Carolyn Bearden Brown
5225 Clemson Avenue #128
Columbia, S.C. 29206
(803) 743-0646

July 8, 2014

V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

Re: Peter Brown vs. SCDHHS (2)
Appellate Case No. #2014 – 000443

Dear Ms. Allen:

In regard to your July 2, 2014, letter received July 7, neither Atty. Patricia Harrison nor anyone else provided the Guardian of Peter Brown with a copy of the April 28, 2014, Order you referenced relieving her as Counsel. In response to your statement about notification of a new Counsel, attached are two letters Guardian wrote to Judge John Few; one was concerning notification of any Hearing scheduled to determine whether SCDDHS will provide an Evidentiary Hearing for Peter. The Guardian has received no response. (Exhibit One.)

In the Guardian's exploration with other attorneys, even though they care deeply about Peter and the Services they know he needs, none chooses understandably to delve into the middle of a nine-year old complicated State/Federal Case that would put Peter through the rigors again of Discovery of Evidence. None chooses to be a part of additional costs for fees and paralegal work for which the Guardian has already spent $100,000 at Atty. Harrison's request. There are ten other family and friends who have invested time and money in this Case.

In addition, the Guardian has found no attorney, who, having read SC DHHS Atty. Woodington's Response to Atty. Harrison's Petition to the Court for a Hearing, believes there is any evidence on which an Appeal could be successful. (Exhibit Two)

If there is further information you need, please contact me. (803) 463-6989.

Sincerely,

Carolyn Bearden Brown

Carolyn Bearden Brown

Cc: Woodington, Hepfer, Roberts

EXHIBIT ONE

Carolyn Bearden Brown
5225 Clemson Avenue #128
Columbia, S.C. 29206
(803) 743-0646

Columbia, S.C.
March 12, 2014

U. S. Certified Mail
The Honorable John C. Few
The South Carolina Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

Re: Peter Brown vs. SCDHHS
Appeals; Case No. 05-MISC-015
ALC Docket No. 13-ALJ-08-0159-AP

Dear Judge Few:

As 26 year Guardian of Peter Brown, appointed by Judge Catherine Kennedy, I respectfully request you to deny the Petition of Attorney Patricia Harrison to appoint a GAL for Peter in above referenced Case. Over nine years I **have spent sacrificially more than $100,000 for legal fees and for hundreds of hours and thousands of miles for paralegal work and meetings Atty. Harrison requested, including two overnights to Atlanta CMS. Guardian believes she has not made similar demands of other disabled clients.**

Atty. Harrison has offered no reimbursement. Our family has exhausted our resources.

Guardian was not advised by Counsel of Judge Matthews' Decision and Order filed February 4, 2014, until late February 26, 2014; after which, Counsel set March 4, 2014, meeting, with little more than 48 hours until March 6, 2014, deadline to file Motion of Intent to Appeal. Counsel advised Guardian she would not file Intent to Appeal unless "Guardian paid a $5,000 retainer and $425.00 per hour billed monthly or to choose a GAL." **Atty. Harrison's current demands are inconsistent with our earlier Agreement.**

While the above referenced is a State Case, it is and has been interlocked directly for three years with the Fourth District Federal Case, identified as the Peter B. Case, including Michelle M. and Chip E., which Atty. Harrison filed on a contingency basis for all three.

With all due respect, through no fault of Peter Brown or the Guardian, Peter has been drawn into the cross hairs of a long-term bitter battle between Atty. Harrison and HHS/DDSN attorneys, which began long before we met her in 2005 and which has nothing to do with either of us.

This heated vitriol spilled out during September 4, 2013, Hearing before Judge Matthews when Atty. Harrison vociferously accused HHS Atty. Woodington in a strong twenty minute monologue, on

the Record, of using obstacles to deny essential Services to our "poorest citizens." **Judge Matthews inquired of Atty. Harrison, "Are you saying they are lying?" Atty. Harrison responded, "Yes," to which Atty. Woodington took exception.** This is not the first time there have been vitriolic exchanges. The Order provided by Judge Matthews is extremely damaging to Atty. Harrison.

At the close of above Hearing Atty. Harrison advised Peter's Counselor Mullis and Guardian she had requested a Court Recorder Transcript in the event Judge Mattews did not rule in our favor; "I will file an Appeal."

