</i> 211 Or. 202, 315 P.2d at 127 (1957).....	20
<i>Stanley, Adm. V. Mueller</i> 211 Or. 209, 315 P.2d at 130 (1957).....	20
<i>Teamsters Union v. Oliver</i> 358 U.S. 283 (1959).....	13

TABLE OF AUTHORITIES- Continues

	Page
CASES:	
<i>Timothy B., et al v. Kody Kinsley</i>	
Case No. 1:22-CV-1046, MD of NC.....	16
<i>Z.S. v. Durham County</i>	
Case No. 1:21-CV-663-WO-LPA, Doc 17, MD of NC	16,26
FEDERAL:	
United States Constitution, Article VI, Clause 2.....	1
United States Constitution, V Amendment.....	2
United States Constitution, XIV Amendment.....	2
§ 1902(a)(30) of the Social Security Act	13
§ 1902(a)(30)(A) of the Social Security Act	3,14
§ 1915(c) of the Social Security Act	2,5,11
§ 1915(k) of the Social Security Act.....	11
§ 1915(k)(1)(A) of the Social Security Act.....	3
Fair Labor Standards Act of 1938.....	3,13,14
§ 504 of the Rehabilitation Act of 1973.....	3,20,27,28
Title II of The Americans with Disabilities Act of 1990.....	3,16,20,21,22,27,28
Federal Rules of Civil Procedure, Rule 19.....	26
28 U.S.C. § 1257(a).....	1
29 U.S.C. § 158(d).....	3,14
29 U.S.C. § 218(c).....	3
29 U.S.C. § 218c(a)(5).....	13,14
29 U.S.C. § 794.....	3,22

TABLE OF AUTHORITIES- Continues

	Page
FEDERAL: Continues	
42 U.S.C. § 794(a).....	20
42 U.S.C. § 1396(a)(30)(A).....	3
42 U.S.C. § 1396n(c).....	3
42 U.S.C. § 1396n(k)(1)(A)(i).....	3
42 U.S.C. § 1396n(k)(3)(B).....	3
42 U.S.C. § 1396n(k)(3)(D).....	3
42 U.S.C. § 12101(a)(2).....	22
42 U.S.C. § 12101(a)(5).....	22
42 U.S.C. § 12132.....	3,16
42 U.S.C. § 12132 - 34.....	20,21,22
42 U.S.C. § 12134.....	27
42 U.S.C. § 12134(a).....	26
28 C.F.R. Part 35.....	26
28 C.F.R. § 41.51(b)(3)(i).....	28
28 C.F.R. § 41.51(d).....	27
28 C.F.R. § 35.103.....	24
28 C.F.R. § 35.130.....	16
28 C.F.R. § 35.130(a)(3)(i).....	22
28 C.F.R. § 35.130(d).....	21,22,27
42 C.F.R. § 430.10-12.....	23
42 C.F.R. § 431.52.....	18
42 C.F.R. § 431.210.....	15
42 C.F.R. § 431.220 - 224.....	21

TABLE OF AUTHORITIES- Continues

Page

FEDERAL: Continues

42 C.F.R. § 435.917(2).....	15,16
42 C.F.R. § 441.300.....	5,12
42 C.F.R. § 441.301(b)(1).....	12
42 C.F.R. § 441.301(c)(2)(v).....	12
42 C.F.R. § 441.301(c)(2)(vii).....	6
42 C.F.R. § 441.500 - 590.....	3
42 C.F.R. § 441.510.....	12
42 C.F.R. § 441.540(b).....	5,12
42 C.F.R. § 441.540(b)(5).....	12
42 C.F.R. § 441.570.....	13
42 C.F.R. § 447.201.....	13
42 C.F.R. § 447.203.....	14
45 C.F.R. § 84.4(b)(2).....	27

STATE:

Oregon Constitution, Article I, § 10.....	17
Oregon Constitution, Article I, § 21.....	17
O.R.S. § 28.010 - 160.....	21
O.R.S. § 183.310(9).....	17
O.R.S. § 409.010.....	25
O.R.S. § 409.040.....	3,24

TABLE OF AUTHORITIES- Continues

Page

STATE: Continues

O.R.S. § 409.060.....	25
O.R.S. § 409.070.....	25
O.R.S. § 409.093 - 160.....	25
O.R.S. § 411.060.....	25
O.A.R. § 411-004-0000 - 0040.....	3
O.A.R. § 411-004-0030(2).....	5
O.A.R. § 411-004-0030(2)(c).....	12
O.A.R. § 411-318-0020.....	21
O.A.R. § 411-360-0200(1)(b).....	19
O.A.R. § 411-360-0200(1)(g).....	3,4,5,8,13,14,18,19,20,21,23
O.A.R. § 411-360-0200(1)(h).....	3
O.A.R. § 411-360-0200(2).....	19
O.A.R. § 461-120-0010.....	18

OTHER AUTHORITIES:

2019-21 Oregon Collective Bargaining Agreement for Adult Foster Home Providers.....	13
Oregon State Plan Transmittal #18-0004.....	12,13,14,21
APD 32-2018.....	3,17,18,20
APD-PT-15-039.....	3,4,5,16,17,18,19,20,23

OPINIONS BELOW

The order denying review by the Supreme Court of the State of Oregon was issued on July 29, 2023 (APP. 1a-2a). The Oregon Court of Appeals affirmed the decision without opinion of the Circuit Court for Oregon's Coos County issued on March 15, 2023, document number A177519 (APP. 3a-4a). The Oregon Court of Appeals issued an order reactivating the case on April 5, 2022 (APP. 5a-6a) after Trial Court re-entered the general judgement on February 23, 2022, and appellant filed an amended appeal on March 4, 2022. The Oregon Circuit Court for Coos County issued its final judgement on February 23, 2022 (APP. 7a-12a) after granting oral arguments on a motion for a new trial by Appellant on November 30, 2021.

STATEMENT OF JURISDICTION

The Oregon Supreme Court issued its order denying review there by affirming the decision of the Oregon's Circuit Court for Coos County on February 23, 2022 (App. 1a-2a). The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article VI, Clause 2:

This Constitution, and the Laws of the 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.

United States Constitution, Amendment XIV §1:

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 any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves the violation of provisions of Section 1915(c) Title XIX of the Social Security Act, 42 U.S.C.

§1396n(c); 1915(k)(1)(A) Title XIX of the Social Security Act, 42 U.S.C. §1396n(k)(1)(A)(i); 42 U.S.C. §1396n(k)(3)(B) and (D); Section 1902(a)(30) (A) Title XIX of the Social Security Act, 42 U.S.C. §1396(a)(30)(A); Fair Labor Standards Act of 1938, 29 U.S.C. 158(d), 29 U.S.C. §218c; Title II of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §12132; and Section 504 of the Rehabilitation Act, 29 U.S.C. §794.(APP. 13a-22a)

STATEMENT OF THE CASE

Plaintiff challenge ODHS' preemption and nullification of Federal Regulations 42 CFR 441.500 through 441.590 as adopted by OAR 411-004-0000 through 411-004-0040 by authority in ORS 409.040, when state agency enacted the 2015 Clarification Policy Transmittal APD-PT-15-039 and the 2018 OAR 411-360-0200(1)(h) filed under APD 32-2018 (listed currently as OAR 411-360-0200(1)(g)) by requiring natural supports that are not provided voluntarily, supplanting needed paid services, limiting services identified as a functional need and applying an individual-based limitation restraint without informed consent in the Developmentally Disabled Clients' Individual Support Plan (ISP) after giving Plaintiff and the Developmental Disabled Clients authorization in 2011 and 2013 for services reflected in the ISPs. (Amended Complaint ¶¶ 9-12, 17-26); (Oregon's Court of Appeals Opening Brief page 28-29); (Oregon's Supreme Court Petition for Review page 1-2)

Plaintiff sought Declaratory Action on payment for all support services provided by Plaintiff and authorized by CLCM and ODHS in the 2019-20 & 2020-21 ISPs. The ISPs did reflect all the required services and supports to be provided as attendant care, did not reflect any limitation on service or supports as stated in APD-PT-15-039 and OAR 411-360-0200(1)(g) and reflected there was no one providing unpaid voluntary services. (Amended Complaint ¶¶ 9-12, 17-26); (Oregon's Court of Appeals Opening Brief page 28-29); (Oregon's Supreme Court Petition for Review page 2).

Plaintiff based their conclusion on if CLCM/ODHS intended to apply OAR 411-360-0200(1)(g) or ADP-PT-15-039 in the ISPs, CLCM/ODHS are required by Federal regulation to reflect in the ISPs: 1. Any limitations to the required services and supports when Clients were traveling with attendant care, 2. State the name of the volunteer, 3. State the volunteer is unpaid, 4. What supports and services the volunteer would be providing as Federal Regulations require. (Amended Complaint ¶¶ 9-12, 17-26); (Oregon's Court of Appeals Opening Brief page 28-29); (Oregon's Supreme Court Petition for Review page 2).

On cross-motions for summary judgement the trial court held that the 2011 and 2013 authorizations to Developmental Disability Clients and Plaintiff can be rescinded by "Express Notice" and pertaining to the ISPs "I don't find that the...the ISPs are a guarantee of payment. I think they're at best vague. I don't think that her argument that if it's not listed in the unpaid section that it's paid if it violates the rules." (Tr 75-76); (Oregon's Court of Appeals Opening Brief, page 13); (Oregon's Supreme Court Petition

for Review page 2). The Oregon's Court of Appeals' Decision affirmed the trial court without opinion.

This Court must grant the writ of certiorari to correct the Circuit Court of Oregon's erroneous errors and confirm if APD-PT-15-039 and OAR 411-360-0200(1)(g) is to be applied in a person-centered service plan it must be reflected in the text of the person-centered service plan.

