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

Peter B., Karen W., Jimmy "Chip" E., and Michelle M.,	)	
Plaintiffs,	)	
v.	)	**Civil Action #: 6:10-cv-767-TMC**
Marshall C. Sanford, et al.,	)	
Defendants.	)	

PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC.; SOUTH CAROLINA CHAPTER OF THE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS; AND SOUTH CAROLINA LEGAL SERVICES, INC. [1]

MEMORANDUM OF LAW AS AMICI CURIAE ON ISSUES UNDER THE AMERICANS WITH DISABILITIES ACT, THE REHABILITATION ACT, MEDICAID PROVISIONS AND FEDERAL AND STATE LAW

Protection and Advocacy for People with Disabilities, Inc., the South Carolina Chapter of the National Academy of Elder Law Attorneys, and South Carolina Legal Services, all of whom represent individuals with disabilities and their families, respectfully submit this memorandum as amici curiae on questions of law under the Americans with Disabilities Act (ADA),[2] Medicaid provisions, the South Carolina Code, and federal case law, that will be addressed by this Court on Defendants' Motion to Dismiss/Motion for Summary Judgment (Defendants' Motion).

[1] These Amici previously filed an Amici Curiae Memorandum in this case in connection with the Plaintiffs' Motion for a Preliminary Injunction. Entry 66, filed September 22, 2010.
[2] For the Court's convenience, a glossary of acronyms relevant to this case is provided at the conclusion of this Memorandum of Law.

Protection and Advocacy for People with Disabilities, Inc. (P&A) is a statewide, nonprofit advocacy organization whose purpose is to promote the legal, civil, and human rights of people with disabilities. The State of South Carolina has designated P&A to serve as the federally-mandated protection and advocacy system for South Carolina. S.C. Code § 43-33-310 *et seq*. As such, P&A is authorized by federal and state law to enforce the civil rights of people with disabilities and is specifically charged with protecting and advocating for the rights of people with developmental disabilities. Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15001 *et seq*. Under state law, P&A has the power and the duty to advocate for the rights of people with disabilities by "pursuing legal, administrative, and other appropriate remedies." S.C. Code § 43-33-350 (1). P&A assists individuals with disabilities who experience discrimination as a result of a disability, or who are illegally denied needed services by a program or agency. The goals of P&A include increasing public knowledge about the rights of people with disabilities and participating in litigation affecting the legal rights and status of people with disabilities. P&A has participated as amicus curiae in cases before South Carolina appellate courts and in this case. *E.g., Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993); *Clemson Univ. v. Speth*, 344 S.C. 310, 543 S.E.2d 572 (Ct. App. 2001). P&A has a particular interest in the issues raised in Defendants' Motion due to P&A's involvement in other litigation relevant to the Defendants' motion. First, P&A is a plaintiff in a lawsuit that asks for a declaratory order that the South Carolina Department of Disabilities and Special Needs (DDSN), through its Commission, must promulgate regulations governing the operations of the department and related matters. Attachment 1, Complaint in *P&A v. DDSN*. Second, P&A is representing Medicaid beneficiaries in circumstances similar to those of Chip E. and Michele M. *See J.K.E. v. Keck*, No. 0:11-cv-02154-TMC (D.S.C. filed August 15, 2011).

South Carolina Chapter of the National Academy of Elder Law Attorneys (SCNAELA) is a state chapter of the National Academy of Elder Law Attorneys (NAELA). NAELA is made up of over 4,200 attorneys who practice in the area of elder law and advocate for the needs of elders and persons who have special needs. NAELA promotes the rights of persons who have disabilities, regardless of age, and advocates for fair access to government benefits and essential services that provide persons who have disabilities as much dignity and independence as possible. Members of SCNAELA are South Carolina attorneys who practice in the area of elder law which includes advocacy for the elderly and those with disabilities. The mission of NAELA is to educate and assist attorneys in providing advocacy, guidance and services to enhance the lives of people as they age as well as individuals with special needs. As the organization has evolved, there has been an increasing emphasis on institutional, as well as individual, advocacy for people with disabilities, regardless of age, with particular emphasis on access to government benefits and services that are essential to achieving as much dignity and independence as possible for the person with disabilities.

South Carolina Legal Services (SCLS) is a non-profit statewide law firm providing legal assistance in a wide variety of civil legal matters to eligible low income residents of South Carolina. SCLS is the sole federally funded Legal Services Corporation grantee in South Carolina and receives additional funding from several sources, including the South Carolina Bar Foundation, local United Ways, state court filing fees, and other federal, state and local funding. SCLS' mission is to protect the rights and represent the interests of low income South Carolinians. Among SCLS' priorities are representing low income individuals in Medicaid cases involving home and community based services. SCLS is currently handling such cases at administrative and appellate levels.

