DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF DIRECTOR

ACTION REFERRAL

TO	DATE
Singleton	12-29-09

DIRECTOR'S USE ONLY	ACTION REQUESTED
1. LOG NUMBER 100278	[ ] Prepare reply for the Director's signature DATE DUE _____
2. DATE SIGNED BY DIRECTOR _____ cc: Forkner (Apperdix Volumes 1-4 to Singleton)	[X] Prepare reply for appropriate signature DATE DUE 1-20-10 [ ] 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. Cleared 12/31/09, document attached.			
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 23, 2009

The Honorable Daniel E. Shearouse
Clerk of Court
SC Supreme Court
PO Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

Enclosed for filing are our Petition for Original Jurisdiction, Summons and Complaint and supporting Affidavits and the Notice as required by Rule 229. Also enclosed is a Petition for Appointment of a Guardian ad Litem with supporting documentation. Also enclosed is our Proof of Service by mail.

Six copies of the Petition and Complaint and supporting Appendices are enclosed.

Please advise if you need anything else from me. Thank you for your assistance and I wish you holiday blessings.

Sincerely,

Patricia L. Harrison

cc: Kenneth Anthony, Jr.
Marjorie Taylor Elliott
All Defendants
Attorney General Henry McMaster

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Karen W., Edward M., Richard S.,
Susan E., Rob L., Peter B., Ann J.,
Corrie D. and Robyn P.,

Petitioners,

v.

Marshall C. Sanford, Individually and in his Official Capacity as the Governor of South Carolina and Member of the South Carolina Budget and Control Board; Converse A. Chellis, III and Richard Eckstrom, Individually and in their Official Capacities as Members of the South Carolina Budget and Control Board; Daniel Cooper and Hugh Leatherman, in their Official Capacities as Members of the South Carolina Budget and Control Board, Emma Forkner, Individually and in Her Official Capacity as the Director of the South Carolina Department of Health and Human Services; Kelly Hansen Floyd, Individually and in her Official Capacity as the Chairman of the South Carolina Department of Disabilities and Special Needs, W. Robert Harrell, Individually and in his Official Capacity as former Chairman and Current Commissioner of the South Carolina Department of Disabilities and Special Needs; Otis Speight, Richard Huntress, Susan Lait, Deborah McPherson and Nancy Banov, in their Official Capacities as Commissioners of the South Carolina Department of Disabilities and Special Needs; and Thomas Waring, Individually and in his Official Capacity as Budget Analyst for the South Carolina Department of Disabilities and Special Needs, and David Goodell, Individually and in his Official Capacity as Associate State Director of SCDDSN,

Defendants.

PROOF OF SERVICE

I, Patricia L. Harrison, attorney for Petitioners certify that I have served the Petition for Original Jurisdiction, Complaint and Summons in the above captioned case on the below listed individuals by Certified US Mail with sufficient first-class postage thereon on December 23, 2009.

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

Ms. Nancy Banov
56 Rebellion Road
Charleston, SC 29407

Ms. Deborah McPherson
304 Valley Springs Road
Columbia, SC 29223

Ms. Susan Lait
308 Turkey Run
Pickens, SC 29671

Mr. Rick Huntress
219 Donington Dr.
Greenville, SC 29615

Dr. Otis Speight
2098 Diamond Head Circle
Tega Cay, SC 29708

Mr. W. Robert Harrell
7449 Hendersonville Hwy
Yemassee, SC 29945

Ms. Kelly Hanson Floyd
1584 Brookgreen Dr.
Myrtle Beach, SC 29577

Thomas Waring
SC Dept. of Disabilities and Special Needs
PO Box 4706
Columbia, SC 29240

David Goodell
SC Dept. of Disabilities and Special Needs
PO Box 4706
Columbia, SC 29240

Emma Forkner, Director
SC Health and Human Services
PO Box 8206
Columbia, SC 29201

Treasurer Converse Chellis
Comp. Richard Eckstrom
Senator Hugh K. Leatherman
Rep. Dan T. Cooper
Governor Mark Sanford
C/O SC Budget and Control Board
PO Box 12444
Columbia, SC 29211

Atty. General Henry McMaster
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

COUNTY OF RICHLAND

Karen W., Edward M., Richard S.,
Susan E., Rob L., Peter B., Ann J.,
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Defendants.

SUMMONS

TO: Marshall C. Sanford, Converse A. Chellis, III, Richard Eckstrom, Daniel Cooper, Hugh Leatherman, Emma Forkner, Kelly Hansen Floyd, W. Robert Harrell, Otis Speight, Richard Huntress, Susan Lait, Deborah McPherson, Nancy Banov, Thomas Waring, David Goodell

YOU ARE HEREBY SUMMONED and required to answer the Petition and Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Petition upon the subscriber at 611 Holly St., Columbia, South Carolina 29205. Rule 229 of the South Carolina Rules of Civil Practice require notice advising you that you have twenty (20) days after the service hereof upon you, to serve and file a return to the Petition and Complaint, exclusive of the day of such service; and if you fail to answer the Petition and Complaint within the time aforesaid, a judgment by default will be rendered against you for the relief demanded in the Petition.

By_____

Patricia L.Harrison
611 Holly St.
Columbia, South Carolina 29205
(803)256-2017
Attorney for the Petitioners

Dec 23, 2009

STATE OF SOUTH CAROLINA IN THE SUPREME COURT

COUNTY OF RICHLAND

Karen W., Edward M., Richard S.,
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Defendants.

NOTICE

TO: Marshall C. Sanford, Converse A. Chellis, III, Richard Eckstrom, Daniel Cooper, Hugh Leatherman, Emma Forkner, Kelly Hansen Floyd, W. Robert Harrell, Otis Speight, Richard Huntress, Susan Lait, Deborah McPherson, Nancy Banov, Thomas Waring, David Goodell

YOU ARE HEREBY NOTICED that Rule 229 of the South Carolina Rules of Civil Practice provide twenty (20) days after the service hereof upon you, to serve and file a return to the Petition and Complaint, exclusive of the day of such service; and if you fail to answer the Petition and Complaint within the time aforesaid, a judgment by default will be rendered against you for the relief demanded in the Petition.

By _____

Patricia L.Harrison
611 Holly St.
Columbia, South Carolina 29205
(803)256-2017
Attorney for the Petitioners

Dec 23, 2009

THE STATE OF SOUTH CAROLINA
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Defendants.

PETITION FOR ORIGINAL JURISDICTION

I. Background.

A. History

Nineteen years ago, President George H. W. Bush signed the Americans with Disabilities Act into law, granting full citizenship to people who have disabilities. Nine years later, the United States Supreme Court reconfirmed, in *Olmstead v. L.C.*, 527 U.S. 581(1999), the rights of people who have mental retardation and related disabilities to live in the community, outside of the confines of discriminatory segregated facilities.[1] The Governor of South Carolina, his cabinet agency, the South Carolina Department of Health and Human Services ("SCDHHS") and the South Carolina Department of Disabilities and Special Needs ("SCDDSN") have acted in total disregard of the civil rights of disabled citizens of South Carolina. The South Carolina Department of Disabilities has taken funds explicitly paid for the purpose of maintaining services for persons who have disabilities in their homes and communities and paid those funds to a rainy day account in violation of the American Recovery and Reinvestment Act (ARRA) and the Americans with Disabilities Act. Petitioners request that the South Carolina Supreme Court authorize the bringing of the attached suit within its original jurisdiction.

Although the facts in this case are convoluted by design of the agencies in order to obfuscate how federal stimulus dollars have been spent (or not spent), the crux of Petitioner's complaint and the relief requested are quite simple. Petitioners allege that certain State officials have acted in concert to violate the ARRA by transferring federal stimulus funds to a rainy day

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[1] In this Petition, the term "segregated" refers to settings where persons who have disabilities are segregated from non-disabled persons and are placed in congregate facilities with other disabled persons instead of being integrated into the community. *Olmstead, supra.*

account instead of using those funds to maintain services needed by Petitioners and jobs of caregivers and support staff. Petitioners ask this Court for a writ of mandamus, or alternatively a declaratory judgment directing the Defendants to use all stimulus funds paid to SCDDSN, including those already transferred to the rainy day account, as directed by Congress, to maintain Medicaid services and to prevent thousands of persons who have disabilities from being placed at risk of institutionalization.

Governor Marshall C. Sanford ("Mark Sanford") has vocally, repeatedly and consistently opposed the use of stimulus funds to benefit South Carolinians who are in greatest need of economic assistance. In a letter sent to House Speaker Robert Harrell, Governor Sanford stated:

> I did everything within my power to impede the federal stimulus legislation as it moved through Congress because I ... was concerned with the disastrous long-term consequences that would come from spending money we don't have...

Letter to Robert Harrell from Governor Sanford dated May 19, 2009. Appendix F at pages 55 to 86, 59. Governor Sanford referred to the federal stimulus money as a "financial windfall" and insisted that a portion of the stimulus funds be set aside. *Id.* He compared the State's receipt of these funds, which were intended to maintain services, to a family winning the lottery. *Id.* According to Governor Sanford, these funds should be set aside to "avert further cuts" "when the federal gravy train runs out." *Id.*

Governor Sanford sought and received national media attention for his efforts to oppose stimulus funds being paid to South Carolina. Appendix G: "*Don't Bail Out My State*," Wall Street Journal, November 15, 2008 (page 67); "*Governors Against State Bailouts*," Wall Street Journal, December 2, 2008 (page 65); "*Clyburn wields clout to thwart Sanford,*" Charlotte Observer, January 30, 2009 (page 52); "*Why South Carolina Doesn't Want 'Stimulus*," Wall

Street Journal, March 21, 2009 (page 22); "*Courting Disaster in South Carolina,*" New York Times, March 29, 2009 (page 20). With assistance from members of the South Carolina Budget and Control Board, the Governor's cabinet agency, SCDHHS, and actors at an agency governed by a board he appoints (SCDDSN) the Governor has managed to have these funds transferred to a rainy day account to accomplish through the back door what the Governor was prohibited by this Court from doing through the front door. South Carolina has illegally transferred hundreds of millions of dollars of funds "attributable" to federal Medicaid stimulus, or "FMAP" dollars, into a rainy day account in violation of the American Recovery and Reinvestment Act (ARRA).[2] By the end of SFY 2010, more than 300 million stimulus dollars will be deposited into a rainy day fund known as the "Health Care Annualization and Maintenance of Effort Fund."