The Federal and State regulations the lower courts ignored in their rulings are 42 CFR §441.540(b) and OAR 411-004-0030(2) which are under a waiver of statutory requirements in 42 CFR §441.300:

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:

(5) 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 cannot supplant needed paid services unless the natural supports are unpaid supports that

are provided voluntarily to the individual in lieu of an attendant;

(7) Be understandable to the individual receiving services and supports, and the individuals important in supporting him or her;

The statutory requirements in 42 CFR §441.301(c)(2)(vii) includes at a minimum, for the written plan to be understandable, it must be written in plain language;

(9) Be finalized and agreed to in writing by the individual and signed by all individuals and providers responsible for its implementation.

(Amended Complaint ¶9); (Oregon's Court of Appeals Opening Brief, page 28); (Oregon's Supreme Court Petition for Review page 1)

The Plaintiff alleges Defendant's withheld service payments and issued overpayment claims with the knowledge of her providing all the services and supports identified in the person-centered service plans for KO and AC (the beneficiaries) and without reflecting any payment or service limitations as required in the person-centered service plans. She asserts claims that defendants limited her ability to be paid for all days of support services provided pursuant to the agreed upon and signed person-centered service plans in violation of statutory requirements in Federal and State regulations (Amended Complaint ¶¶ 9-38); (Oregon's Court of Appeals Opening Brief, page 28); (Oregon's Supreme Court Petition or Review page 1) and prays that this Honorable Court will correct the error of the Oregon Circuit Court for her sake and the sake of all service

providers and beneficiaries of state medical assistance programs.

A. Factual Background

In 2011 Plaintiff completed the state requirements to become an Adult Foster Home for the Developmentally Disabled and opened her Adult Foster Home after receiving a reasonable accommodation authorization from Defendant for the first beneficiary (KO) due to behavioral and health issues.

In 2013 Plaintiff received another reasonable accommodation authorization from Defendant before the second beneficiary (AC) moved into her adult foster home to provide him access to family members out of state.

The 2011 and 2013 reasonable accommodation authorizations from Defendant were issued by Oregon DHS Policy Department's Regional Manager, Dan Boyd. The reasonable accommodation authorizations were allowing travel outside of Oregon with continued required services from the Plaintiff to the beneficiaries for extended periods of time.

In 2014 Oregon DHS issued a Notice of Planned Action (NOPA) to terminate the reasonable accommodation authorizations but withdrew the action before going to the administrative hearing. Thereby authorizing the continuation of the authorizations.

In November 2015 Oregon's DHS issued a policy statement restricting the beneficiaries, KO and AC's travel with services past fourteen days consecutive or 45 days in a Person-centered service

plan year (known as the 45-day rule) by restricting payment to the service providers. The defendant did not go through the required administrative procedures for Oregon before implementing this new or amended policy. The 2015 policy statement (45-day rule) was not an existing administrative rule.

In October 2017 the defendant enforced the 2015 policy statement (45-day rule) on Plaintiff by withholding payments for providing services past the 45-day rule.

In May 2018 the beneficiaries refused to give their written consent for their person-centered service plan due to the Defendant's refusal to reflect the reasonable accommodation authorizations in their person-centered plans.

In July 2018, the two beneficiaries filed a petition for judicial review of administrative rule on the 2015 policy statement (45-day rule) in Oregon's Court of Appeals Case No A168335.

In August 2018, after the filing of the Petition for judicial review, the Defendant, through administrative procedures made the 2015 policy statement (45-day rule) an administrative rule (OAR 411-360-0200(1)(g)).

In April 2019 the judicial review case was settled by stipulated agreement between defendant's and the beneficiaries that included the agreed upon person-centered service plan which is in dispute in this case (2019-20 and 2020-21 service plans).

In the fall of 2019 Plaintiff made defendant CLCM aware of all travel to Arizona with AC and KO. Defendant CLCM

authorized Plaintiff to bill for all support services provided throughout the 2019-20 ISP (person-centered service plan) year.

In February 2020 Defendant sent a letter referring to an overpayment from 2017 without explanation.

In April 2020 Defendant CLCM sent notice of overpayment to Plaintiff for 120 days of service during person-centered service plan 2019-20 and preventing Plaintiff from billing any time after that notice.

In June 2020 Defendant DHS sent a notice of overpayment to Plaintiff for 154 days of service during person-centered service plan year 2019-20.

In August 2020 Plaintiff sent written request to Defendant DHS for authority that supports Defendant DHS' allegation of overpayment and any information pertaining to Plaintiff's contested case hearing rights.

In September 2020 Plaintiff sent written demand notice to Defendant CLCM to allow Plaintiff to bill for all services provided in the person-centered service plans (2019-20 & 2020-21) and the repayment of 2017-18 amounts withheld.

As of this date Defendants have failed and refused to repay the amounts withheld for 2017-18, have failed and refused Plaintiff the ability to bill for support service payments for 2019-20 and 2020-21, and have failed to provide Plaintiff with any authority supporting its allegation of overpayment in the ODDS notice, its attempt to collect the alleged overpayment, or any

information pertaining to Plaintiff's contested case hearing rights.