BACKGROUND

Medicaid Home and Community Based Waiver Services and the ADA Integration Mandate:

Medicaid is a joint federal and state program. *See Doe v. Kidd*, 501 F.3d 348, 351 (4th Cir. 2007). Medicaid funds are used both to provide services to individuals in long-term institutions and to enable individuals to live in the community with appropriate supports. *See generally* 42 U.S.C. § 1396a & 1396n(c). Because some conditions of federal Medicaid law are waived in order to provide certain groups of people with disabilities services in the community rather than in institutions, these programs are referred to as "waivers." *See generally Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007). "Section 1915(c) of the Social Security Act, 42 U.S.C. § 1396n(c), permits states to include in their Medicaid plans non-medical services, such as case management, habilitation services, and respite care. *Id*. § 1396n(c) (4) (B). States must apply for a waiver and be approved in order to include such services in their Medicaid plans. *Id*. § 1396n(c) (1). Programs approved under this subsection are waived from many Medicaid strictures, *id*. § 1396n(c)(3) . . . ." *Bryson v. Shumway*, 308 F.3d 79, 82 (1st Cir. 2002); *see Doe v. Kidd*, 501 F.3d at 350. As required by law, these home and community based waiver services are cost neutral compared with institutional care (in actuality they are typically less expensive). *See* 42 U.S.C. § 1396n(c); *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d, 1175, 1178 (10th Cir. 2003).

Using Medicaid funds for waiver services, rather than for institutional care, enables eligible recipients to remain in the least restrictive setting appropriate to their needs as required by the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* (2008); the United States Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 538 (1999); and the "integration

mandate" as set forth in U.S. Department of Justice regulations. The integration mandate requires states to administer services "in the most integrated setting appropriate to the needs of the qualified individuals with disabilities." 28 C.F.R. § 35.130(d)(amended at 75 F.R. 56164-01, adding a section "h" to § 35.130). The most integrated setting appropriate is defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." *Olmstead*, 527 U.S. at 592 (1999)(citing 28 C.F.R. pt. 35, App. A. p. 450 (1998), redesignated App. B at 75 F.R. 56164-01). The waivers are a vehicle, supported by federal funding, by which a state can comply with these ADA based requirements.

The ID/RD Waiver:

The South Carolina Department of Disabilities and Special Needs (DDSN) provides waiver services to individuals with developmental disabilities and to individuals with head and spinal cord injuries. S.C. Code § 44-21-10 *et seq*. The vast majority of DDSN's funding derives from the federal Medicaid program, passed through to DDSN from the state Medicaid agency, the South Carolina Department of Health and Human Services (DHHS). *See* 42 C.F.R. § 400.203 ("Medicaid agency or agency means the single State agency administering or supervising the administration of a State Medicaid plan."). Defendant DDSN operates several Medicaid waivers for DHHS.[3] The Medicaid waiver relevant to this action is the Intellectual Disabilities and Related Disabilities Waiver (ID/RD Waiver).[4] The ID/RD Waiver is for persons

[3] States may operate a variety of Medicaid waivers. The ID/RD waiver is a 1915(c) waiver, named after the section of the Medicaid act that created it. Social Security Act, § 1915(c), as amended, 42 U.S.C.A. § 1396n(c).

[4] The ID/RD Waiver was formerly known as the MR/RD waiver. The term "mentally retarded" is no longer considered to be accurate or appropriate, and is generally not used by advocates. Until recently, the term has been pervasive in the law and in regulations in South Carolina. On June 7, 2011, Governor Nikki Haley signed Act 47. The act will remove the terms "mental retardation" and "mentally retarded" from state law. The act requires state agencies, boards, committees, and the Code Commissioner (who puts acts into the South Carolina Code of Laws)

who (1) have an intellectual disability or a related disability, (2) are eligible for Medicaid, and (3) who need home and community based services in order to live in the community. *See generally* Attachment 2, DDSN ID/RD Waiver Manual, Chapter 1, What is a Waiver.[5]

Any individual on the waiver will have a set of identified and documented health and safety needs, and a plan of care that addresses how those needs are to be met through services or interventions. *See* Attachment 2, DDSN ID/RD Waiver Manual, Chapter 1, What is a Waiver[6] ("Upon enrollment, approved providers may be authorized to render the needed services that are indicated on the participant's Support Plan [or plan of care] and included in his/her approved waiver budget"). These needs must be reassessed annually. Defendants' Motion, Affidavit of Dr. Beverly Buscemi, ¶ 5 (Entry 169-3). An individual's services may be reduced or increased based upon need at the annual review, at any time there is a change in need, or at any time there is a change in policy. *See* Attachment 3, Personal Care Services, p. 3 (Informing Service Coordinators that they should ask whether this service needs to continue at the level at which it has been authorized.) Any service provided through the waiver must be provided in accordance with a plan of care. 42 C.F.R. § 441.300(b)(1)(i).