Transferring these funds to a rainy day fund places South Carolina at risk of having to repay all Section 5001 federal stimulus funds, not just those millions of dollars transferred to the rainy day account. If South Carolina is not "eligible" for these funds due to violations of the ARRA, the federal government could also require the State to repay the $225 million of stimulus funds distributed by the General Assembly to the General Fund.

Immediate action by this Court is needed to prevent thousands of low-income citizens of South Carolina who have epilepsy, cerebral palsy, head and spinal cord injuries, mental retardation and related disabilities from losing critical services which are necessary to prevent

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[2] SCDDSN claims that the funds transferred to the Health Care Annualization and Maintenance of Effort Fund are not federal funds, but that they have somehow become transmuted into "state funds." Upon information and belief, investigators from the United States Department of Health and Human Services Office of the Inspector General arrived at SCDDSN in November and reportedly will spend four to six months investigating the agency's use of federal Medicaid funds to purchase real estate and to pay for vacant beds.

serious injury or death and to allow these individuals to live safely in the least restrictive setting appropriate to their needs.

Under the pretext of "budget reductions, SCDDSN and SCDHHS have made fundamental alterations in the way MR/RD (Mental Retardation/Related Disabilities) and HASCI (Head and Spinal Cord Injury) services are delivered in South Carolina. SCDDSN and SCDHHS eliminated some waiver services and reduced others. These services are needed to allow individuals with disabilities to remain in their homes and communities, where Medicaid funded services are provided in a more cost effective manner. SCDDSN has claimed that these reductions were necessary because of a $4.6 million shortfall in funding. In reality, because of the receipt of federal stimulus funds and the "excess funds" account held by SCDDSN, there has been no shortfall in funds available to provide these services. Funds exist under the control of the Defendants which are available to SCDDSN to provide these services without requiring the appropriation of additional funds from the State General Fund.

In fact, SCDDSN received more than $34 million in federal stimulus dollars during SFY 2009. Instead of using these stimulus funds to maintain Medicaid services and jobs related to those services, in July of 2009, SCDDSN transferred more than $31 million of funds attributable to the American Recovery and Reinvestment Act (ARRA) to a rainy day fund, in violation of clear Congressional prohibitions. Congress specifically prohibited CMS or even the Secretary of the United States Department of Health and Human Services from waiving this rainy day fund prohibition. Each quarter during SFY 2010, SCDDSN will transfer more than $5 million into this reserve account, instead of using the funds to maintain waiver services and jobs held by caregivers of persons who wish to remain in their homes and communities.

The former interim director of SCDDSN, Eugene A. Laurent, explained that these funds are not available to maintain services because they were used to "meet other needs of the state." "*Explanation of Stimulus Funding and Economic Impact on This Year's Services.*" Appendix H at page 145. "*Explanation of Stimulus Funding and Economic Impact on This Year's Services.*" According to Dr. Laurent, the stimulus funds SCDDSN received were transferred to a "special account at the State Treasurer's Office." Dr. Laurent blamed the South Carolina General Assembly for the shortfall, because these funds were transferred: "In accordance with the wishes of the state legislature." *Id.* However, while repeatedly informing affected Medicaid participants, families and the public of drastic budget reductions, SCDDSN was continuing to use taxpayer dollars to purchase large congregate workshops and to build up excess funds amounting to $7,845,444.32 in August of 2009 (according to Office of State Treasurer).[3]

The transfers of stimulus related funds to the Health Care Annualization and Maintenance of Effort Fund have been and continue to be made in compliance with directives from the South Carolina Budget and Control Board. These directives have been based on a misinterpretation of Proviso 90.13 of the South Carolina SFY 2010 Appropriations Act.

Under the pretense of budget reductions and "utilization control," Defendants have engaged an unconstitutional pattern and practice of operating SCDDSN programs in a manner that contradicts the clear requirements of the American Recovery and Reinvestment Act ("ARRA"), the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act

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[3] According to SCDDSN budget specialist Thomas Waring, on July 14, 2009, SCDDSN was holding $9.1 million in this excess funds account. According to the report Dr. Laurent provided to the South Carolina Budget and Control Board, the agency's last "repayment obligation" matured in June of 2009. The difference of approximately $1.3 million between the amount reported by Mr. Waring and the amount determined by the State Treasurer's Office is unexplained.

and the decision of the United States Supreme Court in *Olmstead v. L.C.*. Actions taken by SCDDSN and SCDHHS include:

1. Violating the civil rights of South Carolinians who have disabilities by threatening to require relocation of 28 individuals who now live in group homes into facilities across the State which have been chosen by SCDDSN, where they will be forced to live away from their friends and families;[4]

2. Eliminating home-based services while promoting more expensive segregated congregate facility-based programs and services in violation of *Olmstead*;

3. Maintaining and encouraging the monopoly of governmental and quasi-governmental DSN boards which unfairly compete with faith based and private providers of Medicaid services;

4. Denying eligibility for Medicaid services when applicants do not "choose" to use local DSN Boards as providers of services when Medicaid recipients exercise their federal right to choose other providers of these services;

5. Substituting the diagnoses and treatment decisions of licensed physicians with the decisions of SCDDSN and SCDHHS bureaucrats who have no medical training when determining level of care and treatment decisions under the guise of "budget reductions" and "utilization control;"

6. Terminating services and eligibility of waiver participants in reprisal for waiver participants objecting to policies of and actions taken by SCDDSN and local DSN Boards;

7. Using state and federal funds which were allocated by the General Assembly to provide home and community-based services to purchase real estate and investments in large congregate facilities, sometimes titled in the names of private corporations;

8. Transferring funds specifically allocated by Congress to maintain Medicaid services and jobs into a rainy day account.

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[4] This plan was aborted by Dr. Buscemi after families contacted the Department and their legislators opposing the plan, which was developed before Dr. Buscemi became State Director of SCDDSN.

This Petition involves a federal law enacted in February of 2009 and the Defendants' interpretation of a proviso which was inserted into the SFY 2010 South Carolina Appropriations Act.

B. The American Recovery and Reinvestment Act ("ARRA")

The American Recovery and Reinvestment Act ("ARRA") was signed into law on February 19, 2009. As this Court has recognized:

> The ARRA, federal economic stimulus legislation, was enacted by Congress to preserve and create jobs and to promote economic recovery; assist those most impacted by the recession; provide investments needed to increase economic efficiency by spurring technological advances in science and health; invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits; and stabilize state and local government budgets in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases. ARRA, §§ 3(a). In the ARRA, as is typical in federal funding legislation, Congress specifies how the federal funds are to be allocated and spent in the respective states.

The ARRA contains a strict Congressional prohibition, which cannot be waived, even by the federal Medicaid agency or the Secretary of the United States Department of Health and Human Services, unambiguously prohibiting States from transferring any funds attributable to the ARRA, directly or indirectly, to a reserve or rainy day fund. ARRA Section 5001(f).

C. Proviso 90.13 of the South Carolina SFY 2010 Annual Appropriations Act

Proviso 90.13, as interpreted by the Defendants, requires state agencies to transfer monies attributable to the ARRA into a rainy day fund, in violation of the unambiguous Congressional prohibitions against using these funds to establish a rainy day account. A plain reading of the language of the proviso requires agencies to transfer only those funds that are "unobligated" to this rainy day fund. The defendants have misinterpreted legislative intent by interpreting the statute to require funds needed to maintain services and eligibility at the July 1, 2008 level to be paid to this fund.

The Defendants' acts of transferring Medicaid funds to this rainy day account ignores the mandatory obligation that the State of South Carolina has to Congress, as a condition of accepting ARRA funds, to use these funds to maintain Medicaid services and to preserve the employment of caregivers. Title V of the American Recovery and Reinvestment Act obligated SCDDSN to spend these funds promptly by providing services, maintaining reimbursement rates and creating jobs. In violation of this federal law, SCDDSN did not spend federal stimulus dollars received during SFY 2009, as the ARRA obligated the agency to do. Instead, SCDDSN hoarded those funds during SFY 2009 and, at the end of the fiscal year, making no attempt to use these funds to avoid reductions in waiver services. Then the South Carolina Budget and Control Board directed the agency to pay over tens of millions of dollars attributable to ARRA into the State's rainy day fund.

Alternatively, if this Court determines that the Defendants' interpretation of Proviso 90.13 is correct, the Court should rule on the constitutionality of the proviso. Any statute which would require funds attributable to the increased FMAP fund being placed in a rainy day account is clearly unconstitutional because it violates the Supremacy Clause of the United States Constitution. The South Carolina General Assembly does not have the authority to override the rainy day fund prohibitions contained in Section 5001(f) of the ARRA. Even the Secretary of the United States Department of Health and Human Services does not have authority to waive this requirement.

II. No New Appropriations Are Requested

Petitioners request no new state or federal appropriations in this action. The funds required to provide these services and to maintain employment of caregivers targeted to lose their jobs on December 31, 2009, are currently being held in a rainy day account.

III. Reasons for Exercising Original Jurisdiction

This case involves matters of extreme and urgent public interest. Not only will the health and safety of thousands of persons who have disabilities be placed at risk if immediate action is not taken by this Court, but the failure of the State of South Carolina to spend these funds, which are undeniably "attributable" to the Section 5001 federal stimulus funds, as required by the ARRA places the State of South Carolina at risk of having to repay the federal government hundreds of millions of dollars. Those funds that have been illegally deposited into the State's rainy day account are not the only funds at risk of federal recoupment. By violating the rainy day prohibitions of Section 5001 of the ARRA, the federal government may determine that South Carolina did not meet eligibility requirements of the Act, thus requiring the State to repay more than $225,000,000 already transferred by the General Assembly to the State General Fund, *in addition to* the funds held in the rainy day account.

Repayment of this $225 million already spent by the General Assembly would create financial chaos in the state budget...the same kind of financial chaos individual families across South Carolina are now experiencing as they are being informed that on January 1, 2010 SCDDSN will terminate the services they need to keep their family members in their homes and out of state funded institutions. The difference is that the Medicaid participants whose services are being cut and their families face the additional emotional distress of being forced from their homes and communities and into institutional placements, where their very lives may be placed at risk.[5]

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[5] Reports issued by South Carolina Protection and Advocacy for Persons With Disabilities ("P&A") describe systemic abuse, neglect and exploitation of persons who have disabilities in congregate residential programs funded by Medicaid. *Unequal Justice for South Carolinians with Disabilities* (2005) and *No Place to Call Home* (2009) by South Carolina Protection and

At the November 2009 SCDDSN Commission meeting, SCDDSN approved an additional capital expenditure of $200,000 to purchase a building to be used for a large congregate workshop.[6] This brought the total expenditures by SCDDSN for real estate purchased between September and November to $2.8 million, at a time when SCDDSN was forcing 28 individuals to be relocated due to "budget reductions." The Commission was unaware that Dr. Laurent sought and obtained permission from the South Carolina Budget and Control Board to spend $2.6 million to purchase real estate. Dr. Laurent assured Budget and Control Board members that this Commission had voted "unanimously" on the plan. The plan had never been presented to the Commissioners, so there could not have been unanimous support for the expenditures.