Ms. Carter, through counsel filed a Breach of Contract; Unjust Enrichment; Declaratory Action; Injunction on December 16, 2020. On February 5, 2021 Defendant CLCM moved to dismiss under ORCP 20A and ORCP 21 for failing to join the State of Oregon Department of Human Services ("DHS") as an indispensable party and because she fails to state any claims for which relief may be granted. On February 24, 2021, Plaintiff filed a response in opposition to Defendant's motion to dismiss. After several motions from both sides on April 22, 2021, the Judge issued her options dismissing breach of contract and unjust enrichment, but not claims for injunctive relief and declaratory relief but ordered ODHS to be joined. On June 3, 2021, Ms. Carter filed a Declaratory Action; Injunction Amended Complaint. On October 15, 2021, Defendant CLCM filed Motion for Summary Judgement, On October 18, 2021, Defendant DHS filed Motion for Summary Judgement along with Plaintiff. On November 3, 2021, the Circuit Court Judge issued her ruling on the Summary Judgements and the case in favor of Defendant's CLCM and DHS. The Judges findings were "I don't find that the – the ISPs are a guarantee of payment. I think that they're at best vague. I don't think that her argument that if it's not listed in the unpaid section that it's paid if it violates the rules. If the contracts had to include all of the administrative rules that applied to these sorts of things, I think that they would be even longer than they already are, and that it can be assumed that a contractor has to follow the rules in order to be paid. And so given that she had express notice multiple – like three or four times that the rule applied to her." "There's not a specific due process right that she has, so I'm going to deny her motion for summary judgement." Tr 75-76

On November 30, 2021 Plaintiff filed a motion for a new trial.

December 9, 2021 Judge granted a hearing and at which time issued her denial for a new trial. Tr 92-94

B. Legal Questions Presented on Appeal.

1. Can a Federal Law be nullified by State Law? (Oregon Court of Appeals Opening Brief page 28-29); (Oregon Supreme Court Petition for Review page 3)
2. Can State Law preempt Federal Law? Oregon Court of Appeals Opening Brief page 28-29); (Oregon Supreme Court Petition for Review page 3)
3. Is the Court required to adjoin all interested parties to this declaratory action? (Oregon Court of Appeals Opening Brief page 21); (Oregon Supreme Court Petition for Review page 4)
4. Can a state agency enact rules that violate the Oregon Constitution? (Oregon Court of Appeals Opening Brief page 22); (Oregon Supreme Court Petition for Review page 5)

C. This Court nullified Federal and State Statutory requirements for the person-centered service plan.

Section 1915(c) and 1915(k) of the Act permits States to offer, under a waiver of statutory requirement, an array of home and community-based

services that an individual needs to avoid institutionalization and what the Medicaid agency must do to obtain a waiver. 42 CFR §441.300, 42 CFR §441.510. If the agency furnishes home and community-based services, the waiver request must provide that the services are furnished under a written person-centered service plan only to beneficiaries who the agency determines would, in the absence of these services, require the Medicaid covered level of care provided in a hospital, a nursing facility, or immediate care facility. If the agency furnishes home and community-based services under a waiver granted under this subpart, the waiver request must provide that the services are furnished under a written person-centered service plan that is based on a person-centered approach and is subject to approval by the Medicaid agency. 42 CFR §441.301 (b)(1), 42 CFR §441.540(b). The person-centered service plans in dispute (2019-20 & 2020-21) reflect the paid and unpaid services and supports that will assist the individual to achieve identified goals, and the providers of those services and supports as required in 42 CFR §441.301(c)(2)(v), 42 CFR §441.540(b)(5), OAR 411-004-0030(2)(c), Oregon State Plan Transmittal #18-0004 Attachment 3.1-K pages 22-24 (approved by CMS July 2, 2018). Tr 21,22,68,69. The plan includes the type of services to be provided, the amount, frequency and duration of each service, and the type of provider to furnish each service as required in Oregon State Plan Transmittal #18-004 Attachment 3.1-K page 24. The person-centered service plans for 2019-20 and renewed for 2020-21, was a product of and approved by Defendants in the

settlement agreement for Oregon's Court of Appeals No. A168335 as written. (Amended Complaint ¶¶ 9-38); (Oregon's Court of Appeals Opening Brief, page 6).

