IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Richard Stogsdill, Nancy Stogsdill, Mother of Richard Stogsdill, Robert Levin, and Mary Self, Mother of Robert Levin,

Plaintiffs,

v.

South Carolina Department of Health and Human Services,

Defendant.

C/A No. 3:12-0007-JFA

ORDER

I. INTRODUCTION

This case arises out of the reduction in benefits provided to two Medicaid-eligible individuals, Richard Stogsdill and Robert Levin, and the impact upon their mothers, Nancy Stogsdill and Mary Self, respectively, (collectively "Plaintiffs").[1] Plaintiffs filed this action against Defendant South Carolina Department of Health and Human Services and alleged numerous claims. The only remaining claims to be addressed by this Court is whether Defendant retaliated against Plaintiffs in violation of the anti-retaliation provision contained in the American with Disabilities Act. See 42 U.S.C. § 12203(a).

II. FACTUAL AND PROCEDURAL HISTORY

The extensive history of this case and applicable statutory framework are detailed in this Court's prior orders. See, e.g., ECF Nos. 131, 184, 193. After this Court entered a judgment in this case, Plaintiffs appealed to the Fourth Circuit. ECF Nos. 249, 250, 252. On January 5, 2017, the Fourth Circuit issued an opinion dismissing the appeals and remanding the case for further

[1] To avoid confusion, this Court will refer to Plaintiffs by their first names.

proceedings due to this Court's failure to dispose of the retaliation claims raised in the second amended complaint. ECF No. 266. Upon receipt of the mandate, this Court scheduled an evidentiary hearing as to the retaliation claims to be held on Monday, February 27, 2017. ECF Nos. 272, 273.

On February 7, 2017, Defendant filed a motion for judgment on the pleadings to which Plaintiffs filed a response in opposition along with several attachments. ECF Nos. 275, 278, 286–89. On February 21, 2017, Defendant filed a reply. ECF No. 282. Due to a status conference held on February 22, 2017, the Court rescheduled the evidentiary hearing to be held on March 29, 2017. ECF No. 284. On March 16, 2017, in an effort to fully address the retaliation claims, this Court denied the Defendant's motion for judgment on the pleadings. ECF No. 294.

On March 29, 2017, the Court held a pretrial conference. ECF Nos. 303–04. Subsequently, due to the multiple witnesses called and the parties' conflicting schedules, this Court held a bench trial for four days over the course of three months—March 30, 2017, March 31, 2017, May 8, 2017, May 12, 2017—with only closing arguments and deposition testimony allowed to be provided on June 13, 2017. ECF Nos. 306–07, 312, 314, 319, 330-1, 330-2, 335, and 336-1.[2]

After receiving the testimony, carefully considering all the evidence, weighing the credibility of the witnesses, reviewing the exhibits and briefs, and studying the applicable law, this Court makes the following Findings of Fact and Conclusions of Law, in accordance with Rule 52(a)(1) of the Federal Rules of Civil Procedure, on Plaintiffs' claims of retaliation. The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of

[2] On the last day of trial—May 12, 2017—Plaintiffs filed a formal motion for reconsideration of this Court's prior rulings for claims previously disposed in 2014 and 2015. On July 25, 2017, this Court denied the motion. ECF No. 341.

Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

III. FINDINGS OF FACT

Based upon the testimony adduced at the bench trial held on March 30, 2017, March 31, 2017, May 8, 2017, and May 12, 2017,[3] the Court makes the following findings of fact.[4]

A. Richard Stogsdill[5]

1. Richard was born 3 months premature and suffers from cerebral palsy. ECF No. 310 at 5. Over the last few years, Richard has had several kidney stones resulting in surgeries or trips to the emergency room. Id. In addition, Richard suffers from gas build-up behind his ribcage due to the curvature in his spine and constipation. Id. Richard requires assistance to perform his daily needs due to his condition. Id. at 7.
2. Prior to the January 1, 2010, waiver changes, Richard was receiving 96 hours of Personal Care Aide and Companion services per week. He also received approximately 36 hours per week of Respite Care. Personal Aide II services consist of hands-on care that a participant requires for daily living, such as bathing, dressing, and toileting. Adult Companion services are similar, except they include an aspect of

[3] The testimony of Dr. Shissias, Dr. Crisp, and Dr. Munn were provided via depositions filed with the Court on June 12, 2017, and June 13, 2017. ECF Nos. 330-1, 330-2, and 336-1. In addition, closing arguments occurred on June 13, 2017. ECF No. 335. Moreover, to the extent such testimony was relevant to the issue of retaliation, the Court has considered testimony previously provided if so directed by a party.

[4] The summaries that follow represent, in many instances, only a small portion of the testimony provided by each witness. After careful review of the record, the Court has determined that large sections of testimony elicited by Plaintiffs are irrelevant to the current issue before the Court or in violation of this Court's prior orders. For example, Plaintiffs' counsel spent significant time discussing the budgetary schemes or CMS's denials of Defendant's waivers. As such, this testimony is not helpful to the Court in issuing a ruling on Plaintiffs' retaliation claims and is excluded.

[5] Paragraphs 2, 3, and 4 are taken from this Court's previous order as they align with the discovery presented in this case. ECF No. 131.

community integration. Respite Care includes a range of services designed to provide care for the participant when the normal caregiver is absent or needs relief. The January 1, 2010, waiver capped any combination of Personal Aide II services and Adult Companion services at 28 hours per week. Respite Care services under the January 1, 2010, waiver is typically 68 hours per month, but can be increased up to 240 hours per month under certain circumstances.

3. Effective January 1, 2010, Richard's Personal Aide II services and Adult Companion Services were reduced to 28 hours per week combined. Respite Care services were limited to 68 hours per month; however, an increase of 172 hours per month of Respite Care was granted following the reductions at the request of Richard's service coordinator. Richard's Occupational and Speech Therapies were discontinued.[6]

4. On February 13, 2009, after Richard's services were reduced, he sought reconsideration by [the South Carolina Department of Disabilities and Special Needs ("SCDDSN")]. This request was subsequently denied on March 3, 2009. On April 1, 2009, Richard then appealed the SCDDSN determination to the Appeals Division. The Appeals Division affirmed the reductions on September 14, 2010. This decision was then appealed to the South Carolina Administrative Law Court ("ALC") on October 20, 2010. While the appeal was pending at the ALC, the current suit was filed in Federal Court. On March 13, 2013, the ALC issued an order upholding the decision rendered by SCDDSN. Subsequently, Richard appealed the ALC decision to the South Carolina Court of Appeals.

5. On September 10, 2014, the South Carolina Court of Appeals issued an order on several issues raised in this Court. Moreover, the case was "remanded for

[6] These therapies may still be available to participants through the Medicaid State Plan.

consideration of the appropriate services to be provided without the restrictions of the 2010 waiver." *Stogsdill v. S.C. Dep't of Health & Human Servs.*, 763 S.E.2d 638, 645 (S.C. Ct. App. 2014). On January 20, 2016, the South Carolina Supreme Court dismissed Nancy and Richard's appeal as improvidently granted and, on March 24, 2016, it dismissed their petition for rehearing. On October 3, 2016, the United States Supreme Court denied the petition for a writ of certiorari.

B. Nancy Stogsdill

6. Nancy is the mother of Richard and has been an active caretaker in his life since he was born. Nancy testified that prior to Richard's graduation from high school, she did not have any issues with Richard's services. ECF No. 310 at 14. When Richard graduated from high school, he lost the assignment of an attendant, who was with him from 7:30 a.m. until approximately 3:00 p.m. Id. at 16. Consequently, Nancy requested additional hours to fill this new need. Nancy testified that she was "definitely not blaming [SCDDSN]" for losing the previous hours that Richard received during school. Id.

7. Nancy testified that she had not filed a grievance against SCDDSN until February 13, 2009,[7] when her request for additional services was denied. Id. at 17. In her appeal, it stated, "Please assure us that there will be no reduction in services or retaliatory actions taken against Richard or his family during this appeal." Id. at 21. Nancy testified that her concern stemmed from the failure to provide Richard's services within a "reasonable period of time" and their denial "for no apparent reason," adding that "through the years there have been quite obvious instances of

[7] Her appeal was filed on or about February 13, 2009. ECF No. 310 at 23. It is unclear whether the "grievance" filed was separate from the appeal itself. Exhibit 91.

retaliation"; however, no specific instances were provided at that time nor did Nancy explain why she did not file a grievance previously. Id. at 21.

