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

Barbara Hickey, Plaintiff, v. Emma Forkner In Her Official Capacity as the Director of the South Carolina Department of Health and Human Services; and Beverly Buscemi, in Her Official Capacity as the Director of the South Carolina Department of Disabilities and Special Needs, Defendants.	Docket No.: 4:10-2696-TWL-TER **CONSENT MOTION TO DISMISS BASED ON MOOTNESS**

The parties hereby move for entry of a Consent Order dismissing this action on the ground of mootness. The basis for this motion is that the Plaintiff has prevailed in a case in the South Carolina Administrative Law Court (ALC) culminating in a Final Order and Decision reversing the services cut underlying the alleged violation of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation at issue in the instant case. A copy of the decision is attached as Exhibit 1. The South Carolina Department of Health and Human Services (DHHS) has not appealed that Final Order and Decision. As a result, the Plaintiff's Personal Care Assistance (PC II) services have been restored to their pre-existing level and the current controversy in the instant case has been rendered moot.

On August 26, 2010 Plaintiff filed an appeal from the DHHS agency level to the Administrative Law Court (ALC) challenging DHHS's denial of the Plaintiff's right to a fair hearing and arguing that DHHS's implementation of a twenty-eight (28) hour per week cap on PC II services pursuant to an amendment to the Mental Retardation / Related Disability

(MR/RD) Medicaid Waiver Program violated the requirements of South Carolina's Administrative Procedures Act, S.C. Code Ann. §1-23-10, et seq. (APA). As to the latter issue, Plaintiff argued that the across-the-board reduction of weekly allowable PC II service hours created a "binding norm" that needed to be promulgated as a regulation under state law before it could be enforced. In its Final Order and Decision, issued on July 19, 2011, the ALC held that DHHS had treated the 28-hour cap as a "binding norm" and therefore reversed the reduction as applied to Plaintiff. The Court held that absent an individualized decision on the specific facts pertaining to Ms. Hickey, "the benefit limitations contained in the January 1, 2010 MR/RD waiver renewal may not serve as the legal basis for a reduction in benefits unless they are promulgated pursuant to the requirements of the South Carolina Administrative Procedures Act." (Exhibit 1 at 11)

After the appeal period passed, the parties continued to discuss the ramifications of the ALC decision on the current action, what the agencies' plans were with respect to Plaintiff's services and other pertinent matters bearing on whether the instant action should be proceed. The primary claim of Plaintiff in this case was that she requires at least the fifty (50) hours of PC II services she has been receiving for years and that the across-the-board cap, which was imposed on her without an individualized review of her medical/physical needs or her particular situation, exposed her to a risk of institutionalization in violation of the ADA and Section 504 of the Rehabilitation Act. As Ordered by the ALC, that cut has been reversed, pursuant to the APA, and Ms. Hickey's service hours have been restored. Pursuant to the ALC Order, Ms. Hickey's hours cannot be cut in the future unless and until Defendants either make an individualized factual determination, as set forth below, or they promulgate the cap as a regulation in

accordance with the APA. It therefore appears that the immediate case may be discontinued as moot provided no such promulgation or further attempted service reduction is imminent.

As set forth in the attached Affidavit of Beverly Buscemi, the Defendants currently have no plans to promulgate the cap as a regulation. (See Exhibit 2, ¶ 4.) The services provided to Ms. Hickey by Defendants do remain subject to annual assessments as provided by law. Any future service level determinations will be based on whether Ms. Hickey continues to medically qualify for her current level of PC II services. This will be on an individualized basis with respect to Plaintiff. (Exhibit 2 at ¶ 6).

Thus, while it is possible that at some future date the agencies might determine as a matter of fact (as opposed simply to applying an across-the-board rule) that Plaintiff's medical condition does not warrant her being provided with fifty (50) hours per week of PC II services, this is purely speculative at this point. Plaintiff has been receiving the same level of PC II services for many years, and, in any event, no review that could lead to such a determination is anticipated for at least six (6) months. (Exhibit 2, ¶ 5) The parties reserve all rights of appeal, including the issue of the appropriate forum, should any reductions occur in the future.

Based on the foregoing, it therefore appears that the case is moot for the present, and that it may never again ripen into a live controversy with respect to the issues that have been raised in this case. As a result, the parties through their undersigned counsel respectfully request that the Court enter the proposed Consent Order of Dismissal that is being sent to chambers by e-mail. That proposed Order would make the dismissal of this case effective on January 16, 2012, with all deadlines and discovery stayed until that time, with the exception of the deposition of the Plaintiff's former Service Coordinator. The reason for using this date is that Plaintiff's counsel

would like to take the deposition of Plaintiff's former Service Coordinator for purposes of preservation of her testimony. Defendants' counsel do not oppose the taking of that deposition.

RESPECTFULLY SUBMITTED,

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