Immediate action is needed by this Court to prevent funds which are desperately needed to pay for services from being transferred for the purchase or improve real estate in violation of the ARRA. Immediate action is needed to prevent this illegal use of funds needed to maintain services and to recover any funds distributed in violation of the ARRA.

Advocacy. Appendix C at pages 1 to 83 and 184 to 260.

[6] Upon information and belief, at the SCDDSN Commissioner meeting, Commissioners were informed by SCDDSN staff that expenditures of $2.6 million had been approved to purchase or renovate three buildings to be owned by three local DSN Boards. The Commissioners were informed that these expenditures were contained in the capital spending plan. The purchase of these three buildings had never been approved by the Commissioners and these buildings were not contained in the capital improvement plan. Staff requested approval of an additional $200,000 to be given to the Babcock Center to purchase a $2.8 million building. Upon investigation of the basis for approval of awarding $200,000 to the Babcock Center, it was learned that none of the three capital projects approved by the South Carolina Budget and Control Board at its September meeting had ever been reviewed by the Commissioners, despite Dr. Laurent's assurance to Budget and Control Board members that the SCDDSN Commission had unanimously approved the plan submitted to the Budget and Control Board.

IV. Jurisdiction and Request for Expedited Review

Petitioners respectfully request that the South Carolina Supreme Court authorize the bringing of this lawsuit within its original jurisdiction pursuant to Rule 229 of the South Carolina Appellate Court Rules, S.C. Code Ann. § 14-3-310 and the South Carolina Constitution Article V, § 5. A proposed complaint is attached as Appendix A. In accordance with Rule 229(a), this Petition is further supplemented by the Affidavits contained in Appendix B.

Due to the time-sensitive nature of this petition, the Petitioners respectfully request that the Court conduct an expedited review of the matters contained herein. This Court has exercised the authority to hear matters in its original jurisdiction in other cases where a petition presents an issue of great public interest. S.C. Const. Art. V, §§ 5; Rule 245, SCACR; *Key v. Currie*, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991) as cited in *Mitchell v. Spartanburg County Legislative Delegation*, Op. No. 26739 decided on November 9, 2009. This Court recently accepted and decided *Williams v. Sanford*, a case involving the Governor's refusal to accept federal stimulus funds, in its original jurisdiction. Op. No. 26662, June 4, 2009. As in *Williams*, the Governor of South Carolina is attempting to thwart the intent of Congress to restore economic security in our communities and, in this case, actions have been taken to trample on the civil rights of the most vulnerable citizens in the State of South Carolina.

V. Relief Requested

Petitioners seek a writ of mandamus and immediate declaratory and injunctive relief to require the director of SCDDSN to use all stimulus federal funds received by the agency to provide, with reasonable promptness, Medicaid services which are determined by participants' treating physicians to be needed to prevent regression and to maintain optimal functional status. These services include, but are not limited to, all Medicaid waiver services which were being

provided on July 1, 2008. Petitioners request that funds be made available immediately so that caregivers will remain employed and funds will be used to maintain and create jobs related to these services. Petitioner request an injunction prohibiting SCDDSN from using funds needed for services for the purchase or improvement of real estate not included in the capital improvement plan approved by SCDDSN in April of 2009. Appendix E at pages 75 and 76.

VI. The Parties

A. The Petitioners

The Petitioners, who are more specifically described in the attached complaint, are citizens of South Carolina who have disabilities, including mental retardation, epilepsy, cerebral palsy, autism and/or head and spinal cord injuries. SCDHHS has certified to the federal government that each of these individuals would require institutional services in a nursing facility or an ICF/MR[7] if home and community based waiver services were not provided. SCDDSN has either reduced or terminated waiver services or is threatening to terminate waiver services which Petitioners require to maintain their health and safety in the least restrictive setting.

Because of the incapacity of Petitioners, their interests are brought before this Court through Sandra K. Ray, as guardian ad litem for the Petitioners. Petitions for the appointment of Sandra K. Ray by this Court, as authorized by Rule 17(d)(1), are attached in Appendix A.

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[7] ICF/MR is a term defined in federal regulations. It refers to a nursing facility which serves persons who have mental retardation or a related disability. An ICF/MR is the most costly and restrictive setting in which SCDDSN services are provided.

B. The Defendants The Defendants named in this Petition include Marshall C. Sanford ("Mark Sanford"), who is sued in his individual and official capacities as the Governor of South Carolina and as a member of the South Carolina Budget and Control Board.

Converse A. Chellis, III and Richard Eckstrom are sued in both their individual and official capacities as members of the South Carolina Budget and Control Board. Daniel Cooper and Hugh Leatherman are sued only in their Official capacity as members of the South Carolina Budget and Control Board.

Defendant Emma Forkner is sued in both her individual and official capacities as the Director of the South Carolina Department of Health and Human Services.

Defendant Kelly Floyd is sued in both her individual and official capacities as Chairman of the SCDDSN Commission, the governing board of the agency. W. Robert Harrell, is sued both individually and in his official capacities as former Chairman and current Commissioner of the South Carolina Department of Disabilities and Special Needs. Otis Speight, Richard Huntress, Susan Lait, Deborah McPherson and Nancy Banov are sued only in their official capacities as Commissioners of the South Carolina Department of Disabilities and Special Needs. Thomas Waring and David Goodell are sued in both their individual and official capacities, respectively as Budget Analyst and the Associate State Director for the South Carolina Department of Disabilities and Special Needs. Mr. Waring and Mr. Goodell have acted in concert with the former Deputy Director of SCDDSN and the former Director to prevent funds allocated by the South Carolina General Assembly and Congress from being used as intended to provide services to persons who have disabilities.

VII. Applicable Law

A. The American Recovery and Reinvestment Act: Congress enacted the ARRA on February 19, 2009 and directed States to spend, not to save, stimulus dollars.

1. Section 3 of the ARRA: Purposes and Principals

Congress clearly identified the purposes and principals of the ARRA in Section 3(a) of the Act:

(1) To preserve and create jobs and promote economic recovery.

(2) To assist those most impacted by the recession.

(3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health.

(4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.

(5) To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.

In addition, Congress directed the States to commence "expenditures and activities *as quickly as possible* consistent with prudent management." (Emphasis added.) Section 3(b) of the ARRA.

2. Title V of the ARRA: Temporary Increase of Medicaid FMAP

Title V of the Act relates specifically to increased federal funds paid to the State to provide Medicaid services. Section 5000(a) of Title V provides:

(a) The purposes of this title are as follows:
(1) To provide fiscal relief to States in a period of economic downturn.
(2) To protect and maintain State Medicaid programs during a period of economic downturn including by helping to avert cuts to provider payment rates and benefits or services, and to prevent constrictions of

> income eligibility requirements for such programs, but not to promote increases in such requirements. (Emphasis added.)

Section 5000 et. seq. of the ARRA expresses a clear Congressional intent to increase the federal Medicaid match rate in order to avert cuts in health care provider payment rates, benefits, or services and to prevent changes in eligibility requirements that would reduce the number of individuals eligible for Medicaid.

The ARRA funds provided to South Carolina under Section 5001 of the Act, were paid to the State for the explicit purpose of increasing the federal matching rate for Medicaid, referred to in federal statutes and regulations as "FMAP." The unambiguous purpose of this Section is to maintain Medicaid services and eligibility at a level that is not less than that funded by the State legislatures on July 1, 2008. Both Governor Sanford and Emma Forkner have written to the federal government assuring the President that South Carolina would use "programmatic," or FMAP, funds in compliance with ARRA. Appendix F at page 92 and 122 to 123. These assurances and the State's acceptance of FMAP funds obligated Defendants to use the money in accordance with the Congressional purposes set forth in Sections 3, 5000 and 5001.

These stimulus funds have never been "unobligated funds." South Carolina is very much obligated to use the funds to avert cuts to Medicaid, to maintain and create jobs and to stimulate the economy with these funds, as required by the ARRA. Petitioners request an interpretation of Proviso 90.13 confirming that SCDDSN is not obligated to transfer FMAP funds to the Health Care Annualization and Maintenance of Effort Fund because those funds are "obligated" funds. The agency is obligated to the federal government to use those funds to maintain services at the level provided on July 1, 2008.

Every state meeting the requirements of ARRA is entitled to receive an increase of 6.2 percentage points in its FMAP upon providing the federal government the assurances required in the Act. Because of its high unemployment rate, South Carolina received an increase of 8.9% in FMAP funds. As this Court recognized in *Williams*, in interpreting ARRA, the Court must give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language should be regarded as conclusive. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Congress could not have been more clear in expressing its intent that the States would be obligated, by accepting stimulus funds, to use increased FMAP funds to maintain Medicaid services and eligibility of Medicaid participants and to maintain and create jobs during a period of economic downturn. Equally unambiguous was Congress' directive that States could not use ARRA funds, or funds "attributed" to the receipt of ARRA funds to fund a rainy day account.

Congress required States to provide the federal government with five attestations before receiving the increase in FMAP funds, assuring that the State understands the obligations attached to the funds:

1. A State may not apply Medicaid eligibility standards, methodologies, and procedures that are more restrictive than those in effect under the State plan ... on July 1, 2008. Section 5001(f)(1).

2. No amount attributable to the FMAP increase may be deposited or credited into a rainy day or reserve fund. Section 5001(f)(3).

3. Political subdivisions within the State may not be required to contribute a greater percentage of costs than was required on September 30, 2008. Section 5001(g)(2).

4. Expenditures for which the State draws the increased FMAP funds must be eligible Medicaid expenditures. Section 5001(e).

