THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM ADMINISTRATIVE LAW COURT
Carolyn C. Matthews, Administrative Law Judge

---

Case No. 13-ALJ-08-0159-AP

---



Peter Brown, ..... Appellant,

v.

South Carolina Department of Health and Human Services, ..... Respondent.

---

**RESPONDENT'S RETURN TO MOTION TO BE RELIEVED AS COUNSEL AND FOR ATTORNEYS' FEES**

---

## STATEMENT

Counsel for Appellant, Peter Brown, has a filed a motion containing the following:

a. A motion to be relieved as counsel.

b. A motion for permission to file a request for payment of attorneys' fees (although it later appears that Appellant's present filing itself is intended to constitute that motion). Motion at 2.

c. A request for "such other relief as may be reasonable and in the best interest of Peter." Motion at 3.

Respondent, the South Carolina Department of Health and Human Services (DHHS), takes no position on the motion of Appellant's counsel to be relieved. However, DHHS opposes the relief sought in Points (b) and (c), for the reasons set forth herein.

## FACTS AND PROCEDURAL HISTORY

The pertinent facts at this stage of this case were set forth in February 4, 2014, ALC Decision and Order ("ALC order," Exhibit 1, attached) as follows:

> On March 12, 2013, a Hearing Officer for the South Carolina Department of Health and Human Services ("DHHS") dismissed this action as moot after DHHS advised the Hearing Officer that based on litigation costs, the Department would no longer contest this case on its merits. This appeal followed.
>
> The case originated with a 2005 administrative appeal by Appellant Peter Brown from a decision by the Department of Disabilities and Special Needs (DDSN) to terminate twelve hours per week of certain services that Appellant had been receiving. As Appellant's attorney advised the DHHS Hearing Officer in 2005, "the only issue currently on appeal before the Division of Appeals and Hearings, is the agency's proposed reduction of twelve hours of services which are needed weekly. . . ."
>
> The case was originally tried by the DHHS Hearing Officer for three days in 2005. The Hearing Officer ultimately dismissed the case on jurisdictional grounds, holding that "that "If a service is not covered by

> Medicaid . . . it is not under the subject matter jurisdiction of a SCDHHS Hearing Officer."

ALC order at 1-2 (attached). The ALC affirmed the Hearing Officer's decision in 2009. This Court reversed in an opinion dated April 20, 2011, holding that the legal conclusions on which the decision of this Court was based were not considerations that affected subject matter jurisdiction. *Brown v. South Carolina Dept. of Health and Human Services*, 393 S.C. 11, 709 S.E.2d 701 (Ct. App. 2011). This Court accordingly remanded the case "for a hearing on the merits." *Id.* 393 S.C. at 13, 18, 709 S.E.2d at 702, 705.

Subsequent events were described in the February 4, 2014, ALC order as follows:

> On remand, DHHS advised the Hearing Officer by letter dated February 26, 2013, that "After balancing the costs versus the benefits of litigating this matter further, DHHS has decided not to contest the above-referenced case on the merits. Therefore, DHHS does not believe that a hearing is necessary in this matter." Appellant's counsel, who was copied with this letter, did not respond to that letter.
>
> In its prehearing brief, DHHS reiterated the position stated in its February 26, 2013 letter that based on cost to the agency, DHHS would no longer contest the merits of the case; that is, the Appellant's entitlement to one-on-one services.
>
> On March 7, 2013, Appellant's counsel filed a one-page, two-paragraph Pretrial Brief. It was not responsive to the position of DHHS as announced in the February 26, 2013 letter. That Pretrial Brief did not acknowledge or otherwise note that DHHS was no longer contesting

> Appellant[s entitlement to the services at issue. Instead, the document stated "that the agency has erred by basing its decision to terminate Appellant's one-on-one or companion services on erroneous grounds. . . ," even though the agency had given notice that it was changing its decision to terminate services. Appellant's Pretrial Brief also asserted that the agency "has failed to provide medically necessary services," but offered no indication regarding what services had not been provided.
>
> On March 11, 2013, the Hearing Officer advised the parties that based on the pretrial briefs the case was moot; that the hearing scheduled for March 13, 2013, was canceled; and that an order would be forthcoming within a week. Appellant's counsel did not express an objection to the cancellation of the hearing.
>
> By order dated March 12, 2013 (mailed March 19, 2013) the Hearing Officer dismissed this appeal as moot, holding as follows:
>
> > The issues of remand as set forth in [the Court of Appeals' opinion], whether or not the "one-on-one" service is a Medicaid service and whether or not the Petitioner needs such services in addition to RHS, are moot based on Respondent's decision not to contest the case on the merits and agrees that the Petitioner as an ID/RD Waiver participant will be allowed to receive ACS offered by the ID/RD Waiver, provided by the qualified provider of his choice, in the same amount, duration, and scope as the Petitioner received "one-on-one" services at the time of Petitioner's appeal in 2005.

*Id.* at 2-3 (emphasis added). In the appeal to the ALC, Appellant's representatives did not challenge the Hearing Officer's conclusion concerning mootness.

To summarize all of the above, once the case was remanded by this Court, DHHS decided for reasons of economy not to contest Appellant's entitlement to

the Medicaid services at issue. That entitlement was the only issue before the Hearing Officer.

Appellant sought, for the first time in the appeal before the ALC, to raise issues about the sufficiency of the services that were already being provided at the time of the March 12, 2013, decision of the Hearing Officer.[1] Because Appellant had never presented those issues to the Hearing Officer with any specificity, the ALC rejected Appellant's attempt to raise those issues for the first time in an appellate case before the ALC. ALC order at 6.

