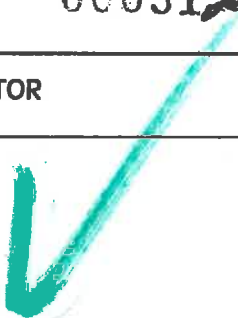


DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF DIRECTOR

ACTION REFERRAL

TO <i>Singletm</i>	DATE <i>12-28-07</i>
-----------------------	-------------------------

DIRECTOR'S USE ONLY	ACTION REQUESTED
1. LOG NUMBER <i>000312</i>	<input type="checkbox"/> Prepare reply for the Director's signature DATE DUE _____
2. DATE SIGNED BY DIRECTOR 	<input type="checkbox"/> Prepare reply for appropriate signature DATE DUE _____
	<input type="checkbox"/> FOIA DATE DUE _____
	<input checked="" type="checkbox"/> Necessary Action

APPROVALS (Only when prepared for director's signature)	APPROVE	* DISAPPROVE (Note reason for disapproval and return to preparer.)	COMMENT
1.			
2.			
3.			
4.			

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

TELEPHONE (803) 256-2017

FAX (803) 256-2213

December 22, 2007

RECEIVED

DEC 27 2007

Department of Health & Human Services
OFFICE OF THE DIRECTOR

The Honorable Ralph King Anderson III
Administrative Law Judge
1205 Pendleton Street, Suite 224
Columbia, SC 29201

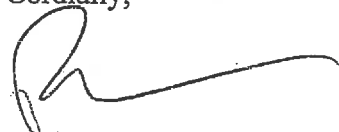
Re: Appeal of Ann Jagar
06 ALJ 08-0770 AP

Dear Judge Anderson:

Enclosed is our Motion and Memorandum in the matter of Ann Jagar v. SCDHHS. I would appreciate your scheduling a hearing on our motion. Please clock the copy and return to me in the enclosed envelope.

I will be out of the country until January 5, 2008 and request protection during this time. Best wishes for the holidays and the coming new year.

Cordially,



Patricia L. Harrison

cc: John Jagar
Byron Roberts, Esquire
Tana Vanderbilt, Esquire
Emma Forkner
Gloria Prevost
Steve Hamm, Esquire

IN THE STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW

Ann Jagar)	ALC Docket No. 06 ALJ 08 0770
Appellant,)	
)	
vs.)	MOTION AND MEMORANDUM
)	
South Carolina Department of)	
Health and Human Services,)	
Respondent)	

Ann Jagar filed a request for a fair hearing on five issues in 2006. The only issue addressed in the hearing officer's original order was whether SCDDSN erred in denying Ann Jagar's request for Adult Companion Services. This Court remanded the case to the hearing officer and an amended order was issued by the Director of the SCDHHS Office of Appeals and Hearings, without providing Appellant an evidentiary hearing or giving Appellant the opportunity to introduce new evidence into the record. Since Appellant's request for a fair hearing was first filed in 2006, Appellant's condition has degenerated because of the failure of SCDDSN to provide needed services. Exhibit 1. SCDHHS has violated Appellant's due process rights by refusing to allow her to present evidence showing the consequences which have resulted from the State's denial of her request for services.¹

¹ This Court may take judicial notice of the request for an audit made to the South Carolina Legislative Audit Council (SCLAC) and the audit plan recently released by SCLAC, which includes an investigation into whether SCDDSN has provided due process to members of the public. Attached as Exhibits 2 and 3.

SCDDSN and SCDHHS Have Failed to Promulgate Regulations for the Operation of the MR/RD Medicaid Waiver

Neither SCDDSN nor SCDHHS have promulgated regulations to implement the programmatic aspects of the MR/RD Medicaid waiver. Federal regulations require that states must designate a "Single State Agency" to administer and supervise the Medicaid program. 42 CFR 431.10. SCDHHS is the "Single State Agency" authorized by the South Carolina General Assembly to administer all Medicaid programs.² Federal law requires this agency to "Make rules and regulations that it follows in administering the plan or that are binding on local agencies that administer the plan." 42 CFR § 431.10(b)(2)(ii). SCDHHS has failed to promulgate regulations on the administration of the MR/RD Medicaid waiver program. Federal law prohibits SCDHHS from delegating authority to "issue policies, rules and regulations on program matters." 42 CFR § 431.10(e). South Carolina Code of Laws § 44-6-190 authorizes SCDHHS to promulgate regulations pursuant to the Administrative Procedures Act and provides that all appeals from decisions by the department are heard pursuant to that Act. SCDHHS is also required by 42 CFR § 431.206 to "issue and publicize its hearing procedures." SCDHHS has failed to promulgate regulations to inform the public of its procedures for how fair hearings will be conducted.

The enabling statute of SCDDSN requires the Commission to promulgate regulations:

"The commission shall determine the policy and promulgate regulations governing the operation

² "The South Carolina Department of Health and Human Services ("DHHS") is the state agency responsible for administering and supervising the Medicaid programs in South Carolina." *Doe v. Kidd*, 501 F.3d 348 (4th Sept. 19, 2007). *Doe v. Kidd* was issued by the U.S. Court of Appeals for the Fourth Circuit after this case was remanded to SCDHHS. In *Doe*, the Fourth Circuit confirmed individual Medicaid participants' private right to bring an action for violation of the Medicaid Act.

of the department and the employment of professional staff and personnel.” S.C. Code 44-20-220. This statute requires the SCDDSN Commissioners to consult with consumer advisory boards which are made up of representatives from each Congressional District in the State and one at-large member:

In promulgating these regulations, the commission must consult with the advisory committee of the division for which the regulations shall apply.

These advisory boards have never been appointed, even though they are mandated by South Carolina Code of Laws § 40-20-225. Instead of promulgating regulations, SCDDSN administers the MR/RD waiver based on manuals written by staff members which have not even been approved by the agency’s governing board. SCDDSN denied Appellant’s request for Adult Companion Services based on a prohibition in its MR/RD Manual for Service Coordinators and Early Interventionists.

This Court may take judicial notice of the pending lawsuit against SCDDSN brought by eleven persons who have disabilities and South Carolina Protection and Advocacy to require the agency to promulgate regulations. (See attached Complaint at Exhibit 4.)

The Administrative Procedures Act was intended to provide a standardized process for all South Carolina agencies to formulate rules in order to obtain public comment and to provide access to agencies’ operations as well as an avenue for appellate review of administrative decisions. Instead, the Director of SCDDSN alleges that he has unfettered and unreviewable authority over decisions made by the agency. Complaint at page 17. Appellant’s services were denied based on this unchecked discretion. Respondent’s decision to deny services based on an

unpromulgated manual should be overturned and this Court should issue an order requiring SCDDSN and SCDHHS to promulgate regulations, with public review after input is received from the advisory boards required by South Carolina Code of Laws § § 44-20-220 and 225.

SCDDSN Has Failed to Provide MR/RD Medicaid Waiver Adult Companion Services with Reasonable Promptness in Violation of 42 U.S.C. 1396a(a)(8).

SCDDSN argues that Adult Companion Services are included within Residential Habilitation services, therefore, they are “duplicative” of Adult Companion Services.³ They offer no law or regulation in support of this position. SCDDSN has provided no opinion from CMS which prevents a person who receives Residential Habilitation from receiving Adult Companion Services.⁴ This explanation ignores the clear mandate of CMS that MR/RD waiver services be separately defined. Services offered under South Carolina’s MR/RD Waiver are defined in Appendix B-1 of the MR/RD Document beginning at page 8. 42 CFR §

³ In *Doe v. Kidd*, SCDDSN and SCDHHS made a similar argument, claiming that “Residential Habilitation Services” and “Respite Services” are the same. The U.S. District Court of Appeals for the Fourth Circuit disagreed, finding that these are separate and distinct services.

