DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF DIRECTOR

ACTION REFERRAL

TO	DATE
Singleton	3-11-11

DIRECTOR'S USE ONLY	ACTION REQUESTED
1. LOG NUMBER 10410	[ ] Prepare reply for the Director's signature DATE DUE _____
2. DATE SIGNED BY DIRECTOR cc: Mr. Teck, Wells, Jacobs, Waldrep, Giese Cleared 3/17/11, letter attached.	[X] Prepare reply for appropriate signature DATE DUE 3-22-11 [ ] FOIA DATE DUE _____ [ ] 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.			

PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC.
The Protection & Advocacy System for South Carolina

March 9, 2011

VIA FACSIMILE and CERTIFIED MAIL / RETURN RECEIPT 7010 2780 0002 2757 3706

Deirdra Singleton
Deputy Director, General Counsel
SC Department of Health & Human Services
P O Box 8206
Columbia, South Carolina 29202-8206

Dear Ms. Singleton:

I am writing on behalf of a coalition of organizations and attorneys who either represent individual recipients of Medicaid, are advocates for effective delivery of Medicaid services in South Carolina, or both:

- Protection and Advocacy for People with Disabilities, Inc.
- Appleseed Legal Justice Center
- South Carolina Legal Services
- Patricia Harrison, Esq.

We are writing regarding the fair hearing process used by DHHS to consider appeals of Medicaid changes based on the Medicaid bulletin dated December 14, 2010, and the beneficiary newsletter published on December 22, 2010. As further set out in this letter, we have serious concerns about the legitimacy of any hearings because of defects in the notices. This letter addresses these concerns as well as the nature of the group hearings scheduled for March 21, 2011. We also have concerns about the logistics of the group hearing scheduled for March 21, 2001, particularly accommodations for individuals with disabilities. The concerns and suggestions for correction are outlined in this letter.

1. Due process issues.

Both the Fourteenth Amendment of the United States Constitution, as interpreted by Goldberg v. Kelly, 397 U.S. 254 (1970) and Article I, Section 22 of the South Carolina Constitution require due process in administrative procedures. The United States Department of Health and Human Services Medicaid fair hearing regulations, 42 CFR Part 431, and the South Carolina Administrative Procedures Act, S.C. Code secs. 1-23-10 et seq. establish minimal criteria for notice and the conduct of hearings. For reasons set out below, the procedures used by HHS to date do not comply with state and federal law and basic due process.

CENTRAL OFFICE
SUITE 208
3710 LANDMARK DRIVE
COLUMBIA, SC 29204
(803) 782-0639
(Voice and TTY)
FAX (803) 790-1946

PIEDMONT OFFICE
SUITE 106
545 N. Pleasantburg Drive
GREENVILLE, SC 29607
(864) 235-0273
1-800-758-5212
(Voice and TTY)
FAX (864) 233-7962

INFORMATION AND REFERRAL
Toll Free:
1-866-275-7273
(Voice and TTY)
or
1-866-232-4525
Email:
info@protectionandadvocacy-sc.org

PEE DEE OFFICE
2137 B HOFFMEYER ROAD
FLORENCE, SC 29501
(843) 662-0752
1-800-868-0752
(Voice and TTY)
FAX (843) 662-0786

LOW COUNTRY OFFICE
1569 SAM RITTENBURG BLVD.
CHARLESTON, SC 29407
(843) 763-8571
1-800-743-2553
(Voice and TTY)
FAX (843) 571-0880

2. Deficiencies in notice and procedures for hearings.

Concerns:

The DHHS fair hearing process is regulated by 43 CFR Part 431.200 and S.C. Code Reg. 126-150. We believe that the notice and proposed group hearing violate the requirements of this part. We also believe that the proposed location, time, and format raise serious issues about compliance with the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and South Carolina law.