There is not a shred of evidence anywhere that the Guardian retained Atty. Harrison to restore the Twelve Hours ACS Weekly except as Federal Judge Childs ordered them to **be of the same "quality, kind, and volume enjoyed by Peter B. prior to July 2009."** Never in the thirteen years Peter's Provider Charles Lea afforded him the Twelve Hours was the Guardian charged with the responsibility to insure that a Trained Staff assigned solely to Peter would work with him weekly to fit his schedule. Not only has Counsel chosen not to use voluminous written evidence provided her to document Judge Childs' Order has been violated, the Guardian has become the Scapegoat.

With all respect, due to her inexperience and lack of knowledge of current staffing in SLP II residences, for Counsel to report Peter has been granted Twelve Hours ACS is empty rhetoric when the mechanics to provide delivery of services as **Court Ordered** is not available since ACS is not competitively funded. Having spent more than $100,000 Guardian believes Counsel has the authority and the obligation to support the Guardian and Peter's Service Coordinator to seek a viable solution, **not to ask the Court to appoint another GAL who has no clue!**

Especially over the past five years the Guardian and Peter's brother Charles have shielded Peter mentally, physically, and emotionally from the increasing vicious fallout between Atty. Harrison and HHS/DDSN attorneys that has resulted in direct reprisal toward Peter. Peter receives daily calls, frequent visits and trips to enjoy Atlanta and Columbia family and friends. No matter where he may live in DDSN System, the bitter battle continues.

Guardian believes Counsel has not had contact with Peter in more than two years. The GAL she recommended in the Federal lawsuit has had contact only 90 minutes with Peter in the five years she has been involved.

From birth Guardian has always put what is best for Peter first. 1976 when Guardian became Single Parent Head of Household with no financial assistance for eleven year and eight year old sons, Guardian taught Peter to read and located multiple therapies for sixteen years, in addition to K-6 public school. As a 41 year S. C. public instructor, including seventeen years as a USC Columbia Faculty Member, she also educated Charlie at the University of the South, Sewanee. He has enjoyed a 27 year Atlanta successful career.

Since Counsel has drained the coffers and taken precipitous action to replace the Guardian after nine years, but she has held no one accountable; one must question why she finds the need to appoint another GAL.

Due to the short time for preparing support documents, Guardian will forward same but respectfully asks that you deny the Petitioner's Request to replace the twenty-six year Guardian with a GAL. Guardian believes this is in Peter's best interest.

It is a matter of public record the Guardian has effectively, compassionately, and safely advocated for Peter successfully; obtained Services and implemented Training, especially for his identified Needs, as well as for his social integration among the non-disabled for 46 years. No other person has had that first hand experience with Peter in the System or the Court.

Thank you.

Sincerely,

Carolyn Bearden Brown

Carolyn Bearden Brown
Guardian/Parent, Peter Brown

3/13/14

Notary: Crystal M. Hill

My Commission Expires May 8, 2017

Cc: Charles Brown
Team Members
Patricia Harrison, Esq.
Richard Hepfer, Esq.
Kenneth Woodington, Esq.

Carolyn Bearden Brown
5225 Clemson Ave.
Columbia, S. C. 29206
(803) 463-6989

April 2, 2014

U. S. Certified Mail
Fax (803) 734-2373
The Honorable Judge John C Few
The South Carolina Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

Re: Peter Brown vs. SCDHHS
Appeals Case No. 05-MISC-015
ALC Docket No. 13-ALJ-08-0159-AP

Dear Judge Few:

Due to the request of Atty. Harrison to be replaced as Counsel for the nine year unusual circumstances, Guardian of Peter Brown respectfully asks for your clarification to protect Peter Brown since Counsel's petition to this Court is four-pronged.

Let there be no doubt, with regard to Twelve Hours Weekly One on One Adult Companion Services (ACS) for Peter eliminated 2009 to present, Guardian has provided Oversight, Implementation, Training for Peter on a modified but essential scale: physicians' appointments, including endocrinologist, ophthalmologist, and Weekly Food Plan.