⁴ In fact, the West Virginia Bureau for Behavioral Health and Health Facilities provides at

Adult Companion: Adult Companion Services are described as a benefit for non-medical care, supervision and socialization, provided to an adult who has a disability. Companions may assist or supervise the individual with such tasks as meal preparation, laundry and shopping, but do not perform these activities as discrete services. Providers may also perform light housekeeping tasks which are incidental to the care and supervision of the individual. This service is provided in accordance with a therapeutic goal in the plan of care, and is not purely diversional in nature. This service is not approved to provide any medical care; it is a non-medical care benefit. Adult Companion Services are complimentary to and not exclusive of Residential Habilitation services, as specified by individual needs on their IPP. Participants will be able to access both Adult Companion Services and Residential Habilitation services under a combined service limit.

441.301(b)(4) requires states to describe each service provided under the MR/RD Waiver separately:

Multiple services that are generally considered to be separate services may not be consolidated under a single definition. Commonly accepted terms must be used to describe the service and definitions may not be open ended in scope. "Bundling" of services is only allowed by CMS when a recipient's access to services and a free choice of providers is not compromised.

The State Medicaid Manual § 4442.3(A)(4) provides:

Define each specific service separately. Multiple services commonly considered separate services (e.g. personal care and habilitation services) generally may not be packaged as a single "comprehensive" service to which one expansive definition is applicable. Further, each definition must be reasonably related to the common meaning(s) of the service defined. A combined service definition (bundling) will be considered if you establish that the bundling of services will permit more efficient delivery of services and not compromise either an individual's access to services or free choice of providers.

The State may not discriminate against persons similarly situated in providing MR/RD Medicaid waiver services. SCDDSN's policy of providing Adult Companion Services to persons who live at home with their parents, but denying these services to similarly situated persons living in supervised apartments is discriminatory. There is no valid legal basis for denying Adult Companion Services to Appellant. SCDDSN is required to render services in "the most by integrated setting appropriate to the needs of qualified individuals with disabilities." *Olmstead v. L. C.*, 527 U.S. 581 (1999). This means "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 CFR pt. 35, App. A, p. 450 (1998). Appellant's opportunities to interact with non-disabled persons is practically non-existent in the workshop setting.

42 U.S.C. § 1396a(a)(8) requires that the State provide Medicaid services with reasonable promptness. *Doe v. Kidd, supra*. Services must be provided to persons who meet ICF/MR level of care, such as Appellant, which are needed to acquire behaviors to allow the client to function with as much self-determination and independence as possible and to prevent regression or loss of current optimal functioning. 42 C.F.R. § 483.440. The record shows that Appellant has been victimized in the institutional day programs provided by SCDDSN. Her treatment team determined that she needs Adult Companion Services. Provision of these services, which are separate and distinct services under the MR/RD Medicaid waiver, would not fundamentally alter the nature of Respondent's programs. The requested services would actually be less expensive than the day services SCDDSN has attempted to force Appellant to receive - services which are peddled by SCDDSN in order to keep the State's repressive and profitable institutional workshops full. Reasonable accommodations are required by *Olmstead*. Appellant requests that this Court prohibit SCDDSN from enforcing the discriminatory prohibition against persons living in SLP and CTH facilities receiving Adult Companion Services.

**Respondent Erred as a Matter of Law in Finding that Appellant
Is Not Entitled to a De Novo Evidentiary Hearing**

42 CFR § 431.220 requires the State Medicaid Agency to provide a hearing to any applicant making a request for a hearing when "his claim for services is denied or is not acted upon with reasonable promptness." The second SCDHHS order held that Respondent is not required to provide Appellant with a de novo hearing. This decision is clearly erroneous as a matter of law. It conflicts with the clear terms of 42 CFR § 431. Persons who are denied Medicaid services are entitled to an evidentiary hearing. 42 CFR § 431.210. Respondent was required to give Appellant a notice of her right to request an evidentiary hearing. Appellant had

a procedural right to bring witnesses, present an argument without undue interference, establish all pertinent facts and circumstances and to question or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses. No evidentiary hearing is ever held at the SCDDSN level before Appellant filed a request for a fair hearing with SCDHHS. If Medicaid participants do not receive an evidentiary hearing at SCDSHHS, they receive no evidentiary hearing at all. Hearing decisions must be based exclusively on evidence introduced at the hearing. 42 CFR § 431.244. Because Appellant was not provided an evidentiary hearing before SCDDSN, her due process rights were denied when SCDHHS refused to provide her with a *de novo* hearing before the hearing officer.

SCDHHS AND SCDDSN Have Violated Appellant's Due Process Rights by Failing to Provide an Evidentiary Hearing and to Issue a Final Order Within 90 Days of Her Request for a Fair Hearing

Two years have passed since Appellant requested a fair hearing. SCDHHS and the hearing officer have violated the Medicaid Act and the due process provisions of the United States Constitution by failing to provide needed services and a fair hearing and a final decision within 90 days of Appellant's request for a hearing.

This Court misinterpreted the timeliness requirement contained in 42 C.F.R. 431.244(f). . . The hearing officer issued the original "fair hearing decision" 210 days after Appellant filed her request for a fair hearing. Because the regulation provides that the State must "ordinarily" meet this time line, this Court erroneously determined that the requirement is just a suggestion that the State can take or leave, at its option. On the contrary, the "*extraordinary*" circumstances under which a different deadline is established are set forth in the regulation and the State Medicaid Manual.

42 U.S.C. § 1396a(a)(8) requires the State to provide Medicaid services with reasonable promptness. In *Doe v. Chiles*, the 7th Circuit Federal Court of Appeals found that a “reasonable” time period does not exceed 90 days. 136 F.3d 709 (11th Cir. 1998). (ICF/MR services must be provided within 90 days of request.)

42 C.F.R. § 431.244f(1) requires the state to take final administrative action “ordinarily, within 90 days.” 42 C.F.R. § 431.233f(2) requires a final determination in certain circumstances within 3 days. The federal Medicaid Agency (CMS) clarified the 90 day requirement contained in 42 C.F.R. § 431.244(f)(1) in the State Medicaid Manual:

2902.10 Prompt, Definitive And Final Action (42 CFR § 431.244(f))—The requirement for prompt, definitive, and final action means that all request for a hearing are to receive prompt attention and will be carried through all steps necessary to completion...Adhere to the time limit of 90 days between the date of the request for the hearing and the date of the final administrative action except where the agency grants a delay at the appellant’s request, or when required medical evidence necessary for the hearing can not be obtained within 90 days. In such case the hearing officer may, at his discretion, grant a delay up to 30 days.

That gives the State 120 days to issue a decision - only when the Appellant requests a delay or additional medical information must be obtained. This requirement is again reiterated in Section 2903.3 of the State Medicaid Manual:

Final Administrative Action. Section 431.244(f) requires that you take final administrative action within 90 days of the request for hearing. In implementing this regulation it is reasonable to allow additional time to meet this standard when a delay beyond 90 days is due to claimant requests or untimely receipt by the hearing officer of documentation needed to render a decision which had been requested timely. Any delay can not exceed 30 days.

In addressing the 90 day requirement contained in 42 C.F.R. § 431.244f(1) for issuing a final determination, one federal court has squarely rejected the State’s attempt to extend the time limitation in violation of 42 C.F.R. § 431.244(f). The State of Tennessee complained that the

timeliness requirements of 42 C.F.R. § 431.244 were too onerous in *Grier v. Goetz*. The federal district court squarely rejected that argument:

The State's request, however, ignores the plain language of federal regulations, which require final administrative action within 90 days of the date the enrollee *files* and appeal, in the case of standard appeals, or as expeditiously as the enrollee's health condition requires but no later than 3 days after a receiving a request for an appeal directly from an enrollee or the case file from a MCC, in the case of expedited appeals. See 42 C.F.R. § 431.244f. Thus, the federal regulations do not make a distinction between the date of receipt of an appeal as opposed to the date all information is gathered.