---

[1] The history of the provision of the services themselves is as follows: The one-on-one services at issue were not actually terminated in 2005, but continued in effect for over four years thereafter, until the final 2009 decision of the ALC. Appellant's representatives appealed to this Court, but did not seek a supersedeas from the ALC or this Court until the latter months of 2010. The supersedeas petitions were denied by both courts, but this Court heard the merits of the appeal in early 2011.

By that time, Appellant's representatives had filed a federal ADA suit, *Peter B. v. Sanford, et al,* No. 6:10–767-TMC (D.S.C.). On March 7, 2011, District Judge Childs issued a preliminary injunction ordering that "Defendants shall . . . return services in the quality, kind, and volume enjoyed by. . . Peter B., prior to July 2009." That injunction was not appealed, but DHHS believes its practical effect was short-lived, because this Court's decision of April 20, 2011 remanding the case had the effect of restoring the situation in effect prior to July 2009, that is, putting the services back in place as a matter of state law during the pendency of an appeal before the DHHS Hearing Officer. (When appeals are taken from terminations of DDSN/DHHS services, the service termination does not take effect until at least the time of the conclusion of the appeal to the ALC.)

Appellants filed a motion later in 2011 in the federal case, complaining that the services being provided were not in accordance with the terms of Judge Childs' order. On July 29, 2011, Magistrate Judge Jacqueline Austin summarily denied Peter's motion. *Peter B. v. Sanford, supra,* Docket No. 131. Appellant's representatives then filed a motion to reconsider, which was also denied by Magistrate Judge Austin, this time in a five-page Order. *Peter B. v. Sanford, supra,* Docket No. 155. Appellant's representatives did not seek to appeal that decision.

From the above, it can be seen that some of the matters raised in Appellant's present motion are identical to issues unsuccessfully presented by them to the District Court in 2011. Appellant's motion does not mention this part of the federal case proceedings.

It would have been reasonable to think that this matter would have ended once the Hearing Officer's March 12, 2013 order was issued. That order was an uncontested decision in Appellant's favor on the provision of twelve weekly hours of services, described by his counsel as "the only issue currently on appeal. . . ." 2/4/14 Decision and Order at 1. Nevertheless, Appellant's representatives appealed that decision to the ALC. In the present motion, Appellant describes the Hearing Officer's decision as one to "dismiss Peter's appeal." That is a misleading characterization of the action taken by the Hearing Officer. It is true that the order of the Hearing Officer dismissed the appeal, but only because DHHS agreed to provide all the relief that had been sought by Appellant in the appeal.[2]

On appeal, the ALC concluded that of the three issues raised by Appellant in the ALC appeal, the first had never been raised before the HHS Hearing Officer, the second sought an advisory opinion, and the third issue was stated in conclusory fashion and did not set forth a basis for reversal. The ALC accordingly affirmed

[2] Appellant's counsel also inexplicably describes the decision of the Hearing Officer as one "terminating benefits." Appellant's Memorandum in Support at 2. The decision in fact did not terminate benefits, but rather ordered them to be provided. Counsel for DHHS cannot imagine what support exists for this odd description of the Hearing Officer's decision. Equally erroneous and equally without support is counsel's claim that "the hearing officer granted Respondent's motion to dismiss his appeal, over the objections of Brown's guardian.. . . ." Appellant's Memorandum in Support at 3 (emphasis added). To the contrary, the only record evidence before the ALC indicates that "Brown's guardian" or his counsel did not voice any objections to the cancellation of the hearing. *See* ALC order at 3 ("Appellant's counsel did not express an objection to the cancellation of the hearing.")

the decision of the Hearing Officer. (None of Appellant's three points actually argued that the Hearing Officer committed reversible error.)

The next step taken on behalf of Appellant was that his counsel, on March 6, 2014, to file the present Motion to be Relieved and for other relief, that is, the motion to which the present Memorandum responds. A Notice of Appeal was filed on the following day, March 7, 2014.

## ARGUMENT

As already noted above, DHHS takes no position on the motion to withdraw as counsel, but opposes the other relief sought by Appellant or his counsel.

### 1. Request for attorneys' fees.

#### a. Appellant has not shown an absence of substantial justification for DHHS's position.

Appellant's counsel has not provided any reason why a position taken by DHHS, and on which Appellant prevailed, lacked substantial justification. For that reason, the fee petition should be dismissed without the need for further proceedings.

Section 15-77-300(A) provides in its entirety as follows:

> (A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

> (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.
>
> The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.

Appellant's motion lists, in conclusory fashion, six different points on which it is claimed that the agency acted without substantial justification. Motion at 2. (The sixth point is not actually a ground in itself, but an improper reference to "other reasons to be disclosed.") Appellant's motion does little or nothing to flesh out exactly which agency actions were ones that involved "the agency act[ing] without substantial justification in pressing its claim against the party. . . ," in the language of § 15-77-300(A)(1), instead merely listing them in conclusory fashion. Motion at 2. To the extent that any such agency actions are even identifiable from Appellant's filings, most or all of them involved points that were either never litigated, or were issues on which the agency prevailed.

To be sure, the uncontested decision of the Hearing Officer established Appellant's right to "receive ACS [services] offered by the ID/RD Waiver, provided by the qualified provider of the Petitioner'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." 3/12/13 order of Hearing Officer at 5. (Exhibit 2, attached). Appellant's motion, however, is completely devoid of any reason why DHHS's original position to the contrary was not supported by substantial justification. That issue is simply not discussed at all in the Motion or Memorandum. Because Appellant has presented no argument on the absence of substantial justification regarding any point on which Appellant prevailed, the petition for attorneys' fees should be denied.

### 3. All remaining relief requested by Appellant or his counsel should be denied.

With respect to the remaining relief requested, DHHS would first note that it is inconsistent for Appellant's counsel to seek to be relieved as counsel on the one hand and to seek relief other than attorney's fees on the other hand. In addition, this request for other relief is devoid of substantive merit. It is also procedurally deficient because it seeks relief that is not properly sought in the context of the present motion.