8. Nancy testified that a hearing was held on May 27, 2009, and a decision was rendered on November 16, 2009, in which the Defendant's hearing officer remanded the case back to SCDDSN with directions to "take into consideration the doctor's orders."[8] Id. at 24–25. Nancy testified that DDSN did not conduct an assessment; however, it is unclear to this Court whether Nancy was referring to an assessment or the independent assessment that she contends Richard needs. Id. at 25. In addition, Nancy testified that when the case was remanded, at the end of 2009, "[a]bsolutely nothing happened." Id. at 26. Apparently, in 2009, a request for medical records was made by the agency and Nancy provided the records to them. Id. at 27.
9. Nancy testified that she did not receive notice of the caps to be imposed in the waiver of 2010 (the "2010 caps"); however, she heard rumors of them through a group called Voices for the Voiceless. Id. at 29–30, 33. Nancy testified that "the fact that decisions were not made in a reasonable period of time, [she felt] like [they] never had reasons for decisions, never had reasons for cutbacks. [They] had cutting of the services. That in itself to [her was] retaliation." Id. at 31.
10. On December 31, 2009, in an effort to prevent the 2010 caps from going into effect, Nancy and Richard participated in filing a lawsuit. Id. at 32–35. In January 2010, the South Carolina Supreme Court dismissed the suit. Id. at 35.
11. Due to the 2010 caps, Richard's respite hours were reduced and his attendant hours were capped. Id. at 36. Nancy requested a fair hearing on Richard's behalf. Id.

[8] The Court notes that Defendant received the appeal at the "Appeals & Hearings" Division on April 1, 2009. Exhibit 91.

Nancy testified she was retaliated against because the "executive director of the [SC]DDSN Board in Kershaw County and service coordinator came to my house and announced that . . . these cuts were going into effect, and they wanted to know how [she] was going to use them." Id. at 36.

12. Nancy testified she became aware of a termination notice sent by the service coordinator, which informed Richard's providers that he was moving out of state so his services were being terminated. Id. at 37. However, Nancy also testified that, when she notified the agency that there had been a mistake, "they jumped on it pretty fast [and she didn't] believe any of [Richard's] services were cut." Id. at 99.
13. Nancy testified that she filed a second request for a fair hearing to avoid the reduction of hours from 55 to 28 in December 2009; however, she did not have a hearing until May 11, 2010. Id. at 41. A decision was issued on September 14, 2010, which was appealed to the South Carolina Court of Appeals. Id. at 43. Richard and Nancy appealed the South Carolina Court of Appeals' decision regarding the 2010 caps to the South Carolina Supreme Court. Id. at 45.
14. Moreover, while the state lawsuit was pending, Nancy testified that she and Richard filed this federal lawsuit with Robert and Mary in January 2012 and filed an amended complaint in January 2014. ECF Nos. 1, 72.
15. Nancy testified that she was informed the service coordinator was the only route she could take to obtain services and provided the service coordinator with everything that she requested. However, as to Nancy's allegation that Richard was never assessed, Nancy stated that the service coordinator "did come in to assess [Richard]." ECF No. 310 at 48.

16. Nancy testified that she gave Dr. Munn's order for 56 nursing hours to the service coordinator between June 2014 and October 2014, but it was never explained why Richard was only awarded 14 nursing hours in October 2014. Id. at 50–51.[9] Moreover, Nancy's request for additional attendant care hours was not granted until October 2016. Id. at 52.

17. Nancy testified regarding Lennie Mullis' position as Richard's psychological service provider. Id. at 58. Nancy testified that Ms. Mullis provided affidavits in support of Richard's increased services for the case filed in the South Carolina Supreme Court and both of the fair hearing appeals. Id. at 58. However, Ms. Mullis advocated for other persons as well. Id. In June 2010, Ms. Mullis was terminated as a service provider, which would eliminate her ability to provide services to Richard in that capacity if she did not appeal. Nancy testified that she did not speak with Ms. Mullis about retaliation. Nancy testified that Richard was close to Ms. Mullis; however, she did not provide specifics as to how Richard was impacted by Ms. Mullis's termination. Id. at 84.

18. Nancy testified that Suzanne Yankovich was Richard's service coordinator in 2013. Id. at 62. Nancy testified that she requested additional respite hours due to her husband's failing health, but the service coordinator could only authorize 68 respite hours and recommend up to 240 hours. Nancy did produce a letter and affidavit from

[9] However, as provided in later testimony, the 56 nursing hours requested were deemed unjustified based upon Dr. Platt's review of the records and the undiagnosed, as well as sporadic, pain experienced by Richard.

Dr. Munn—Richard's primary care physician—in an effort to show compliance with each request made by the service coordinator.[10]

19. Nancy testified that she offered to allow Dr. Tan Platt into her home to assess Richard while her attorney was present or make Richard's physician available via deposition. Id. at 74–75. Nancy testified that she felt the statements of Defendant's counsel to the South Carolina Supreme Court were retaliatory because he stated that Dr. Platt was unable to perform the assessment due to Nancy or her counsel's actions and made other allegedly inaccurate statements. Id. at 76–77.[11] Nancy testified that, after she agreed to allow Dr. Platt to perform an assessment, Richard was awarded additional personal care attendant hours; however, Richard did not receive additional nursing hours.[12] Id. at 79–80. Nancy testified that she and Richard suffered from the delays or denials throughout the course of their appeals. Id. at 82–83.

C. Robert Levin

As instructed, the previous background information regarding Robert was not re-introduced during this trial. The Court adopts its Findings of Facts in its previous order (ECF No. 184) as stated herein:

[10] However, this appears to be related to the request for an independent evaluation, which Nancy and Richard were not entitled to receive. ECF No. 310 at 66.

[11] Plaintiffs' counsel later argued that the statements of Defendant's counsel were retaliatory because he misled the South Carolina Supreme Court by stating that the CMS waiver had the force and effect of law as well as "CMS can change the waiver on a dime." ECF No. 310 at 145–46. However, even if this Court considered the statements, review of the oral arguments made before the South Carolina Supreme Court causes this Court to find Plaintiffs' have not met their burden of proof to show this action was an adverse action made to retaliate against them—Defense counsel merely represented his client. Available at http://media.sccourts.org/videos/2014-002513.mp4 at 9:10-10:15, 16:50-17:30.

[12] Nancy testified that she felt it was a futile process to start another administrative appeal to ask for the nursing hours previously requested. ECF No. 310 at 80.

20. Robert is a Medicaid-eligible disabled adult who has been receiving services under the HASCI waiver program. In 2001, Robert sustained a massive head injury when he fell off a moving truck while attempting to take pictures of Ground Zero in the days following the 9/11 terrorist attacks. Robert suffered a brain stem bleed on the right side of his head, requiring removal of a portion of his brain. He initially spent several months in the hospital obtaining treatment and undergoing several surgeries. Ultimately, the traumatic nature of the injury rendered Robert a wheelchair-bound quadriplegic.

21. For the first four years after Robert's accident, he resided in a nursing home facility approximately 150 miles roundtrip from his mother's home. After daily visits to the nursing home to assist in the care of her son, Mary elected to remove Robert from the facility and provide care for him at home. Prior to the 2010 waiver caps, Robert received 56 hours of Attendant Care/Personal Services per week. However, effective January 1, 2010, Robert's Attendant Care/Personal Services were reduced to 49 hours per week. In addition to these services, Robert is also authorized for 30 hours per year of back up emergency attendant care for use through an agency, should one of his attendants not be available to provide his regularly scheduled care, and he also receives incontinence supplies through both the Medicaid Sate Plan and the HASCI waiver program.

22. Robert's daily ritual of care is lengthy and time consuming. Robert is not totally paralyzed, as he has some limited movement in his limbs; however, he requires assistance with all of his activities of daily living, including toileting, eating, and dressing. Due to the nature of Robert's injury, he is unable to speak and merely

expresses pain, discomfort, or agitation by grinding his teeth or crying out. His caregivers conduct range of motion exercises in order to prevent limb cramping and spasticity, which helps Robert maintain a more normal posture.

D. Mary Self

23. Mary is the mother of Robert and a retired licensed practical nurse (LPN). She has selflessly cared for her son since his disabling accident, which occurred approximately sixteen years ago.