402 F. Supp. 876, 934 (M.D. Tenn. 2005). In dismissing the State's argument, that court found that extending the time for issuing a final decision "risks delaying the appeals process in violation of 42 C.F.R. § 431.244 and would deprive TennCare enrollees of fundamental due process rights." *Id.* at 935-936. The court in that case found "no reason to limit enrollee's due process rights simply to reduce the State's administrative burden."

In Appellant's case, even with an additional 30 days added to the deadline, the hearing officer missed the mark by 90 days. Nothing in the federal law, regulations or interpretations by CMS authorizes the State to extend the 90 day deadline by more than 30 days. The determination of this Court that 42 C.F.R. § 431.244(f)(1) does not require Respondent to take final administrative action within 90 days of Appellant's request for a fair hearing is wrong. This interpretation of 42 C.F.R. § 431.244(f) and the reasonable promptness requirements established under 42 U.S.C. § 1396a(a)(8) are preempted by the Supremacy Clause of the United States Constitution, federal regulation and the Medicaid agency interpretation of federal law and regulation.

In addition, this Court committed error by finding that Appellant failed to prove prejudice due to the delay in processing her claim. Such proof was impossible due to the improper

limitations established by the due process violations of the hearing officer. He refused to allow Appellant to present any testimony or other evidence of deterioration in Appellant's condition occurring after her request for a fair hearing was filed. Even those documents proffered by Appellant were not included in the record provided to the Administrative Law Court, and thereby unavailable to Appellant in preparing her briefs and presenting her oral argument to the lower court.

Appellant's due process right to a prompt decision was violated when the State took 210 days to issue a fair hearing decision. Two years after her request for a fair hearing, Appellant is still not receiving needed Medicaid Adult Companion Services, which has resulted in a deterioration in her condition. Attachment to Appellant's Motion to Supplement the Record dated March 24, 2007. State laws and regulations which are more restrictive than federal requirements are preempted by federal law. These federal requirements mandate the reversal of this Court's determination that the 90 day limit for issuing a final administrative decision is not binding on the State Medicaid Agency.

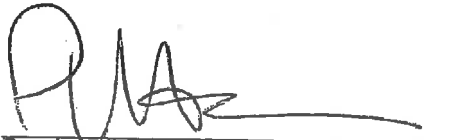
Conclusions

SCDHHS and the hearing officer exceeded their statutory authority by dismissing Appellant's request for a fair hearing and this decision was arbitrary and capricious. Respondent erred as a matter of law by failing to provide Appellant with written notice of her right to request a *de novo* fair hearing. Respondent has violated the Administrative Procedures Act and has failed to promulgate regulations for the administration of the Medicaid program, and specifically for the MR/RD Medicaid waiver programs.

Substantial rights of Appellant have been prejudiced by the second decision issued by SCDHHS. SCDHHS has been given two chances and two years to get it right. Appellant has

gone for two years without needed services - with SCDDSN finally forcing her back into a dangerous setting if she wants to receive any day services at all. Appellant respectfully prays for an order reversing the Respondent's decisions, awarding Adult Companion Services, attorney fees and costs and for other and further relief that is just and proper. In addition, Appellant requests that this Court find that Respondents have violated the clear terms of the enabling legislation which require SCDDSN to consult with advisory boards required by South Carolina Code of Laws 44-20-225 and to promulgate regulations, affording the public input into how tax dollars will be spent. Even more importantly, the agencies should elicit public input into how the State will deliver services and protect the rights of its most vulnerable citizens.

Respectfully submitted,

A handwritten signature in dark ink, appearing to be 'PLH', with a long horizontal line extending to the right.

Patricia L. Harrison
611 Holly Street
Columbia, South Carolina 29205
(803) 256-2017

Attorney for Ann Jagar

December 20, 2007
Columbia, South Carolina

EXHIBIT 1

ADMINISTRATIVE LAW

Ann Jagar
Appellant,

VS.

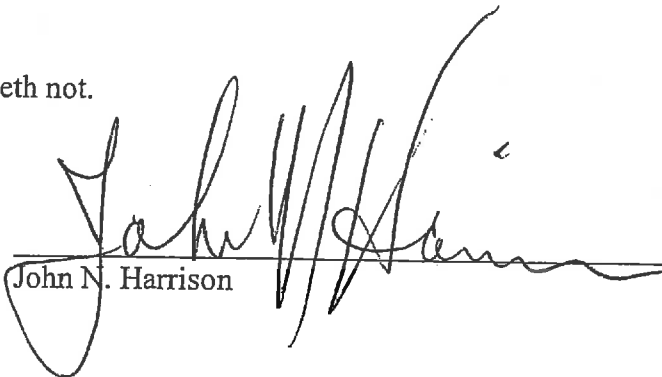
South Carolina Department of
Health and Human Services,
Respondent

ALC Docket No. 06 ALJ 08 0770

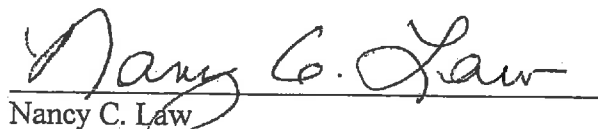
AFFIDAVIT

1. I am related to Ann Jagar by marriage and have participated in some of the meetings of Ann's treatment team.
2. Ann's team has determined that she needs Adult Companion Services, based on the recommendations of her psychological service providers and a determination that Ann should not return to the workshop. Exhibit 1.
3. Ann's condition has deteriorated since she first requested a fair hearing appealing Respondent's denial of her request for Adult Companion Services.
4. Ann and her team have recently requested that she be moved from a SLP to a more restrictive CTH II because of the regression in her skills and condition.
5. Ann has been physically injured in unprovoked assaults at two different Babcock Center workshops and she expressed fear of returning to a workshop after these assaults.
6. Contrary to the recommendations of the team at Ann's annual plan of care meeting, the Babcock Center enrolled Ann at the Three Fountains Workshop, where she attends three days a week.
7. SCDDSN receives additional funding when Ann attends this workshop.
8. Ann's team expressed their concerns about her placement at this workshop because of aggressive persons attending Three Fountains, a sexual assault having occurred in this program and Ann being the victim of unprovoked assaults at two other workshops.
9. The cost of Ann attending this workshop is greater than the cost of the requested Adult Companion Services.

10. The requested Adult Companion Services would be provided in a more integrated setting in the community than the institutional services being provided at Three Fountains Workshop.
11. Ann's need for Adult Companion Services will continue whether or not she moves to a CTH II.
12. Further deponent sayeth not.


John N. Harrison

Sworn to be this 21st day of
December, 2007


Nancy C. Law

Notary Public for South Carolina

Commission exp. 1-05-2014

EXHIBIT 2

Walton J. McLeod
First Vice-Chairman

James H. Harrison
Chairman

William G. Herbkersman
Second Vice-Chairman

Received 6/1/07

Karl B. Allen
Bruce Bannister
Catherine C. Ceips
Alan D. Clemmons
Creighton B. Coleman
Kristopher Crawford
F. G. Delleney, Jr.
Benjamin A. Flagood
Gloria A. Haskins
Douglas Jennings, Jr.
R. Keith Kelly

Patrick G. Dennis
Chief Counsel

Heather F. Smith
Administrative Assistant

Mr. George L. Schroeder
Director
Legislative Audit Council
1331 Elmwood Ave., Suite 315
Columbia, SC 29201

Judiciary Committee



House of Representatives
P.O. Box 11867 Telephone: 734-3120
Columbia, South Carolina 29211
May 24, 2007

J. Todd Rutherford
John L. Scott, Jr.
Fletcher N. Smith, Jr.
Garry Smith
G. Murrell Smith, Jr.
James Smith
James E. Stewart, Jr.
Scott F. Talley
Thad T. Viers
J. David Weeks
Jackson S. "Seth" Whipper

Bonnie B. Goldsmith
Assistant Chief Counsel

Dear Mr. Schroeder:

The following members of the South Carolina House of Representatives and the South Carolina Senate request that your agency conduct an audit of the Department of Disabilities and Special Needs (DDSN). We request that the audit focus on the following items:

1. How effective is DDSN in ensuring the health, safety and welfare of its clients?

a. Are appropriate standards, regulations, policies and procedures in place for the proper licensure and certification of home and community based facilities?

b. Are residential facilities routinely and effectively inspected to ensure quality of care and compliance with such standards?

c. Are adequate safeguards in place in the contracts with local Disabilities and Special Needs Boards to ensure that covered populations receive appropriate, effective and quality services?

d. Are appropriate and effective enforcement measures and sanctions in place and adhered to when deficiencies are identified?

