

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
OFFICE OF DIRECTOR

**ACTION REFERRAL**

TO <i>Singleton</i>	DATE <i>4-3-09</i>
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DIRECTOR'S USE ONLY	ACTION REQUESTED
1. LOG NUMBER <b>101556</b>	<input type="checkbox"/> Prepare reply for the Director's signature DATE DUE _____
2. DATE SIGNED BY DIRECTOR <i>cc: Ms. Fortner</i> <i>Cleaved 7/6/09 email attached</i>	<input checked="" type="checkbox"/> Prepare reply for appropriate signature DATE DUE <i>4-14-09</i> DATE DUE _____ <input 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  
811 HOLLY STREET  
COLUMBIA, SOUTH CAROLINA 29205

TELEPHONE (803) 256-2017

FAX (803) 256-2213

April 1, 2009

VIA FAX AND MAIL

**RECEIVED**

APR 08 2009

Department of Health & Human Services  
OFFICE OF THE DIRECTOR

Mr. Yastine Crouch  
South Carolina Department of Health and Human Services  
PO Box 8206  
Columbia, South Carolina 29202

RE: Richard Stogsdill

Dear Mr. Crouch:

Enclosed is our appeal requesting a fair hearing on behalf of Richard Stogsdill.

Richard's family has attempted to resolve this complaint with the Kershaw County Disabilities and Special Needs Board and the South Carolina Department of Disabilities and Special Needs. We requested reconsideration from the South Carolina Department of Disabilities and Special Needs on February 13, 2009. Our request for reconsideration and the agency's response are included.

We are requesting that MR/RD waiver services, including those services authorized in Exhibit 1, be provided during this appeal, up to the cost of services in an ICF/MR. We are also placing both agencies on notice, as we did with DDSN in our request for reconsideration, of the requirement to preserve records, including e mails and other electronic records, related in any way to Richard Stogsdill or to matters related to this appeal. We are requesting a written decision within 90 days, as required by the applicable federal regulations.

By copy of this notice, we are advising DDSN and HHS that all communications from either agency related to this appeal should be made through my office. Any consent or agreement which would affect this appeal should be sent to my office, not to Richard Stogsdill. Please consider this our notice that electronic records and any other records or correspondence, including e mails, related to Richard Stogsdill must be preserved during this litigation. Thank you very much for your prompt attention to this appeal.

Sincerely,



Patricia L. Harrison

cc: Nancy Stogsdill

Moultrie B. Burns, Jr., Esq.

Eugene A. Laurent

Emma Forkner

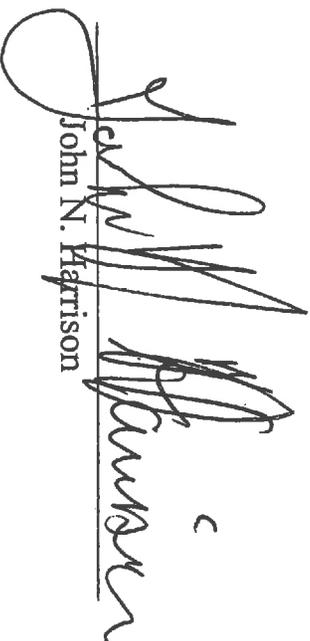
Kathy Bradley

Gloria Prevost

CERTIFICATE OF FILING AND SERVICE

I, Patricia L. Harrison, Attorney for Appellant, certify that I have this day, April 1, 2009, filed one copy of the foregoing Appeal with the S.C. Department of Health and Human Services Office of Appeals and Hearings by mailing same in the US Mail with sufficient postage thereon. I further certify that I have also this day served one copy of the foregoing brief upon Respondent by mailing same in the US Mail, by certified mail.

Ms. Emma Forkner  
SC Dept of Health and Human Services  
PO Box 8206  
Columbia, SC 29202-8206



John N. Harrison



8. The South Carolina Department of Disabilities and Special Needs authorized 3,458 units of services a week on January 3, 2009, effective 8-27-08. Exhibit 3.
9. Subsequently, the Department reduced the number of authorized hours to 70 units per week on February 4, 2009. Exhibit 4.
10. Appellant's needs are subject to change and Respondent is required to meet the health and welfare needs of all Medicaid waiver participants in a timely manner.
11. Respondent is required by the Medicaid Act to provide such services as shall be determined by Appellant's treating physician to be medically necessary.
12. Respondent and its agent, the South Carolina Department of Disabilities and Special Needs, have violated the Medicaid Act by failing to enlist sufficient providers so as to make MR/RD waiver services available to the extent that they are available to the general public.
13. Respondent has allowed the South Carolina Department of Disabilities and Special Needs to base its determination of need for services on the agency's desire to keep workshop seats and institutions full, instead of respecting the choice of the Appellant, and others like him, to a less restrictive plan of care.
14. Respondent's allocation of Appellant's MR/RD Medicaid waiver services appears to be based on arbitrary decisions by the South Carolina Department of Disabilities and Special Needs.
15. Respondent has failed to maintain accountability and oversight of the operation of the MR/RD Medicaid waiver program.