24. Mary testified that Robert's service coordinator, Carmen Hay, informed her that Robert's hours would be cut by 1 hour a day when the 2010 caps were implemented. ECF No. 311 at 143. In an effort to prevent the 2010 caps from going into effect, Mary participated in the lawsuit filed by Nancy and others in the South Carolina Supreme Court on December 31, 2009. Id.

25. Mary testified regarding the filing of a workers' compensation claim against her by a previous caretaker, who was injured while caring for Robert. Id. at 146. Mary testified that the process involved in the workers' compensation claim was "absolutely adverse and retaliatory and just very negligent. It was just really devastating." Id. at 148.

26. Mary testified that she asked Coordinator Hay if there were additional hours or services at least twice, but she was never provided information. See, e.g., id. at 145, 150. Mary testified that the new service coordinator, Tanya Graham, tried to obtain additional hours, but she informed Mary that "there are absolutely no kind of hours available to [Mary and Robert]." Id. at 154. Mary claimed that the refusal to offer additional services was "really retaliatory." Id. at 155. Mary testified that, while her

husband's health was deteriorating due to a tumor, she was not provided additional services and repeatedly requested an assessment "through [her] counsel to the service coordinator and to counsel for [Defendant]." Id. at 160.

27. Mary testified that the requirement of a release to obtain medical records was a pretext because Coordinator Hay did not send the medical records that were requested once the release was signed in 2015. ECF No. 316 at 20. Mary testified that, prior to her request for nursing services, the service coordinator did not have any issues obtaining medical records.

28. Mary testified that, in 2015, there was an offer for Dr. Platt to perform an assessment. Mary testified that she requested an independent assessment. ECF No. 311 at 160–61.

29. Mary testified regarding Robert's hospitalization on December 31, 2016. ECF No. 316 at 52–53.

E. Witness Testimony

Plaintiffs presented fourteen witnesses, including the parties, to testify on the issue of retaliation.

a. Kara Lewis

30. Ms. Kara Lewis is employed by Defendant as the program manager in the Division of Community Options for Defendant. Ms. Lewis supervises staff who manage quality and waiver contractors as well as those who work with the providers for waiver programs.[13] Ms. Lewis described the process that a participant may follow in order to obtain additional services, beginning with the service coordinator and

[13] SCDDSN is one of the contract providers.

working one's way up to an appeal.[14] Ms. Lewis has worked as an employee of Defendant for approximately twenty-six years, but she explained that she would not know of an instance when a medical director was required to enter the home of a waiver participant due to her position.[15] Finally, Ms. Lewis was uncertain whether Defendant had an anti-retaliation policy in place. ECF No. 310 at 136.

b. Elizabeth Hutto

31. Ms. Elizabeth Hutto began working for Defendant in April of 2012. Originally, Ms. Hutto "was the manager over the Appeals and Hearings Division and the Third Party Liability Division." ECF No. 310 at 138–39. While Ms. Hutto was in charge of the hearing division, she issued a decision "saying that hearing officers do not have the authority to exceed waiver limits." Id. at 141. Thereafter, she became the "interim CFO" before obtaining her current position as the "deputy director for eligibility." Id. at 138–40. Ms. Hutto explained that she processes Medicaid applications and determines if individuals are eligible for Medicaid; however, she does not "deal with how the services are provided." Id. at 139.

[14] Ms. Lewis explained that the service coordinator has sole authority to approve or deny services requested by participants. She clarified that, if a question arises, the service coordinator or the case manager has the ability to seek consultation with the supervisor. Ms. Lewis described the process a participant may follow in order to obtain additional services as the following: (1) the patient submits a request for services to the service coordinator; (2) the service coordinator may issue a denial or approval of the service requested (unless an uncertainty warrants a meeting with the supervisor); (3) if the service is denied, the participant may file for reconsideration of the request; (4) if the reconsideration is denied, an appeal may be filed. ECF No. 310 at 130.

[15] Specifically, Ms. Lewis stated that she was "not aware of a situation where [the medical director] demanded it." ECF No. 310 at 134. She thought "probably on some occasions he is requested to go in to assess a home setting for the benefit of the client or the family." Id. Moreover, Ms. Lewis testified that she was not aware of any specific instances "[b]ut that's not [her] role right now. So [she] wouldn't be aware of that." Id.

c. Dr. Beverly Buscemi

32. Dr. Beverly Buscemi has been the "state director for [SCDDSN]" since November 2009.[16] ECF No. 311 at 43. Dr. Buscemi is "responsible for the coordination of services for individuals with intellectual disabilities, related disabilities, total disabilities, head and spinal cord injury, and individuals diagnosed with autism spectrum disorder." Id. Dr. Buscemi explained that she could speak about the systems in place to evaluate the types of services offered, the amount of those services offered, and the authorization by Medicaid; however, she could not speak to Plaintiffs' cases specifically. Id. at 45.

33. Dr. Buscemi stated that she was generally aware of Richard's appeal for a fair hearing filed in February 2009, which was remanded in November 2009 for Richard to be assessed while Dr. Buscemi was the director of SCDDSN. Id. at 47. Dr. Buscemi testified that she knew "we had to work with [Defendant] because [SC]DDSN is not given the authority to authorize services above that and the cap. And so we have to work with [Defendant] as the Medicaid entity on what that process would look like and how we would comply with any Orders." Id. at 47.

34. Dr. Buscemi issued a letter to Nancy denying the request for reconsideration, which stated that SCDDSN could not authorize services above the caps stated by Medicaid. Id. at 48. Dr. Buscemi confirmed the appeals process was as Ms. Lewis articulated—first to the service coordinator, then the supervisor, and onto an official appeal, which is reviewed by SCDDSN staff with a recommendation proposed to the director. Id. at 49–50. Dr. Buscemi provided a brief overview of the service

[16] SCDDSN is an entity that operates subject to Defendant's authority. Thus, Defendant is the state agency that administers the waiver program and SCDDSN is the entity responsible for the coordination of services.

coordinator's responsibilities, such as a yearly plan, two home visits, and at least monthly contact to review the service plan (which does not need to be face-to-face).

35. Dr. Buscemi explained that a letter was sent to families notifying them of the reduction in services due to a change in the waiver.

d. Catherine D. Shealy

36. Ms. Catherine Shealy works in SCDDSN's District One Office under her supervisor, John King. ECF No. 311 at 117. One of her responsibilities is to review requests for respite care services. Id. at 118. Ms. Shealy testified regarding the general process of evaluating a request and explained that she reviews the request as well as additional information regarding the patient with her supervisor. Id. at 119. At one time, Ms. Shealy reviewed Nancy and Richard's request for respite care; however, she testified at the trial that she had no collection of this review, which occurred approximately seven years ago. Id. at 128–131.

e. John King

37. Mr. John King was employed by SCDDSN for 11 years and recently retired. He was the District One Director for SCDDSN and his responsibilities included reviewing the number of respite hours approved for an applicant. ECF No. 311 at 134–35. Mr. King testified that, within his assigned district, the number of respite care hours were capped at 240 hours. Id. at 134. Mr. King testified that he had no knowledge of an applicant receiving more than 240 hours through the central office. Id. at 135.

38. He testified that requests for more than 68 respite care hours were brought to him for his review by Ms. Shealy wherein she would "review the request, count the hours, see what the individual needs, consult with the case manager and then come and

meet with [him] and make a recommendation based on her information that she has." ECF No. 311 at 135–36. Then, Mr. King testified that he would review the relevant information with Ms. Shealy, such as the packet provided along with "the exact needs of the individual, what this person based on the respite guidelines is going to be doing for this individual, how many natural support hours, whether or not the family works, whether or not both family members work . . . ." ECF No. 311 at 138–39.[17]

f. Dr. Tan Platt

39. Dr. Tan Platt is a family physician and has been an Associate Professor of Clinical Family & Preventative Medicine at the University of South Carolina for over 30 years. ECF No. 316 at 64. Approximately sixty percent of his responsibilities at the University of South Carolina entail serving as a medical director for Defendant. Id. at 65. Dr. Platt testified that he was not familiar with Robert,[18] Mary or Nancy; however, he was aware of Richard's condition through the records that he had reviewed. Id. at 63–64.

40. Dr. Platt testified that he is asked to review cases wherein the applicant does not require the usual amount of care. Id. at 85. He testified that he previously reviewed medical records regarding Richard, which were available to Defendant. Id. at 86. Moreover, Dr. Platt confirmed through his testimony that the general process to conduct an assessment begins with the service coordinator and progresses forward. Id. at 88–90.