D. "Express Notice" or agency policy could modify service provider payments.

The State plan must describe the policy and the methods to be used in setting payment rates for each type of service included in the State's Medicaid program to implement in part 1902(a)(30) of the Act, which requires that payments for services be consistent with efficiency, economy, and quality of care. 42 CFR §447.201. Oregon's State Plan states the "Medicaid reimbursement rates for Adult Foster Care providers are collectively bargained through the Department of Administrative Services on behalf of the Department of Human Services with the Service Employees International Union. These rates are set based on a bargaining agreement at two year intervals." The bargaining agreement does not reflect with "express notice" or OAR 411-360-0200(1)(g) as approved methods to reduce provider payments thereby with the enforcement of OAR 411-360-0200(1)(g) the 45-day rule would violate the Collective Bargaining Agreement, State Plan, and the agreed upon person-centered service plan. APP. 23a-24a; 29 U.S.C. §218c(a)(5); SPA #18-0004 Attachment 4.19-B page 26. Under 42 CFR §441.570 state assurances, the state must assure all applicable provisions of the Fair Labor Standards Act of 1938 are met. By the implementation of OAR 411-360-0200(1)(g) the 45-day

rule before obtaining a contract containing the proposed modifications would thereby violate the Fair Labor Standards Act of 1938. 29 U.S.C. §158(d), 29 U.S.C. §218c(a)(5); *Teamsters Union v. Oliver*, 358 U.S. 283 (1959). The State must submit to CMS with any such proposed state plan amendment, an access review, affecting payment rates (reduction or restructuring) when the changes could result in diminished access. That access review must demonstrate sufficient access for any service for which the State agency proposes to reduce payment rates or restructure provider payments to demonstrate compliance with the access requirements at section 1902(a)(30)(A) of the Act. 42 CFR §447.203.

The State agency did not meet the State Plan requirements under 42 CFR §447.203 to address the provider payment reduction or restructuring. The State agency did bury OAR 411-360-0200(1)(g) in the state plan under Adult Foster Care – Licensing requirements under a range of Administrative Rules in SPA #18-0004 Attachment 3.1-K Page 32.

E. “Express Notice” or Agency Policy could take away beneficiaries’ supported services.

The two beneficiaries in this case (KO and AC) received written authorizations from the Defendant DHS that had been exercised respectfully since 2011 and 2013 and been reflected in their person-centered service plans. KO had documented health and severe behavioral issues in his person-centered service plan (known in Oregon as an ISP – Individual Support Plan). AC had

documented requests for access to family members out of state in his ISP. Due to the reasons for the authorizations, one could conclude the authorizations were reasonable accommodations given by the Defendant DHS. (Amended Complaint ¶¶19-21 Ex 1 & 2); Tr 73-74. In *D.P. et al. v. School Board of Palm Beach County*, Statement of Interest of the United States, Case 9:21-cv-81099-AMC Document 198 in the United States District Court Southern District of Florida, the statement of interest clarifies two legal principles, First: a public entity is obligated to provide reasonable modifications to qualified individuals with disabilities where it knows or reasonably should know of the disability-based need for modifications. Second: modifications to a public entity's behavioral response that utilize known strategies and interventions are reasonable and not a fundamental alteration; *see also Hunt v. Amico Properties, L.P.*, 814 F.3d 1213, 1226 (11th Cir. 2016) (holding that "a plaintiff can be said to have made a request for accommodation under the Fair Housing Act when the defendant has enough information to know of both the disability and desire for an accommodation."). To terminate the benefits or services in the 2011 and 2013 authorizations, 42 CFR §435.917(2) state "Notice of adverse action including denial, termination or suspension of eligibility or change in benefits or services. Any notice of denial, termination or suspension of Medicaid eligibility or change in benefits or services must be consistent with §431.210 of this chapter" must be issued. (Amended Complaint ¶¶22-27). OAR 411-360-0200(1)(g) The Department may adjust, suspend, or terminate payment to a provider when any of the following conditions occur:

(g) *An individual is away from the licensed AFH-DD, accompanied by the provider or staff paid by the provider, for 30 consecutive days or 45 days in an ISP year. (Emphasis added).*

The Policy Clarification Transmittal APD-PT-15-039, (known as the 45-day rule) “is intended to provide clarification *for individuals receiving ODDS authorized Community First Choice (K-Plan) state plan and Medicaid waiver services and traveling away overnight from their licensed....DD58 setting....while continuing to receive ADL and IADL supports.*” (Emphasis added). “The following *constraints....are applied when the provider accompanies the individual during their travel for the purposes of providing for ADLs or IADLs.*” (Emphasis added).

By the Defendants applying these policies stated above that infer in the plain text that services for the beneficiaries will not continue to be provided unless the beneficiaries stay at their licensed setting, without a notice of adverse action, would be in violation of 42 CFR §435.917(2) and the integration mandate in the form of unnecessary segregation and isolation. 28 CFR §35.130; 42 U.S.C §12132. In *Olmstead*, the Supreme Court held that, under the ADA and its regulations, “unjustified institutional isolation of persons with disabilities is a form of discrimination.” *Olmstead v. L.C.* 527 U.S. 581, 600 (1999). *Z.S. v. Durham County*, Middle District of North Carolina District Court, Civil Case No. 1:21-cv-663-WO-LPA Document 17 Statement of Interest; *D.P. et al., . School Board of Palm Beach County*, Southern District of Florida District Court, Civil Case No. 9:21-cv-81099-AMC Document 198 Statement of Interest; *Timothy B., et al., v. Kody Kinsley*, Middle District of North Carolina District Court, Civil Case No. 1:22-cv-1046 Statement of Interest; *M.R., et at, v Dreyfus, No. 11-35026 (9th Cir: 2012)*[9] We have several times held that beneficiaries of public assistance “may demonstrate a risk of irreparable injury by showing that enforcement of a proposed rule ‘may deny them needed medical care’“ *Indep. Living Ctr: Of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) (quoting *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982)), *cert granted*

