STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. B-04/19-247
	)	
Appeal of	)	
	)	

INTRODUCTION

This is the second fair hearing ruling in a case involving the denial of long-term care Medicaid eligibility for petitioner by the Department of Vermont Health Access (Department)[1]. The issue raised in this portion of the case is whether petitioner's son has the authority to continue to represent petitioner's interests after her death and through the final stage of the administrative fair hearing process or whether the case has become moot due to petitioner's death. A hearing on the merits of petitioner's financial eligibility was held on June 24, 2019. Subsequent to that hearing, the issue of petitioner's son having authority to continue the appeal after petitioner's death was raised by the hearing

[1] Petitioner has filed three (3) applications for Choices for Care Long-Term Care Medicaid – all were denied by the Department. The denial of the first application was apparently not appealed. The first fair hearing (of the second application) involved the valuation of the petitioner's residence and was ultimately resolved after issuance of the hearing officer's Recommendation. The issues of standing and mootness were not at issue in these earlier applications.

officer and briefed by the parties. A final status conference/hearing was held on January 24, 2020. The following is adduced from supporting documents and legal memoranda filed by the parties.

FINDINGS OF FACT

Petitioner's health status

1. Petitioner, her husband, and her son ran a dairy farm in Charlotte. Petitioner's husband died in 2002.

2. By a designation signed on January 12, 2006, at age 77, petitioner named her son as her Durable Power of Attorney (POA), a designation authorized by Vermont law that enables a principal to name another individual to exercise legal rights for the principal. Petitioner's POA included the following provision

> I authorize my agent to:
>
> . . .
>
> 19. Apply for and receive any local, state or federal benefits related to health care, financial assistance, or otherwise, to take any action deemed desirable to qualify me for any such benefits, and to make any election available to me with regard to such benefits;…

Vermont law also provides that the powers of a Durable Power of Attorney terminate upon the death of the principal.

3. On January 12, 2006, petitioner also designated her son as her Durable Power of Attorney for Health Care which authorized him to make all health care decisions if the petitioner became unable to make those decisions for herself; this designation also ends at the time of the principal's death.

4. Petitioner and her son continued to run the dairy farm until April 2006 when petitioner made the decision to retire from dairy farming and sold her dairy herd. Petitioner continued to live in the residence on the farm property along with her son, and on his marriage, his wife.

5. As petitioner grew older, her health status worsened. Due to heart trouble, petitioner had a pacemaker implanted in February 2015 and recuperated at a skilled nursing home (Burlington Health and Rehab) from February to April 2015 before she returned home to live with her son and his wife.

6. Prior to that pacemaker surgery, petitioner was paying her own bills and handling her finances. After that surgery in February 2015, petitioner suffered from memory loss and was no longer able to handle her own finances or health care decisions; petitioner's son took over the handling of all petitioner's finances and he and his wife

cared for petitioner in the family home, receiving periodic assistance from the Visiting Nurses Association (VNA)[2].

7. Petitioner's declining physical and mental state were documented in the clinical assessment conducted on January 30, 2018 by an assessor with the Department of Aging and Independent Living (DAIL) regarding petitioner's Choices for Care eligibility. The assessment noted that petitioner's diagnoses were memory loss and COPD and that petitioner was moderately impaired in her ability to make decisions regarding tasks of everyday life due to her memory loss and that she needed cuing multiple times a day in order to take actions. Petitioner was approved for a "high needs" level of care.

8. Petitioner's son testified that it was petitioner's wish to remain at home, with his and his wife's care, along with VNA. However, at some time in early 2018, petitioner's medical condition required that she return to the nursing home.

9. On April 17, 2018, the nursing home wrote to petitioner's son notifying him that Medicare coverage for petitioner's nursing home stay would end on April 24, 2018.

[2] VNA provided assistance from April - June 9, 2015, again from July 6 - August 11, 2016, from August 29 - September 20, 2016, and finally from November 30, 2016 - July 15, 2017.

10. Petitioner, while residing in the nursing home, applied for Long Term Care Medicaid (LTC) in an application dated July 18, 2018 (third application) and filed with the Department on July 23, 2018. The application requested retroactive coverage for the three-months prior to the application. Petitioner signed the application and her Age Well caseworker, who assisted her with the application, was listed as an authorized representative. Petitioner's son was not listed on the application as an "authorized representative" but served as her representative based on his POA and supplied all of the information contained in the application.

