

DEPARTMENT OF HEALTH AND HUMAN SERVICES  
OFFICE OF DIRECTOR

ACTION REFERRAL

TO <i>Singletta</i>	DATE <i>12-18-07</i>
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DIRECTOR'S USE ONLY		ACTION REQUESTED	
1. LOC NUMBER  000294	<input type="checkbox"/> Prepare reply for the Director's signature DATE DUE _____		
2. DATE SIGNED BY DIRECTOR  <i>cc: wells</i>	<input type="checkbox"/> Prepare reply for appropriate signature DATE DUE _____		
<input checked="" 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.			

TELEPHONE (803) 256-2017

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

December 16, 2007

*log: Sanileton  
i: wills  
Nec. action*

The Honorable Marvin F. Kittrell  
Administrative Law Court  
1205 Pendleton Street, Suite 224  
Columbia, SC 29201

Re: Brook Waddle v. South Carolina Department of Health and Human Services

Dear Judge Kittrell:

Enclosed is our notice of appeal of the decision of the South Carolina Department of Health and Human Services in the matter of Brook Waddle v. South Carolina Department of Health and Human Services, Appeals Case #07-MISC-028 (HASCJ).

By copy of this letter to the Director of the Division of Appeals and Hearings of the South Carolina Department of Health and Human Services we are requesting that the agency provide your office with a copy of the Record on Appeal, including but not limited to our responses to inquiries made by the hearing officer. A copy of the decision is attached. Also enclosed is a check in the amount of \$50.00 to cover the filing fee.

We have enclosed a stamped envelope for your convenience to return the clocked copies of this letter and notice of appeal to our offices. I hope that you and your family have a blessed Christmas season.

Cordially,

  
Patricia L. Harrison

cc: Brook Waddle

Ken Anthony, Esq.

Emma Forkner

Vastine Crouch

Byron Roberts, Esq.

Curtis Loftis

Harriet Johnson

Gloria Prevost

Steve Hamm, Esq.

**RECEIVED**

DEC 17 2007

Department of Health & Human Services  
OFFICE OF THE DIRECTOR



(1) failed to notify Brook Waddle of her eligibility for services under the MRR/RD Medicaid waiver and to offer these services in the least restrictive setting with reasonable promptness.

(2) failed to provide Brook Waddle with services under the Head and Spinal Cord Medicaid Waiver in the least restrictive setting, including, but not limited to, nursing services, attendant services, psychological services, assistive technology devices and other services for which appellant is eligible to receive and that Respondent has failed to offer these services to Brook Waddle with reasonable promptness.

(3) failed to notify Brook Waddle of her eligibility for services under the MRR/RD Medicaid waiver and to offer these services in the least restrictive setting with reasonable promptness.

(4) failed to perform a PASARR assessment and specialized services as required by federal regulations prior to attempting to discharge Brook to an institutional setting.

(5) failed to provide EPSDT services as required by the Social Security Act and federal regulations.

(6) improperly limited the hours of services offered to Brook Waddle in violation of the Social Security Act and Title 42 of the Code of Federal Regulations.

(7) acted erroneously in denying requested services in violation of applicable federal case law and regulations.

By copy of this Notice of Appeal served upon Respondent, Appellant requests that a copy of the Record on Appeal be provided to Appellant's counsel and the Administrative Law Court. (No transcript exists because Respondent refused to grant Appellant's request for a hearing.).

Appellant appeals from the Decision of Respondent. The following is a general statement of the grounds for appeal, which may be amended, supplemented or modified in the statement of issues in Appellant's Brief:

1. HHS and the hearing officer 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.
2. HHS and the hearing officer exceeded their statutory authority by dismissing Appellant's request for a fair hearing and this decision was arbitrary and capricious.
3. HHS exceeded its statutory authority and erred as a matter of law by failing to provide services which are required by the EPSDT provisions of the Medicaid Act.
4. HHS exceeded its statutory authority and erred as a matter of law by issuing an order more than 90 days after Appellant requested a fair hearing which demanded that Appellant provide a "Memorandum of Understanding" which was "approved as to form and content" by HHS.
5. 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.
6. Respondent has violated the Administrative Procedures Act and has failed to promulgate regulations for the administration of the Medicaid program, and specifically for the HASCI and MTR/RD Medicaid waiver programs.