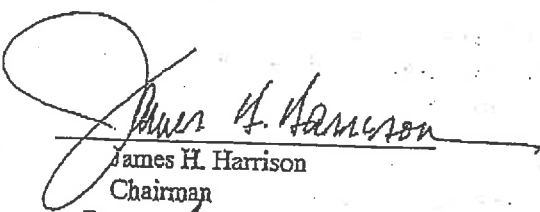
e. What procedures are in place for reporting deficiencies or "life-threatening" conditions and are such procedures adhered to?

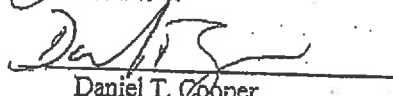
2. Is the claim by DDSN that "the money follows the client" within their system misleading or does it accurately reflect the true financial flow of funds? Is the band payment system used to allocate Medicaid funds an effective, efficient, and accountable

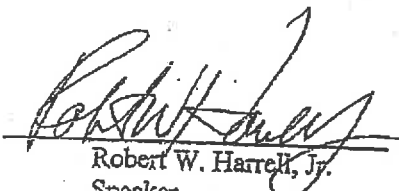
- system? How does HHS ensure DDSN is properly reimbursed with applicable state and federal statutes and that such reimbursement is tracked to individual clients?
3. Are there inherent barriers to free-market competition and consumer choice within the current system operated by DDSN? Is there any merit to recent reports of reprisals by DDSN on clients who attempt to exercise their right to a choice of provider?
 4. Is DDSN effectively utilizing its existing capacity? Has DDSN allowed providers to sell facilities purchased with state funds and retain the proceeds and is this the best use of state funds? Has DDSN "forgiven" any debts owed to it by any of its service providers? If so, are such actions in the best interest of the state?
 5. What has been the impact on client care of the policy of de-institutionalizing ICF/MRs to community training homes?
 6. Are there conflict of interest issues with former employees or other individuals? Has DDSN offered any incentives to vendors or service providers to "encourage" them to hire key former DDSN employees?
 7. As part of its FY 06-07 budget submission DDSN requested \$9,231,000 for 500 new beds for out-of-home placements. These funds were appropriated by the General Assembly for that purpose. Did DDSN have a plan in place at the time of its budget request to fill these beds? What is the status of any funds appropriated for this purpose which remain unspent at this time? Have additional funds been requested as part of the FY 07-08 budget for this same purpose? Is there a plan in place to fill those beds?
 8. Is there merit to a governing structure under which the agency auditor reports directly to the agency governing board rather than to the agency director?
 9. Has the DDSN Board complied with the South Carolina Freedom of Information law with respect to its requirements for open-meetings?

It is the intent of the undersigned to determine how effective the South Carolina Department of Disabilities and Special Needs is in providing services to the vulnerable population it serves and in managing its resources in an effective manner.

Sincerely,


James H. Harrison
Chairman


Daniel T. Cooper
Chairman


Robert W. Harrell, Jr.
Speaker


Harry F. Cato
Chairman

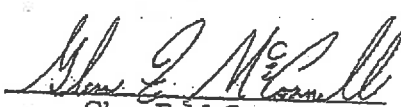

Glenn F. McConnell
President Pro Tempore

EXHIBIT 3



SOUTH CAROLINA GENERAL ASSEMBLY

Legislative Audit Council

Independence, Reliability, Integrity



December 6, 2007

Dr. Stan Butkus, State Director
Department of Disabilities and Special Needs
3440 Harden Street Extension
Columbia, SC 29240

Dear Dr. Butkus:

We have completed our survey work for the audit of the Department of Disabilities and Special Needs. We have consulted with audit requesters, interviewed DDSN staff and other interested parties, and reviewed reports and information relating to the programs, services, and operations of the department. Our audit plan includes the following objectives:

- Determine whether DDSN has appropriate controls to ensure the health, safety, and welfare of its customers.
- Review DDSN's process for funding residential and other customer services to determine whether funding is efficient, equitable, and ensures accountability.
- Determine whether there are barriers to competition and customer choice within the current system operated by DDSN.
- Review state appropriations to DDSN for expanded services to determine whether funds have been used in accordance with legislative intent.
- Determine whether internal and external audits of DDSN provide an appropriate system of accountability.
- Determine whether DDSN has allowed sufficient public input and has provided adequate information and due process to members of the public regarding its services and operations.
- Determine whether DDSN has ensured that there are no conflicts of interest involving its board, employees, contractors, or relevant advocacy groups.

We anticipate that we will complete fieldwork by July 2008. A normal progression of the audit review process would result in publication in early October 2008. Please let me know if you have questions or comments. We appreciate the cooperation of you and your staff.

Sincerely,

George L. Schroeder, Director
cc: Bill Barfield, Deputy Director

LAC.SC.GOV

1331 Elmwood Ave., Suite 315 • Columbia, SC 29201 • 803.253.7612 (VOICE) • 803.253.7639 (FAX)

EXHIBIT 4

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Protection and Advocacy for People with
 Disabilities, Inc, MJB on behalf of and as next
 friend of J.B., CBB on behalf of and as guardian of
 P.B., GC and LC on behalf of and as guardian of
 F.C., DP on behalf of and as guardian of C.M.D.,
 KF and SF on behalf of and as next friend of A.F.,
 JH on behalf of and as next friend of A.J., GM on
 behalf of and as next friend of E.M., MM on
 behalf of and as guardian of E.J.M., RP on behalf
 of and as guardian of S.P., RR and JR on behalf of
 and as guardian of K.D.R., and JK on behalf of
 and as guardian of S.S.

Plaintiff(s)

vs.

South Carolina Department of Disabilities and
 Special Needs, Dr. Stanley J. Butkus, in his
 official capacity as Director of the South Carolina
 Department of Disabilities
 and Special Needs, and Edythe Dove, Mary
 Katherine Bagnal, Ronald Forrest, John Vaughn,
 Dr. Otis Speight, W. Robert Harrell as
 Commissioners of the South Carolina Department
 of Disabilities and Special Needs.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVER SHEET

2007 CP4002/8-

RICHLAND COUNTY
 FILED
 2007 APR -5 PM 4:37
 BARBARA A. SCOTT
 C.C.C. & G.S.