5. States must make payments for Medicaid services promptly. Section 5001(f)(2).

Congress allocates all federal Medicaid funds to CMS (Center for Medicaid and Medicare Services), the federal agency which is responsible for the administration and oversight of the Medicaid program. Federal law requires CMS to pay all federal Medicaid funds coming into South Carolina to SCDHHS, which is the "Single State Agency" for purposes of administering the Medicaid program. In return, SCDHHS must be responsible to the federal government that Medicaid funds are expended as intended and that all Medicaid rules and regulations are followed. 42 C.F.R. § 431.10. In turn, SCDHHS transfers the federal portion of expenses for Medicaid programs operated to SCDDSN to that agency. The South Carolina General Assembly (through the State Budget and Control Board) pays the state match for programs operated by SCDDSN directly to SCDDSN. By statute, SCDDSN is the state agency 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. South Carolina Code of Laws § 44-20-240. Local Disabilities and Special Needs Boards (DSN Boards) are *public bodies* which are responsible for the administration, planning, coordination, and delivery of services under the department's control. South Carolina Code of Laws §§ 44-20-375, 378, 380 and 385. These local DSN Boards must be appointed as specified by county ordinance. South Carolina Code of Laws § 44-20-375(a). MR/RD and HASCI Medicaid waiver services are actually delivered by SCDDS and, local DSN Boards, as well as by private and faith-based providers. The Chart on page 19 shows the relationship of these agencies and the flow of these funds during SFY 2009. During SFY 2010, $40 million in federal stimulus funds, with more than $22 million being paid to the Health Care Annualization and Maintenance of Effort Fund.

Distribution of Federal Stimulus Funds
SC FY 2008-2009

CMS - the Federal Medicaid Agency

$34 million Federal stimulus

SCDHHS - State Medicaid Agency

$34 million Federal stimulus

SC General Assemby
Matching State Dollars

SCDDSN - Operates MR/RD and HASCI Under Contract w/SCDHHS

$31 million stimulus funds

Local DSN Boards

Health Care Annualization and
Maintenance of Effort Fund

Private Providers of DDSN Services

MR/RD or HASCI Waiver Participant

In February of 2009, Congress passed the American Recovery and Reinvestment Act ("ARRA") which will provide South Carolina with billions of dollars of stimulus funds. Seventy-five percent of these funds were paid to South Carolina without certification by the Governor. *Williams v. Sanford, supra.* The Medicaid stimulus funds were paid by CMS to SCDHHS. SCDHHS, in turn, transferred all stimulus funds allocated to SCDDSN programs to SCDDSN, where they were matched with state funds allocated by the South Carolina General Assembly. Congress has imposed stringent requirements on the use of ARRA funds. *Id.* Instead of putting stimulus funds to use immediately to maintain services and jobs, SCDDSN transferred more than 90% of the stimulus funds it receive into a rainy day account, in violation of the ARRA.

Because SCDDSN failed to expend the federal stimulus dollars it received during SFY 2009 and failed to budget stimulus dollars that would be paid to SCDDSN during SFY 2010 in compliance with the ARRA, SCDHHS informed CMS that SCDDSN did not have sufficient funds to continue the MR/RD and HASCI Medicaid waiver services at the same level funded by the South Carolina General Assembly during SFY 2008. Had federal funds been used as intended, there would be no deficit and no need to reduce SCDDSN services.

The budget information presented at the December 17, 2009 SCDDSN Commission meeting reported that state funds paid to SCDDSN had been reduced by $55,934,000 since October of 2008. Appendix H at 147. During this time, upon information and belief, SCDDSN has paid over more than $54,000,000 in federal stimulus funds to the Health Care Annualization and Maintenance of Effort Fund, a rainy day fund created pursuant to Proviso 90.13. According to the chart in Appendix H at page 147, SCDDSN received a $12,753,000 increase in funding for SFY 2010 and was allowed to retain $17,253,491 in stimulus funds. Had SCDDSN used federal

stimulus funds to maintain services and jobs, as intended by Congress, the agency would have a surplus of more than $20 million, which could have been used to serve individuals on the waiting list for waiver services. Thousands of jobs would have been created or maintained if funds had been spent as intended by ARRA.

Instead, SCDDSN continued to reduce beds and home-based services. Appendix H at 148 to 149. The plan presented at the December SCDDSN Commission meeting called for an additional reduction of 68 slots. *Id.*

SCDHHS also provided inaccurate information to CMS about the number of persons who would be affected by the proposed changes, eliminating persons who receive "residential habilitation" from the estimate. These people are affected, because residential providers will no longer be required to provide physical therapy, occupational therapy or speech and language services. Based on these totally false claim of insufficient funds, on or about September 1, 2009, the State Medicaid Agency, SCDHHS, submitted amendments to the federal government asking for permission to reduce services provided in two Medicaid waiver programs operated by SCDDSN. When this plan was submitted to CMS, SCDDSN had just transferred more than $31 million attributable to stimulus funds to the Health Care Annualization and Maintenance of Effort Fund and SCDDSN was holding at least $7.8 million in an excess funds account.[8] According to the interim director of SCDDSN, Dr. Eugene A. Laurent, SCDDSN only needed $4.6 million to maintain these waiver services without a reduction.

The plan of SCDDSN to reduce home based services was not shared with affected consumers, their families or the private providers of Medicaid services until after the decision

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[8] However, in July of 2009, Thomas Waring informed the SCDDSN Commissioners that this excess fund account contained $9.1 million.

had been made by officials at SCDDSN and SCDHHS in May of 2009 to drastically alter the way in which services are provided. The plan was not presented to the governing board of SCDDSN until after it was presented to and approved by the SCDHHS Medical Care Advisory Committee ("MCAC"), the Committee of SCDHHS which must review and make recommendations to Emma Forkner before a waiver program may be amended. The reasons for this change appear to have been purely pretextual. The reduction of home-based services actually appears to have been part of a systemic plan developed by SCDDSN and SCDHHS over a period of years to maintain the monopoly of the DSN Boards, while reducing services provided by faith based and private providers. (See audit of SCDDSN released by the South Carolina Legislative Audit Council on December 3, 2008. Appendix C at pages 84 to 183.) This plan involved building up the capacity of large congregate workshops operated by DSN Boards and those private corporations treated by SCDDSN as county DSN Boards (in violation of South Carolina Code §§ 44-20-30 and 44-20-375, which require a county board to be a "public body" or a "public entity"). The Defendants' plan involved inserting a proviso into the 2010 Appropriations Act to allow SCDDSN to profit from the labor of "mentally retarded trainees."[9] Section 24.1 of Provisos to the SFY 2010 Annual Appropriations Act.

Even when tens of millions of dollars of ARRA stimulus funds became available to SCDDSN in the spring of 2009 to restore home-based services, the agency did not allow anything to get in the way of the ongoing plan to reduce non-facility based SCDDSN services. At the same time, despite reports of unprecedented reductions in funding, the agency continued

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[9] Proviso 24.4 inserted into the SFY 2010 Appropriations Act provides that "All revenues derived from production contracts earned by mentally retarded trainees in Work Activity Programs be retained by the South Carolina Department of Disabilities and Special Needs..."

to purchase real estate where services are provided in segregated congregate workshops operated by SCDDSN Boards. Upon information and belief, this was done to force individuals who were receiving services in their homes and in integrated community settings to "choose" to receive services in congregate workshops (identified as "Work Activity Programs" in SCDDSN lingo). Stimulus funds paid to SCDDSN were not used to restore and maintain services and jobs, as required by ARRA. Instead, SCDDSN held those stimulus funds in reserve until the end of the fiscal year, in violation of its obligation to the federal government to spend those funds maintaining eligibility of Medicaid participants and the jobs of people who provide these services. SCDDSN then transferred those funds to the Health Care Annualization and Maintenance of Effort Fund and continued the ongoing pattern of slashing home-based services of participants in the MR/RD and HASCI Medicaid waiver programs. SCDDSN never performed an economic analysis to determine whether the proposed reductions in services would actually save State taxpayers any money. SCDDSN failed to maintain service levels and eligibility as required by ARRA and continued to deny, further reduce and, in some cases, terminate services based on false claims of budget reductions.

The transfer of more than $31 million of the ARRA funds SCDDSN had received during SFY 2009 to this fund violated the Supremacy Clause of the United States Constitution. Each quarter, SCDDSN continues to violate the Supremacy Clause by transferring additional funds attributable to federal stimulus funds to the rainy day account. This places the State further at risk by having to repay all increased FMAP funds, including hundreds of millions of stimulus funds paid to the State General Fund.

Because South Carolina has not used stimulus funds for the purposes intended by Congress, the unemployment rate in the State has continued to be one of the highest in the country. At the time this action was filed, the State's unemployment rate exceeded 12%, with some local unemployment rates as high as 22%. The following chart compares the stimulus dollars allocated to and received by other surrounding states and the numbers of jobs that have been created by stimulus funds to those figures for South Carolina:

	Amount Awarded	Amount Received	Jobs Created
Tennessee	$3,753,200,000	$340,760,000	9,548
South Carolina	$3,810,180,000	$702,200,000	8,147
Georgia	$4,195,610,000	$1,351,910,000	24,681
North Carolina	$4,278,470,000	$1,137,630,000	28,073

See report at *Recovery.Org* for October 30, 2009. This chart shows that Tennessee has received less than half the amount of stimulus funds received by South Carolina, yet that state has created more jobs. The amount of stimulus funds Georgia and North Carolina have received is less than double the amount South Carolina has received, yet both states have created more than three times the number of jobs. This is because agencies that receive Medicaid funds have deposited a large portion of the stimulus funds received into its rainy day fund, in satisfaction with the Governor's desires, rather than using the money to maintain services and to stimulate the economy.

B. The Medicaid Act

1. The Framework for Providing Medicaid Services

The "Medicaid Act" is contained in Title XIX of the Social Security Act and is codified at 42 U.S.C. §§ 1396-1396v. Federal regulations for the operation of the Medicaid program are contained in Title 42 of the Code of Federal Regulations. The Medicaid Act established a cooperative federal-state program under which the federal government provides funding to states to provide medical assistance to eligible low-income persons. *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007), *cert, denied*, 128 S.Ct. 1483 (2008). States are not required to participate in Medicaid, but those that do accept federal funding for Medicaid programs must comply with the Medicaid Act and with all federal regulations and directives. *Id.* 42 U.S.C. § 1396 et. seq. The flow of Medicaid dollars into South Carolina is shown in the chart contained on page 19 of this Petition.

The Centers for Medicare and Medicaid Services ("CMS") is the federal agency which administers the Medicaid program and provides matching federal Medicaid funds to the states. All Medicaid funds in South Carolina are paid by CMS to the South Carolina Department of Health and Human Services ("SCDHHS"). Emma Forkner is the director of SCDHHS, which is under the direct supervision and control of Governor Mark Sanford, as his cabinet agency.