#### a. Appellant's Point 2 ("Violations of the Medicaid Act").

It is unclear what is sought in Appellant's Point 2, but it appears that Appellant is trying to appeal the 2014 ALC decision via the present motion, rather than in the proper fashion, that is, an appeal of that ALC decision.

The ALC decision addressed Appellant's present Point 2 as follows:

> Appellant cites several procedural requirements found in federal regulations, but offers no suggestion as to how he was prejudiced by the alleged failure to comply with those regulations. A hearing was not necessary in order for the Hearing Officer to decide that the case was moot, which was a decision in favor of Appellant. Again, Appellant's counsel stated at the outset of this process in 2005 that "the only issue currently on appeal before the Division of Appeals and Hearings, is the agency's proposed reduction of twelve hours of services which are needed weekly. . . ." Once DHHS decided not to contest Appellant's challenge to that reduction, the sole issue was resolved in Appellant's favor, leaving nothing else to be heard or decided by the Hearing Officer.

ALC order at 5 (emphases added). While the correctness of this decision appears clear, if Appellant desires to challenge it, the only way to do so is by an appeal of the ALC decision. The present motion is in effect a collateral attack on the ALC decision. It seeks an order that would effectively reverse the ALC order, but such relief should only come in the context of a direct appeal.

The ALC order also held that if Appellant had thought there were any other issues to be resolved by the Hearing Officer, Appellant "never raised that claim before the Hearing Officer, even after DHHS requested that the hearing be canceled on the basis of mootness, and after the Hearing Officer had provided advance notice that the hearing would be canceled and that case would be dismissed as moot." *Id.* The ALC order further held that

> Appellant's Prehearing Brief contained nothing which would suggest that Appellant's representatives wished to present evidence on the nature of the services that

> Appellant was then receiving. To the contrary, the one-page Pretrial Brief did not raise the issue with any specificity, and therefore cannot be claimed to have brought the issue to the attention of the Hearing Officer. *See, e.g., South Carolina Dept. of Tramp, v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007)(in order to be preserved for review, an issue must be "raised to the trial court with sufficient specificity," citing Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)("an objection must be sufficiently specific to inform the trial court of the point being urged by the objector"). As a result, the issue therefore may not be presented in this appeal.

*Id.* at 5-6.

Again, the present motion cannot serve to mount a collateral attack on this this conclusion by the ALC, which may be appropriately challenged only through appeal of the ALC decision. Appellant's counsel has already asked to withdraw as counsel from the appeal, and therefore should not be heard to challenge the ALC decision by means of the present motion. In any event, DHHS submits that the ALC decision was clearly correct, for the reasons set forth therein.

**b. Appellant's Point 4 ("Power of Court to punish for contempt").**

Appellant's Point 4 goes so far as to argue that "DHHS" (actually the DHHS Hearing Officer) acted in contempt of this Court's 2011 decision by ruling in Appellant's favor without a hearing. This Court, of course, remanded this case "for a hearing on the merits. . . ." *Brown v. South Carolina Dept. of Health and Human*

*Services*, 393 S.C. 11, 13, 18, 709 S.E.2d 701, 702, 705 (Ct. App. 2011). This Court's opinion indicated that "the merits" would involve questions pertaining to "the termination of Medicaid waiver services." *Id.,* 393 S.C. at 13, 709 S.E.2d at 702. The primary issue discussed in this Court's opinion was whether the service qualified as a waiver service. If this case had proceeded to be tried after the remand, and if that question had been answered in the affirmative, then the next question involving the merits would have been whether the twelve hours of services were actually needed by Appellant. The answers to both of these questions became moot when DHHS agreed in early 2013 to provide the services. That agreement led to the entry of the March 12, 2013, order of the Hearing Officer.

Appellant's counsel now takes the remarkable position that because this Court remanded this case for "a hearing on the merits," then (a) a hearing was required even if the merits issue in the case became moot as a result of the DHHS decision not to contest the merits, and (b) the DHHS Hearing Officer was required to address at the hearing any issue that Appellant's counsel thought needed to be addressed, even though Appellant's counsel did not bring any such issues to the Hearing Officer's attention with any specificity. Further, it appears to be the contention of Appellant's counsel that even after she was advised that the hearing would be canceled on the basis of mootness, counsel nevertheless had no duty to advise the Hearing Officer of her position that the hearing should still go forward.

The ALC declined to reverse the Hearing Officer on either of these grounds. That decision is the law of this case unless overturned on appeal.

Even if the ALC decision were to be overturned on appeal, however, the decision of the Hearing Officer not to hold a hearing could not be regarded as contumacious. First, this Court's opinion cannot be read as requiring that an evidentiary hearing be held even if subsequent events rendered the case moot. Once the merits were resolved by DHHS's decision not contest the merits of the case, a hearing would have served no purpose, or at least it would have served no purpose in the absence of a communication from Appellant's counsel that there was still some specific issue remaining that needed to be heard. Secondly, under the circumstances, the Hearing Officer obviously did not take any action involving "willfulness," as is required for a holding of civil contempt. In *Ex parte Kent*, 379 S.C. 633, 637, 666 S.E.2d 921, 923 (Ct. App. 2008), for example, this Court held that

> A willful act [for purposes of a finding of contempt] is an act 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law.'