- Notice

  We understand that on December 22, 2010, the agency mailed a flyer to every Medicaid recipient. The flyer is attached, folded as we believe it was folded. The flyer does not meet the requirements of meaningful notice:

  a. The outside of the flyer mentions SCHiex, so it appears that the flyer is about this service.
  b. The flyer is difficult to read because of the design and language used.
  c. The flyer is not dated, but the notice instructs recipients to request a fair hearing within 30 days "of the date of this letter," which indicates another letter may be forthcoming that is more specific and will be dated.
  d. Nothing about the flyer looks official, as a notice should. There is no conspicuous language such as, **"THIS NOTICE CONTAINS IMPORTANT INFORMATION THAT MIGHT REDUCE YOUR MEDICAID SERVICES."**
  e. The flyer is not specific to an individual.
  f. The EPSDT notice did not plainly explain how parents could obtain necessary services for their children. The flyer was misleading in its presentation of caps on services.

  One clear indicator of the inadequacy of the notice is the minute number of individuals who appealed the reductions. We have information that over 900,000 individuals received the notice but only 20 appealed.

- Group Hearing

A group hearing is scheduled for all individuals who appealed based on the notice that was distributed in December. We understand that this group includes:

a. Individuals who appealed who did not receive the notice, but learned from other sources that there were cuts. These individuals are not even sure if or how the cuts apply to them.
b. Individuals who received the notice but are confused about its contents and do not understand what part of the cuts pertain to them.
c. Individuals who received the notice and want to appeal the cuts that will affect them.
d. Parents of children who will be affected by the therapy cuts, some of whom appealed before HHS issued procedures about requesting an exception to the cap in private therapy cuts. Some of these individuals may also be simply switching providers to more expensive hospital therapy.

We have the following concerns about the hearing (there may be other issues as well, but these will have a significant impact on participants):

a. Physical accessibility of the HHS building. Assuming the hearings are held on the 11th floor, are the bathrooms on that floor accessible to an individual in a wheelchair, particularly in a power chair? If not, will there be notices indicating the location of fully accessible bathroom? The power door at the public entrance is often broken; will it be operable on March 21? Where will individuals wait on their hearings?
b. Parking. Very little accessible parking is available within a short distance of the entrance to the HHS office.
c. Transportation. 42 C.F.R. 431.250 permits reimbursement for providing transportation enabling applicants and recipients to attend the fair hearing. The notice provides no information about obtaining transportation, which is a major barrier to people with disabilities and the many individuals who do not have cars.
d. Caregivers. Many recipients need full or part time assistance with their personal needs to enable them to attend the hearing. The notice gives no information to individuals regarding how to request a reasonable accommodation to participate in the hearing, either by paying an existing caregiver or providing an appropriate aide on site.

e. Not enough time to present case. It is our understanding that each appellant is scheduled for 15 minutes, although apparently more time may be allowed on a case by case basis. This time constraint raises two issues. First, it creates an artificial limit that precludes effective presentation of a case or cross-examination of witnesses, rights required by statutes, regulations, and state and federal constitutions. Second, persons whose cases are scheduled later in the day will have to wait many hours, which will be a hardship on parents with children, working people, and people who are elderly or have disabilities. Many of P&A's clients require assistance in eating, toileting, and mobility. The agency's notice did not advise these clients to request a reasonable accommodation by scheduling the hearing close to their home and at a convenient time, or by paying for or providing attendants.
f. EPSDT. Parents of children receiving therapies face a difficult choice: whether to appeal now when a decision on their actual situation has not yet been made or wait and face the chance that the agency will say they should have appealed earlier. The notice should have correctly stated the process that parents should use to obtain authorization for medically necessary services and worked with providers to develop a simple procedure. The subsequent clarification does not cure the defect in the original notice.

We propose that HHS rectify these issues, and others that may occur as the group hearing process unfolds, by, at a minimum:

a. Sending correct, dated notices that indicate the specific change that affects the individual.
b. Prominently placing a notice on its website providing directions in English and Spanish about how to appeal and seek prior approval;
    i. Providing information about how to obtain transportation to the hearing;
    ii. Providing the name and contact information of a specific individual who has authority to answer questions and arrange for reasonable accommodations;
    iii. Providing complete information about how individuals can view their own records and obtain relevant information and information about how to subpoena witnesses from the agency;
    iv. Ensuring that any hearing location complies with the access provisions of the ADA;
    v. Ensuring that qualified sign language and foreign language interpreters are readily available.

c. Allowing individuals to opt out of the group hearing for a more convenient time or location.
d. Allowing individuals to request that a hearing be held in their home counties;
e. Meaningfully informing recipients who qualify for EPSDT of the right to receive all medically necessary services, and provide assistance to them and providers in obtaining any necessary documentation.
f. Informing recipients of their right to raise issues regarding the likelihood of institutionalization if cuts are made, and to obtain documentation about the comparative cost of continued home care compared to institutional placement.