11. During the period from the filing of the July 23, 2018 application until it was denied on January 15, 2019, it is undisputed that petitioner's son and his wife responded to all inquiries and verification requests made by the Department regarding the application without assistance from the petitioner due to her incapacitation. For the final application alone, the Department issued three (3) verification requests on August 17, 2018, September 22, 2019, and November 21, 2018 requesting documentation regarding petitioner's bank accounts, assets and resources. Petitioner's son, with assistance from his wife completed all

the research and produced all available documents; the response, as is typical in LTC cases, was voluminous and very time consuming to complete. Petitioner's son testified that the petitioner was unable to assist him in addressing any of the verification requests due to her memory loss and medical condition.

12. On January 15, 2019, the Department issued a denial of LTC based on petitioner's inability to account for all financial transactions in her bank accounts during the five-year "look back" period reviewed for LTC Medicaid eligibility. Petitioner continued to reside at the nursing home, except for a brief transfer to the hospital in September 2018, until her death in February 9, 2019 at age 90.

13. Petitioner's son appealed the LTC financial eligibility denial on her behalf on April 1, 2019.

14. By letter dated May 30, 2019, petitioner's son was notified that the nursing home was demanding payment from him for petitioner's care for the period April 2018 through February 2019 in the amount of $54,872.27

Definitions of Individual's Rights under Federal Law and HBEE Rules

15. Under federal law and the Health Benefits Eligibility and Enrollment (HBEE) Rules, an individual has the right to apply for health care benefits and to appeal the denial of such benefits.

16. The individual may also have an "authorized representative," a term defined in multiple provisions of the Rules, or other responsible person assist her or act on her behalf during the application and appeal process.

17. Under the Rules, a power of attorney is automatically granted the status of an authorized representative.

18. Under the Rules, an authorized representative or other responsible representative may sign and file a health-benefits application, provide information regarding that application, and request a fair hearing regarding the denial of that application. The Rules further provide that the right to be represented exists during the eligibility determination and the appeal process; the Rules specify that the representative may file an application for benefits or an appeal even if the petitioner is deceased. Finally, the Rules provide that if an individual is incapacitated, no written authorization is required and a person acting

responsibly for the individual may assist the individual during the process.

Department's Position

19. A merits hearing on the denial of petitioner's financial eligibility for LTC was held on June 24, 2018. After petitioner's death, the hearing officer requested, by memoranda dated August 30, 2019 (first request for briefing) and November 14, 2019 (second request for briefing), that the parties brief the issue of the authority of petitioner's son to continue the appeal.

20. By letter and memoranda dated October 7, 2019 and December 13, 2019, the Department stated its position that (1) petitioner's son did not have authority to continue the appeal because his authority under the POA ended with petitioner's death, and (2) that the appeal should be dismissed as moot because no "live controversy" exists after petitioner's death.

21. In contrast to the Department's position, the HBEE Rules authorize, based on the facts presented, petitioner's son to continue to act as her representative in the appeal of the denial of LTC after her death. Further, a review of federal law, the HBEE Rules, and caselaw from other jurisdictions support the finding that a case involving a LTC

application includes the appeal stage of the proceeding and does not become moot until final agency action has occurred.

ORDER

The Department's determinations on the authority of petitioner's son to continue to represent her interests in the fair hearing appeal and on the issue of mootness of the appeal is reversed and remanded to the hearing officer for a Recommendation on the merits of petitioner's financial eligibility for LTC Medicaid.

REASONS

Review of the Department's determination is de novo. The Department has the burden of proof at hearing if terminating or reducing existing benefits; otherwise the petitioner bears the burden. *See* Fair Hearing Rule 1000.3.0.4.

In order to determine whether petitioner's son has the authority to continue to represent her interests in the administrative review process provisions of federal law, state law, and the HBEE Rules are reviewed in turn.

Authority Conferred to Authorized Representative or Responsible Party by Federal Law

Federal law authorizes a "representative" or a "person acting responsibly" to submit a Medicaid application on behalf of an applicant.

> *42 CFR §400.203 Definitions Specific to Medicaid*
>
> *As used in connection with the Medicaid program, unless the context indicates otherwise*
>
> *Applicant means an individual whose written application for Medicaid has been submitted to the agency determining Medicaid eligibility, but has not received final action. This includes an individual (who need not be alive at the time of application) whose application is submitted through a representative* **or person acting responsibility** *for the individual.*

42 C.F.R. § 400.203 [Definition of Applicant](emphasis added).

Authority Conferred by HBEE RULES

Likewise, a review of the HBEE Rules demonstrates that the Rules confer broad authority for either an authorized representative, a legal representative, or other responsible party to assist a petitioner with the LTC application process, including the appeal, and that this right may continue after the death of an applicant.