In the present case, there was no disobedience of the law (much less willful disobedience) by the Hearing Officer when she canceled the hearing on the ground that the issues before her had become moot. The Hearing Officer's order stated that

"The issues, based on Order of Remand from [this Court], are whether or not the "one-on-one" service is a Medicaid service and whether or not the Petitioner needs such services in addition to Residential Habilitation Services (RHS)." If this was legal error at all, which is doubtful based on a reading of this Court's 2011 decision, it was nothing more than a simple, good faith, legal error that was capable of correction upon appeal by Appellant's counsel. The ALC concluded that Appellant had not shown reversible error by the Hearing Officer. Any claim that these actions by the Hearing Officer involved contempt of court is therefore manifestly without merit.

## CONCLUSION

For the foregoing reasons, Respondent DHHS respectfully submits that this Court should inquire into the request to be relieved and render such decision as is appropriate, and deny the remaining parts of Appellant's motion for the reasons set forth above. Alternatively, if the Court concludes that there are any grounds for the attorney fee petition to proceed any further, DHHS would request leave to supplement this filing with an additional showing concerning the applicability of § 15-77-300 to this case, the reasonableness of Appellant's rates and hours, and the application of the other factors set forth in § 15-77-300.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
1611 DEVONSHIRE DRIVE, 2ND FLOOR
POST OFFICE BOX 8568
COLUMBIA, SOUTH CAROLINA 29202-8568
wdavidson@dml-law.com
kwoodington@dml-law.com
T: 803-806-8222
F: 803-806-8855

ATTORNEYS for Respondent

Columbia, South Carolina

March 17, 2014

# *Exhibit 1*

**STATE OF SOUTH CAROLINA**
**ADMINISTRATIVE LAW COURT**

| | | |
|---|---|---|
| Peter Brown,<br><br>Appellant,<br><br>v.<br><br>South Carolina Department of Health and Human Services,<br><br>Respondent. | ) | Docket No. 13-ALJ-08-0159-AP<br><br>**DECISION AND ORDER** |

APPEARANCES: Patricia L. Harrison, Attorney for Appellant
Kenneth P. Woodington, Attorney for Respondent

## FACTS AND PROCEDURAL BACKGROUND

On March 12, 2013, a Hearing Officer for the South Carolina Department of Health and Human Services ("DHHS") dismissed this action as moot after DHHS advised the Hearing Officer that based on litigation costs, the Department would no longer contest this case on its merits. This appeal followed.

The case originated with a 2005 administrative appeal by Appellant Peter Brown from a decision by the Department of Disabilities and Special Needs (DDSN) to terminate twelve hours per week of certain services that Appellant had been receiving. As Appellant's attorney advised the DHHS Hearing Officer in 2005, "the only issue currently on appeal before the Division of Appeals and Hearings, is the agency's proposed reduction of twelve hours of services which are needed weekly. . . ."

The case was originally tried by the DHHS Hearing Officer for three days in 2005. The Hearing Officer ultimately dismissed the case on jurisdictional grounds, holding that "[s]ervice

is not covered by Medicaid . . . it is not under the subject matter jurisdiction of a SCDHHS Hearing Officer." By Order dated May 12, 2009, this Court affirmed. *Peter Brown v. DHHS*, 2009 WL 1744572 (S.C. A.L.C. 2009). This Court denied rehearing on June 18, 2009.[1]

The Court of Appeals reversed in an opinion dated April 20, 2011, holding that the legal conclusions on which the decision of this Court was based were not considerations that affected subject matter jurisdiction. *Brown v. South Carolina Dept. of Health and Human Services*, 393 S.C. 11, 18, 709 S.E.2d 701, 704 - 705 (Ct. App. 2011). The Court of Appeals accordingly remanded the case for a hearing on the merits. *Id.* at 705.

On remand, DHHS advised the Hearing Officer by letter dated February 26, 2013, that "After balancing the costs versus the benefits of litigating this matter further, DHHS has decided not to contest the above-referenced case on the merits. Therefore, DHHS does not believe that a hearing is necessary in this matter." Appellant's counsel, who was copied with this letter, did not respond to that letter.

In its prehearing brief, DHHS reiterated the position stated in its February 26, 2013 letter that based on cost to the agency, DHHS would no longer contest the merits of the case; that is, the Appellant's entitlement to one-on-one services.

On March 7, 2013, Appellant's counsel filed a one-page, two-paragraph Pretrial Brief. It was not responsive to the position of DHHS as announced in the February 26, 2013 letter. That Pretrial Brief did not acknowledge or otherwise note that DHHS was no longer contesting Appellant's entitlement to the services at issue. Instead, the document stated "that the agency has erred by basing its decision to terminate Appellant's one-on-one or companion services on erroneous grounds. . . ,", even though the agency had given notice that it was changing its

[1] On p. 4 of the Brief of Appellant, it is erroneously stated that the denial of rehearing occurred on October 1, 2010, but that was the date on which this Court denied a petition for supersedeas.

decision to terminate services. Appellant's Pretrial Brief also asserted that the agency "has failed to provide medically necessary services," but offered no indication regarding what services had not been provided.

On March 11, 2013, the Hearing Officer advised the parties that based on the pretrial briefs the case was moot; that the hearing scheduled for March 13, 2013, was canceled; and that an order would be forthcoming within a week. Appellant's counsel did not express an objection to the cancellation of the hearing.

By order dated March 12, 2013 (mailed March 19, 2013) the Hearing Officer dismissed this appeal as moot, holding as follows:

> The issues of remand as set forth in [the Court of Appeals' opinion], whether or not the "one-on-one" service is a Medicaid service and whether or not the Petitioner needs such services in addition to RHS, are moot based on Respondent's decision not to contest the case on the merits and agrees that the Petitioner as an ID/RD Waiver participant will be allowed to received ACS offered by the ID/RD Waiver, provided by the qualified provider of his choice, in the same amount, duration, and scope as the Petitioner received "one-on-one" services at the time of Petitioner's appeal in 2005.