We recognize that providing the required, individualized notice to each potentially affected family member or representative entails an administrative burden on HHS[1]. There are, however, some potential benefits to the agency. First, the agency will receive information about individual cases that may illustrate better ways to structure changes in benefits. Second, HHS may receive information that will improve its ability to monitor the operation of agencies operating Medicaid waivers or performing other activities funded by HHS. Third, providing adequate notice and opportunity to present evidence will increase public confidence and support for Medicaid and HHS.

Every Medicaid dollar must be spent efficiently, effectively, and in compliance with state and federal constitutions, laws, and regulations, including the Americans with Disabilities Act. We urge you to revisit the defective notice and hearing process followed so far in order that applicants and recipients receive due process and all Medicaid services to which they are entitled.

We welcome the opportunity to discuss any of these issues with you as soon as possible. We are deeply concerned that individuals be able to present their claims in a forum that is convenient and accessible. Please contact me, I work in the Piedmont Office in Greenville; contact information is located in the bottom margin on the first page.

Sincerely,

Anna Maria Darwin

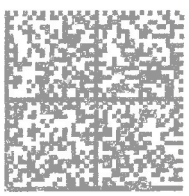
Anna Maria Darwin
Attorney

Enclosure

cc: Anthony E. Keck, Director
Richard Hepfer, Deputy General Counsel

[1] The ability to identify individuals affected by changes to Medicaid and to provide them with proper notice should be a component of the new Medicaid information management system now under development.

PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC.
SUITE 106
545 N. PLEASANTBURG DRIVE
GREENVILLE, SC 29607



Anthony E. Keck
Director
SC Department of Health & Human Services
P O Box 8206
Columbia, South Carolina 29202-8206

PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC.

545 N. PLEASANTBURG DRIVE, SUITE 106
GREENVILLE, SC 29607
FAX (864) 233-7962 PHONE (864) 235-0273
TOLL-FREE & TTY 1-800-758-5212

FACSIMILE TRANSMITTAL SHEET

TO: Brenda James	FROM: Anna Maria Darwin / sg
COMPANY: SC DHHS	DATE: 3/11/11
FAX NUMBER 803-255-8235	TOTAL NO. OF PAGES INCLUDING COVER: 3
PHONE NUMBER:	

RE: Medicaid changes and fair hearing process

☐ URGENT ☐ FOR REVIEW ☐ HARD COPY OF ATTACHED TO FOLLOW BY U.S. MAIL

NOTES/COMMENTS:

Attachment for letter dated 3/9/11

Medicaid & You

Mark Sanford, Governor • Emma Forkner, DHHS Director
South Carolina Department of Health and Human Services

Dear Medicaid Beneficiary,

The South Carolina Department of Health and Human Services must make changes to the Medicaid program because it no longer has enough funds to continue to offer the same services. We regret if any of these changes cause you difficulties. Many of the following changes may not affect you. Please read the entire newsletter carefully and call the Medicaid Resource Center at 1-888-549-0820 if you have any questions.

SERVICES TO BE ELIMINATED

Effective February 1, 2011, the following services will no longer be offered through Medicaid:

- Podiatry services for people 21 and older
- Vision services for people 21 and older
- Dental services for people 21 and older
- Hospice care services for people 21 and older
- Coverage of routine newborn circumcisions

SERVICES TO BE REDUCED

Also effective February 1, 2011, the following services will be reduced in scope:

- One pair diabetic shoes a year instead of two
- Home health visits reduced to 50 visits per year instead 75
- Individuals under 21 years of age can receive a combined total of 75 visits per year for private rehabilitative services (speech and language therapy, occupational therapy or physical therapy)
- Chiropractic services will be reduced to six visits per year instead of eight