SCDHHS contracts with the South Carolina Department of Disabilities and Special Needs ("SCDDSN") to provide Medicaid programs for persons who have mental retardation, related disabilities and head and spinal cord injuries. Governor Sanford has total control over who serves on the SCDDSN Commission. He appoints the seven member Commission that governs SCDDSN and these Commissioners are subject to removal by the Governor. SCDDSN receives the federal matching share (referred to in the Medicaid Act and federal regulations as "FMAP") for the Medicaid programs it operates from SCDHHS and it receives the required state Medicaid matching funds directly from the State Treasury. SCDDSN then "bundles" the state

and federal money and pays capitated "band payments" to local Department of Special Needs ("DSN") Boards.

The local DSN Boards receive the capitated "band" payments from SCDDSN and they provide most of the Medicaid services under the programs operated by SCDDSN.[10] When home-based waiver services are provided by private or faith based providers, the provider must either bill the local DSN Boards or bill SCDHHS, which in turn reduces the band payment to the local board by the amount billed directly to SCDHHS. When services are provided by private providers, the amount of money retained by the local DSN Board is reduced..[11]

2. Medicaid Home and Community Based Services

South Carolina has elected to participate in Medicaid programs which provide services outside of traditional nursing care institutions. These are called "waiver" programs, because the federal government "waives" the requirement that the participant live in an institution in order to receive Medicaid funding. The State must comply with all other requirements not specifically "waived." Persons receiving services under a home and community based Medicaid waiver program are considered to be "categorically needy." Under the Medicaid Act, medical assistance a state provides for any categorically-needy individual "shall not be less in amount, duration, or

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[10] The Medicaid Act requires States to provide participants a choice from all qualified Medicaid providers willing to serve the participant. 42 U.S.C. § 1396a(a)(23). SCDDSN has been criticized by the federal Medicaid agency and the South Carolina Legislative Audit Council for limiting services to those provided by the local DSN Boards, without offering participants a meaningful choice. See the 1999 Audit by the federal Medicaid Agency (Appendix D at pages 318 to 342) and the 2008 LAC audit of SCDDSN (Appendix D at pages 84 to 183).

[11] Some providers bill SCDHHS directly. In those cases, SCDHHS pays the claim, then SCDDSN bills the local DSN Board by reducing its "band payment" by the amount of the claim.

scope" than the assistance provided to any other categorically needy individual. 42 U.S.C. § 1396a(a)(10)(B)(i).

Although participation in a home and community based waiver program is "optional," once the State receives funding for these programs, it is obligated to comply with all federal statutes, regulations and directives related to the Medicaid program. *Doe v. Kidd,* 501 F.3d 348, 354 (4th Cir. 2007), cert, denied, 128 S.Ct. 1483 (2008). One of the requirements Congress imposed on States is that they must "include reasonable standards . . . for determining eligibility for and the extent of medical assistance under this plan." 42 U.S.C. § 1396a(a)(17). (Emphasis added.) "Medical assistance" is defined in the Medicaid Act as "payment of part or all of the cost of . . . care and services." 42 U.S.C. § 1396d(a). Such financial assistance must be provided with "reasonable promptness" under § 1396a(a)(8) of the Medicaid Act. *Doe v. Kidd, supra.*

Services must be provided which are directed toward - (i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and (ii) The prevention or deceleration of regression or loss of current optimal functional status. 42 C.F.R. § 483.440(a)(1) and Level of Care Assessment form contained in S.C. MR/RD Medicaid Waiver Document. Appendix H at page 89.

The "comparability statute" of the Medicaid Act requires that services provided to one member of a covered group must be made available to all participants in that program. 42 U.S.C. § 1396a(a)(10)(B)(i), (ii). Services provided to any individual in a group of covered persons must be "equal in amount, duration, and scope for all recipients within the group." 42 C.F.R. § 440.240. Courts have consistently recognized that states have violated the comparability requirement when some recipients are treated differently from other recipients where each has the same level of need. *Schott v. Olszewski,* 401 F.3d 682, 688-89 (6th Cir.2005) (finding

treatment was not comparable when Medicaid did not reimburse recipient for medical expenses she paid out of pocket after she was wrongfully denied coverage); *White v. Beal,* 555 F.2d 1146, 1151-52 (3d Cir.1977) (finding statute was illegal when it covered eyeglasses for those suffering from eye diseases but did not cover glasses for patients when refractive error caused poor eyesight).

Congress has allowed States to develop Medicaid waiver programs to target a specific group of disabled persons. The MR/RD and HASCI Medicaid waiver programs provide non-institutional services to certain severely disabled individuals who have been determined by SCDHHS to require care in an institution in the absence of waiver services. The MR/RD Medicaid waiver program provides services targeted to people who have mental retardation or related disabilities, including epilepsy, autism or cerebral palsy. The HASCI (Head and Spinal Cord Injury) Medicaid waiver provides services to persons who have survived head or spinal cord injuries. Additional services may be provided to participants of the MR/RD and HASCI Medicaid waiver program that are not provided to participants of the "regular" or "State Plan" Medicaid program. However, all medically necessary services which are offered through the waiver must be provided to all participants in that program under the comparability requirement. Likewise, all medically necessary services provided to any HASCI waiver participant must be available to all participants.[12]

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[12] In *Jenkins v. DSHS*, the Washington Supreme Court held that reduction in services without an individual assessment of need violates the comparability requirement of Medicaid waiver programs:

> Once a person is assessed to require and receive a certain number of care hours, the assessment cannot be reduced absent a specific showing that fewer hours are required. To "presume" some recipients need fewer hours of care without individualized determination violates the comparability requirement ... The needs of a recipient are not

The stated purpose of the MR/RD and HASCI Medicaid waiver programs is to provide services outside of an institution to persons who would otherwise require care, at the expense of the State, in an ICF/MR. Each year, every waiver participant must be informed that he or she has the right to choose between Medicaid waiver services and receiving these services in an institutional setting at the expense of the State. At any point in time, a waiver participant can opt out of the waiver program and demand placement in an ICF/MR or a nursing home. Each year, every waiver participant must sign a statement acknowledging that he or she has been provided notice of this right and has chosen to receive waiver services.

So long as the home and community based services, *in the aggregate*, are less expensive than the cost of institutional care in an ICF/MR, the State is obligated to provide all Medicaid waiver services contained in a MR/RD or HASCI Medicaid waiver participant's plan of care. 42 U.S.C. § 1396n. SCDHHS has admitted that services may be provided to an individual participant which cost more than the average cost of ICF/MR services, so long as the cost of *all* persons receiving MR/RD Medicaid waiver services does not exceed the aggregate cost of care of those persons if they were living in institutions funded by Medicaid. However, Defendants have elected, in violation of the Americans with Disabilities Act, to place an arbitrary cap on services provided to persons who live at home which is not imposed on persons who live in more restrictive institutional settings, thus also violating the comparability provision of the Medicaid Act.

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presumed met without an individualized assessment.

Jenkins v. DSHS, 160 Wn2d 287, 157 P.3d. 388 (WA 2007) at 393, 394.

Indeed, SCDHHS has supported and affirmed the authorization by CMS allowing SCDDSN to pay more than $150,000.00 a year for waiver participants who have high needs to live in residential programs (CTH II facilities[13]). Appendix D at page 292. 2006 Audit of MR/RD Medicaid Waiver Program Operated by SCDDSN by SCDHHS. However, waiver participants who choose to live in less restrictive settings in their own homes or in apartment settings, are discriminated against by the arbitrary caps established by SCDDSN for persons living at home. SCDDSN prohibits persons who do not live in an ICF/MR or group home from receiving "one-on-one" services. Individuals whose cost of care exceeds the arbitrary caps established by SCDDSN, who could live at home for less than the cost of institutional care will be forced to move to an institution. These individuals living at home have only one option: institutionalization if their needs exceed the arbitrary caps established by the waiver amendments. Even when the cost of services in an institution greatly exceeds the cost to care for a severely disabled individual at home, the arbitrary caps established by SCDDSN will force that individual into the institution at greater costs to taxpayers. Despite SCDDSN having a "money follows the person" policy, waiver participants do not have the option of moving out of an institution and taking their funding with them to provide medically necessary services in a less restrictive environment at less cost to the taxpayer. This practice keeps the ICF/MR and DSN Board beds full and it discriminates against those disabled persons whose disabilities are more

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[13] MR/RD and HASCI Medicaid waiver programs provide services in participants' homes or in residential settings funded by SCDDSN. Residential programs are offered in CTH I (foster homes), CTH II (group homes) or SLP (supervised apartment) settings. SCDDSN band payments are higher for persons living in one of the residential settings compared to the band payment made for individuals who live in their own homes. SCDDSN pays lower "band" rates to persons who live at home, based solely on where they live, without regard for their needs. This practice has forced "high needs" waiver participants to move to institutions to obtain the care they need, at a significantly greater aggregate cost to the state.

severe in violation of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act.

In 1999 the federal regulatory agency (then HCFA, which is now CMS) reported that: "There was evidence that the provision of services was budget driven and, as noted above, limited to services provided by the local DDSN." Appendix D at page 337. The barriers to competition remained in place in December 2008, when the LAC reported that: "We found that in South Carolina, DDSN's consumers often have little choice of providers. Most services are provided by local disabilities and special needs (DSN) boards." Appendix D at page 125. Because most service coordinators are employees of the local DSN Board, access to services is "compromised" because the band payment is made to the agency that determines what services will be provided, with the DSN Board keeping any unused funds. Appendix H at page 127. As is demonstrated in the attached complaint, persons who have severe disabilities are provided less than eight hours a day of services if they choose to remain at home, regardless of whether the cost of institutionalization would far exceed the cost of services the participant's treating physician has determined that he or she needs at home.

To receive Medicaid funds under a waiver program, the State must provide sufficient services to assure the federal government that the health and welfare of every waiver participant is protected. 42 U.S.C. § 1396n(e). Repeated studies have shown that residents of SCDDSN residential programs may not be safe. See *"Unequal Justice for South Carolinians with Disabilities"* (Appendix D at page 186). The LAC audit reported that "there remain gaps in oversight that may pose risks to DDSN's consumers." Appendix D at page 99. The reductions in home-based services will force many waiver participants into unsafe facilities, even where the institutional care costs more than they are requesting in order to remain in their homes. Even

waiver participants who have family support at home will be forced into institutions for respite services once home-based daily respite is removed as an option on January 1, 2010.

The cost of daily institutional respite will increase to $270 per day from $157 per day on January 1, 2010. Defendants have not explained how eliminating home-based respite services which cost less than $70 per day, and replacing these services with institutional services costing $270 per day will save taxpayers money. It is undeniable that this change will force waiver participants into institutional care when this less restrictive, and less costly, home-based respite alternative is eliminated on January 1, 2010.