All individuals on the waiver must meet a level of care that is similar to that required to

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to substitute the term "intellectual disability" for "mental retardation" and "person with intellectual disability" for "mentally retarded." The change will take place when rules, regulations, policies, procedures, statues, ordinances, and publications in state agencies are revised. Because of the state's budget situation, changes will be made on a rolling basis as reprinting is needed.

[5] The Waiver Manual is available at http://www.ddsn.sc.gov/providers/medicaidwaiverservices/mrrd/Documents/Default/MR_RD%20Waiver%20Manual%20Chapter%201-%20What%20is%20a%20Waiver.pdf (last viewed March 21, 2012).

[6] DDSN ID/RD Waiver Manual, Chapter 10, Personal Care Services, *available at* http://www.ddsn.sc.gov/providers/medicaidwaiverservices/mrrd/Pages/default.aspx (last viewed March 28, 2012).

receive services in a nursing home. *Doe v. Kidd*, 501 F.2d at 351.[7] Each waiver recipient must be evaluated to determine that "the recipient, but for the provision of waiver services, would otherwise be institutionalized in such a facility." 42 C.F.R. § 441.302(c)(1)(ii)&(2). In order to be approved for a waiver, the state must make an assurance to CMS that every participant in the waiver has been given the choice of either institutional or home and community-based services. 42 C.F.R. § 441.302(d)(2). Therefore, because waiver services are designed to provide the services which an individual needs to remain in the community, a reduction or termination of services may force an individual to seek services in an institution. In such case, the failure to provide for an individual's needs in the community states a claim for a violation of the Americans with Disabilities Act, 42 U.S.C. § 12132, as interpreted by *Olmstead v. L.C.,* 527 U.S. 581 (1999).

The Personal Care Cap:

In late 2009, DHHS, as the single state agency responsible for the Medicaid program, sought and received the approval of the United States Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS) to amend the ID/RD waiver to limit or cap certain services. Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, Ex. 3, Amended and Supplemental Affidavit of Kathi Lacy, Ph.D., Att. A (Entry 28-1). The amended waiver places a service use cap or flat cap on the number of hours an individual can receive of particular services: Personal Care I and II, Adult Attendant Care, Adult Companion Care, Nursing, and in-home Respite services. *Id*. These services provide care to address the needs of individuals who live in their own homes or the home of a family member or

[7] The Fourth Circuit describes the level of care as being like that of a nursing home, but technically the level of care that must be met is the same as for an Intermediate Care Facility for Intellectually Disabled or ICF/ID (also known as an ICF/MR).

friend. This cap affected two of the Plaintiffs, Chip E. and Michelle M. *Id*. at p. 3-5. The Defendants' Motion applies only to these two Plaintiffs. The alleged unlawful conduct by the Defendants' with regard to these Plaintiffs is the reduction in their Medicaid waiver services, namely their Personal Care II (PC II) services. PC II services are designed to meet the care needs of individuals with disabilities who live in the community. *See generally* Attachment 3, DDSN ID/RD Waiver Manual, Chapter 10, Personal Care Services.

Procedural History and Defendants' Motion:

Plaintiffs' commenced this action under the ADA and Section 504 of the Rehabilitation Act and other provisions of law on March 24, 2010. On April 29, 2010, Plaintiffs filed a Motion for Preliminary Injunction to maintain their services at the levels in place prior to the implementation of the cap on PC II services. In response to that Motion, the Defendants argued, in part, that the case was not ripe for adjudication because Chip E. and Michelle M. had not actually been exposed to the reduction in their services. Order, p. 2 (Entry 95). On March 7, 2011, this Court granted Plaintiffs' Motion for Preliminary Injunction, noting that the "requirement that the harm alleged be of sufficient immediacy does not . . . require plaintiffs 'to await the consummation of threatened injury to obtain preventive relief.'" *Id.* p. 3 (quoting to *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982)). The Plaintiffs' "ability to seek redress and more stable resolution through the court remains independent of the vagaries of the Defendants." *Id.* After making the determination that the case involved a live controversy, this Court found that Plaintiffs were likely to succeed on the merits of their claims because Defendants' reduction of their PC II hours to 28 hours per week exposed them to a risk of institutionalization in violation of the ADA and the Supreme Court's decision in *Olmstead*. *See id.* 5.