[17] Plaintiffs' counsel did not inquire regarding Mr. King's review of any requests made by Plaintiffs.

[18] Dr. Platt testified that he did not recall receiving a request that he assess Robert. ECF No. 316 at 82. He also stated he was not aware that Robert's mother had "asked that [Dr. Platt] come to the house to assess him." Id.

41. Dr. Platt testified as to his knowledge regarding the assessment of Richard. Id. at 93–107. However, Dr. Platt clarified during his testimony that it was an offer to visit Richard's home, not a mandate, in order to facilitate the process of evaluating his condition. Id. at 100, 110. Moreover, Dr. Platt testified that he did not deem the number of nursing hours prescribed to be necessary because the emergency visits did not appear to be preventable by a nurse—the records indicated the pain was associated with constipation, gas, or kidney stones and the nursing notes did not mention pain or other problems—as well as there were only eight to nine visits to the emergency room since December 2014. Id. at 116–19.

g. Peter Liggett

42. Mr. Peter Liggett has been the Deputy Director of Long-Term Care and Behavioral Health for Defendant since 2012. ECF No. 316 at 137. He reports to the current interim director, Deirdra Singleton. Id. at 139. Mr. Liggett testified that the decision to continue litigation or settle a case would likely entail a meeting between himself, general counsel, and the director; however, he testified that he has not been faced with the situation. Id. at 147–48. Mr. Liggett testified that he did not make a decision, nor was he aware of one, refusing to conduct an assessment of Richard. Id. at 148.

h. Lennie S. Mullis

43. Ms. Lennie Mullis is a psychological consultant, and she provides psychological services to Richard and Robert.[19] ECF No. 316 at 166. Ms. Mullis testified that she previously submitted an affidavit in support of Richard receiving additional services.

[19] However, Ms. Mullis did not begin providing services to Robert until October 2016. ECF No. 316 at 177. Moreover, Ms. Mullis testified that she stopped serving as a waiver provider in 2016. ECF No. 316 at 171.

Id. at 166, 168. Ms. Mullis testified that she received notice—in approximately June 2010—that SCDDSN was recommending she be terminated as a provider. Id. at 168. Although Ms. Mullis was terminated, she appealed the decision and was successful. Id. at 169, 172. Ms. Mullis testified she felt that she was terminated in retaliation for her advocacy. ECF No. 316 at 170.

i. Christian Soura

44. Mr. Christian Soura served as the Interim Director or Director of Defendant from approximately November 20, 2014, until April 7, 2017. ECF No. 318 at 6, 52, 55, 67, 68. Mr. Soura testified that, as director, he was briefed by general counsel on pending legal matters. Id. at 60–62. Mr. Soura testified as to the steps he took to address issues brought to his attention—such as instructing staff to conduct assessments, working with CMS to incorporate language allowing for hours in excess of the caps to be awarded, and training staff against retaliation in accordance with Defendant's policy—although some of the steps were taken just recently. Id. at 63–64, 79, 82. Overall, Mr. Soura's testimony provided a minute amount of information regarding Plaintiffs in this case.

j. Dr. Charles Shissias

45. Dr. Charles Shissias is Robert's neurologist, who has administered Botox injections approximately every three months for the last eleven years to address Robert's segmental dystonia and contractures. ECF No. 330-1 at 8, 33, 34. Dr. Shissias testified, based upon Robert's condition as of May 2017, that Robert would need at least 60 nursing hours "to keep him functioning at his baseline." Id. at 14. Moreover, Dr. Shissias testified that he believed Robert would need 84 nursing hours "if you

subtracted out family . . . [and] the state were to take total . . . charge of managing and maintaining [Robert].” Id. In reference to the nursing hours, Dr. Shissias testified that he felt that Robert “would continue to be at serious risk of institutionalization without the services [he] ordered.” Id. at 18. In addition to the nursing hours ordered, Dr. Shissias ordered personal care attendant services at all times when a nurse is not present. Id. at 26.

46. Dr. Shissias testified that he is only one of the physicians familiar with Robert’s needs and recognized that he only sees Robert during a “brief snapshot” every couple months. Id. at 27. Dr. Shissias testified that he thought it would be best if Defendant, Robert’s caregivers, and others could work collaboratively to ensure both sides were being realistic and meeting Robert’s needs. Id. at 30. Dr. Shissias was unable to answer the question posed by Defendant’s counsel as to whether all medical records were provided because the records did not include his order for nursing hours. Id. at 33. With regard to the service hours needed, Dr. Shissias testified that he is “not, you know, . . . the final say but that [his] recommendation is that it be care up to [60 nursing hours]” and he would be open to discussing it with another who thought less hours were necessary. Id. at 35, 66.

47. Dr. Shissias testified that he did not notice a change in Robert’s condition from 2010 until 2014 when he wrote the order for nursing services; however, he was under the impression that the hours were going to be decreased so he was concerned and wrote the order. Id. at 37–38. Dr. Shissias testified that Robert’s visits were “procedures” and “they were not consultation or office visits where [they] sit and [they] talk about the general health of the patient, examine the patient . . . [or] review the

medications." Id. at 40–41. Dr. Shissias testified that most of his information came from conversations with Mary, which did not include specifics such as Robert's daily activities; however, Dr. Shissias had a general idea of what Robert needed. Id. at 42–43, 50–51.

48. Dr. Shissias testified that he knew Dr. Platt and thought he was "a good and reasonable person" with whom he would be willing to speak with regarding Robert. Id. at 46.

k. Dr. Jeremy Crisp

49. Dr. Jeremy Crisp has been Robert's primary care physician since January 2016. ECF No. 330-2 at 22. Dr. Crisp testified that Robert is "at a high risk of institutionalization, because of the risk of complications from the . . . injuries and the ongoing problems that he has." Id. at 6.[20]

50. Dr. Crisp testified that he has met with Robert twice—in January 2016 and October 2016. Id. at 22. Dr. Crisp testified that he did not discuss the specific daily needs of Robert during these two visits. Id. at 23. Dr. Crisp testified that he has been available to provide information regarding Robert's medical needs and, furthermore, he provided Robert's medical records to the case manager in December 2016. Id. at 19.

[20] During his deposition on May 25, 2017, Dr. Crisp evaluated a care plan for Robert that was dated May 23, 2017, which he testified was accurate based upon Robert's daily needs from a care standpoint. ECF No. 330-2 at 7–9. Defendant's counsel objected to the plan because it was prepared outside the discovery period. ECF No. 330-2 at 8. The Court would sustain this objection as it is outside the scope of discovery and not relevant to the issue of retaliation. Moreover, review of this detailed plan reveals that the itemized tasks and hours requiring a service do not surpass the proposed hours of each service recommended by Dr. Platt (ECF No. 329-1) and agreed to by Defendant (ECF No. 329-2) should Robert be released from the hospital such that he is eligible to receive services again. ECF No. 330-2 at 59–61. For example, according to the recent plan, there appears to be approximately 77 hours of nursing care needed and 84 hours recommended by Dr. Platt. Id. Furthermore, Dr. Crisp testified that the plan of care "accurately assess[ed] [Robert's] need for nursing care and personal care attendant services." ECF No. 330-2 at 10.

51. Dr. Crisp testified that he was not aware of Robert's condition deteriorating from his initial visit until his hospitalization in December 2016. Id. at 25–26. Dr. Crisp admitted during his testimony that "someone being in the house" would be sufficient. Id. at 30.

52. Dr. Crisp testified that he has a good opinion of Dr. Platt's capabilities as a doctor. Id. at 32. Dr. Crisp testified that a treating provider's request for medical records does not necessarily require a release whereas a request from Defendant's counsel would require a release. Id. at 34.

l. Dr. Susan Munn

53. Defendants objected to the admission of Dr. Munn's testimony as she was not listed as an expert by Plaintiffs and proper disclosures were not provided.[21] ECF No. 296 at 5; ECF No. 310 at 65.

54. Dr. Munn testified that she has been treating Richard since 2010. ECF No. 336-1 at 7. Dr. Munn testified that she has participated in the unsuccessful attempt to diagnose Richard's sporadic incidents of pain. Id. at 17–18. Dr. Munn testified that she has been contacted for advice on how to treat Richard during these incidents by Nancy as well as hospital staff. Id. at 40.