on other issue, 131 S. Ct. 992 (2011); *see also, e.g. Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1113 (9th Cir. 2010), *cert Granted on other issue*, 131 S. Ct. 992 (2011); *Rodde v. Bonta*, 357 F.3d 988, 998-99 (9th Cir. 2004); *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983).

REASONS FOR GRANTING THE PETITION

I. This Court should take review because this case presents significant constitutional issues regarding the state agency's power to enact rules that contravene or nullify federal regulation.

(a) The 2011 and 2013 authorizations by the state agency's policy department constitutes as a "rule" as defined in ORS 183.310(9) and agency's enactment of APD-PT-15-039 or APD 32-2018 would then violate the *ex post facto* prohibition in this case. *Ross v. Oregon*, 227 U.S. 150, 162-63 (1913); *Oregon Constitution, Article 1, Section 21*. (Oregon Court of Appeals Opening Brief page 22,27); (Oregon Supreme Court Petition for Review page 6). An agency has an obligation to abide by its own regulations and by its conduct deprive Plaintiff of any of the rights guaranteed him by the statute or by regulations issued pursuant thereto. *Accardi v. Shaughnessy*, 347 U.S. 260, 265-67 (1954); *Oregon Constitution, Article 1, Section 10*. The failure to follow an applicable regulation may be a sufficient ground for vacation of an agency's decision, resulting

in a remand. *Nelson v. INS*, 232 f.3d 258, 262 (1st Cir. 2000).

(b) Both APD-PT-15-039 and APD 32-2018 referenced the reliance on Federal Regulation 42 CFR 431.52 Payments for services furnished out of state and OAR 461-120-0010 Oregon Residency Requirements. Both address temporary absence only as being out of state, neither indicated a limitation to the amount of time for that absence from the state. The state agency's promulgated rule (APD 32-2018, OAR 411-360-0200(1)(g)) redefines "Temporary Absence" to be "individuals who receive supports away from the licensed AFH-DD". (Oregon Court of Appeals Opening Brief page 25); (Oregon Supreme Court Petition for Review page 7). This Court previously noted in *Oil Re-Refining Co. v. Environmental Quality Comm. Cite as 361 Or 1 (2017)* "[t]he legislature's incorporation by reference is equivalent to its having republished the specified federal provisions in the state statutes." *Okorn v. Dept. Of Rev.*, 312 Or 152, 155, 818 Ped 928 (1991). (The same reasoning applies to administrative rules, when an agency promulgates a rule that incorporates a federal rule by reference, the agency's incorporation is equivalent to republishing the referenced federal rule in the agency's own rule.)

(c) When identifying the statutory and regulatory context of APD-PT-15-039 and OAR 411-360-0200(1)(g) is there a contrary intent stated in other provisions of the same rule, the statute pursuant to

which the rule was created, and other related statutes. (Oregon Court of Appeals Opening Brief page 25); (Oregon Supreme Court Petition for Review page 7). *Gafur v. Legacy Good Samaritan Hospital*, 344 Or 525, 533, 185 Ped 446 (2008). The Federal regulations established a regulatory scheme and prohibiting certain specific conduct and then authorized the state to enforce those substantive standards through agency administrative rules. The failure to follow an applicable regulation may be sufficient ground for vacation of an agency's decision, resulting in a remand. *Nelson v. INS*, 232 F.3d 258, 262 (1st Cir. 2000).

(d) The Oregon Supreme court has not previously addressed the question of whether the court should defer to an agency's interpretation of a federal rule that the agency has incorporated into its own rule by reference. See *Brand Energy Services, LLC v. OR-OSHA*, 261 Or App 210, 215 n 5, 323 Ped 356 (2014) (noting the lack of Oregon case law). (Oregon Supreme Court Petition for Review page 8).

(e) The enactment of APD-PT-15-039 and OAR 411-360-0200(1)(g) are inconsistent with OAR 411-360-0200(1)(b) and OAR 411-360-0200(2) in this case. (Oregon Supreme Court Petition for Review page 9).

(f) It was clearly erroneous when the state agency enforced APD-PT-15-039 and OAR 411-360-0200(1)(g) without being reflected in the ISPs.

(Amended Complaint ¶ 9); (Oregon's Court of Appeals Opening Brief, page 28); (Oregon's Supreme Court Petition for Review page 1).