WHEREFORE, substantial rights of Appellant have been prejudiced by the Decision and therefore, Appellant respectfully prays for an order reversing the Decision, attorney fees and costs and for other and further relief that is just and proper.

Respectfully submitted,



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

Ken Anthony  
250 Magnolia Street  
Spartanburg, South Carolina 29306  
(864) 582 2355

Attorneys for Brook Waddle

December 16, 2007  
Columbia, South Carolina

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State of South Carolina  
Department of Health and Human Services

Mark Sanford  
Governor

Emma Forkner  
Director

November 16, 2007.

CERTIFIED MAIL

Patricia Harrison, Esquire  
611 Holly Street  
Columbia SC 29205

RE: Order of Dismissal in the Appeal Matter of Brook Waddle v. SCDHHS  
Appeals' Case # 07-MISC-028 (HASCI)

Dear Ms. Harrison, Esquire:

The Order of Dismissal in the referenced appeal matter is set forth in the enclosure.

Any party has the right to petition for further review of this Decision/Order, as provided in the Administrative Procedures Act [S.C. Code Ann. Section 1-23-310, et seq., (1976, as amended).] To request an appeal, a Notice of Appeal must be filed with the Administrative Law Court, 1205 Pendleton Street, Brown Building - Suite 224, Columbia, S. C. 29201-3755 within thirty (30) days of receipt of this Decision/Order. A copy of the Notice of Appeal should be provided to the S. C. Department of Health and Human Services' (SCDHHS) Office of General Counsel. The Notice of Appeal must be submitted in accordance with Rule 33 of the Rules of Procedure for the S.C. Administrative Law Court, which establishes specific requirements for the contents of a Notice of Appeal, as well as the requirement that a copy of the request for transcript accompany the Notice of Appeal. The original request for transcript should be directed to the SCDHHS' Division of Appeals at the address below. In accordance with the ALC rules, the cost of producing the transcript will be the responsibility of the party requesting appellate review. For a copy of the ALC rules, you may contact the Administrative Law Court at (803) 734-0550.

Also, please see the enclosed Rule 71 of the Rules of Procedure for the ALC, which sets forth the required filing fee for an appeal.

Sincerely,

*Nastine G. Crouch*  
Nastine G. Crouch

Director, Division of Appeals and Hearings

VG/C/mbh  
Enclosures (2)

Patricia Harrison, Esquire  
November 16, 2007  
Page Two

cc: George Maky, Department Head, Community Waivers, SCDHHS  
Office of General Counsel, SCDHHS  
Byron R. Roberts, Esquire, Office of General Counsel, SCDHHS  
Tana Vanderbilt, Esquire, Office of General Counsel, SCDDSN



## 71. Filing Fee.

A. Cases for which Fee Required. Each request for a contested case hearing, notice of appeal, or request for injunctive relief before the Court must be accompanied by a filing fee in the amount set forth in Rule 71(C). A case will not be assigned to an administrative law judge and will not be processed until the filing fee has been paid or a waiver has been granted pursuant to Rule 71(B). This fee is not required for contested cases, appeals, or requests for injunctive relief brought by the State of South Carolina or its departments or agencies. For appeals brought pursuant to *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000), the fee will be assessed only for the seventh and subsequent appeals filed by an inmate during a given calendar year.

B. Request for Waiver. A party who is unable to pay the filing fee may request a waiver of the fee by filing a completed Request for Waiver form with the Clerk of the Court at the same time the request for a contested case, notice of appeal, or request for injunctive relief is filed with the Court. Request for Waiver forms shall be issued by the Clerk of the Court. If the filing fee is not waived, the party must pay the filing fee within ten days of the date of receipt of the order denying waiver of the filing fee. If the filing fee for a case is waived on behalf of a party, any motions filed by that party in that case are exempt from the motion fee as provided in Rule 71(D).