55. Dr. Munn testified that she could not guarantee the presence of a nurse would result in successful management of the pain every time; however, she did testify that oftentimes Richard has not had to be ambulated on the nights a nurse is present because she believes the nurse is able to manage the pain by administering a dose of Valium. Id. at 40–44.

[21] The Court discusses this objection infra.

56. Dr. Munn testified that she knew Dr. Platt and respected his professional abilities. ECF No. 336-1 at 38.

F. Pla*intiffs' Claims*

57. The only remaining claims before this Court are Plaintiffs' claims of retaliation in violation of the ADA.

IV. CONCLUSIONS OF LAW

As previously stated, the extensive history of this case is detailed in this Court's prior orders. See, e.g., ECF No. 131. This case was appealed to the United States Court of Appeals for the Fourth Circuit, and that court issued an opinion dismissing the appeals and remanding the case for further proceedings due to this Court's failure to dispose of the retaliation claims raised in the second amended complaint. ECF Nos. 266, 272.

This Court begins by noting that Plaintiffs mentioned retaliation six times in their second amended complaint and neither party mentioned the issue of retaliation during the initial trial in this case. Moreover, Plaintiffs requested only protection from possible future retaliation due to this federal lawsuit in their second amended complaint. See ECF No. 72. This Court has attempted to address this issue on the merits and allowed Plaintiffs to present evidence in support of their retaliation claims; however, this Court finds Plaintiffs have failed to meet their burden of proof in this case.

During closing arguments, Plaintiffs' counsel cited numerous cases, which are inapposite here or do not change this Court's analysis. See, e.g., Baird ex rel. Baird v. Rose, 192 F.3d 462 (4th Cir. 1999) (stating a student's complaint sufficiently alleged discrimination under the ADA on the basis that her disability was a motivating factor in her exclusion from a choir); Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 587 (1999) (stating placement of persons with mental

disabilities in community settings is qualifiedly appropriate "when the *State's* treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated . . ." (emphasis added); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 500 (4th Cir. 2005) (stating "for purposes of a First Amendment retaliation claim under § 1983, a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights") (emphasis added).

Moreover, Plaintiffs conflate retaliation with discrimination. Plaintiffs cite the following statute in support of their retaliation claims: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). Although this statute is correct, Plaintiffs only focus upon the phrase "[n]o person shall discriminate against any individual" and overlook the requirement that the discrimination be "because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." Id. (emphasis added). Thus, Plaintiffs need to show more than alleged discrimination and show there is a causal connection between the adverse action and their protected activity.

As explained by the Fourth Circuit:

> The ADA's retaliation provision provides, in relevant part, that "[n]o person shall discriminate against any individual because such individual . . . made a charge . . . under this Chapter." 42 U.S.C. § 12203(a). To establish a prima facie retaliation claim under the ADA, plaintiffs must allege (1) that they engaged in protected

> conduct, (2) that they suffered an adverse action, and (3) that a causal link exists between the protected conduct and the adverse action. Rhoads v. F.D.I.C., 257 F.3d 373, 392 (4th Cir. 2001).

*A Soc'*y Without A Name v. Virginia, 655 F.3d 342, 350 (4th Cir. 2011).[22] This Court repeatedly asked Plaintiffs' counsel to assist the Court in determining whether a causal connection or adverse action existed—assuming there was protected activity. Unfortunately, Plaintiffs failed to prove to this Court by a preponderance of the evidence that such adverse action or a causal connection existed for each claim.

A succinct timeline and course of events evidencing this lack of action or connection were provided by Defendant in its well-articulated closing argument with citations to each applicable portion of the record. In an effort to streamline the numerous witnesses's testimony received in this case, the Court will discuss each in accordance with the actions argued to

[22] During closing argument, Plaintiffs' counsel attempted to distinguish this case from A Society Without a Name, which appears to be one of the most recent published cases in the Fourth Circuit stating the elements required for a retaliation claim under the ADA for the specific statute cited by Plaintiffs. For clarification, this Court is relying upon this case for the elements needed to prove a retaliation claim.

In addition, during their closing argument, Plaintiffs cited to 42 U.S.C. § 12203(b) in support of their retaliation claim for the first time. Notably, this section is separate from the retaliation provision of the statute and is titled "[i]nterference, coercion, or intimidation" and, as such, is inapplicable to Plaintiffs' retaliation claim. This Court will not allow Plaintiffs' apparent attempt to modify their claim at the eleventh hour. Moreover, even if this Court did consider it, the modification would not change its analysis.

Finally, Plaintiffs cited to 42 C.F.R. § 441.301, stating it reflected the requirements of a care plan such as consideration of a physician's order or unpaid support. However, this citation provides the requirements for the contents of a waiver request and provides an explanation that a written plan under the waiver must "[r]eflect the services and supports (paid and unpaid) that will assist the individual to achieve identified goals, and the providers of those services and supports, including natural supports. Natural supports are unpaid supports that are provided voluntarily to the individual in lieu of 1915(c) HCBS waiver services and supports." 42 C.F.R. § 441.301(c)(2)(v). Moreover, the law also states, "No physician member of a review team may evaluate or assess the care of a beneficiary for whom he or she is the attending physician." 42 C.F.R. § 441.365(c)(2).

constitute protected conduct by Plaintiffs.[23] The Court will separate the discussions to address Plaintiff Richard Stogsdill and his mother, Nancy Stogsdill, together as well as Plaintiff Robert Levin and his mother, Plaintiff Mary Self.

A. Plaintiffs Richard and Nancy Stogsdill

As to Plaintiffs Richard and Nancy, the following testimony was received.

1. Fair Hearing Requested in February 2009

In early 2009, Nancy was notified that Richard's services would be changed due to his graduation from high school, and she filed an appeal to request additional hours with the Fair Hearings Division of Defendant ("First Fair Hearing").[24] ECF No. 310 at 95. In response to this protected activity, she received a favorable ruling from the hearing officer—who is employed by Defendant—and the case was remanded for consideration of his necessary services in light of his treating physician's order. Id. Thus, although a protected activity occurred, there was no adverse action and, accordingly, the claim for this action fails on the second and third elements.

2. Lawsuit Regarding Upcoming 2010 Caps filed on December 31, 2009

At the end of 2009, Nancy became aware of an upcoming reduction in services, which was to be applied across the board for Richard's program as approved by the CMS waiver, with notice sent to the program's participants, scheduled to begin in 2010—the 2010 caps. On December 31, 2009, Nancy, along with others, filed suit under original jurisdiction in the South

[23] As to any action alleged by Plaintiffs to constitute protected conduct that is not specifically discussed herein, this Court finds that Plaintiffs failed to meet their burden of proof to satisfy the elements. Moreover, Plaintiffs' argument that retaliation can be evidenced by the lack of reasonable standards implemented does not show how Defendant retaliated against Plaintiffs. At most, the lack of standards may make it easier for Defendant to retaliate; however, the standards in place are applied to every participant and Plaintiffs did not show that they were implemented or adversely used in connection with Plaintiffs's protected conduct. In addition, the Court notes that the witnesses denied retaliating against Plaintiffs.

[24] Prior to 2009, Nancy did not have any problems with services or grievances against Defendant. ECF No. 310 at 95.

Carolina Supreme Court in an effort to prevent the 2010 caps from going into effect. This suit was dismissed and the 2010 caps went into effect, resulting in Richard's services being reduced as previously scheduled. His personal care hours were reduced from 54 hours per week to 28 hours per week and his respite hours were reduced from 36 hours per week to 17 hours per week. Thus, despite the protected activity of filing suit and the adverse action of Richard's reduced hours, there is no causal connection because the adverse action was simply a result of the 2010 caps going into effect, not in retaliation for Plaintiffs filing suit in the South Carolina Supreme Court. Therefore, this claim fails on the third element.

3. Second Fair Hearing Requested for 2010

Due to the reductions, Nancy and Richard filed another appeal to the Fair Hearing Division with Defendant ("Second Fair Hearing"). During this Second Fair Hearing request, Richard's hours were maintained at the original amount—54 hours and 36 hours per week—and not reduced. ECF No. 310 at 98–99. Moreover, although Ms. Mullis testified that she felt retaliated against for submission of her affidavit in support of Richard, the Court does not view this action to be so related. ECF No. 316 at 170. The Court notes that Ms. Mullis submitted affidavits multiple times in February 2009, December 2009, and May 11, 2010; however, it was not until June 2010 that Ms. Mullis was terminated. Moreover, Ms. Mullis confirmed that she timely appealed the termination and, thus, she was able to continue providing services for Richard. ECF No. 310 at 59. Thus, although there was protected activity, there was either no adverse action or causal connection.[25] Accordingly, the claim for this action fails on the second and third elements.