> 4.02 Rights of individuals with respect to application for and receipt of health benefits through AHS
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> . . .
>
> (f) Right to apply. Any person, individually **or through an authorized representative or legal representative** has

the right, and will be afforded the opportunity without delay, to apply for benefits.

(g) Right to be assisted by others.

(1) The individual has the right to be represented by a legal representative.

(2) The individual has the right to be accompanied and represented by an authorized representative during the eligibility **or appeal processes.** Upon request by the individual, copies of all eligibility notices and all documents related to the eligibility or appeal process will be provided to the individual's authorized or legal representative.

. . .

(4) **An authorized representative may file an application for health benefits or an appeal on behalf of a deceased person**…

(i) **Right to appeal. An individual has the right to appeal, as provided in § 68.00.**

HBEE Rule 4.02

Other provisions of the HBEE Rules confirm the right of an authorized representative or responsible person to assist the applicant in the application process, including after the applicant's death.

5.02 Authorized representatives

(a) In general

(1) An individual may designate another person or organization to accompany, assist, and represent or to act responsibly on their behalf in assisting with the individual's application and renewal of eligibility and other ongoing communications with AHS. These include:

(i) Guardians and people with powers of attorney (§ 5.02(i)); and

(ii) **Any other person of the individual's choice.**

. . .

(2) Except as provided in paragraph (h) of this subsection, and consistent with current state policy and practice, designation of an authorized representative must be in writing, including the individual's signature, or through another legally binding format subject to applicable authentication and data security standards.

. . .

(5) Legal documentation of authority to act on behalf of an individual under state law, such as a court order establishing legal guardianship or a power of attorney, shall serve in the place of written authorization by the individual. In such cases AHS may recognize an individual as an authorized representative before the legal documentation is provided to AHS.

(6) **When an individual dies before applying for retroactive Medicaid coverage, the administrator or executor of the individual's estate, a surviving relative or responsible person may act as the individual's representative.**

(c) Duration of authorization

The power to act as an authorized representative is valid with AHS until:

. . .

(iii) There is a change in the legal authority upon which the individual or organization's authority was based.

HBEE Rule §5.02.

HBEE Rule §5.02 clearly provides authority for an authorized representative or legal representative to act for an applicant after the applicant's death and through the appeals process. However, consistent with the definition of applicant found in 42 C.F.R. § 400.203 the Rule also provides that a "responsible person" may represent a petitioner's interests. HBEE Rule §5.02 (a)(6) specifically provides that an estate administrator, a surviving relative or another interested person may file an application on behalf of a deceased individual for retroactive Medicaid even after an individual's death.

Finally, the Rules contain a specific provision that grants broad authority to a responsible person to assist an incapacitated adult during the application process.

> (h) Minors and incapacitated adults. If the individual is a minor or an incapacitated adult, no authorization is required; someone acting responsibly for the individual may assist in the application process or during a redetermination of eligibility. Such person may also sign the initial application on the applicant's behalf.

HBEE Rules 5.02(h).

In this case there is clear evidence of petitioner's incapacitation, and her reliance on her son's assistance, post February 2015 until the time of her death in February

2019. The evidence is undisputed that petitioner had memory loss that prevented her ability to continue to make financial or medical decisions after her surgery in February 2015. After that time, petitioner's son, along with assistance from his wife, handled all of petitioner's finances, provided the information necessary to file the LTC application(s) and provided all of the documentation during the verification process. Petitioner's incapacitation was confirmed by the assessment completed by DAIL in January 2018 which noted that petitioner had a medical diagnosis of moderate memory loss and that petitioner demonstrated during the assessment that her medical condition justified the "highest needs" level of care.

In allowing a responsible adult to assist an incapacitated applicant HBEE Rule § 5.02(h) clearly anticipated the fact that many of our elders may lose mental or physical capacity as they age and require assistance. Otherwise, seniors with advanced medical conditions, memory loss, or dementia could never apply for and qualify for LTC assistance when they needed it most. Here, petitioner, as evidenced by her designation of her son as her POA and POA for Health Care, clearly intended to grant her son the authority to act on her behalf should she become

incapacitated. Therefore, the facts of this case support the conclusion that petitioner's son, who has acted responsibly as her agent since 2015, has authority to serve as her representative under the Rules during the appeal.