Appellant's representatives filed the present appeal, but did not challenge the Hearing Officer's conclusion concerning mootness.[2]

## STANDARD OF REVIEW

This case is before the Court as an appeal from a Final Order of DHHS pursuant to S.C. Code Ann. § 1-23-600(D) of the Administrative Procedures Act (APA). An Administrative Law Judge reviews the case in an appellate capacity under the APA. In South Carolina, the provisions

[2] Respondent has provided information to the Court concerning a federal case in which Appellant's representatives have sought, on other grounds, the relief sought in the present case. This information is not reiterated in this Order, because it is not necessary to the decision of the issues in this appeal.

of the APA, specifically, Section 1-23-380(5), govern the circumstances in which an appellate body may reverse or modify an agency decision. That section states:

> The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2012).

## CONCLUSIONS OF LAW

**1. Appellant has received all the relief he requested, and therefore is not entitled to additional relief.**

Appellant's counsel stated at the outset of this matter in 2005 that "the only issue currently on appeal before the Division of Appeals and Hearings, is the agency's proposed reduction of twelve hours of services which are needed weekly. . . ." That sole issue has been resolved in Appellant's favor as a result of the DHHS decision not to contest his entitlement to the twelve weekly hours of services.

The relief actually sought by Appellant is not entirely clear. It appears, however, that the only relief Appellant now seeks under that argument heading is an order granting a hearing, based on an unsupported claim that "as of June 14, 2013," the services ordered in the March 12, 2013, Order, were not being provided. In other words, Appellant's current complaint is addressed to alleged noncompliance with the March 12, 2013, Order at a time several months after its issuance.

Appellant also appears to request, without any factual showing other than the argument of counsel, that this Court "schedule a hearing to take evidence of the irregularities in this process. . . ." *Id.* This is an apparent reference to § 1-23-380(4), which provides as follows:

> The review must be conducted by the court and must be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, and established by proof satisfactory to the court, the case may be remanded to the agency for action as the court considers appropriate.

(Emphasis added.)

The Record does not contain evidence of these alleged "irregularities." The statute requires a showing of irregularities "by proof satisfactory to the court," but Appellant's counsel has offered no evidence of whatever is being claimed.

Appellant cites several procedural requirements found in federal regulations, but offers no suggestion as to how he was prejudiced by the alleged failure to comply with those regulations. A hearing was not necessary in order for the Hearing Officer to decide that the case was moot, which was a decision in favor of Appellant. Again, Appellant's counsel stated at the outset of this process in 2005 that "the only issue currently on appeal before the Division of Appeals and Hearings, is the agency's proposed reduction of twelve hours of services which are needed weekly. . . ." Once DHHS decided not to contest Appellant's challenge to that reduction, the sole issue was resolved in Appellant's favor, leaving nothing else to be heard or decided by the Hearing Officer.

To the extent that Appellant now argues that a hearing should have been held in order to review claims that the services already being provided were inadequate, Appellant never raised that claim before the Hearing Officer, even after DHHS requested that the hearing be canceled on the basis of mootness, and after the Hearing Officer had provided advance notice that the hearing would be canceled and that case would be dismissed as moot. Appellant's Prehearing

Brief contained nothing which would suggest that Appellant's representatives wished to present evidence on the nature of the services that Appellant was then receiving. To the contrary, the one-page Pretrial Brief did not raise the issue with any specificity, and therefore cannot be claimed to have brought the issue to the attention of the Hearing Officer. *See, e.g., South Carolina Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007)(in order to be preserved for review, an issue must be "raised to the trial court with sufficient specificity," citing Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)("an objection must be sufficiently specific to inform the trial court of the point being urged by the objector"). As a result, the issue therefore may not be presented in this appeal. *See, e.g., Carson v. South Carolina Dep't of Natural Res.*, 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002)(court sitting in appellate capacity may not consider issues not raised or ruled on by administrative agency). *See also,* ALC Rule 36(G)("The Administrative Law Judge will not consider any fact which does not appear in the Record").

Appellant cites and discusses *Catanzano v. Wing*, 103 F.3d 223, 227 (2d Cir. 1996), claiming that in the present case (as apparently occurred in *Catanzano*), "the State's agent [Charles Lea Center] refused to provide the services that had been ordered. . . ." Again, however, Appellant's representatives did not present this issue to the DHHS Hearing Officer. Based on the same authorities cited above, the issue is not properly before the Court in this appeal.

**2. Appellant seeks an advisory opinion about matters that were neither raised to, nor ruled on, by the Hearing Officer.**

Appellant's second question asks this Court to act in a manner completely contrary to principles of appellate practice. Apparently, Appellant would like for this Court to issue an order

as to what this Court is not deciding. Appellant is therefore seeking an advisory opinion from this Court.[3]

The issue is not only advisory, but also concerns an issue that, like Appellant's first question, was never presented to or ruled upon by the Hearing Officer. This is reason enough for this Court to decline to consider it. *Carson v. South Carolina Dep't of Natural Res., supra.*

This issue also does not seek reversal of anything in the March 12, 2013 Order of the Hearing Officer. In the absence of such a request for reversal, Appellant is not seeking anything that may properly be sought from a court sitting in an appellate capacity. As the Supreme Court held in *Powers v. City of Aiken*, 255 S.C. 115, 177 S.E.2d 370 (1970),

> This is a court of review. The purpose of an appeal under our procedure is to determine if the lower court did something that it should not have done, or omitted doing something it should have done. A trial judge will not be reversed for failing to grant a motion on a ground that was not submitted to him.

255 S.C. at 117, 177 S.E.2d at 371. Appellant's second question does not seek review of anything, and therefore should not be addressed for that reason as well.