[25] Due to a mistake, Richard's providers received termination notices stating that Richard was moving out-of-state and would no longer be eligible to receive the services. However, as soon as Nancy was notified of the issue and the agency was contacted, the matter was corrected. During this time, Richard's services continued and they were never terminated. See ECF No. 310 at 99.

4. Federal Lawsuit filed in January 2012

On January 1, 2012, Plaintiffs filed suit in this Court. ECF No. 1. Despite this lawsuit, Nancy and Richard's plan of care was still updated on January 16, 2012, and Richard received 6 hours per week of personal care one, 55 hours per week of personal care two, and 43 hours per week of respite. ECF No. 310 at 100–01; ECF No. ECF No. 310 at 103-20. Thus, although there was protected activity, no adverse action occurred and Plaintiffs' services actually increased during the administrative appeal and during this lawsuit. Accordingly, the claim for this action fails on the second and third elements.

5. Request for Additional Services in February 2013

On or about February 23, 2013, while this lawsuit was pending and the administrative appeal was proceeding through the administrative law courts, the health of Nancy's husband began fail. Due to this unfortunate and saddening circumstance, Nancy requested additional service hours. ECF No. 310 at 102. The request was granted, and respite hours were increased from 43 hours per week to 240 hours per month—an approximate increase of 17 hours per week, which was the maximum amount allowed under the 2010 caps at that time.[26] Id. at 104. Thus, despite the fact that Nancy and Richard engaged in protected activity, no adverse action occurred. Moreover, Richard was awarded an increase of services during the administrative appeal and this lawsuit. Id. at 108. Accordingly, the claim for this action fails on the second and third elements.

[26] This increase was made prior to the South Carolina Court of Appeals' order to evaluate Richard without regard to the 2010 caps. Thus, the 2010 caps were still applicable to Richard's case.

6. Alleged *Refusal to Obey the South Carolina Court of Appeals'*s Order in 2014

On September 10, 2014,[27] the South Carolina Court of Appeals issued an opinion finding that the 2010 caps were lawfully implemented; however, it also found there was evidence to support that Richard was at risk of institutionalization and Defendant failed to establish a fundamental alteration defense so the case was "remanded for consideration of the appropriate services to be provided without the restrictions of the 2010 Waiver." Stogsdill v. S.C. Dep't of Health & Human Servs., 763 S.E.2d 638, 645 (S.C. Ct. App. 2014). A rehearing was denied on October 23, 2014. Id. That same month, of the 56 nursing hours that Nancy requested for Richard, only 14 hours were awarded.

Here, protected activity occurred through the appeal and request for nursing hours. Whether an adverse action occurred is debatable because, although all of the hours requested were not awarded, Nancy and Richard still received additional services—nursing hours—that they were not receiving prior to the protected activity. This Court finds that Defendant is not compelled to award all of the services requested in order to avoid a claim of retaliation; otherwise, waiver participants may simply file suit and then expect to receive all of their requested services without regard to actual necessity. Due to the fact that services as a whole were increased for Nancy and Richard during this time period, the Court finds they did not suffer an adverse action and, moreover, there would not be a causal connection if they had suffered an adverse action because the hours awarded were based upon Dr. Amin's order and other records.[28]

[27] Nancy testified that she felt Dr. Platt's affidavit submitted to the South Carolina Supreme Court was done in retaliation. The Court finds that the affidavit was submitted in conformance with 42 C.F.R. § 441.365(f), stating, when a beneficiary declines access to the home, "the review is limited solely to the review of the provider's records."

[28] Contrary to Plaintiffs' assertion, the United States Supreme Court has stated that the "State's treatment professionals" are entitled to deference. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 602–07 (1999) ("Consistent with these provisions, the State generally may rely on the reasonable assessments of its own professionals . . . For the reasons stated, we conclude that, under Title II of the ADA, States are required

In addition, this action was the first time since the initial protected activity occurred that Richard and Nancy did not receive all of the services they requested. Accordingly, the claim for this action fails on the second and third elements.

7. Filings in South Carolina Supreme Court and United States Supreme Court

Although Nancy and Richard were successful with regard to their argument that Richard was at risk of institutionalization and the 2010 caps should not apply, they appealed the South Carolina Court of Appeals' decision that the 2010 caps were lawfully implemented. On April 9, 2015, the South Carolina Supreme Court granted certiorari, but dismissed the case as improvidently granted on January 20, 2016. *Stogsdill v. S.C. Dep't of Health & Human Servs.*, 781 S.E.2d 719 (S.C. 2016). On March 24, 2016, the South Carolina Supreme Court dismissed Nancy and Richard's petition for a rehearing. *Stogsdill v. S.C. Dep't of Health & Human Servs.*, 784 S.E.2d 669 (S.C. 2016). They appealed to the United States Supreme Court, which denied their petition for writ of certiorari and rehearing. *Stogsdill v. S.C. Dep't of Health & Human* Servs., 137 S. Ct. 278 (2016); 137 S. Ct. 540 (2016). Despite Nancy and Richard's loss with regard to this issue, Defendant awarded additional services to them. Thus, although Nancy and Richard engaged in protected activity, no adverse action occurred as they were awarded additional services, resulting in almost 24/7 coverage for Richard amongst his various services. ECF No. 310 at 108–09. Accordingly, the claim for this action fails on the second and third elements.

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to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities."). Moreover, the plan of care required for a participant in the waiver plan specifically states that the attending physician may not be a member of the review team assigned to evaluate or assess the care of the participant. See 42 C.F.R. § 441.365(c)(2).

8. Denial of Services

a. Denial of Nursing Services

In June 2014, Richard's primary care physician wrote an order for 56 nursing hours per week, and it appears Nancy submitted this request in September 2014. ECF No. 310 at 104; ECF No. 311 at 27. In October 2014, Nancy was awarded 14 nursing hours per week for Richard's care. ECF No. 310 at 104. Defendant has provided numerous services to Nancy and Richard, which amount to 24/7 care should the hours be allocated in that manner. Id. at 108–09.[29] In fact, Nancy testified that the only issue is Defendant has not awarded the 56 nursing hours per week that were requested and only awarded 14 hours. ECF No. 310 at 109. However, the refusal to provide the full amount of hours requested is supported by the medical records, Dr. Platt's assessment, and Dr. Munn's deposition.[30]

As revealed during trial, Richard intermittingly suffers from undiagnosed pain, which has caused him to be ambulated to the emergency room approximately nine times in over two and a half years. Richard and Nancy claim that the presence of a nurse in the evening hours will allow him to be treated with an injection of Valium and address the pain more quickly, which would negate the need for him to be brought to the emergency room. However, the medical records reveal that the pain appears to be undiagnosed, related to kidney stones, constipation, or gas.

[29] Richard currently receives 6 hours per week of Personal Care I services, 148 hours per week of Personal Care II services, 240 hours per week of Respite Care, and 14 hours per week of nursing services. ECF No. 310 at 105–06.

[30] Plaintiffs's counsel raised the argument that this case is similar to Doe v. Kidd, wherein the Fourth Circuit stated that providing a different service than what has been ordered for a plaintiff is the same as failing to provide any service. Doe v. Kidd, 419 F. App'x 411, 417 (4th Cir. 2011). However, in Doe, the entity itself had determined that the plaintiff was entitled to a certain type of service, yet failed to provide it to her. This case is distinguishable because the entity did not state Richard was entitled to 56 nursing hours—his personal doctor did. Here, the entity determined that Richard was entitled to 14 nursing hours and 14 nursing hours were provided. Moreover, this Court wishes to clarify that Plaintiffs' counsel often conflates the doctor's order as an order that Defendant must provide certain services. The doctor's order is to be provided for Defendant's consideration; it is not an order that Defendant is mandated to follow under the current law.

ECF No. 310 at 110–11; 117–18. Thus, although no one wishes anyone to endure unnecessary pain, Dr. Platt testified that the assistance of a nurse during the additional hours was unwarranted because he or she could not address issues such as kidney stones or gas—other than to ease the pain—and nine emergency visits in two and a half years did not justify the additional expense of increasing Richard's nursing hours threefold.