CO-PAYMENT ADJUSTMENTS

Beginning April 1, 2011, the Medicaid program will increase the small part of your medical bill that you must pay for some services, called a co-payment. The provider will tell you when you need to make a co-payment. The new co-payment schedule is listed below:

	Old	New
Office Visits	$2.00	$2.30
(Physician, Nurse Practitioner, Licensed Midwife)		
Chiropractor	$1.00	$1.15
Home Health	$2.00	$2.30
Clinic Visits	$2.00	$2.30
Prescription Drugs	$3.00	$3.40
Outpatient Hospital	$3.00	$3.40
Medical Equipment/Supplies	$0-3.00	$.60-3.40

The following Medicaid beneficiaries do not have to make co-payments:

- Children under 19 years of age
- Pregnant women
- Individuals receiving Family Planning services
- Institutionalized individuals
- Individuals receiving emergency services
- Federally recognized Native Americans

For Community Long-Term Care Waiver Beneficiaries Only

Effective April 1, 2011, the following Community Long Term Care services will no longer be offered through Medicaid:

- Chore service
- Appliance service
- Nutritional supplements
- Adult day health care nursing service
- Respite service

The following service reduction is effective April 1, 2011:

- Home-delivered meals will be reduced to 10 per week instead of 14

If you feel this action is taken in error, you may ask for a fair hearing before the South Carolina Department of Health and Human Services. To ask for a fair hearing, send a request in writing within 30 days of the date of this letter.

You can hire an attorney to help you or you can have someone come to the hearing and speak for you. If you request a hearing before the date of action your Medicaid benefits will continue until a ruling is made by the hearing officer. Please note, if the hearing officer does not rule in your favor, you will be required to pay back any Medicaid benefits you received while your case was being reviewed.

EPSDT Notice

Medicaid offers a screening, diagnosis, and treatment program called EPSDT. EPSDT stands for Early Periodic Screening, Diagnosis, and Treatment. It is important for your child to have these regular well-child visits with his/her doctor so that medical problems may be found and treated. If you have a doctor for your child, call and make an appointment for a screening. If you need help finding a doctor, please call your local health department, or check our website at www.scdhhs.gov. If you do not know your local health departments phone number, call the Department of Health and Environmental Control (DHEC) at 1-800-868-0404.

South Carolina Healthy Connections
P.O. Box 8206
Columbia, SC 29202-8206

PRSRT STD
US POSTAGE
PAID
COLUMBIA SC
PERMIT 1132

S.C. Healthy Connections Choices

The way you get Medicaid in South Carolina has changed. Medicaid members may now enroll in a health plan.

A health plan is a group of doctors and may also include hospitals and other staff. Your health plan will make sure you can see the right doctors when you need them. All plans provide the same medical services as Medicaid, but they may also offer extra services, like diabetes or asthma management programs.

You may have already received a packet in the mail from South Carolina Healthy Connections Choices. It is very important that you read it. If you don't choose a plan, we may choose a plan for you.

If you go to a doctor you want to continue to see, you can call 1-877-552-4642 or visit www.schoices.com to find out what plan he or she belongs to. You can call it anytime. Don't wait – enroll with a plan now.

Keep Your Benefits

Medicaid requires each beneficiary to complete a review form at certain times. Some people may need to fill out a form every three months, and others may only need to fill one out every year.

When it is time for your review, we will mail you a form called the Medicaid Review Form. This form will tell you what information you must return to us. We may need to know how much money you earn, what property you own, or if you have childcare expenses.

You must answer all the questions on the form and sign it. It is important that you mail this form back to the address listed on the form, and mail it back by the due date. If you fail to return your Medicaid Review Form on time, your Medicaid benefits will end.

If you have questions, please call 1-888-549-0820.

En Espanol

Si necesita esta boletin informativo de Medicaid en espanol, por favor llame a la oficina de medicaid al 1-888-549-0820. La llamada es gratuita.

SCHIEx Notice

Your health and the care you receive are very important to us. That is why we are participating in a statewide computer system called the South Carolina Health Information Exchange (SCHIEx). This computer system can help the doctors you work with give you better care. SCHIEx is a statewide effort that lets doctors look up your health facts for treatment purposes over a secure web site. Your health record contains facts like your name and date of birth, and data about medical services and care you have received.