In reference to above Case, Guardian reports:

1996-2009: Provider Charles Lea Center, at which Peter has been a 31year resident, employed one staff person to work one-on-one with Peter for targeted Training with physician ordered/dietician devised Food Plan for diabetes, hyperglycemia; aerobics exercise, eye health, podiatry care, as well as participation among the off-site non-disabled. Training was fine-tuned over time. Guardian gave input and approval since health, safety, personal funds were involved. Charles Lea provided transportation and occasional tickets for companion.

On March 7, 2011, Fourth Circuit Federal Judge Childs ordered that ACS be continued and

> "... **be of the same quality, kind, and volume enjoyed by Peter Brown prior to July 2009.**"

Although Guardian has reported many violations, Judge Childs' Order has not been enforced. From March 16, 2014, to date; fourteen new CLC Staff untrained on Peter's Food Plan (whom I can name) have appeared at Peter's apartment at meal times.

2009-Present: The March 12, 2013, Order of DHHS Hearing Officer Janet Goode states

"... Petitioner as on 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 amount, duration, and scope as the Petitioner received one-on-one services..."

There is no evidence anywhere the Guardian retained Counsel for or agreed to assume responsibility for above Order. This order does not provide the Service Charles Lea afforded Peter 1996-2009.

Due to several requests in Counsel's Petition, Guardian respectfully asks that you advise first if this Court will grant a Hearing on whether DHHS has satisfied this Court's Remand to provide an Evidentiary Hearing for Peter. This decision is extremely significant as to how Guardian will proceed for legal representation for Peter and with regard to thousands already spent.

I declare that the foregoing is true, under penalty of perjury, to the best of my knowledge, information and belief. Executed in Columbia, South Carolina on this second day of April, 2014.

Thank you.

Sincerely,

Carolyn Bearden Brown

Carolyn Bearden Brown
Guardian/Parent, Peter Brown

JAMES MARTIN
Notary Public - State of South Carolina
My Commission Expires February 12, 2023

Cc: Charles Brown
Team Members
Patricia Harrison, Esq.
Richard Hepfer, Esq.
Byron Roberts, Esq.
Kenneth Woodington, Esq.

Exhibit Two

DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855
www.dml-law.com

William H. Davidson, II
Andrew F. Lindemann*
James M. Davis, Jr.†
Robert D. Garfield
Michael B. Wren

*Also Admitted In North Carolina
†Certified Mediator

Daniel C. Plyler
Joel S. Hughes
Justin T. Bagwell
David A. DeMasters
Steven R. Spreeuwers
Todd R. Flippin

Of Counsel
Kenneth P. Woodington

Writer's Email: kwoodington@dml-law.com

March 17, 2014

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Edgar Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

RE: Peter Brown v. South Carolina Department of Health and Human Services
Appeal Tracking Number: 2014-000443
ALC Docket Number: 13-ALJ-08-0159-AP
Our File Number: 79.9238

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of **Respondent's Return to Motion to be Relieved as Counsel and for Attorneys' Fees** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

With highest regards, I am

Sincerely yours,

DAVIDSON & LINDEMANN, P.A.

/Ken Woodington

Kenneth P. Woodington

KPW/jmb
Enclosures

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.

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.

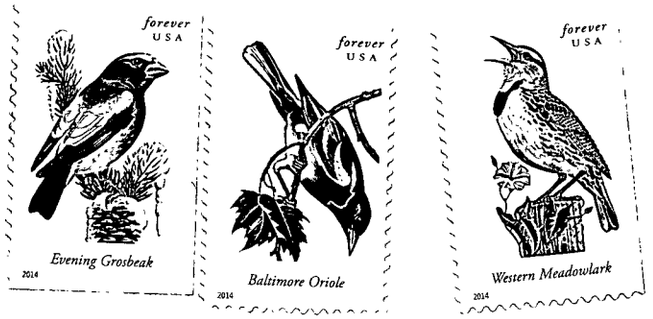
AND IT IS SO ORDERED.

Janet R. Goode
Hearing Officer

DATED AT COLUMBIA,
South Carolina

March 12, 2013

Carolyn Bearden Brown
5225 Clemson Avenue #128
Forest Acres
Columbia, SC 29206



Re: V. Allen, Deputy Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, South Carolina
29211