(Please Print)

Submitted By: Kenya Carver Miller

Address: 1900 Barnwell Street, Columbia, SC 29201

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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|---|---|--|
| <input type="checkbox"/> Contracts | <input type="checkbox"/> Torts - Professional Malpractice | <input type="checkbox"/> Torts - Personal Injury | <input type="checkbox"/> Real Property |
| <input type="checkbox"/> Constructions (100) | <input type="checkbox"/> Dental Malpractice (200) | <input type="checkbox"/> Assault/Slander/Libel (300) | <input type="checkbox"/> Claim & Delivery (400) |
| <input type="checkbox"/> Debt Collection (110) | <input type="checkbox"/> Legal Malpractice (210) | <input type="checkbox"/> Conversion (310) | <input type="checkbox"/> Condemnation (410) |
| <input type="checkbox"/> Employment (120) | <input type="checkbox"/> Medical Malpractice (220) | <input type="checkbox"/> Motor Vehicle Accident (320) | <input type="checkbox"/> Foreclosure (420) |
| <input type="checkbox"/> General (130) | <input type="checkbox"/> Notice/ File Med Mal (230) | <input type="checkbox"/> Premises Liability (330) | <input type="checkbox"/> Mechanic's Lien (430) |
| <input type="checkbox"/> Breach of Contract (140) | <input type="checkbox"/> Other (299) | <input type="checkbox"/> Products Liability (340) | <input type="checkbox"/> Partition (440) |
| <input type="checkbox"/> Other (199) | | <input type="checkbox"/> Personal Injury (350) | <input type="checkbox"/> Possession (450) |
| | | <input type="checkbox"/> Wrongful Death (360) | <input type="checkbox"/> Building Code Violation (460) |
| | | <input type="checkbox"/> Other (399) | <input type="checkbox"/> Other (499) |

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| Inmate Petitions | Judgments/Settlements | Administrative Law/Relief | Appeals |
| <input type="checkbox"/> PCR (500) | <input type="checkbox"/> Death Settlement (700) | <input type="checkbox"/> Reinstate Driver's License (800) | <input type="checkbox"/> Arbitration (900) |
| <input type="checkbox"/> Sexual Predator (510) | <input type="checkbox"/> Foreign Judgment (710) | <input type="checkbox"/> Judicial Review (810) | <input type="checkbox"/> Magistrate-Civil (910) |
| <input type="checkbox"/> Mandamus (520) | <input type="checkbox"/> Magistrate's Judgment (720) | <input type="checkbox"/> Relief (820) | <input type="checkbox"/> Magistrate-Criminal (920) |
| <input type="checkbox"/> Habeas Corpus (530) | <input type="checkbox"/> Minor Settlement (730) | <input type="checkbox"/> Permanent Injunction (830) | <input type="checkbox"/> Municipal (930) |
| <input type="checkbox"/> Other (599) | <input type="checkbox"/> Transcript Judgment (740) | <input type="checkbox"/> Forfeiture (840) | <input type="checkbox"/> Probate Court (940) |
| | <input type="checkbox"/> Lis Pendens (750) | <input checked="" type="checkbox"/> Other (899) | <input type="checkbox"/> SCDOT (950) |
| | <input type="checkbox"/> Other (799) | Declaratory Judgment Action | <input type="checkbox"/> Worker's Comp (960) |
| | | | <input type="checkbox"/> Zoning Board (970) |
| | | | <input type="checkbox"/> Administrative Law Judge (980) |
| | | | <input type="checkbox"/> Public Service Commission (990) |
| | | | <input type="checkbox"/> Employment Security Comm (991) |
| | | | <input type="checkbox"/> Other (999) |

- Special/Complex /Other**
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| <input type="checkbox"/> Environmental (600) | <input type="checkbox"/> Pharmaceuticals (630) |
| <input type="checkbox"/> Automobile Arb. (610) | <input type="checkbox"/> Unfair Trade Practices (640) |
| <input type="checkbox"/> Medical (620) | <input type="checkbox"/> Out-of State Depositions (650) |
| <input type="checkbox"/> Other (699) | |
- Negligence: Damages to
Under Ground Utilities

Submitting Party Signature: _____

Date: April 5, 2007

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Protection and Advocacy for People with
Disabilities, Inc, MJB on behalf of and as
next friend of J.B., CBB on behalf of and as
guardian of P.B., GC and LC on behalf of
and as guardian of F.C., DP on behalf of
and as guardian of C.M.D., KF and SF on
behalf of and as next friend of A.F., JH on
behalf of and as next friend of A.J., GM on
behalf of and as next friend of E.M., MM on
behalf of and as guardian of E.J.M., RP on
behalf of and as guardian of S.P., RR and
JR on behalf of and as guardian of K.D.R.,
and JK on behalf of and as guardian of S.S.

PLAINTIFFS,

v.

South Carolina Department of Disabilities
and Special Needs, Dr. Stanley J. Butkus,
in his official capacity as Director of the
South Carolina Department of Disabilities
and Special Needs, and Edythe Dove, Mary
Katherine Bagnal, Ronald Forrest, John
Vaughn, Dr. Otis Speight, W. Robert
Harrell as Commissioners of the South
Carolina Department of Disabilities and
Special Needs.

DEFENDANTS.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

) CIVIL ACTION NO.:

SUMMONS
(Non-Jury)

RICHLAND COUNTY
FILED
2007 APR -5 PM 4:38
BARBARA A. SCOTT
C.C.C. & G.S.

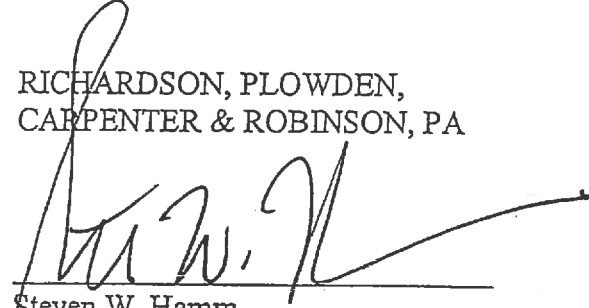
TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this
action, a copy of which is herewith served upon you, and to serve a copy of your Answer
to the Complaint on the Plaintiff at 1900 Barnwell Street, Columbia, South Carolina
29201, within thirty (30) days after the service hereof, exclusive of the day of such

service, and if you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded in the Complaint.

RICHARDSON, PLOWDEN,
CARPENTER & ROBINSON, PA

BY:



Steven W. Hamm
C. Jo Anne Wessinger Hill
Kenya Carver-Miller
1900 Barnwell Street
Columbia, South Carolina 29201
803-771-4400

ATTORNEYS FOR PLAINTIFFS

Columbia, South Carolina

April 5, 2007

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Protection and Advocacy for People with
Disabilities, Inc, MJB on behalf of and as
next friend of J.B., CBB on behalf of and as
guardian of P.B., GC and LC on behalf of
and as guardian of F.C., DP on behalf of
and as guardian of C.M.D., KF and SF on
behalf of and as next friend of A.F., JH on
behalf of and as next friend of A.J., GM on
behalf of and as next friend of E.M., MM on
behalf of and as guardian of E.J.M., RP on
behalf of and as guardian of S.P., RR and
JR on behalf of and as guardian of K.D.R.,
and JK on behalf of and as guardian of S.S.

PLAINTIFFS,

v.

South Carolina Department of Disabilities
and Special Needs, Dr. Stanley J. Butkus,
in his official capacity as Director of the
South Carolina Department of Disabilities
and Special Needs, and Edythe Dove, Mary
Katherine Bagnal, Ronald Forrest, John
Vaughn, Dr. Otis Speight, W. Robert
Harrell as Commissioners of the South
Carolina Department of Disabilities and
Special Needs.

DEFENDANTS.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.:

COMPLAINT
(Non-Jury)

BARBARA A. SCOTT
C.C.C. & G.S.

2007 APR -5 PM 4:38

RICHLAND COUNTY
FILED

Plaintiffs would respectfully show unto the Court:

PARTIES AND JURISDICTION

1. That Plaintiff Protection and Advocacy for People with Disabilities, Inc.
(hereinafter "P&A") is a private, non-profit corporation established pursuant to Federal and State
law to protect and advocate for the rights of people with disabilities in the State of South

Carolina, including individuals eligible for or receiving services from SCDDSN. P&A represents individuals and their families who receive some services from or seek appropriate services from SCDDSN.

2. That individual Plaintiffs are citizens and residents of the State of South Carolina who have need for services from Defendant South Carolina Department of Disabilities and Special Needs (hereinafter "SCDDSN"). Due to the highly personal nature of the facts surrounding their claims and due to their fear of retaliation by Defendant, Plaintiffs will be identified in this Complaint by their initials only. Additionally, any reference to his or her, herein, is not an indication of any particular gender.