II. This court should take review because the developmentally Disabled population are affected by this decision.

(a) The enacted rules in APD-PT-15-039 and OAR 411-360-0200(1)(g) were applied in ISPs it would implement an improper scope and application of the integration of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 USC 12132-34 and Section 504 of the Rehabilitation Act of 1973, 29 USC Section 794(a) and would therefore constitute unjustified isolation or unduly segregation of the Developmentally Disabled clients by requiring overnight stay in the Adult Foster Home in order to receive their required services. *Olmstead v. L.C.*, 527 U.S. 581, 600 (1991); *Lane et al v. Kitzhaber et al*, No. 3:2012cv00138 – Document 40 (D. Or. 2012); *Id Document 34* (D. Or. 2012); (Oregon Court of Appeals Opening Brief page 21,28); (Oregon Supreme Court Petition for Review page 9)

(b) If the enacted rules in APD-PT-15-039 and APD 32-2018 were applied in the Clients ISP, the Clients themselves would be affected by the Declaratory action and therefore the Clients should be made parties to the proceeding. *Stanley, Adm. V. Mueller*, 211 Or. 198, 315 P.2d at 125 (1957); (at

202, 315 P.2d at 127); (at 209, 315 P.2d at 130); ORS 28.010-160; (Oregon Court of Appeals Opening Brief page 21,28); (Oregon Supreme Court Petition for Review page 9)

(c) This decision opens the door for the state agency to use administrative rule OAR 411-360-0200(1)(g) or like, as an impermissible end run around OAR 411-318-0020, preempting 42 CFR 431.220-224, 42 USC 12132-34, 28 CFR 35.130(d); (Oregon Supreme Court Petition for Review page 10)

III. This Court Must Resolve the issue does the agency policy and rule stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress or the Federal law's purpose.

Both beneficiaries that live in the Plaintiff's Adult Foster Home were receiving services under Oregon's Community First Choice (K-Plan) state plan. This plan includes the Medicaid waiver for Home and Community-Based services (HCBS). SPA #18-0004 Attachment 3.1-K, Pg 2. HCBS is for both home and community-based services. SPA #18-0004 Attachment 3.1-K Pg 10. A provider for the K-plan home services also provides services to the beneficiary when the beneficiaries are in the community. The Plaintiff provided services at home and in the community as per the person-centered service plan for both beneficiaries. Tr 75

In 1990 the Americans with Disabilities Act passed, and congress enacted its Findings and purpose, that

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. 42 U.S.C. §12101(a)(2). Individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of overprotective rules and policies, segregation, and relegation to lesser services, programs, activities, benefits, or other opportunities (42 U.S.C. §12101(a)(5)) and as such promulgated rules and regulations and the enforcement of those rules and regulations to the Department of Justice. 42 U.S.C. §12131-12134, 29 U.S.C. §794. One of the regulations known as the “integration mandate,” states “A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 CFR §35.130(d). A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability. 28 CFR §35.130(a)(3)(i). The Department of Justice is quoted in the Courts opinion for *M.R. v. Dreyfus*, No. 11-35026 (9th Cir. 2012)[13] “[t]he integration mandate prohibits public entities from pursuing policies that place individuals at risk of institutionalization is not required.” Rather, “[t]he elimination of services that have enabled Plaintiffs to remain in the community violates the ADA, regardless of whether it causes them to enter an institution immediately, or whether it causes them to decline in health over time and eventually enter an institution in order to seek necessary care.” (Oregon Court of Appeals Opening Brief

page 21); (Oregon Supreme Court Petition for review page 9-10)

The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in Chapter IV, and other applicable official issuances of the Department. The plan must provide that it will be amended whenever necessary to reflect policy interpretations, materials changes in State law or policy, or in the State's operation of the Medicaid program. Prompt submittal of amendments is necessary. 42 CFR §430.10-12.

Both OAR 411-360-0200(1)(g) and Policy Transmittal APD-PT-15-039 put service constraints on the beneficiaries while they are in the community. The Policy and rule require the individual to sleep in the Adult Foster Home overnight to receive continued required services. Both the policy and rule implement reduction of services to the beneficiary disregarding their required support needs or that the services had been authorized and used in the past. In *Olmstead*, the Supreme Court held that, under the ADA and its regulations, "Unjustified institutional isolation of persons with disabilities is a form of discrimination." *Olmstead v. L.C.*, 527 U.S. 581,600 (1999) and that unnecessary segregation is itself a form of discrimination under Title II. *Id* 527 U.S. at 597-598, 600-01.

Clearly the adherence to the agency's policy and rule does not provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them (28 CFR §35.103) thereby defeating the purpose of the Federal laws. When federal law forbids an action that state law requires, the state law is "without effect." *Maryland v. Louisiana*, 451 U.S., at 746 (1981); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. ____ (2015) ["a court may not hold a civil defendant liable under state law for conduct federal law requires."] see, e.g., *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. ___, ____ (2013)(slip op., at 13-14). And, as we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding that state's regulatory actions preempted. *Ex parte Young*, 209 U.S. 123-156(1908).; *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472 (2013) quotes *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield".