On March 6, 2012, Defendants filed a Motion to Dismiss/Motion for Summary Judgment with respect to the claims of Chip E. and Michelle M., the two Plaintiffs who were affected by the amended waiver services. Defendants' Motion (Entry 169). Originally, the Defendants sought to reduce Michelle M. and Chip E.'s services based upon the artificial leval set by Defendants' PC II service cap. Now the Defendants have asserted that they will provide PC II services to Plaintiffs Chip E. and Michele M. in the amount they received prior to the implementation of the cap, at least until Plaintiffs' next annual review. Defendants' Memorandum in Support of Defendants' Motion, p. 5 (Entry 169-1). Defendants assert that "[w]ith respect to these Plaintiffs' services in the future, the agencies might still determine in the future that as a matter of fact (as opposed simply to applying an across-the-board rule), Plaintiffs' individual situations warrant changes or reductions in the services with which they will be provided. However, no review that could lead to such a determination is anticipated for at least six months." *Id*. Defendants argue that because they are providing the services requested until the next annual review, the Plaintiffs' cases are moot—asserting a lack of case or controversy.

Defendants' motion comes in the wake of their tactical abandonment of their attempt to enforce these cuts in parallel administrative proceedings. When the new waiver was implemented on January 1, 2010, Plaintiffs along with approximately 22 other Medicaid beneficiaries appealed the reduction in their PC II services to DHHS, each beneficiary asking for a fair hearing regarding the reduction in PC II services. Attachment 4, Forkner Interrogatories from *Hickey v. Forkner*, No. 4:10-2696-TLW-TER. Upon information and belief, each administrative appeal involving PC II reductions was dismissed without a fair hearing. Plaintiffs Chip E. and Michelle M. appealed the dismissal of their case without a fair hearing to the

Administrative Law Court (ALC). Defendants' Memorandum, ALC Decision (Entry 169-2). On November 9, 2011, the ALC held that DHHS had to give Plaintiffs an opportunity for a hearing and that DHHS could not apply the 28 hour cap like a rule without first promulgating the cap as a regulation. *Id*. at 14-15. The ALC remanded the case to DHHS for a hearing on the merits. *Id.* at 16. On remand, DHHS voluntarily abandoned its arguments by informing the Hearing Officers that it did not intend to reduce the services to the Plaintiffs, at this time, and the Hearing Officers dismissed Plaintiffs' administrative fair hearings, presumably because the Defendants' had asserted that the relief requested had been granted. Defendants' Memorandum, Hearing Officer Decisions (Entry 169-4 at p. 3 and Entry 169-5 at p. 2).

Notwithstanding this newfound willingness to temporarily continue Plaintiff's services, there has not been any decision by those with authority over whether the cap will be promulgated as a binding regulation to cut Plaintiffs' benefits. Also, DDSN has not adopted any policies, guidelines, or procedures to award care hours in excess of the 28 hour cap, which DDSN still continues to treat as a mandatory limit in its service documents. The PC II policy is available at http://www.ddsn.sc.gov/providers/medicaidwaiverservices/mrrd/Documents/Default/MR_RD%20Waiver%20Manual%20Chapter%2010%20(Personal%20Care%20Services).pdf (last viewed March 28, 2012). Finally, the Defendants have not reversed their position that Plaintiffs do not need more than 28 hours of PC II because of the alleged availability of alternative replacement services.

ARGUMENT

Defendants assert that they should win their Motion to Dismiss/Motion for Summary Judgment and prevail in this federal lawsuit merely because they have abandoned certain administrative proceedings and have promised to temporarily abstain from enforcing the cuts at

issue. Based on this, they argue that the Court lacks jurisdiction over the case because there is no longer a case or controversy between the parties; therefore, according to Defendants, the case is moot. The case is not moot and Defendants' motion should be rejected on several grounds. In particular, voluntary cessation of illegal conduct does not render a case moot. Therefore, Defendants temporary forbearance and bare averments about future plans are insufficient to protect Plaintiffs from the risks of institutionalization. Indeed this Court in granting Plaintiffs' preliminary injunction, recognized these very risks as at the heart of Plaintiffs' claims. In relation to those risks, nothing has changed because Defendants have neither definitively abandoned the 28 hour cap nor set forth any policies or procedures for determining allocation of services in the wake of this voluntary cessation that would comply with the ADA. The Plaintiffs remain at risk of institutionalization in violation of the ADA, and this case can and should continue.