16. Respondent and the South Carolina Department of Disabilities and Special Needs has failed to promulgate regulations, which comply with the requirements of the *Olmstead* decision, to establish reasonable standards for determining medical necessity.
17. Instead, Respondent and the South Carolina Department of Disabilities and Special Needs have based their decisions for allocating services on arbitrary and capricious standards which have not been subjected to public rulemaking or compliance with the Administrative Procedures Act.
18. Respondent and the South Carolina Department of Disabilities and Special Needs have failed to base Appellant's plan of care on the opinions of his treating physician.
19. Respondent and the South Carolina Department of Disabilities and Special Needs have violated the Medicaid Act and federal law and regulations by providing greater funding for similarly situated persons living in institutions as compared to amounts allowed for individuals who have disabilities who choose to live in the community.
20. Respondent's practices discriminate against persons who choose to live in the community instead of living in the institutions operated by the State and its agents.
21. Appellant requests that this tribunal order Respondent to provide those MR/RD waiver services which are determined by Appellant's treating physician to be medically necessary, up to the annual cost of services in an ICF/MR.
22. Appellant requests reimbursement for the cost of services incurred by Appellant which should have been provided through the MR/RD Medicaid waiver.

23. Appellant requests reimbursement for legal fees and costs and expenses of this action.

Respectfully submitted,



Patricia L. Harrison  
Attorney for Richard Stogsdill  
611 Holly Street  
Columbia, South Carolina 29205  
803 256 2017

Columbia, South Carolina  
April 1, 2009

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

TELEPHONE (803) 256-2017

February 13, 2009

FAX (803) 256-2213

VIA FAX AND MAIL

Dr. Stan Butkus  
State Director  
South Carolina Department of Disabilities and Special Needs  
PO Box 4706  
Columbia, South Carolina 29240

RE: Richard Stogsdill

Dear Dr. Butkus:

This letter is to notify you of our request for a fair hearing for Richard Stogsdill. DDSN has failed to provide Richard, with reasonable promptness, with MR/RD Medicaid services which are medically necessary. Richard is totally dependent upon others for all of his ADL's. He currently needs up to twelve hours per day of care and supervision. Because Richard requires two caregivers to safely lift him, a second caregiver is needed during eight and one-half hours each day. Thus, Richard's current medical needs include up to 20.5 caregiver hours of PCA services (82 units) per day. Of course, these needs may change, as Richard's treating physician assesses his medical needs.

We are also appealing the failure of DDSN to enlist sufficient providers so as to make MR/RD waiver services available to the extent that they are available to the general public. DDSN has based its determination of need for services on its desire to keep workshop seats full, instead of respecting the choice of the Appellant, and others like him, of a less restrictive plan of care. This has become increasingly apparent in the evidence showing that DDSN spent funds intended for MR/RD Medicaid waiver services to build and/or buy workshops and other real estate across the state.

DDSN's allocation of Richard's MR/RD Medicaid waiver services appears to be based on arbitrary decisions by DDSN. We are appealing the failure of DDSN to promulgate regulations, in compliance with Olmstead, to establish reasonable standards for determining medical necessity. Instead, DDSN has based its decisions for allocating services on arbitrary and capricious standards which have not been subjected to public rulemaking or compliance with the Administrative Procedures Act. We are appealing the failure of DDSN to base Richard's need for services on the opinions of his treating physician. In addition, we are appealing the Department's policies and practices which base funding on residential placement and provide greater funding for persons in more restrictive residential settings, regardless of the individual's need for services.

Exhibit 1

Richard's family has attempted to resolve this complaint with the Kershaw County Disabilities and Special Needs Board, however, they have been unable to resolve these issues because of policies and directives from the South Carolina Department of Disabilities and Special Needs. We are requesting a written decision within 10 days, as required by CMS' contract for the MR/RD Medicaid Waiver. We are also requesting a copy of the most recent SC MR/RD Medicaid Waiver Document (the contract between HHS and CMS which delegates responsibility for operating the MR/RD Medicaid waiver to DDSN). Our request for that document is made pursuant to FOIA.