Oregon revised statute ORS 409.040 states Federal law supersedes state law in all cases where federally granted funds are involved, the federal laws, rules and regulations applicable thereto shall govern notwithstanding any provision to the contrary

in ORS 409.010, 409.060, 409.070, 409.093 to 409.160, 411.060 and this subsection.

The Federal regulation state that all required services must be reflected in the person-centered service plan and must reflect who and what funding source will provide those services at home and in the community that the agency's policy and rule expressly limit those required services. Thus, the agency's prohibition would seem to "stan[d] as an obstacle to the accomplishment" of one of the Federal Statute's purposes, *Hines v. Davidowitz*, 312 U.S. 52,67 (1941). The Federal regulations convey obligation by using the term "Must" when stating "the written plan "must" reflect..., with the agency rule using the discretionary action by stating "The department "may" adjust, suspend.... Thereby if the agency were to use the discretionary rule, it must be reflected in the person-centered service plan to reflect all required service needs and who is providing them voluntarily. Tr 66

IV. This Court Must Resolve the issue AC and KO the beneficiaries are required to join in this case as indispensable parties.

The 2011 and 2013 reasonable accommodation authorizations were issued to both the beneficiaries and the Plaintiff under specific conditions. The person-centered service plans pertain to both beneficiaries and Plaintiff. When one party is affected by this case, all signing parties would be affected by this case as all parties are required to agree in writing. To change one aspect of either the

authorizations or the person-centered service plans would therefore affect the other parties. Clearly stated under history of this case AC and KO, the beneficiaries have had an active role in the agency's policy and rule and just like DHS being required to join, both AC and KO should have been joined as well. AC and KO's have shown an interest relating to the subject of this action and is so situated that disposing of the action in their absence may impair or impede their ability to protect their interests and would leave the Plaintiff subject to substantial risk of incurring inconsistent obligations because of AC and KO being the primary beneficiaries of the authorizations and the person-centered service plans. If the beneficiaries have not joined as required, the court must order that the person be made a party. (Oregon Court of Appeals Opening Brief page 21-22); (Oregon Supreme Court Petition for Review page 9-10); Federal Rules of Civil Procedure Rule 19.

V. This Court Must Resolve the issue of Discrimination against the eligible Developmentally Disabled persons when the agency enforced limitations on required services.

In *Z.S. v. Durham County*, Civil Case No. 1:21-cv-663, US District Court for the Middle District of North Carolina, Statement of Interest of the United States of America states Because the Department of Justice is the agency assigned to promulgate regulations under the law, it is afforded deference in its interpretation of the ADA. 42 U.S.C. §12134(a); 28 CFR Part 35 (delegating to the Department of Justice authority to promulgate regulations under Title II); see, e.g., *City of Arlington v. Fed Commc'ns Comm'n*, 569 U.S. 290, 296 (2013) ("Statutory ambiguities

will be resolved within the bounds of reasonable interpretation, not by the courts but by the administering agency.”). Title II. 42 U.S.C. §12134, these regulations require public entities, to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 CFR §35.130(d) (“the integration mandate”). The most integrated setting is one which enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible. The regulations also require entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability. *Id.* The agency’s policy and rule required the beneficiaries to stay in their adult foster home to receive continued needed services. In *Olmstead*, the Supreme Court held that, under the ADA and its regulations, unjustified institutional isolation of persons with disabilities is a form of discrimination. *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999). Section 504 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). 45 CFR §84.4(b)(2) states that aids, benefits, and services, to be equally effective...must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person’s needs. *Id.* Under these regulations, a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration...that have the effect of subjecting qualified handicapped persons to

discrimination on the basis of handicap. 28 CFR §41.51(b)(3)(i). *Id.* The Fourth Circuit has held Title II of the ADA and Section 504 of the Rehabilitation Act “impose the same integration requirements.” *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013) (citing *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2nd Cir. 2003)). *Id.* Further, courts have held that a change in the method of administering a program as to avoid unnecessary segregation of people with disabilities constitutes a reasonable modification. *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1319-20 (W.D. Wash 2015). The receipt of the services in the 2011 and 2013 authorizations is a plausible reasonable accommodation and to terminate them would be discrimination.

CONCLUSION

This Honorable Court must grant the writ of certiorari in this case to confirm that the agency used a policy and rule as a pretextual to limit the eligible Developmentally Disabled persons from receiving needed services in their greater community and created interference with the collective bargaining agreement of the provider. Case law has shown that reduction to provider payments directly or indirectly reduces beneficiary services. *M.R. v. Dreyfus* No. 11-35026 (9th Cir. 2012); *Clinton et al v. DHHS et al*, Case No. 1:10CV123, DC of NC.

Petitioner Carter, every service provider, and eligible beneficiary under the medical assistance for Home and Community-Based Services in this

country urgently need this Court's answer to the question of whether an agency policy or rule contrary to law and its preemption is implicit because the state law stands as an obstacle to the accomplishment of the Federal law's purpose.

Respectfully submitted,

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