


DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF DIRECTOR

ACTION REFERRAL

TO	DATE
Singleton	1-4-10

DIRECTOR'S USE ONLY	ACTION REQUESTED
1. LOG NUMBER 001282	<input type="checkbox"/> I Prepare reply for the Director's signature DATE DUE _____
2. DATE SIGNED BY DIRECTOR  Response sent 12/31/09 Ref Log # 278	<input type="checkbox"/> I Prepare reply for appropriate signature DATE DUE _____ <input type="checkbox"/> I FOIA DATE DUE _____ <input checked="" type="checkbox"/> Necessary Action

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

Ref. log #278

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December 30, 2009

RECEIVED

JAN 04 2010

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

Department of Health & Human Services
OFFICE OF THE DIRECTOR

Dear Mr. Shearouse:

We are respectfully requesting an emergency order preserving services which are scheduled to be terminated on January 1, 2009. Attached is a Motion and a Proposed Order.

Please advise if you need anything further from us. Thank you very much for your assistance with this emergency request.

Sincerely,



Patricia L. Harrison

cc: Kenneth Anthony, Jr., Esquire
Marjorie Taylor Elliott, Esquire
All Defendants
Attorney General Henry McMaster
Edward Gunn, Esquire
Diedra Singleton, Esquire
Tana Vanderbilt, Esquire

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
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of the South Carolina Department of Health and Human
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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
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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.

MOTION FOR EMERGENCY PRELIMINARY INJUNCTION

Karen W., Edward M., Richard S., Susan E., Rob L., Peter B., Ann J., Corrie D. and Robyn P. (“Petitioners”) filed a Petition and Complaint requesting this Court to accept this case in its original jurisdiction on December 23, 2009. Petitioners respectfully petition this Court for emergency preliminary injunctive relief. All of the Petitioners are persons who have a variety of chronic and disabling conditions and have limited income. Petitioners all are dependent upon services provided by the South Carolina Department of Disabilities and Special Needs (“SCDDSN”) to remain out of institutions.

During December of 2009, SCDDSN informed individual participants of the MR/RD and HASCI Medicaid waiver programs of service reductions which **will take place on January 1, 2010**. As set forth in Petitioners’ Petition and Complaint filed on December 23, 2009, these reductions will result in institutionalization of many waiver participants and will jeopardize the health and safety, and the very lives, of persons who refuse to move from their homes to institutional settings or who are denied immediate admission to state-funded institutions.

Evidence has been presented to this Court in Petitioners’ Petition and Complaint, which has been admitted by the Defendants, that drastic reductions in services have occurred since October of 2008. These reductions have affected the ability of participants of the MR/RD and HASCI Medicaid waiver programs to remain safely in their homes and communities. Further devastating reductions are scheduled to occur on January 1, 2009, unless an emergency injunction is issued by this Court.

Since February 19, 2009, SCDDSN has received more than \$50 million in federal stimulus funds which have been or soon will be transferred to a rainy day account in violation of the clear prohibitions of the American Recovery and Reinvestment Act (“ARRA”). That Act requires the States to apply eligibility standards, methodologies and procedures which were in effect on July 1, 2008, in administering MR/RD and HASCI Medicaid waiver programs. ARRA at Section 5001(d)(1).

The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act prohibit discrimination on the basis of disability. 42 U.S.C. § 12132; 29 U.S.C. § 794(a). The United States Supreme Court has determined that unjustified institutionalization constitutes a violation of the constitutional rights of persons who have disabilities, the ADA and Section 504 of the Rehabilitation Act. *Olmstead v. L.C.*, 527 U.S. 581 (1999).

Petitioners have requested that this Court order the Defendants to restore home and community based services which were in effect on July 1, 2008 and such other services which have been ordered since July 1, 2008 by treating physicians due to changes in conditions and circumstances of individual participants since that time. Emergency relief is requested because families are being informed that their services will be reduced or be terminated on January 1, 2010. Thousands of caregivers and other employees funded by these waiver programs will lose their jobs or have their working hours reduced on January 1, 2010 if this Petition is not granted.