As to Dr. Munn's testimony, the Court sustains Defendant's objection because she was not listed as an expert witness by Plaintiffs and excludes the testimony to the extent it consists of expert opinion testimony. See Ingram v. ABC Supply Co., No. C/A 3:08-1748-JFA, 2010 WL 233859, at *2 (D.S.C. Jan. 14, 2010) ("It is clearly within the court's power under Rule 37(c)(1) to exclude witnesses who are not properly identified.") (citing In re Air Crash at Charlotte, N.C., 982 F. Supp. 1086, 1088 (D.S.C. 1997); Charles A. Wright, Arthur R. Miller and Richard L. Marcus, 8A Federal Practice and Procedure § 2289; Id. at § 2031.1). The Court finds that Plaintiffs' failure to disclose Dr. Munn as an expert was unjustified and Defendant could be substantially prejudiced by this witness's expert opinion.[31] The Court finds that a treating physician's testimony about a patient's diagnosis, prognosis, and future medical care is opinion testimony that falls under Rule 26(a)(2)(A)'s expert disclosure requirement. See Fed. R. Evid. 702. Therefore, the Court (1) will not permit Dr. Munn to provide any expert opinion about Richard's diagnosis, prognosis, and future medical needs, and (2) will restrict Dr. Munn's testimony to her individual factual treatment of Richard, as such treatment is documented in the medical records.

[31] Plaintiffs's counsel recognized this possible issue at the beginning of Dr. Munn's deposition wherein she stated that "Dr. Munn succeeded Dr. Joseph, and it's the same practice and Dr. Joseph has retired." ECF No. 336-1 at 4–5. However, despite the statement of Plaintiffs's counsel that she would "deal with that with the judge," this issue was not addressed and the deposition reveals that Dr. Munn did not take over Dr. Joseph's practice. Id.; see ECF No. 336-1 at 7.

However, even if the Court had entertained all of Dr. Munn's testimony and had not sustained Defendant's objection, the result would not change this Court's conclusion. Dr. Munn—Richard's family physician—admitted during her testimony that the cause of Richard's pain is undiagnosed and they could only show it helped Richard when he received the injection while he was in pain. ECF No. 336-1. Furthermore, Dr. Munn could not say with certainty that the additional nursing hours would prevent Richard's trips to the emergency room. See, e.g., id. at 42:14–25. Moreover, Dr. Platt served as Dr. Munn's preceptor—someone that a student, such as Dr. Munn at the time, could shadow and train from—during medical school approximately twenty years ago. ECF No. 336-1 at 38. Dr. Munn stated that she respected Dr. Platt and his professional abilities. Id. Dr. Munn was unable to confirm whether a nurse was present when Richard was in pain as Dr. Platt noted the nursing notes did not mention any incidents. Id. at 39–40. Consequently, this Court finds that Nancy and Richard's request for additional nursing services was not denied out of retaliation for their protected activity, but it was based upon Dr. Platt's determination of Richard's needs, the medical records, and the practicality of resources available. Therefore, this Court finds there is no causal connection and this claim fails upon the third element.

b. Alleged Denial of Assessment without Reasonable Promptness and Sufficient Notice

As to Plaintiffs' contention that Defendant's failure to assess, respond with reasonable promptness, or provide sufficient notice was retaliation, Plaintiffs did not show by a preponderance of the evidence that such failure, if any exists, was done in retaliation.

First, Richard is not entitled to an independent assessment. The Court reviewed the South Carolina Court of Appeals' order, which only states that the case was "remanded for consideration of the appropriate services to be provided without the restrictions of the 2010

Waiver," not that an independent assessment was to be done. *Stogsdill v. S.C. Dep't* of Health & Human Servs., 763 S.E.2d 638, 645 (S.C. Ct. App. 2014). Moreover, this Court reviewed the regulation and State Medicaid Manual cited by Plaintiffs in support of their argument that Richard is entitled to an independent assessment, which state:

> An appeal on medical issues may involve a challenge to the Medical Review Team's decision regarding disability; or there may be disagreement about the content of reports concerning the appellant's physical or mental condition or the individual's need for medical care requiring prior authorization. When the assessment by a medical authority, other than the one involved in the decision under question, is requested by the claimant and considered necessary by the hearing officer, obtain it at agency expense. The medical source should be one satisfactory to the claimant. The assessment by such medical authority shall be given in writing or by personal testimony as an expert witness and shall be incorporated into the record.

ECF No. 325-4 at 10 (emphasis added).

> If the hearing involves medical issues such as those concerning a diagnosis, an examining physician's report, or a medical review team's decision, and if the hearing officer considers it necessary to have a medical assessment other than that of the individual involved in making the original decision, such a medical assessment must be obtained at agency expense and made part of the record.

42 C.F.R. § 431.240(b) (emphasis added). During closing argument, when the Court inquired if there was something in the record showing that the hearing officer in this case considered an independent assessment to be necessary, Plaintiffs' counsel conceded there was not. This Court cannot ignore the clear language of the law stating that a hearing officer must consider an independent assessment to be necessary before such assessment becomes a right. Thus, Nancy and Richard are not entitled to an independent assessment and Defendant's failure to provide it is conforming to the law, not retaliation. Therefore, this claim fails on the second and third elements.

Second, an evaluation is unable to be performed without the necessary information. See, e.g., 42 C.F.R. § 441.365(f); 42 C.F.R. § 431.244(f)(4). Unfortunately, Plaintiffs did not carry

their burden and show this Court that all necessary records were provided to Defendant or proper requests for evaluation were completed. Each response appeared to have qualifiers, such as Plaintiffs' counsel must be present when the participant was evaluated, a release was not necessary because it had been provided previously, or Plaintiffs made a request but it was through an improper channel—the attorney for Defendant—instead of the service coordinator. Exhibits 102, 114. Moreover, Plaintiffs' counsel appeared to represent—through her questions to Mr. Liggett—that Richard's complete medical records had just been provided to Defendant during the course of this trial. ECF No. 316 at 149–50, 162–63. Furthermore, amongst the various levels of appeals, the Code of Federal Regulations states that an agency must take a final administrative action "[o]rdinarily, within 90 days"; however, it provides an exception for when an "appellant . . . fails to take a required action." 42 C.F.R. § 431.244(f)(1), (4). Finally, Plaintiffs's counsel consistently clarified that they were seeking an independent assessment, which they were not entitled to. See, e.g., ECF No. 316 at 98, 100, 148, 156, 161. Thus, although periods of time appeared to lapse before assessments or decisions were made, this Court does not find it was done in retaliation to Plaintiffs but rather filled with miscommunication, missing records, and overcomplicated actions.

Third, although Nancy and Richard claim the allegedly insufficient notices constituted retaliation, she specifically testified that "[a] lot of people have complained for the same reason [Nancy and Richard were] complaining" with regard to the waiver program, billing, or notices. ECF No. 310 at 112. The fact that these alleged issues have been consistently applicable to others in the program may show that an improved administration is needed, but it does not show retaliation against Nancy and Richard for their protected activity. Furthermore, Nancy acknowledged during her testimony that if she was dissatisfied with her provider then she could

select a different one. Moreover, Nancy testified that she did not believe any of the service coordinators currently assigned to Richard had retaliated against her or Richard. ECF No. 310 at 115–16. Thus, whether or not there was adverse action, there is no causal connection between the alleged denials of assessment, delays, or insufficient notices and Plaintiffs's protected activity. Therefore, this claim fails, at least, on the third element.

B. Plaintiffs Robert Levin and Mary Self

As to Plaintiffs Robert and Mary, the following testimony was received.

1. Lawsuit Regarding Upcoming 2010 Caps filed on December 31, 2009

Although Mary testified that she did not receive an official notice regarding the 2010 caps, she acknowledged that she became aware of them prior to their implementation and that they would cause services to be reduced in January 2010. ECF No. 316 at 5, 44. In an effort to prevent these caps from going into effect, Mary participated in the same suit as Nancy when she filed an original jurisdiction action in the South Carolina Supreme Court. Id. As stated above, the South Carolina Supreme Court dismissed the action and the caps went into effect in 2010. The implementation of the caps reduced Robert's attendant care services by 7 hours a week—resulting in a decrease from 56 hours per week to 49 hours per week. Mary and Robert did not appeal that reduction, or challenge it, and no additional requests for services were made until October 2014.[32] Thus, despite the fact that Mary and Robert were engaged in protected activity—the original jurisdiction lawsuit in the South Carolina Supreme Court—and adverse action occurred—a 7-hour reduction in services—there is no causal connection as the reduction was due to the 2010 caps that went into effect and it applied to all relevant participants. Therefore, this claim fails on the third element.