3. That Defendant SCDDSN is a state agency created by and operating through the authority of the South Carolina General Assembly, pursuant to S. C. Code Ann. §§ 44-20-10 *et seq.* with the stated purpose of "[having] authority over all of the state's services and programs for the treatment and training of persons with mental retardation, related disabilities, head injuries, and spinal cord injuries." S.C. Code Ann. § 44-20-240.

4. That Defendant Dr. Stanley Butkus is the duly appointed Director of defendant SCDDSN, and in such capacity has virtually unfettered and nonreviewable authority over decisions affecting thousands of citizens of this State.

5. The Defendants Edythe Dove, Mary Katherine Bagnal, Ronald Forrest, John Vaughn, Dr. Otis Speight, W. Robert Harrell as Commissioners of the South Carolina Department of Disabilities and Special Needs, are charged with the statutory duty to determine the policy and promulgate regulations governing the operation of the department [SCDDSN] and the employment of professional staff and personnel.

6. That pursuant to the South Carolina Administrative Procedures Act (APA), S.C. Code Ann. 1-23-10 *et seq.* and SCDDSN's enabling statute (S.C. Code Ann. 44-20-10 *et seq.*) SCDDSN is statutorily required to promulgate regulations. Additionally, the APA was intended to provide a standardized process for all public agencies to formulate rules in order to obtain public comment and to provide access to agencies' operations as well as an avenue for appellate review of administrative decisions.

7. That SCDDSN has never promulgated regulations regarding issues of critical concern to applicants and recipients of its services, including but not limited to eligibility for its services; appeal procedures; standards for the operation of its residential programs; procedures for its Human Rights Committees; and standards for research on human subjects.

8. That SCDDSN's failure to comply with the requirements of the APA has resulted in South Carolina citizens and entities being unable to seek information about its policies in the South Carolina Administrative Code, unable to determine their rights to receive or dispute SCDDSN decisions, and participate in the rule-making process as intended by the APA.

9. That the individual Plaintiffs have been, are being and will continue to be harmed as the direct result of said deficiencies, through denial of services, inadequate services and unequal availability and quality of services, and lack of an appropriate grievance procedure; all of which affect their health, safety, well-being, their right to live and participate in their communities and their ability to enjoy typical lifestyles.

10. That Plaintiff P&A has been, and will continue to be, injured by Defendant's failure to promulgate regulations in that it has and will continue to repeatedly expend time and resources attempting to determine and enforce rights of developmentally disabled persons

without access to any meaningful or enforceable rules or regulations regarding eligibility and services, and with no access to judicial review of decisions affecting its clients.

11. That this Court has jurisdiction to declare, rights, status, and other legal relations and to grant injunctive and other relief pursuant to the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10, *et seq.*, by ordering Defendant to promulgate regulations concerning its operation and services, as more fully set forth in this complaint.

BACKGROUND FACTS

12. The allegations of all preceding paragraphs are incorporated as if repeated verbatim herein.

13. Plaintiff P&A has been, and will continue to be, injured by SCDDSN's failure to promulgate regulations in that it has and will continue to repeatedly expend time and resources attempting to determine and enforce rights of developmentally disabled persons without access to any meaningful or enforceable rules or regulations regarding eligibility and services, and with no access to judicial review of decisions affecting its clients.

14. J.B. is a resident of a facility for people with developmental disabilities and has been a SCDDSN client for many years. His disabilities include a tendency towards self-destructive and aggressive behaviors. The facility, defined as a Community Training Home II ("CTH II") by SCDDSN, included in his care plan that he would be provided with services of a psychologist to develop a "Behavior Support Plan (BSP)". BSPs are designed to provide the resident staff with specific target behavior identification along with effective prevention and interventions tailored to the needs of the individual client. They are an integral part of effective services and are required to enhance the individual's skills in order to increase independence and minimize self-injury and injuries to other clients and staff. However, for over a year while J.B.

lived in the supervised facility, SCDDSN failed to develop a BSP, despite repeated efforts by P&A and J.B.'s family.

15. BSPs are critically important to the recipients of services and to the service providers. However, SCDDSN has never promulgated regulations regarding their process or components nor has SCDDSN promulgated regulations for the operation of these CTH II homes. Instead, SCDDSN implements internal directives to serve as a guide in implementing BSPs. Pursuant to SCDDSN internal directives, BSPs must be approved by a Human Rights Committee (HRC). See S.C. Code of Laws § 44-26-70 (mandating the establishment of Human Rights Committees). The role of the HRCs is to safeguard and protect the rights of people receiving services and to ensure that individuals are treated with dignity and respect in the full recognition of their rights. However, HRCs do not have the authority to order that a BSP be developed within a certain time frame as SCDDSN has not promulgated any regulations regarding the membership, jurisdiction, or procedures of HRCs.

16. During the time that J.B. went without any BSP in place, J.B. suffered increased aggressiveness and self-destructive behavior. Not only did he pose a danger of harm to himself, but staff and other clients were at increased risk as well. Although J.B.'s family and P&A worked for over a year to get a BSP for J.B., their efforts were met with limited success as no regulation exists to provide a method to appeal the failure to develop or implement a BSP. J. B., and others like him, are and will continue to be subjected to this type of arbitrary failure and refusal to provide a proper level of services unless and until SCDDSN is forced to promulgate and adhere to regulations, with the availability of judicial review.

17. P.B. is a person who has mental retardation residing in a supervised apartment ("SLP II") funded by SCDDSN. Without prior notice to P.B.'s guardian or other persons

receiving similar services across the state, SCDDSN implemented a change in policy purportedly eliminating P.B.'s eligibility to receive the adult companion services which SCDDSN had provided for many years prior to this change of policy. In addition, without notice to guardians or family members, SCDDSN changed the standards for supervision of the program, so that 24 hours a day on-site supervision is not provided to P.B. and other persons living in SLP II settings as was required when P.B. was admitted to the program. P.B. was subsequently left unsupervised at a public fair. P.B.'s guardian reported this neglect to the South Carolina Department of Social Services after the SCDDSN private/contract provider refused to do so. SCDDSN has not promulgated any regulations with regard to operation of SLPs. Regulations are needed to establish standards for supervision, reporting procedures, an appeals process to challenge decisions of the SCDDSN and procedures for the operation of an independent HRC.

18. SCDDSN's failure to promulgate regulations has resulted in P.B. incurring significant legal expenses to protect his services. Promulgation of regulations by Defendant would provide P.B., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state.

19. F.C. is a minor child who lives with his parents. F.C. has a long history of hospitalizations and treatment, as his parents have tried desperately to find the right kind of help for him. Experts have concluded that F.C. has Asperger's Disorder, as well as Attention Deficit Hyperactivity Disorder (ADHD) and other diagnoses. Asperger's Disorder is a developmental disability (not a mental illness), classified in the Diagnostic and Statistical Manual (DSM-IV) under "Pervasive Developmental Disorders". It is characterized by symptoms such as

impairment in the use of nonverbal behaviors to regulate social interaction, apparently inflexible adherence to specific, nonfunctional routines or rituals, and severe and sustained impairment in social interaction. Likewise, F.C., who has severe developmental delays including emotional and social deficits, is unable to socialize effectively, has difficulty understanding nonverbal social and other cues, is unable to function effectively in many school and home situations, and requires specialized training and habilitation.

20. F.C.'s mother contacted SCDDSN and attempted to have F.C. evaluated for services. However, SCDDSN refused to evaluate F.C. stating that SCDDSN does not recognize the diagnosis of Asperger's as criteria for eligibility for services. SCDDSN denied services to F.C. despite the fact that Asperger's is very similar to Autism, a condition that SCDDSN does serve, and despite that South Carolina statutory law requires that Defendant SCDDSN treat individuals with mental retardation and "related disabilities". See S.C. Code Ann. § 44-20-240.

21. The Department of Mental Health and the Continuum of Care for Emotionally Disturbed Children have provided some services to assist F.C., but due to their lack of expertise in the treatment of developmental disorders such as Autism and Asperger's, these services have not and cannot adequately address the needs of F.C. As a result, F.C. remains in danger of institutionalization due to a lack of appropriate long-term services, which could and should be provided by SCDDSN as the agency charged by law with serving people of all ages who have developmental disorders.