Please assure us that there will be no reduction in services or other retaliatory actions taken against Richard or his family during this appeal. Mrs. Stogsdill and I would be available to meet with you if you would like to attempt to resolve this complaint during the appellate process. At this point, we would agree to resolve this complaint by agreement that DDSN will provide those Medicaid services prescribed by Richard's treating physician, up to the annual cost of care at Midlands Center. However, as you are aware, CMS has previously agreed that this cost does not set a cap on individual waiver budgets (2006 Audit of DDSN by HHS) and we do not concede that this amount is the appropriate limit. This offer should simply be considered to be an offer in compromise, which is not binding on the appellant in the event that we need to proceed with this appeal. We are not making a concession of Richard's right to have his MR/RD Medicaid waiver budget exceed this amount. This offer also should not delay the ten day deadline for your agency's response.

All communications from DDSN related to this appeal should be made through my office. Any consent or agreement which would affect this appeal should be sent to my office, not to Richard Stogsdill. Please consider this our notice that electronic records and any other records or correspondence, including e mails, related to Richard Stogsdill must be preserved during this litigation. Thank you very much for your prompt attention to this appeal.

Sincerely,



Patricia L. Harrison

cc: Nancy Stogsdill  
Moultre B. Burns, Jr., Esq.  
Kathy Bradley  
Gloria Prevost

RECEIVED MAR 03 2009

Stanley J. Butkus, Ph.D.  
State Director  
Robert W. Barfield  
Deputy State Director  
Administration  
David A. Goodell  
Associate State Director  
Operations  
Kathi K. Lacy, Ph.D.  
Associate State Director  
Policy



3440 Harden Street Ext (29203)  
PO Box 4706, Columbia, South Carolina 29240  
V/TTY: 803/898-9600  
Toll Free: 888/DSN-INFO  
Home Page: [www.state.sc.us/ddsn/](http://www.state.sc.us/ddsn/)

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March 3, 2009  
Patricia L. Harrison  
611 Holly Street  
Columbia, SC 29205

Re: Richard Stogsdill Appeal

Dear Ms. Harrison:

The agency is in receipt of your letter requesting a fair hearing for Richard Stogsdill. In your letter, you state, the following issues are being appealed:

1. DDSN failed to provide Richard, with reasonable promptness, with MR/RD Medicaid services which are medically necessary.
2. The failure of DDSN to base Richard's need for services on the opinions of treating physician.
3. The failure of DDSN to enlist sufficient providers so as to make MR/RD Waiver services available to the extent that they are available to the general public.
4. The failure of DDSN to promulgate regulations and the Department's policies and practices which base funding on residential placement and provide greater funding for persons in more restrictive residential settings.

As to the failure of DDSN to provide Richard, with reasonable promptness, with MR/RD Medicaid services which are medically necessary, Richard has new plan dated January 29, 2009 in which Ms. Stogsdill participated. Additionally, since April 2008 Richard has services authorized to receive and is receiving 210 units of Personal Care II services. Richard, with reasonable promptness, with MR/RD Medicaid services which are medically necessary

As to the failure of DDSN to base Richard's need for services on the opinions of his treating physician, the Kershaw County DSN has an order from a physical dated January 27, 2009 which authorizes two caregivers to lift. Therefore services are in compliance with the opinion of the physician.

As to the failure of DDSN to enlist sufficient providers so as to make MR/RD Waiver services available to the extent that they are available to the general public, DDSN has

KOLBC 239  
Clinton 803/935-5338  
Phone 803/938-9497  
Midland Center - Phone: 803/935-7500  
Whitman Center - Phone: 864/833-2733

9995 Miles Jamison Road  
Summerville, SC 29485  
Phone: 843/832-5676

Coastal Center - Phone: 843/873-5750  
Pee Dee Center - Phone: 843/664-2600

no authority over Personal Care services as the Department of Health and Human Services (SCDHHS) is responsible for recruiting and enlisting providers of Personal Care services.

As to the failure of DDSN to promulgate regulations and the Department's policies and practices which base funding on residential placement and provide greater funding for persons in more restrictive residential settings, this issue is not relevant to Richard Stogsdill.

At this time, there is no suspension, reduction or termination of services to Richard Stogsdill. If such were to occur in the future, an appeal can be filed with the DDSN at that time.

Your FOIA request for a copy of the contract between SCDHHS and CMS is being handled separately.

If you decide to pursue this matter further, you have the right to request an appeal with the Department of Health and Human Services. Procedures for the appeal process are attached.