Funds are available in the Health Care Annualization and Maintenance of Effort Fund, the rainy day fund established by Proviso 90.13 of the South Carolina Appropriations Act for SFY 2010, to provide the requested services and to maintain the jobs which will be eliminated on January 1, 2010. No funds from the State General Fund would be required to maintain these services.

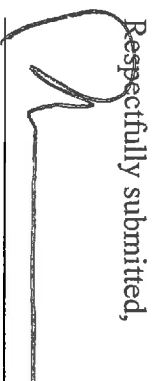
Courts in other states have issued injunctions to prevent the reduction or termination of home-based services needed to allow persons who have disabilities to remain in the least restrictive environment. On December 11, 2009, Disability Rights of North Carolina filed a lawsuit on behalf of individuals with disabilities who would be affected by service reductions going into effect on December 15, 2009. On December 14, 2009, the Court issued a Temporary Restraining Order prohibiting the reduction of services. *Marlo M. v. Cansler*, Case 5:09-cv-000535-BO (contained in Volume 4, Section H, page 150 of Petitioners' Appendix). On December 23, 2009, the United States Department of Justice filed a motion for leave to file *Amicus Curiae* in that case. Courts in Tennessee and California have also granted injunctive relief to prevent States from reducing services which would increase the risk of institutionalization of persons who have disabilities. *Independent Living Center of Southern California v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009) and *Crabtree v. Goeltz*, Case 3:09-cv-00939 (M.D. Tenn. 2009).

PRAVER FOR EMERGENCY RELIEF

Petitioners beg this Court to issue a writ of mandamus, declaratory judgment or other injunctive relief requiring SCDDSN to continue services currently being provided and to restore services in effect on July 1, 2008, prior to reductions made by SCDDSN during SFY 2009 and SFY 2010. Petitioners request a writ requiring Defendants to use funds contained in the Health Care Annualization and Maintenance of Effort Fund to pay for these services.

Dated: December 30, 2009

Respectfully submitted,



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Counsel for Plaintiffs

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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and Robyn P.,

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and in her Official Capacity as the Chairman of the South
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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 Capacity 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,

Defendants.

PROPOSED ORDER ON MOTION FOR PRELIMINARY EMERGENCY INJUNCTION

This matter is before the Court on Petitioners' Motion for emergency relief, pursuant to Rule 229 of the South Carolina Rules of Civil Procedure. For the reasons discussed below, Petitioners' Motion requesting injunctive relief is GRANTED.

Petitioners are adults who have Mental Retardation, Epilepsy, Cerebral Palsy or a head or spinal cord injury. Petitioners have been receiving services through the South Carolina Department of Disabilities and Special Needs (SCDDSN"). In December, participants in the MR/RD and HASCI Medicaid waiver programs received notification that the funding they rely upon to receive care and remain in the least restrictive setting would be terminated effective January 1, 2010. As a result, Petitioners are at risk of institutionalization.

Petitioners have filed a Complaint alleging Defendants actions have violated the American Recovery and Reinvestment Act, the Americans with Disabilities Act, Title II, 42 U.S.C. § 12132, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 and the Civil Rights Act, 42 U.S.C. § 1983 et seq. These laws require Defendants to administer government services and programs in a manner as to not deny individuals with disabilities benefits that they are entitled to under the law. Petitioners have requested emergency injunctive relief to maintain services and to restore services to the level provided on July 1, 2008 where these services have been reduced or eliminated.

Having reviewed the Petition and Complaint filed on December 23, 2009 and the Petition requesting emergency relief filed on December 30, 2009, the court finds that the balance of

hardships in this case favors Petitioners. Without action, Petitioners are at risk of being removed from their homes, and other less restrictive settings, and they will lose services needed to function within the community on a day-to-day basis. Evidence has been presented that caregivers will lose their jobs and family members will become unemployed if services are terminated or reduced on January 1, 2010. Defendants have acknowledged the loss of jobs, allegedly due to budget reductions. The harm to Petitioners outweighs the harm to Defendants, who will only have to provide services with existing funding has been provided through the American Recovery and Reinvestment Act, which funds have previously been placed in a rainy day fund.