The District Court only has constitutional jurisdiction over cases and controversies. [8] U.S. Const., art. III, § 2, cl. 1; *see, e.g. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180 (2000). A case is moot if there is no longer vital controversy between the parties, or the issue is no longer "live." *See Murphy v. Hunt*, 455 U.S. 478, 481 (1982). However, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of

[8] Some cases describe the doctrine of mootness as one of "justiciability," and other cases as matter of whether the Court has jurisdiction over a live case or controversy. *Compare Fisher v. U.S.*, 402 F.3d 1167, 1176 (Fed. Cir. 2005)("Though justiciability has no precise definition or scope, doctrines of standing, mootness, ripeness, and political question are within its ambit."), *with Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1121 (10th Cir. 2010)(" Under the constitutional-mootness doctrine, a federal court has jurisdiction over only 'cases' and 'controversies.'"). Mootness cases are also divided between concepts of constitutional mootness as well as "prudential mootness." *Rio Grande*, 601 F.3d at 1121. Defendants have not articulated their arguments in terms of these distinctions. However, the two cases they cite deal with constitutional or jurisdictional mootness, so the line of cases referred to in this memorandum, attempts to focus on constitutional/jurisdictional mootness.

power to hear and determine the case, i.e., does not make the case moot." *E.g., U.S. v. W. T. Grant Co.,* 345 U.S. 629, 633 (1953). A party should not be able "to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1115 (10th Cir. 2010). The party asserting mootness bears the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* at 1116 (*quoting Laidlaw*, 528 U.S. at 189). To meet this heavy burden the Defendants must show that "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, **and** (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."[9] *Id.* at 1115 (*quoting Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)) (emphasis added).

The mere fact that services are maintained pending a future assessment does not render a case moot. In *Pashby v. Cansler*, a recent and similar case from North Carolina, the Medicaid agency argued that because at least one of the plaintiffs had been successful in the plaintiff's Medicaid administrative case, the claims made in federal court were moot. No: 5:11-CV-273-BO, 2011 WL 6130819, slip op. (E.D.N.C., Dec. 8, 2011)(Attachment 5). As in this case, *Pashby* involved Medicaid provided personal care services. Some of the plaintiffs "timely appealed the termination of their in-home [personal care services] . . . and are now. . . receiving in-home [personal care services]." *Id*. at 4. The court noted that "Defendant has only agreed to continue to provide coverage for in-home PCS . . . until the earlier of December 30, 2011, or said Plaintiff's next assessment." *Id*. "Accordingly, because these named Plaintiffs continue to face termination of their in-home PCS, their claims are not moot and Defendant's argument as such

[9] Government officials, like a legislative body, may moot a case when a challenged law is repealed or expires, meeting the "heavy burden." *Rio Grande,* 601 F.3d at 1116-1117 and fn 15. The Court should look to see if there is a "reluctant submission [by government actors] and a desire to return to the old ways." *Id*. at 117.

must fail." *Id. (Citing Doe v. Kidd*, 501 F.3d 348, 354 (4th Cir. 2007); *Peter B. v. Sanford*, No. 6:10–CV–00767, 2011 WL 824584, slip op. at *1 (D.S.C. March 7, 2011)); *see also L.S. v. Delia*, 5:11-cv-354-FL, slip op. at * 12-13 (E.D.N.C. March 29, 2012) (*also citing Doe v. Kidd*, 501 F.3d at 354; *Peter B. v. Sanford*, No. 6:10-CV-00767, 2011 WL 824584 at *1 (In this due process case, addressing the issue of standing, the court found that a temporary increase in services did not moot Plaintiffs' claims: "Additionally, in increasing D.C.'s and M.S.'s services in 2012, defendants make no assertion that the future use of the SIS and SNM resulting in decisions to reduce participants' services will comply with federal law and due process."). As recognized by the North Carolina District Court's citation to this Court's prior opinion, this Court has already concluded that "[w]hile the Court recognizes that Chip and Michelle's services have been temporarily stayed at the discretion of Defendants, their ability to seek redress and more stable resolution through the court remains independent of the vagaries of Defendants." Order, p. 3 (Entry 95). The Defendants' argument against the Preliminary Injunction has now been recast as a Motion to Dismiss/Motion for Summary Judgment, but nothing has fundamentally changed. Plaintiffs continue to seek a stable resolution independent of the vagaries of the Defendants and, like the Plaintiffs in *Pashby*, are entitled to this.