Under the requirements of the Medicaid Act, SCDHHS must also assure CMS that participants are given a choice of any Medicaid provider willing to serve the participant. 42 U.S.C. § 1396a(a)(23). Federal regulations require that services be "sufficient in amount, duration and scope to reasonably achieve their purpose." 42 C.F.R. § 440.230(b). *See also* 42 U.S.C. § 1396a(a)(10)(B). Moreover, states cannot "arbitrarily deny or reduce the amount, duration or scope of services to an otherwise eligible individual solely because of diagnosis, type of illness or condition." 42 C.F.R. § 440.230(c).

Although SCDHHS has delegated to the South Carolina Department of Disabilities and Special Needs ("SCDDSN") the responsibility for the day-to-day operation of the MR/RD and HASCI Medicaid waiver programs, federal law requires SCDHHS to remain solely responsible for the administration and oversight of all Medicaid programs in the state. 42 C.F.R. § 431.10(e). As the Chief Executive Officer in the State of South Carolina, Governor Mark Sanford is ultimately responsible for the actions taken by his cabinet agency, SCDHHS.

C. The United States Supreme Court *Olmstead* Decision: the ADA and Section 504

In *Olmstead*, the United States Supreme Court held that "Unjustified isolation... is properly regarded as discrimination based on disability." At 597. The Court determined that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."[14] Id. at 597.

In determining what treatment is appropriate, the State must give deference to the opinions of participants' treating physicians and the choice of the participant in determining the appropriate conditions for treatment. *Id.* at 610. In his concurring opinion in *Olmstead*, Justice Kennedy noted that:

> It is of central importance, then, that courts apply today's decision with great deference to the medical decisions of the responsible, treating physicians and, as the Court makes clear, with appropriate deference to the program funding decisions of state policymakers.

Id.

VIII. 2009 Amendments to the SC MR/RD and the SC HASCI Medicaid Waiver Programs

In the fall of 2008, SCDHHS and SCDDSN embarked on a plan which was intended to fundamentally alter the way in which MR/RD and HASCI Medicaid waiver services are

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[14] However, it is important to recognize that the Court in *Olmstead* did not give States the right to force persons who choose to live in a more restrictive setting to move to a less restrictive setting. As noted by the *Olmstead* Court:

> Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. See 28 CFR §§ 35.130(e)(1) (1998) ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept."); 28 CFR pt. 35, App. A, p. 450 (1998) ("[P]ersons with disabilities must be provided the option of declining to accept a particular accommodation.")

Id. at 602.

provided in South Carolina. This plan was based on the desire of SCDDSN, SCDHHS and Governor Sanford to reduce home-based services while increasing the use of services provided in segregated congregate facilities, for the most part workshops, also referred to as "Work Activity Centers," operated by local DSN Boards. This plan forces waiver participants into congregate facilities and it conflicts with the requirements established by the United States Supreme Court in *Olmstead,* in which the Court declared the Constitutional right of persons who have disabilities to receive services in the least restrictive setting. *Supra.* A chronology is contained in the attached Complaint which documents actions taken by Defendants in furtherance of this strategy. The strategy was intended to allow local DSN Boards to maintain a monopoly on Medicaid waiver services by to maintain barriers to competition. It also increased reimbursement rates paid to SCDDSN and local DSN Boards for services provided in institutional settings while decreasing rates for services provided by private providers.

IX. Conclusion

The fact that federal stimulus funds have been improperly transferred to a rainy day fund is not in question in this case. SCDDSN admits transferring more than $50 million to a rainy day fund. The record contains undeniable evidence that services and the numbers of persons served in waiver programs have been drastically reduced by SCDDSN, despite the federal stimulus funds being available to maintain these services and the jobs that go along with these services.

Governor Sanford has recognized this Court's power to issue writs or orders of injunction or mandamus. S.C. Const. Art. V, §§ 5; S.C. Code Ann. §§ 14-3-310 (1976). *Sanford v. S.C. State Ethics Commission et al.*, Case No. 26741, November 5, 2009. As noted by this Court in that case, the writ of mandamus is "the highest judicial writ known to the law." *Willimon v. City*

of Greenville, 243 S.C. 82, 86, 132 S.E.2d 169, 170 (1963); *accord* Edwards v. State, 383 S.C. 82, 678 S.E.2d 412 (2009); *City of Rock Hill v. Thompson*, 349 S.C. 197, 563 S.E.2d 101 (2002); *Ex parte Littlefield*, 343 S.C. 212, 540 S.E.2d 81 (2000). The principal function of mandamus is to command and execute. *Id.*

The ARRA mandates that federal stimulus funds be used to maintain Medicaid services at the level provided on July 1, 2008. It also mandates that no funds attributable to federal stimulus funds shall be paid to a rainy day account. There is no discretion in complying with the maintenance of efforts requirements of the ARRA, nor the rainy day fund prohibitions of the Act. Congress even prohibited the federal agency responsible for administering the Medicaid program from granting a waiver to the rainy day fund rules.

Petitioners have shown that Defendants had a duty to perform the act of spending Section 5001 federal stimulus dollars to maintain services and eligibility for waiver programs, and to maintain and create jobs. The act of spending the funds to maintain and restore the status quo as it existed on July 1, 2008 is ministerial. Petitioners have a legal right, established in the Americans with Disabilities Act, Section 5001 of the Rehabilitation Act and the United States Supreme Court in Olmstead, to receive these services in the least restrictive setting and to require Defendants to discharge their duty to provide these Medicaid services with reasonable promptness. *Doe v. Kidd, supra.* Petitioners have no other legal remedy. Life sustaining services and supplies will be reduced or terminated on January 1, 2010 if this Court does not intervene. Lives will be placed at risk and many individuals will be forced into institutions in violation of their constitutional right to be integrated into the community. *Olmstead, supra.*

Petitioners have exhausted non-judicial options: immediately upon learning of the agency's intent to reduce services in May, advocates worked tirelessly to obtain a 90 day

extension while trying to explore alternatives with agency officials. Advocates enlisted legislative support, having an amendment to Proviso 90.13 drafted to comply with the ARRA. However, as occurred in the spring of 2010, during the two day legislative session in October of 2009, controversy created by the Governor overshadowed the basic needs of our State's most vulnerable citizens and distracted the legislature from its duties established under the ARRA, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act and *Olmstead*.

Petitioners request a writ of mandamus or other injunctive relief requiring SCDDSN to apply federal stimulus funds to provide those services determined by Petitioners' treating physicians to be medically necessary to allow them to live in the least restrictive setting.

As this Court noted in *Sanford v. S.C. Ethics Commission*, "A prohibitory injunction is defined as an injunction 'that forbids or restrains an act.'" Blacks Law Dictionary 855 (9 th ed. 2009). Petitioner requests an injunctive order prohibiting SCDDSN from transferring additional funds attributable to federal stimulus funds to a rainy day fund and forbidding the funds already transferred to that fund from remaining in the rainy day account. Petitioners ask for an order directing SCDDSN to use all of the federal stimulus funds received by the agency to restore services that have been reduced since July 1, 2008 and to maintain services in effect now. Petitioners ask for an order requiring SCDDSN to use these funds to offer services in the least restrictive setting as determined by the treating physician to be appropriate to meet the needs of the participant, while recognizing the right of waiver participants to choose a more restrictive setting.

Petitioners respectfully request that this Court accept this case into its original jurisdiction, and grant a declaratory judgment establishing the legislative intent of Proviso 90.13 by declaring that the proviso does not apply to increased FMAP funds paid to SCDDSN.

Petitioners request that this Court issue a writ of mandamus requiring the Defendants to return all funds paid by SCDDSN to the Health Care Annualization and Maintenance of Effort Fund and to be use those funds to provide such MR/RD and HASCI waiver services which are contained in participant's plan of care, with the need for services determined by the participants' treating physician. Petitioners request that the Court order those funds be used to provide waiver services found by treating professionals to be necessary to prevent regression and to maintain optimal functional status.

Alternatively, in the event that this Court determines that the South Carolina General Assembly intended for funds attributable to increased FMAP funds to be paid to the Health Care Annualization and Maintenance of Effort Fund, then Petitioners respectfully request that this Court issue a declaratory judgment determining that Proviso 90.13 is invalid due to violation of the Supremacy Clause of the United States Constitution. Any interpretation of Proviso 90.13 which would authorize increased FMAP funds to be paid to a rainy day account violates the Supremacy Clause of the United States Constitution because the ARRA prohibits states from paying funds attributable, directly or indirectly, to stimulus funds to a rainy day account. Petitioners pray for an order requiring Defendants to return to SCDDSN all stimulus funds, or funds attributable to the ARRA, which have been paid by SCDDSN to the Health Care Annualization and Maintenance of Effort Fund. Petitioners request an order requiring these funds to be used to provide direct MR/RD and HASCI waiver services in compliance with all of the requirements of the Medicaid Act and the Americans with Disabilities Act.

Petitioners also pray for a writ of mandamus or other injunctive relief preventing Defendants from using more restrictive eligibility standards, methodologies and procedures than are used by the Social Security Administration, as required by 42 C.F.R.435.541(b)(1), to

determine whether an applicant or waiver participant has mental retardation, epilepsy, cerebral palsy or another related disability. Petitioners pray for an injunction prohibiting Defendants from terminating or reducing any services provided on July 1, 2008 and a writ of mandamus requiring SCDDSN to provide, with reasonable promptness, those Medicaid waiver services which participants' treating physicians determine to be necessary to prevent regression and to maintain optimal functional status.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Karen W., Edward M., Richard S., Susan E., Rob L., Peter B., Ann J., Corrie D. and Robyn P.,

Petitioners,

Marshall C. Sanford, Individually and in his Official Capacity as the Governor of South Carolina and Member of the South Carolina Budget and Control Board; Converse A. Chellis, III and Richard Eckstrom, Individually and in their Official Capacities as Members of the South Carolina Budget and Control Board; Daniel Cooper and Hugh Leatherman, in their Official Capacities as Members of the South Carolina Budget and Control Board, Emma Forkner, Individually and in Her Official Capacity as the Director Of the South Carolina Department of Health and Human Services, Kelly Hansen Floyd, Individually and in her Official Capacity as the Chairman of the South Carolina Department of Disabilities and Special Needs, W. Robert Harrell, Individually and In his Official Capacity as former Chairman and Current Commissioner of the South Carolina Department of Disabilities and Special Needs; Otis Speight, Richard Huntress, Susan Lait, Deborah McPherson and Nancy Banov, In their Official Capacities as Commissioners of the South Carolina Department of Disabilities and Special Needs; and Thomas Waring; Individually and in his Official Capacity as Budget Analyst for the South Carolina Department of Disabilities and Special Needs, and David Goodell, Individually and in his Official Capacity as Associate State Director of the South Carolina Department of Disabilities and Special Needs,

Defendants.