[32] Moreover, there were no additional changes to the services.

2. Federal Lawsuit filed in January 2012

On January 1, 2012, Mary and Robert filed suit with Nancy and Richard in this Court. In this lawsuit, Mary and Robert raised many claims—as previously discussed in this Court's prior orders—including the risk of institutionalization from reduction of service hours due to the 2010 caps. Mary and Robert did not request additional services until October 2014. During this two year period, there were no modifications or terminations of Mary and Robert's services, which consistently remained at 49 hours per week. Thus, during this two year period, no adverse action was taken despite Mary and Robert's protected activity of filing this federal lawsuit. Therefore, from January 2012 to October 2014, this claim fails on the second and third elements.

3. Request for Additional Services in October 2014

In October 2014, Mary contacted the service coordinator assigned to Levin—Carmen Hay—and inquired about nursing services. ECF No. 238 at 43. Apparently, an order was written by Dr. Shissias in June 2014 (Exhibit 120) for nursing services "up to 60 hours" per week, but the order did not appear to be provided to Coordinator Hay until October 2014. Id. at 44. Coordinator Hay previously testified that she informed Mary the nursing and attendant care services, when combined, could not exceed 70 hours—which was in accordance with the 2010 caps. Id. at 43. Thus, because Robert was receiving 49 attendant care hours, the maximum nursing hours that could be awarded were 21 hours. At the time of the trial in February 2015, Coordinator Hay testified that Mary had not returned the required release for the evaluation. Mary confirmed this fact during her testimony on April 28, 2015. Id. at 44–45; ECF No. 218 at 159–60 and 163–64. Thus, failure to grant the requested services in October 2014 for an extended period of time did not constitute an adverse action as Defendant did not have the

necessary forms to assess the request. Therefore, this claim fails on the second and third elements.

4. Request for Additional Services in April 2015

In March 2015, after this Court issued its order stating that Robert had failed to prove he was at risk of institutionalization due to the decreased hours, Mary signed the requested release in April 2015 and made a second request for nursing services. ECF No. 316 at 47. By the end of June 2015, Robert was awarded the maximum amount of nursing services allowed—21 hours per week—in combination with the attendant care he was already receiving. Id. at 47–48. Because this Court ruled that Robert had not met his burden of proof to show he was at risk of institutionalization without more hours, Defendant rationally did not approve services in excess of the caps—without risk of institutionalization, Robert's services were subject to the caps.[33] Thus, although there was protected activity through Mary and Robert's request and perhaps adverse action insomuch as the amount he requested was not provided, there was no causal connection reflecting the action was taken in retaliation. Therefore, this claim fails on at least the third element.

5. Request for Additional Services in October 2016

In October 2016, an additional request for nursing services was submitted to Robert's service coordinator. In addition, the medical records required to evaluate the request were not received by the service coordinator until December 2016. Unfortunately, Robert aspirated due to vomiting and was rushed to the hospital on December 31, 2016. Pursuant to 42 C.F.R. § 441.301(b)(1)(ii), services may not be furnished to beneficiaries who are inpatients of a hospital. Because Robert became an inpatient of the hospital, his waiver services were suspended and his

[33] Thus, although the most recent medical records were not included in the package, it appears to be an inadvertent error and did not cause harm to Robert as he was not eligible for additional services above the caps at that time and his doctor deemed it appropriate to continue with his plan of care.

request for additional services could not be considered.[34] Robert and Mary's request for reconsideration was denied, as Dr. Buscemi explained in her testimony, because Robert was an inpatient of the hospital. ECF No. 311 at 41–114. Moreover, as stated in Dr. Buscemi's letter to Robert and Mary, the services were terminated due to his hospitalization, and the letter set forth the regulation and his appeal rights. ECF No. 286-6. Thus, there was protected activity in the second request for additional nursing hours and there was adverse action because his services were suspended; however, the suspension of services and failure to consider his request for additional services were not connected to the protected activity and was a result of Robert's inpatient hospitalization as mandated by the Code of Federal Regulations. Therefore, this claim fails on the third element.

Defendant pointed out that Mary previously requested additional supplies or revisions to equipment—such as hand splints, a wheelchair and its repairs, a computer replacement for Robert's mattress—which were approved without incident. ECF No. 237 at 126–28. These provisions further support there was no retaliation against Mary and Robert for their protected activity.

Separately, this Court notes that Defendant provided a declaration by Dr. Platt and stated it would be willing to increase Robert's hours to 84 nursing hours per week—the maximum ever alleged to be requested by Mary and Robert—and 42 attendant care hours per week upon Robert's release from the hospital. ECF Nos. 329-1, 329-2. This decision was made in light of the depositions and information recently provided because Mary has testified that she cannot accept Robert back home without additional services. Id. Regrettably, Plaintiffs's counsel has represented that these hours would not be enough and she expected 24-hour care to be awarded

[34] Moreover, Plaintiffs' counsel represented that she has been insisting upon an independent assessment, which has not been shown to be ordered by the hearing officer as required before it becomes a right under the law cited by Plaintiffs as discussed supra. ECF No. 318 at 85.

instead, despite the concession of Robert's doctors that they would defer to Dr. Platt's determination. ECF No. 330-1 at 46; ECF No. 330-2 at 32. This Court mentions this submission as it appears Defendant is attempting to assist Mary and Robert in their quest, not retaliate against them.

6. Request for a Speech Device

In 2014, Dr. Shissias ordered a speech evaluation to be conducted to see if Robert would qualify for a speech device. In 2015, a speech evaluation was performed by a third-party, who found that Robert was able to use an iPad and recommended that Robert be further evaluated to see if he would qualify for an eye gaze device as well as a swallow study to address swallowing issues. Robert and Mary contend that an order for the speech device has been disregarded; however, Defendant contends that there is no order stating Robert is entitled to a speech device and it appears that no one has followed up on the eye gaze evaluation. Moreover, Defendant contends that these issues are now provided through the state's plan—not the waiver program. Mary and Robert did not direct this Court to evidence showing the contrary. Thus, there does not appear to be adverse action taken against this protected activity and, furthermore, Robert and Mary have not carried their burden to show a causal connection for retaliation as to this claim. Thus, it fails on the second and third elements.

7. *Workers' Compensation Claim*

In 2011, one of Robert's caregivers—Angela—was injured on the job and she filed a workers' compensation claim against Defendant and Mary. Robert and Mary contend that Defendant retaliated against them by allowing the progression of the workers' compensation claim. However, the record reflects Mary had no evidence that Coordinator Hay added Mary as a party to the claim nor did Coordinator Hay indicate that Mary was responsible. Moreover, Mary

testified Angela's response to the notice that she would be fired was "that [is] okay because she [is] going to sue them [i.e. Defendant] and sue me [i.e. Mary], too." ECF No. 311 at 146. Finally, the Court notes that the decision of the workers' compensation claim states that Angela—the injured caretaker—originally filed the claim against DDSN; however, the claimant re-filed her action naming "all the present parties." ECF No. 61-4 at 5. Thus, this Court does not find that Defendant instigated the suit against Mary nor was their defense done in retaliation. Therefore, this claim fails on all of the elements.

V. CONCLUSION

Therefore, based upon the evidence and testimony received at trial, submitted depositions, and a complete review of the record, this Court finds that Plaintiffs have failed to show by a preponderance of the evidence that Defendant retaliated against them in violation of the American with Disabilities Act and finds in favor of Defendant.[35]

IT IS SO ORDERED.

Joseph F. Anderson, Jr.

July 25, 2017
Columbia, South Carolina

United States District Judge

[35] This order, in conjunction with all previously issued orders in this case, is calculated to conclude all the claims before this Court as the Court has attempted to adjudicate all pleaded claims raised by Plaintiffs. See Martin v. Duffy, 858 F.3d 239, 246–47 (4th Cir. 2017). As to any claims not specifically addressed, if any, this Court finds Plaintiffs have failed to meet their burden of proof. Moreover, the Clerk of Court is directed to enter a judgment reflecting an intent to dispose of all issues. Id.