Finally, the relief requested by Appellant's second question is of a purely advisory nature. However, it is axiomatic that such issues cannot be decided. *See, e.g., Booth v. Grissom,* 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975)("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.").

**3. Appellant's third question is entirely conclusory, and fails to set forth a basis for reversal.**

Appellant's third question is stated in the Brief of Appellants as follows:

---

[3] The issue in Question B is stated on p. 1 of the Brief of Appellant as follows:

> "This Court should issue an order affirming that the violations of the Americans with Disabilities Act and § 1983 alleged by Peter in his federal lawsuit are not before this Court and that jurisdiction for those claims lies properly with the federal court."

> Respondent has violated the Administrative Procedures Act by enacting binding norms in the administration of the DDSN Medicaid waiver programs, has violated the U.S. Supreme Court's mandate of Olmstead to give the greatest of deference to the opinions of Peter's treating physicians in determining the need for services and has retaliated against Peter and his representatives in violation of the Americans with Disabilities Act and Appellant should be allowed to file a supplemental brief after a hearing pursuant to S.C, Code § l-23-380(A)(5)[sic] in the event that the requested remedial relief is not granted.

Br. of Appellant 1.

ALC Rule 37(B)(1) provides in part that "The statement [of the issues on appeal] shall be concise and direct as to each issue and may be stated in question form. Broad general statements may be disregarded by the Court." Appellant's Question C is neither "concise" nor "direct." Instead, it consists of three or four "broad general statements" combined in a single sentence. As the Supreme Court has held in *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010), and many other cases, "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." To the same effect is *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011), which holds (in the context of a Rule 59(e) motion) that "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge."

Appellant offers only a one-paragraph conclusory argument in support of this point, and it bears little or no resemblance to the argument heading. In fact, the argument of the point is not much longer than the statement of the issue. Appellant argues, in summary fashion and without any details, that he "has been prejudiced in bringing these [unstated] issues to the attention of this Court because of the eight year lapse of time without providing the hearing ordered by the Court of Appeals and required by the Medicaid Act." This contention fails "to bring into focus

the precise nature of the alleged error. . . ." *Herron, supra.* It does not challenge any issue that was actually brought to the attention of the Hearing Officer or decided by the Hearing Officer.

The conclusory argument of this vaguely-stated issue sheds no light on the nature of the error asserted. The appellate courts of this State have often held that such conclusory arguments will not be considered. *See, e.g., Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct.App.1999)(declaring that conclusory arguments may be treated as abandoned); *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 304 n. 2, 433 S.E.2d 871, 873 n. 2 (Ct.App.1993)(stating that a one sentence argument is too conclusory to present any issue on appeal). This is especially true in this case, when Appellant simply asserts "prejudice" without showing how he was prejudiced, or what specifically is requested. *See, e.g., State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998)(holding an appellant's argument meritless where appellant did not argue or show prejudice except in conclusory fashion). For the reasons stated in the above authorities, the Court declines to consider this issue.

## CONCLUSION

For the foregoing reasons, the Order of the DHHS Hearing Officer dismissing the matter as moot is affirmed.

**AND IT IS SO ORDERED.**

Carolyn C. Matthews

CAROLYN C. MATTHEWS
Administrative Law Judge

February 4, 2013
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 4th day of February 2014

By: MaryBeth Campbell
Judicial Law Clerk

# *Exhibit 2*

ORDER OF DISMISSAL IN
THE APPEAL MATTER OF
P.B. (PETITIONER) v. SCDHHS (RESPONDENT)

Appeals' Case #05-MISC-015 (MR/RD Waiver)
Medicaid # 5727764401
Hearing Date: Not held

## JURISDICTION

Procedure in this case is governed under the authority granted by the South Carolina General Assembly to the South Carolina Department of Health and Human Services (SCDHHS) to administer various programs and grants (See e.g., S.C. Code Ann. 44-6-10, et seq.). This appeal has been conducted pursuant to the provisions of the Appeals and Hearings regulations of the South Carolina Department of Health and Human Services (Reg. 126-150, et seq.) and the South Carolina Administrative Procedures Act (S.C. Code Ann. 1-23-310, et seq.).

## ISSUE

The issues, based on Order of Remand from Judge C. Few, South Carolina Court of Appeals, are whether or not the "one-on-one" service is a Medicaid service and whether or not the Petitioner needs such services in addition to Residential Habilitation Services (RHS). Any issues raised in the proceedings or hearing of this case but not addressed in this Decision are deemed denied.

## BACKGROUND

Petitioner is an individual eligible for Medicaid, who receives Home and Community Based Services (HCBS) through the Mental Retardation/Related Disabilities Waiver (MR/RD) Waiver. The Waiver has been changed to Intellectual Disabilities/Related Disabilities (ID/RD) Waiver. The Waiver was MR/RD at the time of appeal in 2005. The MR/RD Waiver is a Medicaid Waiver managed by South Carolina Department of Health and Human Services (SCDHHS). SCDHHS has delegated the day to day operations of the waiver to the South Carolina Department of Disabilities and Special Needs (SCDDSN). Petitioner has been a recipient of one of the services available through the MR/RD waiver; specifically Residential Habilitation Services (RHS) through the Supervised Living Program. In addition to being a recipient of RHS, Petitioner also received twelve (12) hours of "one-on-one" services. In March 2005, Petitioner's mother request for reconsideration to SCDDSN for the proposed termination of Petitioner's one-on-one services resulted in SCDDSN upholding the initial determination to terminate Petitioner's one-on-one services. On April 4, 2005, Petitioner's Representative, Patricia L. Harrison timely appealed the reconsideration denial. A hearing in this matter began on August 9, 2005, continued on August 10, 2005 and concluded on October 19, 2005. Hearing Officer, Barry Streeter, Esquire (retired) rendered a decision on December 29, 2006 determining SCDHHS lacked subject matter jurisdiction that in the matter. Petitioner's Representative appealed the Hearing Officer's decision to the Administrative Law Court (ALC). The ALC upheld the Hearing Officer's decision on appeal, deciding DHHS lacked subject matter jurisdiction and that the one-on-one services were duplicative of the RHS services. Petitioner's Representative