Authority of Power of Attorney

As noted above, petitioner's son was also designated by petitioner as her POA. As the Rules provide authority for petitioner's son to act on her behalf due to her incapacity it is not necessary to reach the question here whether the son also had any continuing authority to act as petitioner's authorized representative in his capacity as her POA[3].

Mootness

Having determined that federal law and the Rules provide authority for petitioner's son to act as her representative, the next issue in this case is whether petitioner's death renders the case moot.

[3] While, by statute, 14 V.S.A. §3507(a)(3), the power to take "legal actions" as a POA ends with the principal's death, the Rules clearly provide that an applicant may designate an authorized representative to act after her death and that a POA is automatically an authorized representative. The Department makes the interpretation that the petitioner's death extinguishes authority for her son to continue to represent her interests in the LTC appeal as her POA merely because he is not also listed as the authorized representative on the LTC application – a designation that the Rules makes duplicative. Given that petitioner's son provided all information contained in the application and all information supplied to the Department during the verification process, that interpretation appears inconsistent with the intent of federal law and the Rules and does not further the goal of providing financially eligible seniors with necessary Medicaid coverage.

The Board has considered the issue of whether an appeal survives the death of a Medicaid applicant in numerous prior cases. In most of those cases, the Board has dismissed the appeal as "moot" based on a lack of a surviving "interest" of the applicant in the outcome of the appeal. *See* Fair Hearing No. 18,450; Fair Hearing No. 18-476; Fair Hearing No. B-04/10-194; Fair Hearing No. B-10/12-669; Fair Hearing No. B-01/12-60; Fair Hearing L-04/18-260 ; Fair Hearing No. L-04/18-577; Fair Hearing No. R-06/18-403. *But see* Fair Hearing No. A-2/15-133 (Spouse of deceased Medicaid applicant may pursue appeal); Fair Hearing No. 17,208.[4]

However, recent caselaw, along with additional guidance from current rules and regulations, calls for reconsideration of this issue, and in particular compels the Board to determine whether the federal requirement of "final agency action" on all applications means the application of a deceased applicant generally includes (at a minimum) the fair hearing process.

[4] It is noted that the decision in Fair Hearing No. 17,208 takes a broader view of the interests and issues at stake: "Although the petitioner has not and will not be denied access to health benefits by any decision of PATH, the integrity of the program and thus the access of other recipients to healthcare is certainly still very much at stake, making a decision by the Board appropriate in this matter."

In the first place, federal Medicaid rules and attendant state rules provide for a fair hearing in mandatory terms:

> (a) The State agency *must grant an opportunity for a hearing* to the following:
>
> (1) Any individual who requests it because he or she believes the agency has taken an action erroneously, denied his or her claim for eligibility...

42 C.F.R. § 431.220 (titled "When a Hearing is *Required*") (emphasis added); *see also* Health Benefits Eligibility and Enrollment ("HBEE") Rules § 80.03 (Right to a State Fair Hearing).

Pointedly, federal rules promulgated in 2016 also circumscribe when a fair hearing may be "denied" or "dismissed":

> The agency *may deny or dismiss* a request for a hearing if—
>
> (a) The applicant or beneficiary withdraws the request. The agency must accept withdrawal of a fair hearing request via any of the modalities available per § 431.221(a)(1)(i). For telephonic hearing withdrawals, the agency must record the individual's statement and telephonic signature. For telephonic, online and other electronic withdrawals, the agency must send the affected individual written confirmation, via regular mail or electronic notification in accordance with the individual's election under § 435.918(a) of this chapter.
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> (b) The applicant or beneficiary fails to appear at a scheduled hearing without good cause.

42 C.F.R. § 431.223 (promulgated by 81 FR 86449, Nov. 30, 2016) (emphasis added).[5]

Federal Medicaid regulations further provide that:

> As used in connection with the Medicaid program, unless the context indicates otherwise—
> *Applicant means an individual whose written application for Medicaid has been submitted to the agency determining Medicaid eligibility, but has not received final action.* This includes an individual (*who need not be alive at the time of application*) whose application is submitted through a representative or a person acting responsibly for the individual.
> . . .*Medicaid agency or agency means the single State agency* administering or supervising the administration of a State Medicaid plan. . .