Because your privacy is very important, only approved users such as doctors and medical staff can access SCHIEx. They must have a ID to see information about you. All users must agree to keep your health facts private, and must follow all federal and state privacy laws.

While we hope you will participate in SCHIEx, it is not required. You may choose to stop at any time. Before deciding to stop, please keep in mind that data in SCHIEx can help you and your doctor make better choices about your care.

If you do not want doctors to see your health facts, or have questions, please call the Resource Center at 1-888-549-0820. Or, you may view a demonstration and get more information at www.schiex.org.

Questions?

Call the Resource Center
Monday through Friday 8 a.m. - 5 p.m. at
1-888-549-0820
if you have any questions.

Log # 000410

South Carolina Department of
Health & Human Services

Anthony E. Keck, Director
Nikki R. Haley, Governor

March 17, 2011

Anna Maria Darwin, Esquire
Protection and Advocacy for People with Disabilities
Piedmont Office
545 N. Pleasantburg Drive, Suite 106
Greenville, South Carolina 29607

Re: Your letter of March 9, 2011

Dear Ms. Darwin:

Your letter was given to me to respond. The Department is committed to ensuring that everyone's due process is protected. To this end, the notice contained in the December 2010 Medicaid Newsletter was drafted to comply strictly with the requirements of 42 CFR 431.210. These requirements constitute due process notice under the Medicaid regulations when an action is taken by, among others, the Department.

This regulation contains several elements that must be included in order for the notice to be proper and to comply with due process requirements. There is no requirement the notice be dated, "looks official," be designed in a certain way or targeted to specific persons. A Medicaid Beneficiary Newsletter is the normal way in which the Department communicates with beneficiaries. This newsletter is in the same familiar format that is used with every notification of program changes that affect the Medicaid beneficiary and all beneficiaries know the newsletter contains important information. Additionally, the passages notifying beneficiaries that services would be eliminated or reduced were highlighted with white letters inside a darker box to draw the reader's attention to it. These passages were also placed on the first page of the newsletter.

Regulation 42 CFR 431.210 requires:

a) A statement of what action the State intended to take. This was given.
b) The reasons for the intended action. This, too, was given.
c) The change that required the action. Again, this was given.
d) An explanation of a person's right to request a hearing and an explanation of the circumstances under which Medicaid benefits would be continued. This information was contained in the notice.

The newsletter, therefore, met all the requirements of the federal regulations and it must be considered adequate.

Office of General Counsel
P.O. Box 8206 • Columbia, South Carolina 29202-8206
(803) 898-2792 • Fax (803) 255-8210

Group Hearings are specifically allowed under 42 CFR 431.222 when the sole issue involved is one of State policy. The sole issue at the group hearing is whether the Department has the authority to limit or eliminate an optional service. At the hearing the Department will present its case and be subject to cross-examination. The various appellants, in turn, may present their reasons why the Department lacks authority to limit optional services and will, in turn, be subject to cross examination. With such a limited focus for the hearing, 15 minutes does not seem like an unreasonable guide for a time limit. However, this decision lies in the purview of the Hearing Officer. As usual, the appellant will bear the burden of proof.

Concerning the ESDPT issue, the Department will follow the procedures outlined in its policy manual as clarified in the January 31, 2011 Medicaid Bulletin to override the limits set in the Beneficiary newsletter. To obtain a fair hearing in cases in which an override is not granted, a beneficiary should file a new appeal. A beneficiary's failure to appeal the Department's action in limiting services does not foreclose a future appeal on the issue of needing additional services nor does appealing the Department's action in limiting services foreclose a later appeal should a claim be denied.

Addressing your other concerns: Physical accessibility is not a concern, nor is restrooms a problem. All newsletters were mailed to the current address the Department has on file for each household. While 42 CFR 431.250 does permit FFP for administrative costs to the agency for transportation to the hearing, 42 CFR 431.210 does not require the Department to give notice of this. If an appellant needs transportation to the hearing, he should contact the transportation broker for his area and arrange for transportation to be provided.

I appreciate your concerns but feel that the Department gave adequate legal notice and that most of your concerns are addressed in the newsletter.

Sincerely,

George R. Burnett
Assistant General Counsel

GRB/b