Sincerely,



Robert W. Barfield  
Acting State Director

Attachment

cc: Kathy Bradley, Executive Director, Kershaw County DSN Board  
Kimberly Bennett, Service Coordinator, Kershaw County DSN Board  
John King, Director, District I  
Vicki Coleman, MR/RD Waiver Coordinator, District I

S. C. DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS  
MR/RD WAIVER

AUTHORIZATION FOR SERVICES  
TO BE BILLED TO SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES

TO: Home Remedy  
2030-A Lytleton Street Camden, SC 29220

RE: Richard Stegwell 8/27/87  
Recipient's Name Date of Birth

Address: Hunt Club Lane Camden, SC 29220

Phone Number: (803) 432-5587

Medicaid #: 11081548711011  
Social Security #: 21497156115131

You hereby authorized to provide the following service(s) to the person named above. Only the number of units rendered may be billed. Please note: This nullifies any previous authorization to this provider for this service(s).

Prior Authorization #: R.W. 218103191

Personal Care Services  
Personal Care I (PC I) S5130  
Personal Care II (PC II) T1019  
Number of Units Per Week to be Provided: 3,458 (one unit = 15 minutes)  
Start Date: 8-27-08

Service/Tasks Requested:

- Assistance with personal care activities such as bathing, dressing, toileting, brushing teeth, grooming, shampooing hair, clearing for skin, etc.
- Assistance with meals such as feeding, shopping for food, preparing/cooking meals, post-meal cleanup, etc.
- Assistance with home care/light housekeeping tasks such as sweeping, light laundry, bed making, changing bed linens, etc.
- Monitoring conditions such as temperature, checking pulse rate, observation of respiratory rate, checking blood pressure, monitoring medications, etc.
- Assistance with exercise, ambulation, positioning, etc.
- Transportation and/or escort services

Please note: Physician's order must be attached for individuals under age 21. MR/RD Form 15 may be used.

Service coordinator/early interventionist: Name / Address / Phone # (Please Print):

KCBOSN 432-4841  
PO Box 316 Camden, SC 29021  
Kerby Bennett 1/13/08  
Date

Signature of Person Authorizing Services  
MR/RD Form A-3 (7/05)

Exhibit 3

S. C. DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS  
MR/RD WAIVER

AUTHORIZATION FOR SERVICES  
TO BE BILLED TO SOUTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES

0: Active Nursing

930 Oswea Rd Santee, SC 29153

TO: Richard Stagsdell 8/27/89  
Recipient's Name Date of Birth

1 Han + Club Lane Camden, SC 29020

Address

(803) 432-5587

Phone Number

Medicaid # 112181514181711011

Medicaid # 1214191715161115131

*You are hereby authorized to provide the following service(s) to the person named above. Only the number of units rendered may be billed. Please note: This nullifies any previous authorization to this provider for this service(s).*

for Authorization # R1W121810131911

Personal Care Services

Personal Care I (PCI) S5130

Personal Care II (PC II) T1019

70

(one unit = 15 minutes)

Number of Units Per Week to be Provided: 70

Start Date: 2/4/09

- Twice Tasks Requested:
- Assistance with personal care activities such as bathing, dressing, toileting, brushing teeth, grooming, shampooing hair, caring for skin, etc.
  - Assistance with meals such as feeding, shopping for food, preparing/cooking meals, post-meal cleanup, etc.
  - Assistance with home care/light housekeeping tasks such as sweeping, light laundry, bed making, changing bed linens, etc.
  - Monitoring conditions such as temperature, checking pulse rate, observation of respiratory rate, checking blood pressure, monitoring medications, etc.
  - Assistance with exercise, ambulation, positioning, etc.
  - Transportation and/or escort services

Please note: Physician's order must be attached for individuals under age 21. MR/RD Form 15 may be used.

Twice coordinator/early interventionist:

Name / Address / Phone # (Please Print):

SCBDSR (803) 432-4841

2 Box 310 Gamble, SC 29621

Indy Bunn 2/4/09

Date

Signature of Person Authorizing Services

MR/RD Form A-3 (1/05)

Exhibit 4

**Brenda James - Log 0556**

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**From:** Elizabeth Hutto  
**To:** Brenda James  
**Date:** 7/8/2009 3:31 PM  
**Subject:** Log 0556  
**CC:** Elizabeth Hutto

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Per Vastine Crouch - This was an appeal from Patricia L. Harrison Re: Fair Hearing on Richard Stogsdill. The appeal was held on 6/29/09 and the decision will be rendered in about 3 weeks.