To prevail on grounds of mootness, Defendants have the heavy burden of showing that their actions are not voluntary, and that Plaintiffs' services will not be reduced again in violation of the ADA as interpreted in *Olmstead v. L.C.*, 527 U.S. 581 (1999). *See* 42 U.S.C. § 12132. Defendants attempt to meet this burden by submitting the order of the Administrative Law Court, the orders of the Hearing Officers, and an affidavit signed by the Director of DDSN, Dr. Beverly Buscemi. None of these documents are sufficient to meet the Defendants' burden.

The Administrative Law Court held that Defendant DHHS may reduce Plaintiffs' PC II services, but only if the Defendants take certain actions first. Either Defendants may reduce PC II services to 28 hours pursuant to a duly promulgated regulation, or the Defendants may reduce PC II services based upon the needs of the individual, providing a hearing is available on whether that decision was made correctly. Defendants' Memorandum, Administrative Law Court Order, (Entry 169-2). On remand the orders of the Hearing Officers did not resolve any of these issues. The Hearing Officers simply dismissed the current administrative appeals because they were informed that the Defendant had decided to reinstate the hours. Defendants' Memorandum, Hearing Officer Orders, (Entries 169-4 & 5).

Defendants May Still Promulgate the 28 Hour Cap as a Regulation and Reduce Plaintiffs' Services Pursuant to Regulation:[10]

Defendant's Motion can only succeed if they have met the heavy burden of showing that there is no reasonable expectation that they will promulgate a regulation to implement the cap, which would mean the alleged illegal activity (namely the reduction in services in violation of the ADA) could recur. *See Laidlaw,* 528 U.S. at 189. To meet this burden, the Defendants state that they "do not presently seek to promulgate the challenged policy [the 28 hour cap on PC II services] as a regulation." Defendants' Memorandum, p. 7 (Entry 169-1). The evidence supporting this statement, the affidavit of Dr. Beverly Buscemi, the Director of DDSN, does not satisfy this burden. First, the statement professes nothing about the future. The complaint asks for an injunction, or prospective relief. An affidavit regarding the Defendants' "present plans"

[10] For purposes of clarification, whether or not the 28 hour cap in PC II services is imposed upon the Plaintiffs based upon a policy, a regulation, or even a state statute, is irrelevant to whether the ADA is violated under the *Olmstead* case. Whether the 28 hour cap is implemented pursuant to a regulation only relates to the state law decision made by the Administrative Law Court, which held that a cap on services could not be imposed unless it was promulgated as a regulation.

does not satisfy the "heavy burden" showing the case is moot. *See generally*, *Virginia v. Califano,* 631 F.2d 324 (4th Cir.1980). Second, the affidavit is signed by the Director of DDSN. The South Carolina Code does not grant the Director of DDSN the authority to promulgate regulations. She serves at the pleasure of the South Carolina Commission on Disabilities and Special Needs. S.C.Code Ann. § 44-20-220 (Supp. 2011). "The commission shall determine the policy and promulgate regulations governing the operation of the department." *Id*. Dr. Buscemi has mistakenly indicated to the Court that she has authority or control over whether such a regulation will be promulgated. The assertion by Dr. Buscemi that promulgating a regulation implementing the cap is not "presently" in the plan is legally insufficient to render the federal law suit moot.

Defendants Have Not Met the Heavy Burden of Showing That They Will Maintain Plaintiffs' Services:

Defendants assert that they will not reduce Plaintiffs' services "for at least six months," and that any future reduction will be based upon need. Defendants' Motion, Affidavit of Dr. Beverly Buscemi, ¶ 5 (Entry 169-3). Defendants have not asserted how Plaintiffs' needs will be determined in the future, namely whether they have a rationally designed tool to assess need or whether they will implement an arbitrary and impermissible definition of "need." Under the voluntary cessation doctrine, the question before this Court is whether Defendants have met the "heavy burden" of establishing that the reduction in the Plaintiffs' services, which this Court has already determined would likely violate the ADA, will not recur. While Defendants have asserted that the reduction will not happen through an unpromulgated flat cap on PC II services, they have not suggested that a reduction will not recur. Significantly, Defendants have not bound themselves to return to the pre-cap rules and procedures that led to the agency's prior

determination that Plaintiffs required their current and long-standing levels of service. Nor have they announced any new procedures that would pass muster under the ADA and *Olmstead*. Defendants' theory of this case consistently has been that these Plaintiffs only **need** 28 hours of PC II services because other services are available. Plaintiffs disagree with that assessment (and in connection with the Preliminary Injunction have already established a likelihood of success on the merits of their position). In fact, Defendants have stated that **no one** needs more than 28 hours of PC II services:

- "[T]he Defendants, with the approval of CMS, have concluded that no one needs more than 28 hours weekly of PC II services." Attachment 6, Buscemi Interrogatories from *Hickey v. Forkner*, No. 4:10-2696-TLW-TER.
- "28 hours of PC II services, with corresponding adjustments in respite care and other services, was determined to be a level of authorization by which an individual could be maintained in his or her home in reasonable comfort and safety. It is therefore probably most accurate to describe PC II services in excess of 28 hours per week as services that are desired by the recipients, but not indispensable." Attachment 4, Forkner Interrogatories, Response 3, from *Hickey v. Forkner*, No. 4:10-2696-TWL-TER.
- In this case, the Defendants have repeatedly asserted that other services are available to meet the needs of the Plaintiffs and are an adequate substitute for the lost PC II services. Defendants' Objection to Report and Recommendation, p. 8-10 (Entry 74).

Defendants' Motion does not retract the above claims. The Plaintiffs and Defendants have fundamental differences over whether more than 28 hours of PC II services are needed and over whether other services are available or appropriate to replace those hours. Defendants' statement that Plaintiffs will only be assessed for PC II services based upon "need" does not indicate that

Defendants have reversed their position regarding what is needed and what is not. Nothing in the documents filed with Defendants' Motion changes the fundamental controversy between the parties—how Defendants will provide for Plaintiffs' needs in the community. Thus, there remains a "reasonable expectation" that the violation will recur. *See e.g*. *Rio Grande Silvery Minnow v. Bureau of Reclamation,* 601 F.3d 1096, 1115 (10th Cir. 2010).

Defendants Have Not Changed Their Policy Implementing the 28 Hour Cap in PC II Services:

In some jurisdictions, governmental officials have been able to meet the "heavy burden" established in *Laidlaw*, by discontinuing the challenged practice. *Rio Grande*, 601 F.3d at 1116 ("even when a legislative body has the power to re-enact an ordinance or statute, ordinarily an amendment or repeal of it moots a case challenging the ordinance or statute.") "Likewise, the '[w]ithdrawal or alteration of administrative policies can moot an attack on those policies.'" *Id*. at 1117 (quoting *Bahnmiller v. Derwinski*, 923 F.2d 1085, 1089 (4th Cir.1991)). In *Bahnmiller*, the complained of policy had been unequivocally reversed. The Fourth Circuit distinguishes between cases where the government makes an unequivocal reversal of policy with no intention to revive it and where the government concedes for the purposes of litigation in one particular case. *Compare Bahnmiller v. Derwinski*, 923 F.2d 1085 (4th Cir.1991) *with Virginia v. Califano,* 631 F.2d 324 (4th Cir.1980). In *Califano*, the Commonwealth of Virginia argued that the federal Department of Health, Education, and Welfare (HEW) had to provide a formal hearing when it denied approval of an amendment to the state plan, which implemented the Aid to Families with Dependent Children program. *Califano*, 631 F.2d at 325. While the case was pending in the district court, HEW provided the hearing requested in the complaint. HEW then argued that the case was moot, without ever conceding that Virginia was entitled to the hearing.

Id. at 326-27. HEW lost on the mootness issue because "[v]oluntary cessation of established illegal conduct makes a case moot only if it can be said with assurance that there is no reasonable expectation that the wrong will be repeated because otherwise the defendant is free to return to his old ways. This is sufficient to prevent mootness because of the public interest in having the legality of the practices settled." *Id*. at 326.

In this case, Defendants have not changed their policy, nor have they claimed any intention to do so. Replacing a service like PC II with a potentially unavailable and inappropriate service, like respite care, is a matter with which the public has an interest "in having the legality of the practices settled." *Id.* Defendants' website continues to post the 28 hours cap on services. Attachment 3, DDSN ID/RD Waiver Manual, Chapter 10, Personal Care Services (showing that only 28 hours of PC II services may be authorized). Defendants have only conceded that they will not reduce "these Plaintiffs'" services prior to the next annual review. They have stated that if the services are reduced, the reduction will be based upon "need." However, the Defendants clearly have not reversed their position that "no one needs more than 28 hours of PC II services weekly" or their position that other allegedly equivalent services are available to replace those PC II services. This matter continues to present a live controversy over whether or not the Defendants will make a determination that Plaintiffs' needs are met within the 28 hour limit. The controversy remains, and the case is not moot.