RETURN OF DEFENDANTS FORKNER, ET Al., TO PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

STATEMENT

Plaintiffs have requested, on unnecessarily short notice, i.e., by motion filed less than 48 hours prior to the alleged need for relief, that the Court enjoin the Defendants from "reduc[ing] or terminat[ing] Petitioners' DDSN services on January 1, 2010." Petitioners also seek mandatory preliminary injunctive relief from the Court, such relief to include an order to restore services in effect on July 1, 2008, and an order to use funds contained in the Health Care Annualization and Maintenance of Effort Fund to pay for those services. This Return is filed on behalf of the Defendants listed in the footnote,[1] some of whom have not been served with the Petition for Injunction, and none of whom have been properly served with anything else.[2] These Defendants oppose the granting of preliminary injunctive relief.

The Court has requested that the Defendants respond to Petitioner's Petition for Injunction by 1:00 p.m. on December 31, 2009. In view of the extremely short time which has been given in which to respond, these Defendants are constrained to present some of their arguments in summary fashion. This Return by necessity is limited to the narrow issues pertaining directly to preliminary injunctive relief, and not to the other issues that Petitioners seek to have this Court determine.

The core position of these Defendants is simple: Petitioners simply have not shown any likelihood of immediate harm to themselves, or for that matter to anyone else, that would require

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[1] The Defendants on whose behalf the present Return is being filed are all Defendants listed in the caption starting with Emma Forkner and running through David Goodell, the last-named Defendant. These persons are all officers or employees of DHHS or DDSN.

[2] All of these Defendants reserve all rights to object to the service, or nonservice, of papers in this action, which was made only by certified mail, and not in the manner prescribed by Rule 4, SCRCP.

preliminary injunctive relief,[3] nor have they shown any reasonable likelihood that any action by State authorities would contravene any provision of state or federal law. While changes are planned to take effect on January 1, 2010, those changes have been known (or should have been known) to counsel for Plaintiffs by the beginning of December at the very latest.[4] In fact, the changes had been developed in the course of a very public process that started over six months ago, as set forth in the proposed Complaint in this case. Moreover, and as will be shown herein, the provisions that are scheduled to take effect on January 1, 2010, expressly provide for hardship exceptions. Goodell Affidavit, attached, and exhibits thereto. As the Goodell Affidavit indicates, a number of individuals, although only one of the Petitioners has applied for and received such exceptions, so that their prior levels of services will continue without change after January 1, 2010. In fact, few persons (about 8 out of 85) who requested such an exception have been denied it. Goodell Affidavit. Moreover, Petitioners' claim that many persons stand in danger of being institutionalized is grossly overstated. DDSN is not aware of any person who is likely to be institutionalized as a result of the changes set to take effect in January 1, 2010. . Goodell Affidavit. This is also shown by a brief review of the claims of each of the individual Petitioners, set forth herein.

With respect to the mandatory relief sought by Petitioners, i.e., the spending of certain state funds, DDSN would advise, as set forth in more detail below, that an Order requiring the State to expend in funds in such a manner would involve the State's spending money on a Medicaid program in a manner not authorized by federal Medicaid authorities. This could, and

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[3] Petitioners have not sought class certification, and as a result, their claims of alleged harm must be limited to whatever they can show in the way of likely harm to themselves. In fact, they can show none.

[4] As shown by the Priest Affidavit, filed herewith, Petitioners' counsel Harrison attended a meeting in Bamberg in September 2009, where the waiver changes were discussed.

likely would, mean that state funds would be spent in a manner that would prohibit their being recovered from any federal funding source. In other words, the requested injunctive relief would require the expenditure of Medicaid funds in a manner that directly contravenes the provisions of the state waiver plan recently approved by federal authorities; when Medicaid funds are expended in a manner contrary to what has been approved by federal authorities, as would be the case here, a number of unfavorable consequences result, including Medicaid audits, the need for repayment by the State, etc.[5] See Forkner Affidavit, attached hereto, Paragraph 11.

FACTS

1. Nature of the Medicaid Waiver Program.

A brief description of the MR/RD (Mental Retardation/Related Disabilities) Waiver program that is the subject of the present motion is set forth in *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007):

> Medicaid is an optional, federal-state program through which the federal government provides financial assistance to states for the medical care of needy individuals. *Wilder v. Va. Hosp. Ass'n,* 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). Once a state elects to participate in the program, it must comply with all federal Medicaid laws and regulations. *Id.* The South Carolina Department of Health and Human Services ("DHHS") is the state agency responsible for administering and supervising Medicaid programs in South Carolina. The South Carolina Department of Disabilities and Special Needs ("DDSN") has specific authority over the state's treatment and training programs for people with mental retardation and related disabilities.
>
> This case involves the Medicaid waiver program created by 42 U.S.C. § 1396n(c) (2000), which permits states to waive the requirement that persons with mental retardation or a related disability live in an institution in order to receive certain Medicaid services. *See generally Bryson v. Shumway,* 308 F.3d 79, 82 (1st Cir.2002) ("[The program] allow[s] states to experiment with

[5] While the present request pertains only to the nine individual Petitioners, the implications of granting preliminary relief as to any or all of those nine persons is that a much broader, program-wide, injunction might soon follow.

> methods of care, or to provide care on a targeted basis, without adhering to the strict mandates of the Medicaid system."). When an individual in South Carolina applies for DDSN services, including the waiver program, DHHS first determines whether the individual is eligible for Medicaid funding. Thereafter, DDSN determines whether the individual is eligible for DDSN services and, if so, what "level of care" the individual requires. To be given the option under the waiver program of receiving services at home or in the community, rather than in an institution, individuals must first qualify for the Intermediate Care Facility for the Mentally Retarded ("ICF/MR") level of care-that is, they must meet the criteria necessary to reside in an institution like a nursing home. If approved, waiver services are provided in a variety of settings including, in order of restrictiveness: (1) a Supervised Living Program II ("SLP II"), an apartment where recipients of DDSN services live together; (2) a Community Training Home I ("CTH I"), a private foster home where a recipient of DDSN services resides with a family, one member of whom is a trained caregiver; and (3) a Community Training Home II ("CTH II"), a group home with live-in caregivers for four or fewer recipients of DDSN services. Appeals from DDSN decisions about the services, if any, it will provide are taken to a DHHS hearing officer and, after that, to the state of South Carolina's Administrative Law Judge Division.

501 F.3d at 351-352 (emphases added). The conditions under which the requirements of federal law will be "waived" are subject to approval by the federal Department of Health and Human Services, and specifically by the federal Centers for Medicare and Medicaid Services (CMS). The process is described more fully as follows in a typical case:

> In 1993, New Hampshire requested federal approval to provide home and community-based services for individuals with ABDs under the Medicaid waiver provisions. Section 1915(c) of the Social Security Act, 42 U.S.C. § 1396n(c), permits states to include in their Medicaid plans non-medical services, such as case management, habilitation services, and respite care. *Id.* § 1396n(c)(4)(B). States must apply for a waiver and be approved in order to include such services in their Medicaid plans. *Id.* § 1396n(c)(1). Programs approved under this subsection are waived from many Medicaid strictures, *id.* § 1396n(c)(3), such as the requirements that programs be in place statewide, *see id.* § 1396a(a)(1), and that medical assistance be made available to all individuals equally, *see id.* § 1396a(a)(10)(B). Waivers are initially approved for three years and may be re-approved for five-year

> periods. *Id.* § 1396n(c)(1). The waiver program is designed to allow states to experiment with methods of care, or to provide care on a targeted basis, without adhering to the strict mandates of the Medicaid system.

Bryson v. Shumway, 308 F.3d 79, 82 (1st Cir. 2002)(emphasis added). To qualify for federal matching funds, known as the Federal Medical Assistance Percentage (FMAP), a state must establish and administer its Medicaid program through a state plan approved by CMS. *Id.*

Congress enacted the American Recovery and Reinvestment Act (ARRA) on February 17, 2009. H.R. 1, 111th Cong., Pub.L. No. 111-5 (1st Sess.2009). As one court has explained,

> Under ARRA, qualifying states receive a general 6.2 percent increase in their FMAP, and states with relatively high growth in unemployment rates receive additional increases based on quarterly unemployment statistics. *Id.* § 5001(b), (c).
>
> In order to receive enhanced FMAP, a state may not restrict eligibility "standards, methodologies, or procedures" beyond those in effect on July 1, 2008. Id. § 5001(f)(1).

Gray Panthers of San Francisco v. Schwarzenegger, 2009 WL 2880555, *3 (N.D. Cal. 2009)(emphasis added). Petitioners apparently claim that the changes set to take effect in South Carolina's Medicaid Waiver program on January 1, 2010, are in violation of Section 5001 of ARRA. However, as set forth herein, this is not the case. The changes proposed for South Carolina are not changes in eligibility requirements, but changes in the levels of services provided. Both CMS and the only federal court to address the issue (*Gray Panthers, supra*) have held that changes in the level of services, as opposed to eligibility, do not implicate the aforementioned provisions of ARRA.

2. Claims of the individual Petitioners.

As is shown below, none of the individual Petitioners has set forth a credible claim of adverse effect on themselves that requires the drastic remedy of preliminary injunctive relief. Five of the nine Petitioners receive residential habilitation services, which are not affected by the

January 1, 2010 changes. One has requested, and been granted, a hardship exemption. Another has filed an appeal, which stays the effect of the changes. This leaves only two others, one of whose services will not change for other reasons, and the other of whom will receive a reduction from 8 hours of service daily to 7 hours daily. In other words, the proposed changes will have no practical effect on eight of the nine Petitioners, and the changes that affect the sole remaining Petitioner are minimal. Moreover, as discussed below, ARRA does not in any event prohibit reductions in services.

Rob L. (Complaint, Paragraphs 206 through 224). The only reduction in services that would allegedly occur for this individual is a reduction of personal caregiver services at home from 8 hours a day, seven days a week, to 7 hours a day, seven days a week. In other words, the reduction would be one hour a day.