22. Neither the standards for eligibility and receipt of SCDDSN services nor the grievance process have been subjected to review by the public or the General Assembly. SCDDSN has no regulation or clearly established procedures for appealing the denial of services to an internal or external hearing officer. Consequently, F.C. and his family have no meaningful

access to standards used to determine to which services he may be entitled. F.C. and his family have no avenue for appealing any SCDDSN determination regarding services provided, or not, by SCDDSN. Promulgation of regulations by Defendant would provide F.C., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation of regulations would also provide individuals such as F.C. and his family with a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulation.

23. C.M.D. is an adult residing in a group home funded by SCDDSN which is classified as a CTH II home. Funds for the purchase of this residence were provided by SCDDSN and the South Carolina Housing Trust Fund. C.M.D. disputes the method used to calculate her rental payment to the CTH II home. SCDDSN has failed to promulgate regulations for the establishment of rent charged to residents of SCDDSN CTH II funded residences. In addition, SCDDSN has failed to promulgate regulations for the release of records and investigations to victims of abuse, neglect and exploitation and has denied C.M.D.'s brother and guardian access to records regarding abuse and neglect of C.M.D. Promulgation of regulations by Defendant would provide C.M.D., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation of regulations would also provide individuals such as C.M.D. and his family with a process for accessing the courts to

obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulation.

24. Plaintiff A.F., age 19, lives with his parents and natural guardians, K.F. and S.F. A.F. has been diagnosed with and treated for many years for severe developmental disabilities, including Asperger's Syndrome and Pervasive Developmental Disorder. As the result of his developmental disorders, he has extreme difficulty with social interaction and adaptation, with independent living skills, and with learning. He has become increasingly aggressive and difficult for his parents to handle, to the point that it has become clear that, without appropriate support services, his parents will be forced to place him in a residential care facility. Despite A.F.'s critical and obvious need for services, Defendant SCDDSN steadfastly refused to provide services or participate in meetings with other service providers, including the local school district, local Department of Mental Health Center, and local Department of Juvenile Justice personnel.

25. Eventually, the Family Court in a juvenile justice proceeding ordered SCDDSN to provide services to A.F., who will need services for the rest of his life. However, once A.F. reached the age of eighteen, SCDDSN was no longer obligated under the Court Order to provide him with services. Recently, SCDDSN terminated A.F. from services. SCDDSN has not promulgated any regulations for A.F.'s family to refer to or for SCDDSN employees to follow, in making the decision to continue or discontinue services, or in determining what services A.F. would receive if any. There is also no avenue for appealing any SCDDSN determination with regard to denied services. Although SCDDSN has a "grievance process", this loosely defined process is subject to change at any time without notice. Neither the standards for eligibility and

receipt of services nor the grievance process have been subjected to review by the public or the General Assembly.

26. Promulgation of regulations by Defendant would provide A.F., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation would also provide individuals such as A.F. and his family with a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

27. A.J. is a person who has mental retardation and resides in an SLP II. SCDDSN has paid for his participation in a workshop program; however, A.J. has been assaulted twice at the workshop and is fearful of returning to the workshop. SCDDSN has denied A.J. and other residents of SLP II's eligibility for less expensive adult companion services by changing the eligibility criteria to require A.J. and others like him to attend institutional day programs. SCDDSN has not promulgated any regulations with regard to the standards for eligibility and receipt of services. SCDDSN has no regulation or clearly established procedures for appealing the denial of services to an internal or external hearing officer. Promulgation of regulations by Defendant would provide A.J., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state.

28. E.M. is a long-time client of Defendant SCDDSN. Over the years, E.M. has utilized day services obtained through the use of Medicaid funds administered by Defendant

SCDDSN. E.M. has participated in a job training program and is employable in the private sector, albeit in very limited areas. E.M.'s parents have always cared for him in the home, and though E.M. is well into adulthood, he is unable, and is unlikely to ever be able, to live on his own. Although E.M. and his parents are aware that there is a long waiting list for residential services through Defendant SCDDSN, they have, for many years, attempted to have E. M. placed on a waiting list. Despite the declining health of E.M.'s parents, Defendant SCDDSN for years refused to place E.M. on a waiting list for residential placement. In effect, Defendant SCDDSN informed E.M. and his family that unless E.M.'s needs were "critical" (i.e. he was facing immediate homelessness) or it he could be shown that he needed residential placement within twelve months, he could not be placed on any list. E.M.'s parents even offered to pay for the difference between E.M.'s current funding and the cost of a residential placement. SCDDSN, however, refused to allow such use of the funds, and failed to provide any explanation for such refusal or appeal options.

29. After years of requesting that E.M. be placed on the waiting list, just recently in late 2006, SCDDSN finally provided GM with a verbal offer of residential placement. Nevertheless, due to SCDDSN's failure to promulgate regulations as it is required to do so, E.M. and his family was not afforded access to any formal procedure for challenging Defendant's waiting list procedures or their decisions regarding the use of funds in which Plaintiff E.M. had already been approved. Neither the standards for eligibility and receipt of services, the standards governing choice of services needed/provided, the waiting list process, nor the grievance process are subjected to review by the public or the General Assembly. SCDDSN has no regulation or clearly established procedures for appealing the denial of services, denial of change in services, or admission to or priority on a waiting list to an internal or external hearing officer.

30. E.M. and his family were afforded no avenue for appealing any SCDDSN determination regarding services provided, or not, by SCDDSN as no such procedure exists. Promulgation of regulations by Defendant would have provided E.M., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation of regulations would also provide individuals such as E.M. and his family with a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

31. E.J.M. has profound mental retardation and was voluntarily admitted to SCDDSN services in 1999. For the next six years, E.J.M. was subjected to repeated physical and psychological abuse at a private facility (the "Private or Contract Provider") funded by SCDDSN. Violations of the human rights of residents of this facility are not reviewed by a Human Rights Committee operated by the county SCDDSN Board. Instead, SCDDSN allows the Private or Contract Provider to operate its own Human Rights Committee (HRC). SCDDSN has not promulgated any regulations with regard to operation of such a committee or with regard to the appeals process to challenge the decision of the Private or Contract Provider's HRC. Thus, E.J.M. has not had access to a HRC through promulgation.

32. E.J.M.'s mother attempted to move him to a safer facility but SCDDSN refused to do so, even to the point of refusing to permit his guardian to terminate SCDDSN services. As SCDDSN does not promulgate regulations with regard to eligibility of services or appeals rights/processes, E.J.M.'s mother was forced to employ the services of an attorney in order to acquire the needed services in which E.J.M was entitled. Only after E.J.M. incurred significant

legal expenses were these services finally provided. Promulgation of regulations by Defendant would provide E.J.M., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. Promulgation of regulations would also provide individuals such as E.J.M and his family with a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

33. K.D.R. is a minor who lives with his parents. As a young child, K.D.R. had developmental delays and was a client of SCDDSN. At age seven, K.D.R. was diagnosed with Asperger's Disorder and continued to receive sporadic services from Defendant. At age nine, despite the fact that his symptoms and difficulties had worsened, SCDDSN cut off K.D.R.'s services, stating he was not qualified to receive them. K.D.R.'s parents were told by a local DSN Board employee that there was no appeal process. However, K.D.R.'s parents persisted and eventually received a determination that K.D.R. was ineligible for services because he did not meet diagnostic criteria for autism or Mental Retardation, and that neither PDD-NOS nor Asperger's were considered "related disabilities". If SCDDSN promulgated regulations as it is required to do, K.D.R., his family and others like him would be provided with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. They would also have a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

34. S.P began receiving SCDDSN funded residential services in 2003 when he filed a lawsuit against SCDDSN and Defendant Butkus. In 2005 SCDDSN found S.P. to be ineligible for SCDDSN services based on eligibility criteria which are more restrictive than those contained in state and federal law. SCDDSN has failed to promulgate regulations establishing eligibility criteria which comply with state and federal law. In addition, SCDDSN has refused to follow the guardian's wishes in providing appropriate residential services to S.P. SCDDSN has released protected health records to other entities in violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and possibly other state and federal law. See 29 U.S.C.A. § 1181, Pub. L 104-191, August 21, 1996, 110 Stat. 1936. SCDDSN has not promulgated regulations for compliance with HIPAA. Promulgation of regulations by Defendant would provide S.P., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state.