The Availability of Administrative Remedies Does Not Make This Case Moot:

Finally, ignoring the repeatedly demonstrated deficiencies of their administrative process and the manifest right of individuals to pursue their ADA claims in federal court, Defendants assert that "[b]ecause of the existence of [Medicaid fair hearings which are] federally-mandated remedies in state tribunals . . . the continuation of this action is no longer an appropriate means

for challenging any individualized, fact-based determination that might be made with respect to the service hours required by these Plaintiffs." Defendants' Memorandum, p. 6 (Entry 169-1). Defendants' position is without merit. First, the Defendants position that "no one needs more than 28 hours of PCII services weekly" is neither "individualized" nor "fact based." Second, as the Fourth Circuit has stressed, the existence of DHHS' administrative hearing procedures has no effect on Plaintiffs individual rights to proceed in federal court. *Doe v. Kidd*, 501 F.3d 348, 353 n.1 (4th Cir. 2007). Third, the administrative remedies are not adequate to address the issues raised in the complaint, namely whether the Defendants' alleged illegal action, the reduction of services and the threat of future reductions in services, violates the ADA. Even though Medicaid beneficiaries may have access to a hearing, any relief found there, assuming they are successful in the hearing, is only temporary at best.

In this case, DHHS wishes to identify the administrative process as a panacea for individuals who make allegations that the reduction in their services is in violation of the ADA. For those who are successful in an administrative hearing on any grounds, DHHS wishes to quash the availability of a meaningful administrative remedy before the Hearing Officers. According to the attached affidavit of the Director of DHHS, the Medicaid Hearing Officer does not have the authority to order prospective relief or a change in policy (like a change in the 28 hour cap). Attachment 7, Affidavit of Anthony E. Keck, ¶ 7.[11] According to the affidavit, the only authority a fair hearing officer has is to reverse or affirm a DHHS' determination. *Id.* at ¶ 8. If the Director of DHHS does not agree with the decision of the hearing officer, then he asserts

[11] This affidavit was submitted in an appeal before the Administrative Law Court. In that case, the Medicaid beneficiary had succeeded in the case before the DHHS Hearing Officer. DHHS then brought an appeal to the Administrative Law Court from the decision of the DHHS Hearing Officer.

he can authorize the Office of General Counsel to appeal the hearing officer's decision.[12] *See id.* at ¶ 10. DHHS cannot assert drastic limits on the Hearing Officer's authority in one context and assert that the Hearing Officers are the "appropriate means" for challenging agency action in the ADA context. Unlike the DHHS fair hearing officer, this Court does have the authority to grant prospective relief and to find that Defendants' policy violates the ADA. The alleged availability of administrative relief does not make this case moot.

CONCLUSION

"[U]nder Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when [1] the State's treatment professionals determine that such placement is appropriate, [2] the affected persons do not oppose such treatment, and [3] the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Olmstead*, 527 U.S. at 607. To help states meet the requirement imposed by Title II, the Medicaid waiver programs were established to provide care in the community for individuals who want to be in the community and whose needs can be met in the community. *See generally Radaszewski v. Maram*, 383 F.3d 599, 601-02 (7th Cir. 2004).

Each amicus in this case represents individuals who receive services through DHHS and DDSN. These amici organizations have seen the negative effect that the reduction in services continues to have on individuals with disabilities and their families. The policy implementing the cap on PC II services has not changed and continues to place individuals like these Plaintiffs at risk of institutionalization, in violation of the ADA. For reasons stated herein, Amici

[12] While amici do not necessarily agree with DHHS's view of the authority of the hearing officer, they accept the premise for the purposes of this brief and for purposes of distinguishing the relief available in the administrative process and the relief available in federal court.

respectfully request consideration of this Memorandum of Law in rendering any decisions on the Defendants' Motion.

Respectfully submitted,

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GLOSSARY OF ACRONYMS

- ADA – Americans with Disabilities Act
- ALC – Administrative Law Court
- CMS –U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services
- DDSN – South Carolina Department of Disabilities and Special Needs
- DHHS – South Carolina Department of Health and Human Services
- ID/RD – Intellectual Disabilities/Related Disabilities (aka MR/RD)
- P&A – Protection and Advocacy for People with Disabilities, Inc.
- PC II – Personal Care II
- SCLS – South Carolina Legal Services, Inc.
- SCNAELA – South Carolina Chapter of the National Academy of Elder Law Attorneys