Karen W. (Complaint, Paragraphs 225 through 251). As the Complaint states, this individual has been on the waiting list for services for 18 years, and is still over 1,500 persons down on that list. In other words, this person is not even receiving waiver services at present. As a result, there is no suggestion that the changes set for January 1, 2010, will result in any immediate changes to this person's situation. . In any event, this person is receiving residential habilitation services, which are not affected by the January 1, 2010 changes. Goodell Affidavit, Paragraph 10.

Susan E. (Complaint, Paragraphs 252 through 265). The only allegation of a possible change to the situation of this individual is a reduction from 2 ½ cases per month of Ensure, a nutritional supplement, to 2 cases per month. The price of a half case of Ensure appears to be no more than $20-$25 per month, according to online shopping sources.

Edward M. (Complaint, Paragraphs 266 through 284). As set forth in the Goodell Affidavit, the only change that would occur to this person's situation is a 1% drop in funding, In addition, this person requested, and was granted, the case-by-case exception from the reductions scheduled to take place in 2010. Goodell Affidavit. As a result, no further relief is needed in order to protect any rights this person might have. Most of the allegations of the Complaint pertaining to this individual are completely irrelevant to the issues presented in this case.

Richard S. (Complaint, Paragraphs 285 through 302). It appears that this individual is already involved in the administrative hearing process, which is very incompletely described in the Complaint. In addition, this person has, as of a day or so ago, appealed the proposed 2010 changes via administrative appeal to DHHS. That effect of the appeal is to keep his level of services unchanged. As a result, his situation presents no need for injunctive relief in the present case, because a stay is already in place with respect to him.

Peter B. (Complaint, Paragraphs 303 through 314). It is clear from the Complaint that any reductions in services for this individual took place in June 2009. As a result, the case of this individual does not present a claim that would be affected by enjoining the January 1, 2010 changes to the Medicaid waiver. In any event, this person is receiving residential habilitation services, which are not affected by the January 1, 2010 changes.

Ann J. (Complaint, Paragraphs 315 through 317). The Complaint contains no suggestion as to how the changes set to take effect on January 1, 2010 would affect this individual. In any event, this person is receiving residential habilitation services, which are not affected by the January 1, 2010 changes.

Corrie D. (Complaint, Paragraphs 318 through 331). The Complaint contains no suggestion as to how the changes set to take effect on January 1, 2010 would affect this individual. Most of the allegations of the Complaint pertaining to this individual are completely irrelevant to the issues presented in this case. In any event, this person is receiving residential habilitation services, which are not affected by the January 1, 2010 changes.

Robyn P. (Complaint, Paragraphs 332 through 363). This person's situation is one in which the parent could request the case-by-case exception from the reductions scheduled to take place in 2010, even assuming that those reductions would affect this person, which is by no means clear. The eligibility decisions related to this person were made in 2005, and would be unaffected by the standards in effect on July 1, 2008. In any event, this person is receiving residential habilitation services, which are not affected by the January 1, 2010 changes.

ARGUMENT

It is well settled that "[t]he remedy of an injunction is a drastic one and ought to be applied with caution." *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Likewise, "[t]he party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction." *Id.* In the present case, granting a temporary injunction would be a particularly drastic remedy, because it could have seismic effects on whether the Defendants, in complying with any temporary injunction, might endanger the ability of the State to receive reimbursement from federal funds for any monies

spent pursuant to any injunction. Conversely, Petitioners have made no real showing of a legitimate emergency need for temporary injunctive relief.

Petitioners have not established any of the three elements for a temporary injunction. These, as set forth in *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 603 S.E.2d 905 (2004), are that a plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. In addition, "[b]efore granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief. *Peek v. Spartanburg Regional Healthcare System*, 367 S.C. 450, 455, 626 S.E.2d 34, 36-37 (Ct. App. 2005). Petitioners' claims for temporary injunction are deficient in all of these respects.

1. Petitioners have not shown a likelihood of irreparable harm.

A review of the motion for temporary injunction reveals that it is devoid of any specific, credible claim of imminent harm to any of the individual Petitioners. The proposed Complaint and its attachments, moreover, contain claims that are vague and conclusory. The lack of harm has been discussed above in the discussions of the allegations made on behalf of each of the Petitioners.

In contrast, the Affidavit of David Goodell, filed herewith, demonstrates that the alleged harm to the Petitioners is nonexistent. Five of the nine Petitioners are receiving residential habilitation services, which are not affected by the January 1, 2010, changes. Goodell Affidavit, Paragraph 9. Of the other four Petitioners, one of them Edward M., has requested of DDSN in any fashion that their service levels remain unchanged, although the agency had provided for a case-by-case review of alleged hardship cases and has granted almost 80 such requests while

denying only about 8. Goodell Affidavit. Since most Petitioners have not even attempted to use the existing process for relief through the agency, they cannot claim to be the potential victims of irreparable harm. This is not merely a matter of failure to exhaust administrative remedies; instead it shows that Petitioners simply cannot credibly claim possible harm, because they have declined to use a process that has worked for many others. The Goodell Affidavit also notes that none of the Petitioners stands in any immediate danger of being institutionalized as a result of the proposed 2010 changes. In most instances, this is also readily apparent from the Complaint itself, which simply fails even to allege a claim of immediate harm.

As noted in the authorities cited above, the Court should weigh the equities between the parties. The Goodell and Forkner Affidavits note that granting the requested temporary injunction would require the State to spend funds in a way that has not been approved by CMS for the use of Medicaid funds. As a result, the State could well end up spending funds that would have to come from the State Treasury.

For the same reasons as those stated above, there is no present likelihood that any rights of the Petitioners under the federal Americans With Disabilities Act, or the Rehabilitation Act, or the Constitution, will be violated, because Petitioners have simply failed to allege or prove any reasonable likelihood that they will be moved to a more restrictive environment in the absence of temporary injunctive relief.

2. Petitioners have shown no likelihood of success on the merits.

Petitioners' legal claims under ARRA are devoid of merit. As held in *Gray Panthers of San Francisco v. Schwarzenegger,* 2009 WL 2880555, (N.D. Cal. 2009), *supra,* while ARRA provides that income eligibility standards for Medicaid cannot be changed while still receiving stimulus funds,

> there is no corresponding provision in § 5001 that applies to the cutting of benefits or services. The fact that Congress did include the limitation in § 5001(f)(1) [pertaining to income eligibility requirements] indicates that it could also easily have included a prohibition against cutting benefits or services if it wanted to, but chose not to.

2009 WL 2880555 at *10. In fact, as that court noted, a provision that would have prevented the cutting of services was proposed, but did not pass. *Id.* at *6.

As previously indicated, CMS, the agency charged with applying Medicaid statutes generally, is of the same view, which in effect is that Petitioners' suggested interpretation of ARRA is incorrect, and that states can indeed cut waiver services without running afoul of ARRA. Deference to agency interpretation is especially justified when the agency is CMS and the statute is the Medicaid statute, because of the intricacies and complexities of the subject matter:

> The Medicaid statute is a prototypical "complex and highly technical regulatory program" benefitting from expert administration, which makes deference particularly warranted. [citation omitted] . . . Recognizing the mechanisms for evaluation of amendments at the agency level, "[w]e take care not lightly to disrupt the informed judgments of those who must labor daily in the minefield of often arcane policy, especially given the substantive complexities of the Medicaid statute." *Cmty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir.2002).

West Virginia v. Thompson, 475 F.3d 204, 212 (4th Cir. 2007).

CMS's views on the subject are apparent from that agency's approval on November 9, 2009, and November 24, 2009, of the proposed changes in the South Carolina waiver program. Those approval are consistent with an earlier FAQ document that CMS issued on July 7, 2009. Goodell Affidavit, Ex. B, p. 9. There, CMS set forth the following question and answer:

> Question 19: Can States modify or eliminate services, as opposed to eligibility criteria, and still qualify for the increased FMAP?

> Answer: If the change in the service has no potential impact on an individual's ability to maintain Medicaid eligibility, such a change would not disqualify a State from the increased FMAP.

Likewise, in response to its Question 20, CMS advised that reduction in optional services provided would not disqualify a State from receiving FMAP because no beneficiaries would lose eligibility. Accordingly, and despite the apparent complexity of the federal statutes involved in this matter, the result is already clear, and that result is the kinds of service cuts of which Petitioners claims will not give rise to a claim under ARRA.[6]

3. There is an adequate remedy at law.

In the absence of a showing of immediate harm, an examination of Petitioners' claims shows that those claims are capable of being resolved through normal agency processes. As noted above, there are opportunities for Petitioners to request that the changes set to take effect in 2010 not apply to them. Those remedies are by no means ephemeral, having been used successfully by a number of other consumers in the past few weeks, as set forth in the Goodell Affidavit. Moreover, any decision by DDSN involving the 2010 changes is reviewable under normal APA procedures, with the opportunity available to seek stays through the Administrative Law Court or the appellate courts on a case-by-case basis if necessary. Those remedies are adequate to protect any rights that any individual Petitioner might claim.

4. Petitioners' claims for temporary injunctive relief are barred by their unreasonable delay, and by the doctrine of laches.

Finally, Petitioners have unreasonably delayed their motion for temporary injunctive relief. As set forth above, Petitioners have had reason to know for months that the changes set for

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[6] As for the ADA, the Rehabilitation Act and the constitutional requirement of the least restrictive environment, Petitioners' present showing is far short of establishing, as a matter of fact, the possibility of any likelihood of immediate harm.

January 1, 2010 would take place then.[7] Any doubt about the matter was removed nearly two months ago, when CMS approved the changes on November 9, 2009. Petitioners did not bring the instant matter until December 23, 2009 (serving the Defendants only by certified mail, which meant that many did not receive it until December 29), and even then did not request temporary injunctive relief until late in the afternoon of December 30, 2009, a week later.

The doctrine of laches has been described by this Court as follows:

> Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). In order to establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches. *See Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007).

Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009). Here, the delay, while measured only in weeks and months, was still unreasonable under the circumstances. As a result, temporary injunctive relief should be denied for that reason as well.[8]

CONCLUSION

For the foregoing reasons, these Defendants respectfully submit that Petitioners' motion for temporary injunction should be denied. In so arguing, these Defendants do not concede that this Court should assume original jurisdiction over this case, but instead, they reserve the right to respond with respect to that issue under the time periods prescribed by law.

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[7] Again, see the Priest Affidavit referenced above.

[8] These Defendants incorporate all arguments made by the Budget and Control Board Defendants, or any other Defendants who may respond separately, including their argument about the need for the posting of a substantial bond.

Respectfully submitted,

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