Under the ADA, “Qualified individuals with a disability” are those who “with or without reasonable modifications to rules, policies, or practices...meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42U.S.C. § 1213 (2). Petitioners are qualified individuals under the ADA. Prohibited discrimination includes “unjustified institutional isolation of persons with disabilities.” *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 600-02 (1999)

Having shown in the Petitions and Complaint that services and funding have been reduced and a likelihood of success under the ADA; the Defendants having acknowledged the reduction in services and loss of jobs due to these reductions, and the public having an interest in maintaining cost-effective treatment, the Petitioners have met the requirements for granting an emergency order for injunctive relief.

CONCLUSION

For the reasons stated above, Petitioners' Motion for Injunction Order is hereby GRANTED. Defendants, and all persons acting on their behalf, are hereby ORDERED to not reduce or terminate Petitioners' SCDDSN services on January 1, 2010. Further, Defendants are ORDERED to restore their services in effect on July 1, 2008. Defendants are ORDERED to use funds contained in the Health Care Annualization and Maintenance of Effort Fund to pay for these services.

IT IS SO ORDERED.

This ___ day of December, 2009.

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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, Nancy C. Law, Assistant to Patricia L. Harrison, attorney for Petitioners certify that I have delivered the Motion for Emergency Preliminary Injunction in the above captioned case on the below listed Attorneys for the Defendants by hand-delivery on December 30, 2009.


Nancy Law, Assistant to Patricia L. Harrison

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(803) 256-2017

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Diedra Singleton, Esquire
SC Health and Human Services
1801 Main Street
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Edward Gumm, Esquire
C/O SC Budget and Control Board
305 Wade Hampton Office Building
1200 Senate Street
Columbia, SC 29201

Attorney General Henry D. McMaster
Rembert C. Dennis Office Building
Columbia, SC 29211

I, Nancy C. Law, Assistant to Patricia L. Harrison, attorney for Petitioners, certify that I have delivered the Motion for Emergency Preliminary Injunction in the above captioned case on the below listed Defendants by US Mail with sufficient first-class postage attached on December 30, 2009.


Nancy Law, Assistant to Patricia L. Harrison

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Columbia, South Carolina 29205 (803) 256-2017

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Ms. Nancy Banov
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Comptroller General Richard Eckstrom

Ms. Deborah McPherson
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Ms. Susan Lait
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Columbia, SC 29201

Emma Forkner, Director
SC Health and Human Services
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Columbia, SC 29201

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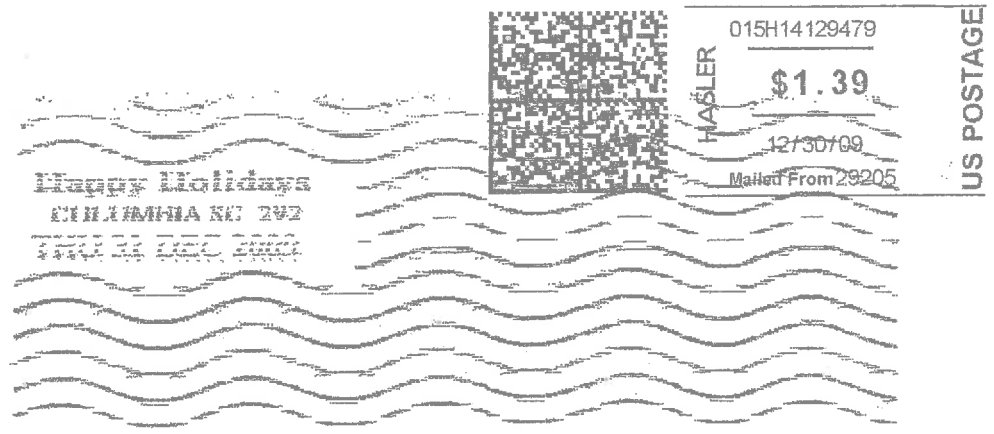
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TO: Emma Forkner, Director
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Columbia, SC 29201

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