appealed the ALC decision to the South Carolina Court of Appeals. Judge C. Few, South Carolina Court of Appeals reversed and remanded the case to the DHHS Division of Appeals and Hearings for a hearing on the merits with the sole issues on appeal being whether or not the "one-on-one" service is a Medicaid service and whether or not the Petitioner needs such services in addition to RHS. On December 16, 2011, Order of Remand was received in the Division of Appeals and Hearings and assigned to a Contract Hearing Officer as the original Hearing Officer had since retired. In July of 2012, the Contract Hearing Officer returned the case to the Division of Appeals and Hearings with no action taken on the case. The appeal was reassigned to the undersigned Hearing Officer on July 24, 2012. The undersigned Hearing Officer reviewed the Remand Order and evidence of record (ten (10) bound volumes) from the 2005 hearing. Via email of August 28, 2012, Attorneys for both parties were notified of the reassignment of the appeal to the undersigned Hearing Officer. Attorneys were requested to respond to the undersigned Hearing Officer by August 31, 2012 with proposed, agreed upon hearing dates for the hearing with the month of November open on the undersigned Hearing Officer's calendar. Upon receipt of agreed upon dates, Notice of Hearing was sent. On November 13, 2012, Petitioner's mother and Attorneys for both parties timely arrived for the scheduled hearing. Approximately 30 minutes prior to the hearing, Petitioner's mother and Attorney for the Petitioner met outside of the Hearing Officer's and Attorney for Respondent's presence. Respondent's Attorney was called into the meeting with the Hearing Officer not present. The Hearing Officer presented to the conference room when summoned. Attorneys informed the Hearing Officer the parties were close to settling and requested additional time for Petitioner's Attorney to present additional documents to Respondent's Attorney. Respondent's Attorney stated he had to consult with his client before agreeing to settlement. Both parties were given to December 6, 2012 to notify the Hearing Officer as to whether resolution had been achieved. The Attorneys requested an extension to December 6, 2012 stating they were continuing with good faith negotiations in an attempt to resolve the case without a hearing. On January 25, 2013, via email, the Hearing Officer was notified mutual resolution was not met. Based on the Hearing Officer's calendar, dates for rescheduling the hearing were proposed with the parties agreeing on March 12, 2013 and March 13, 2013. On February 4, 2013, Notice of Hearing was sent. On February 26, 2013 correspondence from the Respondent's Attorney was received by the undersigned Hearing Officer requesting each party be given the opportunity to submit proposed orders for the Hearing Officer's consideration with there being no need for a hearing because the Respondent had decided not to contest the case on the merits. The Hearing Officer offered to accept a Consent Order signed and dated by both Attorneys or the hearing in the matter would be held as scheduled. On March 6, 2013, Robert French, Chief Hearing Officer called with the Attorneys present, requesting the hearing scheduled for March 12, 2013 be moved to March 13, 2013 with an additional day given to submit Prehearing Briefs. Request was granted. On March 7, 2013, both parties submitted Prehearing Briefs.

Prehearing Brief from Attorney for the Petitioner argues federal regulations at "431.243". The Hearing Officer found this regulation to be irrelevant to this appeal. However, the Hearing Officer found it obvious, based on the context of the brief, that federal regulation at 431.244 was the Attorney's intended reference. Attorney further argued in addition to Respondent's violation of reasonable promptness requirements of the Medicaid Act, Respondent erred by basing the decision to terminate Petitioner's one-on-one companion services on erroneous grounds and failed to provide medically necessary services. Attorney concluded stating all allegations

previously made by the Petitioner during the course of these proceedings are realleged to include the allegations that Petitioner's services were terminated in retaliation for acts by Petitioner's guardian and other advocates.

Prehearing Brief from Attorney for the Respondent provided a history of the case and presented Respondent's Position. Respondent's Attorney states Respondent is not contesting the case on the merits and after considering litigation cost in continuing this matter, the Respondent has decided not to contest Petitioner's assertion that the "one-on-one" service is a Medicaid service, ACS, and that Petitioner meets criteria for and is appropriate for ACS. In not contesting the case on the merits, Respondent's Attorney states Respondent agrees that as an ID/RD Waiver participant, Petitioner will be allowed to receive ACS offered by the ID/RD Waiver, provided by the qualified provider of his choice, in the same amount, duration, and scope as Petitioner received "one-on-one" services at the time of his appeal in 2005. Respondent's Attorney requested cancellation of the scheduled hearing arguing no issue remains for adjudication.

## FINDINGS OF FACT AND CONCLUSION OF LAW

I make the following Findings of Fact by a preponderance of the evidence:

(1) Based on the evidence of record in Petitioner's file, Hearing Officer, Barry Streeter requested a Psychological evaluation after the hearing that concluded on October 19, 2005. The Psychological evaluation was performed on January 26, 2006 and sent to both parties for comment on March 6, 2006. Mr. Streeter rendered a decision in this matter on December 29, 2006 (See, Case File);

(2) On February 6, 2007 Petitioner's Representative filed a Notice of Appeal with the ALC (See, Case File);

(3) On May 12, 2009, the Honorable Carolyn C. Matthews issued an order upholding the SCDHHS Hearing Officer's final Decision that SCDHHS did not have subject matter jurisdiction. Judge Matthews also held that the one-on-one services the Petitioner was receiving were a duplication of RHS that Petitioner was simultaneously receiving under the MR/RD Waiver. On appeal, the South Carolina Court of Appeals, Judge C. Few reversed the ALC's conclusion that the Hearing Officer did not have subject matter jurisdiction to hear the Petitioner's appeal and its application of an incorrect legal standard. The case was remanded to Division of Appeals and Hearings, SCDHHS for a hearing on the merits (See, Case File);

(4) On December 20, 2011, Order of Remand was received in the Division of Appeals and Hearings and assigned to a Contract Hearing Officer (See, Case File);

(5) In July 2012, the Contract Hearing Officer returned the case to the Division of Appeals and Hearings with no evidence of action taken on the case (See, Case File);

*Conclusion of Law: 42 CFR 431.244 states "(f) The agency must take final administrative actions as follows; (1) Ordinarily, within 90 days from the earlier of the following...."*.