C. Schedule of Filing Fees. The filing fee will be assessed according to the following schedule:

Case Type	Fee
Dept. of Health and Human Services	\$50

D. Motion Fees. A fee of \$25 will be imposed for the following motions filed with the Court:

- (1) Motion for Summary Judgment
- (2) Motion to Intervene
- (3) Motion to Dismiss
- (4) Motion for Injunctive Relief (in a pending case)
- (5) Motion to Compel

The fee must be submitted to the Clerk of the Court at the same time the motion is filed, unless a waiver of the filing fee in the case was previously granted to the party filing the motion. A motion will not be deemed filed until the fee is paid. The motion fee is not required for motions filed by the State of South Carolina or its departments or agencies.



and simultaneously copied the Hearing Officer. By letter dated July 5, 2007, the Respondent asserted that he did not receive a copy of the Memorandum of Understanding to approve as to form and content prior to its submission to the Hearing Officer. The Hearing Officer's requirement for approval as to form and content and the filing of a finalized version of the Memorandum of Understanding was to avoid the filing of a document containing errors (evidenced by the Petitioner's assertion that the Pre-hearing Conference was held by telephone on June 26, 2007 and the Respondent's assertion that the Pre-hearing Conference was held on June 19, 2007) or misstatement of respective positions.

The Petitioner asserted in the July 5, 2007 entitled Memorandum of Understanding that the following issues had not been resolved Respondent's failure to provide nursing services, attendant services, psychological services and assistive technology devices with reasonable promptness; Respondent's failure to notify Petitioner of her eligibility for services under the MR/RD Waiver and failure to offer MR/RD services with reasonable promptness; The State's failure to perform a PASSAR assessment and specialized services prior to discharging Petitioner to an institutional setting; Respondent's failure to provide EPSDT services; Respondent's improper limitation of service hours.

The Respondent by letter dated July 5, 2007 advised the Hearing Officer that Respondent did not receive a copy of the Memorandum Of Understanding to approve as to form and content, prior to its submission to the Hearing Officer. The Respondent asserted that the only issue on appeal was the denial of nursing services through the HASCI Waiver, as evidenced by the SCDDSN March 30, 2007 denial notice; and, insofar as nursing services have been authorized, the March 30, 2007 denial of nursing services is resolved and the other matters stated by the Petitioner are not properly before the Hearing Officer.

On August 17, 2007, the Hearing Officer issued an Interlocutory Order, pursuant to authority granted by SCDHHS Regulation 126-154, directing the Petitioner to Show Cause and provide supporting documentation, no later than, September 10, 2007, why:

1. The alleged remaining issues in this matter should not be dismissed due to alleged failure to file the Memorandum of Understanding pursuant to the directives of the Hearing Officer, which required submission of a finalized copy, following the Respondent's approval as to form and content?
2. The allegation of failure to provide nursing services with reasonable promptness should not be dismissed as moot? And if not moot, what is the remedy the Hearing Officer has jurisdiction to afford?
3. The allegation of the Respondent's failure to notify to the Petitioner of MR/RD Waiver eligibility and failure to offer services with reasonable promptness should not be dismissed as improperly before the Hearing Officer? Provide documentation evidencing the date of the request/application for MR/RD Waiver services;

4. The PASSAR allegation should not be dismissed as moot or improperly before the SCDHHS Hearing Officer;
5. Why the EPSDT allegation should not be dismissed as improperly before the SCDHHS Hearing Officer;
6. Why the allegation of a limitation of service hours should not be dismissed as improperly before the Hearing Officer?

The Petitioner's response to the Hearing Officer's Order to Show Cause was postmarked on September 10, 2007 and received by the Appeals Division on September 14, 2007. Petitioner's counsel included with the Order to Show Cause response, subpoena requests directed to SCDHHS counsel and SCDDSN counsel. The subpoena requests were pre-mature and not responsive to the Hearing Officer's Order to Show Cause. The Hearing Officer did not execute the subpoena requests.

The Appeals Division received the Respondent's reply to the Order to Show Cause on September 24, 2007.

