IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Peter B., Jimmy "Chip" E. and Michelle M., Plaintiffs, v. Beverly Buscemi, Kelly Floyd, the South Carolina Department of Health and Human Services, the South Carolina Department of Disabilities and Special Needs, Anthony Keck, and Richard Huntress, Defendants.	Civil Action Number: 6:10-767-TMC **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS REMAINING ISSUES AS MOOT**

For the reasons set forth herein, the remaining Defendants listed in the caption above have moved to dismiss the claims of Peter B., which are the only claims left in this case, on the ground of mootness.

FACTS

When this action was filed in 2010, Plaintiff Peter B. alleged that he was entitled to an order from this court restoring twelve weekly hours of adult companion services, originally terminated by DDSN in 2005. The services had been kept in place through mid-2009, when the South Carolina Administrative Law Court affirmed a DHHS administrative decision terminating the services. Plaintiff did not ask the Court of Appeals to stay the termination of services until more than a year later. Prior to that belated request, Plaintiff in the spring of 2010 sought a preliminary injunction from this

Court to have the services restored during the pendency of this litigation. In March 2011, Judge Childs issued a preliminary injunction ordering that pending this litigation, Peter's adult companion services be restored in the quality, kind, and volume enjoyed by Peter prior to July 2009. ECF No. 95 at 7.[1]

Peter's representatives appealed the 2009 ALC decision to the Court of Appeals, which reversed and remanded for a hearing on the merits in 2011. *Brown v. South Carolina Dept. of Health and Human Services*, 393 S.C. 11, 709 S.E.2d 701 (Ct. App. 2011). The ultimate issue to be determined in the course of the remand was whether the twelve weekly hours of adult companion services should be provided to Peter.

Before the remand hearing was held before the DHHS hearing officer in early 2013, the Defendants in the present case moved for summary judgment on the ground that Peter's federal claims were not ripe for decision, there having been no final decision by a state tribunal as of that time on the issue of whether the services should be provided. ECF No. 200. In an order filed on March 7, 2013, this Court agreed that Peter's claims were not ripe at that time. The Court did not dismiss Peter's claim, as Defendants had suggested might be appropriate, but instead elected to stay this action pending the resolution of the state proceedings. ECF No. 231 at 19.

As Defendants have previously stated to the Court, DHHS in early 2013 advised the hearing officer that the agency had decided not to contest the case on the merits, after considering the litigation cost in continuing to litigate the action. *See* ECF No. 241-1, the

[1] That order became superfluous just a few weeks later, when the Court of Appeals remanded Peter's state case to the HHS Hearing Officer. *Brown v. South Carolina Dept. of Health and Human Services*, 393 S.C. 11, 709 S.E.2d 701 (S.C. Ct. App. 2011). That remand had the effect of returning the case to the status of being on appeal before the agency's hearing officer. Services are continued in effect when a case is in that status.

March 12, 2013 Order of the hearing officer, at 3. The hearing officer accordingly dismissed the case as moot. *Id.* The same Order, noting the consent of DHHS, provided that the services be provided by the "qualified provide[r] of the Petitioner's [Peter's] choice, in the same amount, duration, and scope as Petitioner received one-on-one services at the time of Petitioner's appeal in 2005." *Id*. at 8.

Peter's counsel appealed that order to the Administrative Law Court, but nether party asserted on appeal that the services should not be restored. The ALC affirmed the hearing officer's decision, primarily because the claims made in that court by Peter were made for the first time on appeal. *See* ECF No. 247-1 (2/4/14 ALC Order). Peter's then-counsel filed a protective Notice of Appeal, along with a motion to be relieved as counsel, which was granted by the Court of Appeals by Order dated April 28, 2014. ECF No. 247-2. The same Order provided that "Appellant has thirty days to obtain new counsel, or this Court will presume Appellant is proceeding pro se." *Id.* That period expired on June 30, 2014, and so far nothing has been filed on Peter's behalf with the Court of Appeals. In any event, nothing that might occur in that case in the future would affect the clear mootness of the present federal case, because even if the appeal goes forward, neither party contends in that case that the services should not be restored.

ARGUMENT

Peter's federal claims have been rendered moot by the 2013 Order of the DHHS hearing officer.

The pertinent law on mootness has been summarized by this Court in its Order dismissing the other two Plaintiffs from this case as follows:

> A claim is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496

> (1969). "The requisite personal interest that must exist at the commencement of the litigation . . . must continue throughout its existence . . . ." *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 397(1980) (quotation omitted). Otherwise, a court's ruling would be an advisory opinion on hypothetical facts. *White v. Nat'l Union Fire Ins. Co.*, 913 F.2d 165, 167 (4th Cir. 1990) (internal quotation omitted).
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> A claim that is moot may be considered by the Court, however, if it is "capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). This exception is limited to exceptional situations. See *Incumaa v. Ozmin*t, 507 F.3d 281, 289 (1983). "In the absence of a class action, the 'capable of repetition, yet evading review' doctrine [is] limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

Order of March 7, 2013, ECF No. 231 at 14. Applying those legal principles, this Court dismissed the claims of the other two Plaintiffs, noting the existence of a DHHS hearing officer Order that prohibited the agencies from enforcing the service caps that formed the basis for those two Plaintiffs' contentions in the present federal case. *Id.* at 15.

For the same reasons that applied to the claims of the other Plaintiffs, Peter's claim is now moot. The relief sought by Peter in the Amended Complaint in this case was to have his adult companion services restored. Amended Complaint, ECF No. 108 at 8-10, ¶¶ 41-46, 11-12, ¶¶ 51-55, and 16, ¶ 83. As with the prior Plaintiffs, that relief has now been granted in the form of an Order issued by the DHHS hearing officer. Peter now has no credible claim that the restoration of adult companion services is likely to be reversed at any time in the future. As the Court has held with respect to the other two Plaintiffs, now dismissed, "any presumption of future violations . . . would be purely speculative making any opinion the court might render an advisory opinion." 3/7/13

Order, ECF No. 231, at 16. Simply put, the services have not only been restored, they have been restored by the hearing officer's Order, and there is no reasonable basis for concluding that there is any longer a live issue about whether the adult companion services will continue to be made available to Peter.[2]

Finally, for the reasons set forth by Defendants in their Response to Plaintiff's Status Reports, ECF No. 255, there is still a question about whether Ms. Harrison is still authorized to represent Peter. Defendants' counsel has no knowledge at all on that issue, nor on the question of whether Mr. Anthony, the other counsel of record for Peter, is still authorized to represent Peter. This is a matter that might warrant inquiry by the Court.

CONCLUSION

For the foregoing reasons, Peter's claims, the only remaining claims in the case, should be dismissed as moot.

Respectfully submitted,

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[2] Damages have never been sought in this case, so there is no live claim of money damages that could now be made.