35. Minor Plaintiff S.S. is currently in an out of home placement, but formerly lived with his mother, stepfather and siblings in their family home. S.S. has been treated for many years for a variety of diagnoses due to unusual and at times unmanageable behaviors, strange thought patterns and, as he has become older, episodes of severe aggression. In 2005, the Medical University of South Carolina evaluated S.S. and diagnosed him with Asperger's Disorder. This disorder, very similar to autism, is one of a group of diagnoses referred to in the DSM IV as "Pervasive Developmental Disorders." S.S. is unable to socialize effectively, has difficulty understanding nonverbal social and other cues, is unable to function effectively in many school and home situations, and requires specialized training and habilitation. Defendant

SCDDSN denied services to S.S., stating only that he did not meet requirements for a diagnosis of Autism. He was not evaluated for "related disabilities" and has never received SCDDSN services.

36. Despite S.S.'s mother's "appeal" to state-level SCDDSN, Defendant has consistently refused to provide services. S.S. has been repeatedly committed to treatment facilities and foster homes because services from the Department of Mental Health have been inadequate for his needs. S.S.'s mother has no access to any formal procedure for challenging Defendant's refusal to provide services. Neither the standards for eligibility and receipt of services nor the grievance process have been subjected to review by the public or the General Assembly. SCDDSN has no regulation or clearly established procedures for appealing the denial of services to an internal or external hearing officer. S.S. and his family have no meaningful access to standards used to determine to which services he may be entitled. Additionally, S.S. and his family have no avenue for appealing any SCDDSN determination regarding services provided, or not, by SCDDSN. Promulgation of regulations by Defendant would provide S.S., his family and others like him with meaningful participation into the rulemaking process, access to information about the agency's rules and eligibility requirements as well as standards for particular services, and ensure that services are provided uniformly and fairly throughout the state. They would also have a process for accessing the courts to obtain a decision by a neutral third party where SCDDSN's actions fail to conform to the regulations.

FOR A CAUSE OF ACTION

DECLARATORY JUDGMENT

37. The allegations of all preceding paragraphs are incorporated as if repeated verbatim herein.

38. That SCDDSN has promulgated only five regulations: R. 88-105, License Requirement for Facilities and Programs; R. 88-210-Definitions; R. 88-310, Recreational Camps for Mentally Retarded Persons; R. 88-405, Day Programs for Mentally Retarded Persons; and R-88-910, Unclassified Facilities and Programs. SCDDSN has never promulgated regulations defining for issues of critical concern to applicants and recipients of its services, including but not limited to eligibility for its services; appeal procedures; standards for the operation of its residential programs; procedures for its Human Rights Committees; and standards for research on human subjects.

39. That SCDDSN's enabling statute requires that the Commission of the SCDDSN promulgate regulations, stating "The commission shall determine the policy and promulgate regulations governing the operation of the department and the employment of professional staff and personnel." S.C. Code Ann. § 44-20-220 (emphasis added).

40. That SCDDSN is additionally required to promulgate regulations pursuant to S.C. Code Ann. § 44-26-180 ("...The department shall promulgate regulations to obtain informed consent and to protect the dignity of the individual.") (emphasis added).

41. Section 44-20-790 of the South Carolina Code of Laws dealing with promulgation of regulations governing hearings provides that "[t]he procedures governing hearings authorized by "Notice of Deficiencies . . ." must be in accordance with regulations promulgated by the department.

42. That the APA was intended to provide a standardized process for all public agencies to formulate rules in order to obtain public comment and to provide access to agencies' operations as well as an avenue for appellate review of administrative decisions.

43. That Defendant Dr. Stan Butkus is the duly appointed Director of defendant SCDDSN, and in such capacity has virtually unfettered and nonreviewable authority over decisions affecting thousands of citizens of this State.

44. That on or about October 24, 2005, Plaintiffs, by and through counsel, delivered to Defendant SCDDSN a letter demanding that regulations be promulgated pursuant to S.C. Code Ann. §§ 1-23-10 *et seq.*, commonly known as the Administrative Procedures Act or APA.

45. That SCDDSN has refused to adhere to its statutory duty to promulgate regulations.

46. That the failure to promulgate regulations under the APA results in Defendant SCDDSN having unfettered decision-making authority, with no opportunity for public participation in the rulemaking process, review by the General Assembly or opportunity for independent judicial review.

47. That such unfettered decision-making authority has marked potential for, and indeed has resulted in, numerous instances of inconsistency, misapplication of the law, failure to provide services, failure to provide adequate services, provision of unequal levels of service coordination and delivery, arbitrary and capricious eligibility decisions, and no avenue for judicial scrutiny of agency decisions.

48. That by failing to promulgate regulations, SCDDSN and the Commission have circumvented not only the requirements of its own enabling legislation, but the requirements of the APA, leaving the public, P&A, the individually named Plaintiffs, defendant's employees, the legislature and the courts with no meaningful access to generally applicable standards which can be judicially reviewed.

49. That Plaintiffs are informed and believe themselves entitled to a Declaratory Judgment requiring that SCDDSN promulgate regulations governing the operation of the department and the employment of professional staff and personnel and to obtain informed consent and to protect the dignity of the individual.

50. That Defendants do not have substantial justification for refusal to promulgate regulations.

51. That attorney's fees and costs have continued to incur in this matter.

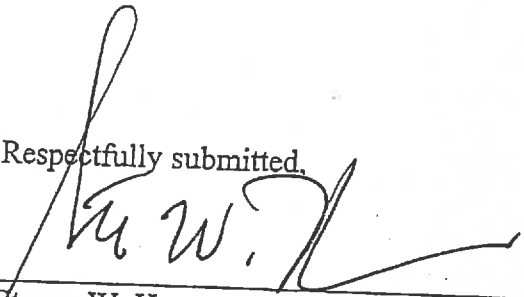
52. That upon information and belief, there are no special circumstances which would make an award of attorney's fees and costs unjust.

53. That Plaintiffs are informed and believe they are entitled to an order of this court requiring Defendants to pay Plaintiffs' attorney fees and costs pursuant to S.C. Code Ann. § 15-77-300.

WHEREFORE, Plaintiffs pray this Court for an Order:

1. Declaring that Defendant SCDDSN is required to, and that it shall promptly promulgate regulations governing the operation of the department and the employment of professional staff and personnel, and to obtain informed consent and to protect the dignity of the individual in research settings; and
2. Awarding reasonable attorney's fees and costs to Plaintiffs.

Respectfully submitted,


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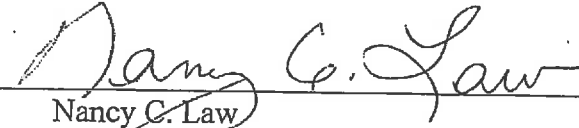
Columbia, South Carolina

April 5, 2007

ATTORNEYS FOR THE PLAINTIFFS

CERTIFICATE OF SERVICE

I, Nancy C. Law, Assistant to Patricia L. Harrison, do hereby certify that I have caused the attached paper to be served by first class mail to the attorney shown below at the address shown below.


Nancy C. Law

Date mailed: December 22, 2007

Document mailed: Motion and Memorandum

Mailed to: Byron Roberts, Esquire
SC Dept. of Health and Human Services
PO Box 8206
Columbia, SC 29202-8206