#### **FINDINGS OF FACT**

Following consideration of the Petitioner's response to the Hearing Officer's Order to Show Cause and the Respondent's reply, I find that:

#### **MEMORANDUM OF UNDERSTANDING**

1. Pursuant to authority granted by SCDHHS Regulation 126-156, the Hearing Officer directed counsel for the parties to conduct a pre-hearing conference. The Respondent was to take the lead in making arrangements for the conference and the Petitioner's counsel was to prepare a Memorandum of Understanding "approved as to form and content" by the Respondent and provide a finalized copy of the MOU to the Hearing Officer;
2. On July 5, 2007, counsel for the Petitioner submitted, via facsimile, a copy of a Memorandum of Understanding, to the Hearing Officer, which was not approved as to form and content by the Respondent;
3. The Memorandum of Understanding was not approved as to form and content and a finalized version was not submitted to the Hearing Officer. Had the Hearing Officer's directive been followed, the Respondent's July 5, 2007 letter clarifying its position with respect to the Pre-hearing Conference would not have been necessary. The Hearing Officer in the Order to Show Cause, referenced why the submitted Memorandum of Understanding was to be approved as to form and content and a finalized copy submitted, [to wit] the Hearing Officer identified a discrepancy regarding when the pre-hearing conference was held, merely as an illustration. The Petitioner's counsel in her response to

the Order to Show Cause averred that the Respondent "falsely" gave an incorrect date for the pre-hearing conference, which the Respondent clarified in the Order to Show Cause Reply was a mistake. The Hearing Officer's directive in the Pre-hearing Conference Order regarding submission of a finalized copy was to avert such appeared inconsistencies and misstatement of positions presented in two documents (See, Petitioner's Order to Show Cause Response & Respondent's Order to Show Cause Reply);

4. Petitioner's counsel failed to submit a finalized copy of the Memorandum of Understanding; therefore, this matter properly subject to dismissal, pursuant to 126-154;

MARCH 30, 2007 DENIAL OF NURSING SERVICES

5. The Petitioner's attorney did not provide a copy of the notice of agency action, with the April 28, 2007 notice of appeal; therefore, the Hearing Officer, pursuant to authority granted by SCDDHS Regulation 126-154, directed said counsel to submit a copy of the notice, or advise if Respondent failed to issue a denial notification. The Petitioner's counsel submitted the South Carolina Department of Disabilities and Special Needs (SCDDSN)-Head and Spinal Cord Injury Waiver-NOTICE OF DENIAL OF SERVICE, on June 19, 2007. The asserted reason for denial was: Exceeds service limits, with comments: HASCI Waiver services (home and community based services) cannot be offered when it can be reasonably expected that the cost of services to [redacted] would exceed the cost of nursing facility level of care. The Hearing Officer gave notice that the submission of the DDSN notification of denial of nursing services was to establish jurisdiction;

6. Petitioner's counsel, by letter dated May 9, 2007, addressed to SCDDHS counsel, SCDDSN Counsel and the SCDDHS Appeals Division Director confirmed the Respondents' offer and the Petitioner's acceptance nursing services under the HASCI Waiver;

7. Petitioner is being provided nursing services (See, Respondent's Reply, Affidavit of Linda Veldheer), consequently, there is no basis to the allegation that the State is failing to furnish services with reasonable promptness;

8. After Respondent's subsequent determination to grant Petitioner nursing services under the HASCI Waiver, the March 30, 2007 denial of services was no longer an initial determination from which the Petitioner could take an appeal; consequently, the Petitioner no longer had a right to a hearing on the SCDDSN March 30, 2007 denial of nursing services. The consequence of Respondents' approval of nursing services was the elimination of the March 30, 2007 denial, which was the basis of the Petitioner's hearing request; therefore, the April 28, 2007 notice of appeal is properly subject to dismissal and is hereby dismissed;

9. The appeal request in its entirety is hereby dismissed pursuant to authority granted by

SCDHHS Regulation 126-154, as provided in Findings of Fact numbers one (1) through (8). Although this matter is dismissed in its' entirety, the Hearing Officer has elected to address:

MR/RD WAIVER

10. The April 28, 2007 notice of appeal alleges "the State failed to notify to the Petitioner of MR/RD Waiver eligibility and failure to offer services with reasonable promptness." In order to determine agency action and jurisdiction, the Hearing Officer directed the Petitioner's counsel provide a copy of Petitioner's request for MR/RD Waiver Services. Petitioner's counsel did not provide documentation, as directed in the Hearing Officer's Order to Show Cause, evidencing that a request was made for MR/RD Services;