*The case file offers no explanation for the lack of reasonable promptness in any action taken by individuals prior to the case being assigned to this Hearing Officer. The argument by the Petitioner's Attorney is not an issue addressed in the Order of Remand from Judge C. Few.*

(6) The undersigned Hearing Officer was assigned the appeal on July 24, 2012 with actions taken as timely as possible while allowing a hearing continuation and multiple extensions as it was determined good faith effort was being given by the parties in the attempt to reach resolution without the need for a hearing (See, Case File);

(7) On March 7, 2013, both Attorneys for both parties submitted a Prehearing Brief (See, Case File);

(8) Prehearing Brief submitted by the Attorney for the Respondent states the Respondent is not contesting the case on the merits and has decided not to contest Petitioner's assertion that the "one-on-one" service is a Medicaid service, ACS, and that Petitioner meets criteria for and is appropriate for ACS. Attorney for the Respondent requests cancellation of the Hearing with the Petitioner allowed to receive ACS offered by the ID/RD Waiver, to be provided by the qualified provider of his choice, in the same amount, duration and scope as Petitioner received one-on-one services at the time of his appeal in 2005(See, Case File);

(9) Prehearing Brief submitted by the Attorney for the Petitioner argues the Petitioner alleges Respondent is in violation of federal regulations and has requested a fair hearing that may not be dismissed unless the Petitioner requests dismissal or fails to appear at a scheduled hearing without good cause. Attorney asserts the Respondent has erred by basing its decision to terminate the Petitioner's one-on-one or companion services on erroneous grounds with the Respondent failing to provide medically necessary services. In addition, Petitioner's Representative states all allegations previously made by the Petitioner during the course of these proceedings are realleged to include the allegations that Petitioner's services were terminated in retaliation for acts by Petitioner's guardian and other advocates (See, Case File);

(10) The issues of remand as set forth in Judge C. Few's Order, whether or not the "one-on-one" service is a Medicaid service and whether or not the Petitioner needs such services in addition to RHS, are moot based on Respondent's decision not to contest the case on the merits and agrees that the Petitioner as an ID/RD Waiver participant will be allowed to received ACS offered by the ID/RD Waiver, provided by the qualified provider of his choice, in the same amount, duration, and scope as the Petitioner received "one-on-one" services at the time of Petitioner's appeal in 2005.

*Conclusion of Law: A Hearing Officer has the authority to dismiss an appeal pursuant to Department of Health and Human Services' regulations on Appeals and Hearings §126-154 which states, "A Hearing Officer has the authority, among other things, to: direct all procedures; issue interlocutory orders, schedule hearings and conferences; preside at formal proceedings; rule on procedural and evidentiary issues; require the submission of*

*briefs and/or proposed findings of fact and conclusions of law; call witnesses and cross examine any witnesses; recess, continue and conclude any proceedings; dismiss any appeal for failure to comply with requirements under this Subarticle."*

*Conclusion of Law: The dismissal of this appeal is proper as it is moot and does not present a justiciable controversy as supported by 27 S.C. Code Ann. Regs 126-155 which states, "Generally, a court may conclude a matter that becomes moot and does not present a justiciable controversy. Sloan v. Friends of the Henley, Inc. 369 S.C. 20.630 S. E. 2d 474 (2006). A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court. Sloan, Id, citing Mathis v. South Carolina Highway Dep't. 260 S.C. 344, 195 S.E. 2d 713 (1973). Nevertheless, even though an issue has become moot, the court may still review the issue, if the action complained of is 1) capable of being repeated without review and 2) is a matter of important public interest. Curtis v. State of South Carolina. 345 S.C. 557m 549 S.E. 2d 591 (2001) as quoted in Sloan, Id. See also Commissioners of Public Works v. South Carolina Department of Health and Environmental Control. 372 S.C. 351.641 S.E. 2d 763 (2001).*

## DECISION

Based on the Findings of Fact and Conclusions of Law, there being no issue remaining for adjudication, the Hearing in this matter is cancelled and this matter is **DISMISSED**. As an ID/RD Waiver Participant, Petitioner is allowed to receive ACS offered by the ID/RD Waiver, provided by the qualified provided of the Petitioner'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.

**AND IT IS SO ORDERED.**

Janet R. Goode
Hearing Officer

DATED AT COLUMBIA,
South Carolina

March 12, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM ADMINISTRATIVE LAW COURT
Carolyn C. Matthews, Administrative Law Judge

---

Case No. 13-ALJ-08-0159-AP

---



Peter Brown, ..... Appellant,

v.

South Carolina Department of Health and Human Services, ..... Respondent.

---

**CERTIFICATE OF SERVICE**

---

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondent, does hereby certify that service of **Respondent's Return to Motion to be Relieved as Counsel and for Attorneys' Fees** in the above-captioned matter was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 17th day of March 2014:

Patricia L. Harrison, Esquire
611 Holly Street
Columbia, South Carolina 29205