11. 42 CFR §431.241 provides a hearing must cover Agency action or failure to act with reasonable promptness on a claim for services. I find that the blanket use of the term "reasonable promptness" in the Petitioner's notice of appeal is not sufficient to invoke jurisdiction absent notice that a claim or request for MR/RD Waiver Services was made. Absent a request for MR/RD Waiver Services, there is no Agency action or failure to act with reasonable promptness;

EPSTD

12. Petitioner 's April 28, 2007 notice of appeal alleges, "the State has failed to provide EPSTD services as required by the Social Security Act". The Petitioner's EPSTD claims are not ripe, because, there is no allegation in the April 28, 2007 notice of appeal, that the Petitioner requested and was denied medically necessary EPSTD services;

PASSAR

13. PASSAR is the requirement of preadmission screening of all individuals with mental illness or mental retardation who are new admissions to Medicaid nursing facilities. While 42 CFR 431.220 (4) provides for an opportunity for a hearing, to any individual who believes the State has made an erroneous determination with regard to preadmission and annual resident review requirements (PASSAR). The Petitioner alleges that the State failed "to perform PASSAR assessment prior to attempting to discharge the Petitioner to an institutional setting." The Petitioner is receiving nursing services in a non-institutional setting. And the Petitioner's allegation concerned "the attempt to discharge" without performing PASSAR. There was no erroneous determination from which an appeal could be taken; consequently, the PASSAR allegation is improperly before the Hearing Officer;

LIMITATION OF SERVICE HOURS

14. The March 30, 2007 denial was for nursing services under the HASCI Waiver. The Respondent granted nursing services, rescinding the agency act of denial. The Petitioner

accepted nursing services. With respect to the denial by the Respondent, the allegation of limitation of service hours is improperly before the Hearing Officer.

#### APPLICABLE LAW

A Hearing Officer has the authority, among other things, to: direct all procedures, issue interlocutory orders; schedule hearings and conferences; preside at formal proceedings; rule on procedural and evidentiary issues; require the submission of briefs and/or conclusions of law; call witnesses; recess, continue, and conclude any proceedings; dismiss any appeal for failure to comply with the requirements under this Sub-article. South Carolina Department of Health and Human Services, Chapter 126, "Administration" R.126-154, §44-6-90, S.C. Code, 1976, as amended.

#### CONCLUSIONS OF LAW

I conclude the following as a matter of law:

1. *The Petitioner's attorney did not submit a finalized copy of the Memorandum of Understanding, approved as to form and content by the Respondent, as directed in the Hearing Officer's June 11, 2007 pre-hearing conference order; consequently, this matter is dismissed, pursuant to South Carolina Department of Health and Human Services, Chapter 126, "Administration" R.126-154, §44-6-90, S.C. Code, 1976, as amended, which provides: A Hearing Officer has the authority, among other things, to: direct all procedures, issue interlocutory orders; schedule hearings and conferences; preside at formal proceedings; rule on procedural and evidentiary issues; require the submission of briefs and/or conclusions of law; call witnesses; recess, continue, and conclude any proceedings; dismiss any appeal for failure to comply with the requirements under this Sub-article.*

2. *The Respondent authorized nursing services for the Petitioner, which rescinded the March 30, 2007 denial action. The sole issue was the denial of nursing services, which were granted and accepted, thereby rendering the reasonable promptness claim moot, with no affordable remedy. The Petitioner's attorney did not provide documentation, as directed by the Hearing Officer, evidencing the Petitioner's request for MR/RD Waiver Services. The PASSAR and limitation of service hours allegation(s) are moot and improperly before the Hearing Officer. The attendant allegations, piggybacked by the Petitioner on the Respondent's April 30, 2007 denial of nursing services are concomitantly dismissed, pursuant to South Carolina Department of Health and Human Services, Chapter 126, "Administration" R.126-154, §44-6-90, S.C. Code, 1976, as amended.*

#### DISCUSSION

The Petitioner's attorney asserts that when a Medicaid recipient request a fair hearing, the State

must take final administration action within ninety (90) days, and references 42 C.F.R. 431.244(f). Section 431.244 (f) (1), is applicable to hearing recommendations or decisions and provides "ordinarily" final administrative action must be taken with ninety (90) days of the appeal request. The Hearing Officer in the June 11, 2007 correspondence transmitting the Pre-hearing Conference Order gave notice that the Petitioner's April 28, 2007 notice of appeal did not present an ordinary appeal.

SCDHHS Regulation 126-154 grants the Hearing Officer authority to direct all procedures and issue interlocutory orders. SCDHHS Regulation 126-156 grants the Hearing Officer discretion to direct the parties to hold a pre-hearing conference. Regulations 126-154 and 126-156 are not limited to provider appeals, as Petitioner's counsel suggests. Furthermore, within the scope of granting the Hearing Officer said authority, an appeal may be dismissed if there is a failure to comply with the requirements under the Sub-article. Attorneys were representing both parties in this matter. The directive to provide the Hearing Officer a "finalized" copy of the Memorandum of Understanding within ten (10) days following the pre-hearing conference was not as counsel for the Petitioner hyperbolically claims "Herculean". The directive was made to seasoned attorneys, not a *pro se* litigant. The Petitioner's counsel could have requested and extension of time for submittal of the Memorandum of Understanding, since there should have been awareness that counsel for the Respondent was experiencing difficulties opening the e-mailed Memorandum of Understanding in the format transmitted by counsel for the Petitioner. The Hearing Officer's Pre-Hearing Conference Order directives and the issued Order to Show Cause were within the Hearing Officer's discretion and authority.

The appeals process is for the purpose of review and adjudication of Agency action or decision. The attempt to bootstrap onto the rescinded March 30, 2007 denial of nursing services, without delineating when a request for services was made and when a denial was made does not constitute a justiciable appeal. Nursing services related to the March 30, 2007 Notice of Denial were granted and accepted. There was no interference with the Petitioner's ability to request a hearing. The Hearing Officer has authority to determine ripeness, standing and jurisdiction, pursuant to SCDHHS Regulation 126-154.

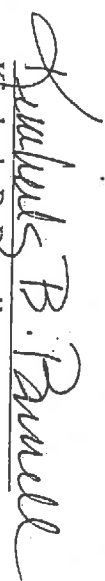
The Petitioner attorney instead of specifically responding, as directed in the Hearing Officer's Order to Show Cause, asserts due process violations. Due process, it is true, requires "the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. at 267 (quotations and citations omitted). At the same time, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S.471, 481 (1972)). SCDHHS Regulation 126-154 was duly promulgated and grant the Hearing Officer authority to direct all procedures and rule on procedural issues. The Hearing Officer, pursuant to authority granted by the promulgated regulations, issued an Order to Show Cause, following interpreted jurisdictional motions by the Respondent. The Petitioner's counsel had an opportunity to respond, and the Hearing Officer has authority to rule.



ORDER

Based on the Findings of Fact, Applicable Law, Conclusions of Law and Discussion, the Petitioner's April 28, 2007 notice of appeal is hereby dismissed.

AND IT IS SO ORDERED.

  
Kimberly B. Burrell  
Hearing Officer

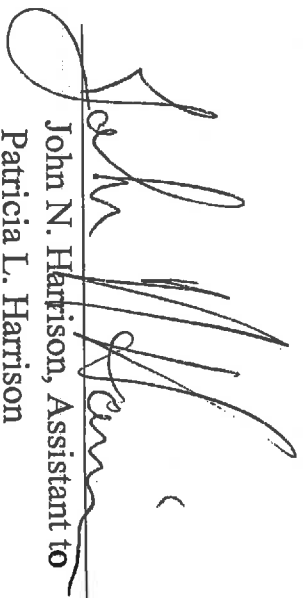
DATED AT COLUMBIA,  
South Carolina

November 16, 2007.

CERTIFICATE OF FILING AND SERVICE

I, John N. Harrison, Assistant to Patricia L. Harrison, Attorney for Appellant, certify that I have this day, December 17, 2007, filed one copy of the foregoing Notice of Appeal with the S.C. Administrative Law Court by hand delivery. I further certify that I have also this day served one copy of the foregoing Notice of Appeal upon Appellees by hand delivery to their counsel of record:

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



John N. Harrison, Assistant to  
Patricia L. Harrison