42 C.F.R. § 400.203 [Definition of Applicant](emphasis added).

Furthermore, under state law, "final agency action" on a Medicaid application does not occur until the AHS Secretary reviews the decision of the Human Services Board – meaning

[5] As noted below, federal and state rules also provide that an applicant "need not be alive" at the time of application. This provision in the federal Medicaid rules was added in 1978, when certain Medicaid rules were decoupled from rules governing other federal benefit programs covered by Title 45 of the Code of Federal Regulations (*see* 43 Fed.Reg. 45176, at 45187, September 29, 1978). Of special emphasis, the pre-1978 regulations under Title 45 (which included Medicaid at the time) did not require a determination of eligibility if there was proof the applicant "had died" – this exception remains in the current rules governing the programs falling under Title 45. *See* 45 C.F.R. § 206.10. This only gives stronger emphasis to the fact that this exception (that an eligibility determination need not be made for a deceased applicant) was effectively removed from the federal Medicaid rules in 1978 and replaced by the proviso that a Medicaid applicant "need not be alive" to receive "final action" on an application.

the fair hearing process must occur *before* there is final agency action. *See* 3 V.S.A. § 3091.

The consequences of these requirements on whether the application of a deceased applicant *must be* determined through the fair hearing stage (at a minimum) has been noted by at least one federal court. In *Hillspring Health Care Center, LLC V. Dungey*, 2018 WL 287954, U.S. Dist. Ct., S.D. Ohio (2018), the Court – in denying the plaintiff's standing to bring an affirmative suit in federal court – clearly provides that the requirement of "final agency action" includes the fair hearing process, despite the petitioner's death:

> As Graham's application proceeded through both the administrative and state court of common pleas appeal process, she received a final action on her application as contemplated by the regulation. Therefore, Graham is no longer an applicant under that definition, which terminates any authority the authorized representative arguably may have under that definition to proceed on Graham's behalf following her death.

Id. at 5. *See also Tiggs v. Ohio Department of Job and Family Services,* 2018 WL 3815054, Court of Appeals of Ohio, Eighth District (2018).

Finally, the current Health Benefits Eligibility & Enrollment Rules contain a provision allowing for an authorized representative to "file an appeal on behalf of a

deceased person." HBEE § 4.02(g)(4). The HBEE replaced the previous Medicaid rules in 2014; those rules had no apparent provision for the right to file an appeal on behalf of a deceased applicant. *See* https://humanservices.vermont.gov/sites/ahsnew/files/document(10).pdf.

The Department – through its long-term care Medicaid program – will generally process the application of a deceased applicant, as a function of fulfilling its administrative responsibilities. The question before the Board is whether the fair hearing is a necessary and included element of the *administrative* process of rendering a decision on a Medicaid application, or whether the fair hearing process independently implicates the constitutional principle of mootness. The clear dictate of the rules and thrust of caselaw is that the fair hearing decision is part of the application process itself, and not an independent process.

Moreover, an exhaustive and broad search of caselaw vis-à-vis the administrative Medicaid appeal process provides virtually no support for application of the conventional principle of "mootness" to a Medicaid fair hearing determination – if anything, there are numerous cases which effectively provide a deceased appellant with a decision on the merits, or suggest that the fair hearing process is a

necessary and automatic element of the administrative application process, without regard to issues of mootness, including:

- Federal court decisions. *See Hillspring, supra; Diversicare v. Glisson*, 2017 WL 4873510 (noting that, after the death of the Medicaid applicant, the authorized representative was authorized to complete the fair hearing administrative process on her behalf); *James v. Richman*, 547 F.3d 214 (3d Cir. 2008) (finding Medicaid litigation by estate of deceased individual not moot where "District Court adjudicated the question of 'ultimate liability' for the costs of nursing care and the Department continues to contest its liability.");

- State court decisions holding that a fair hearing is required once the issue of authorized representation or "standing" is established. *See D.T. v. Division of Medical Assistance and Health Services*, WL 6816927, Not Reported in Atl. Rptr (NJ Sup.Ct.)(rejecting argument that legal authority automatically terminated upon the death of the "applicant," citing 42 C.F.R. 400.203, and concluding "that DMAHS shall transfer the matter to the OAL for it to address that standing claim, and if FCC is successful, the merits of

the dispute related to the BSS's March 1, 2017 income eligibility calculations at a fair hearing conducted consistent with fundamental notions of due process."); *J.G. v. Medical Assistance and Health Services, 2019 WL* 2082108, Not Reported in Atl. Rptr. ((NJ Sup.Ct.)(same); *J.C. v. Division of Medical Assistance and Health Services*, 2019 WL 852181 (NJ Sup.Ct.)(same);

- State court decisions presuming jurisdiction, without specifically discussing mootness, over Medicaid appeals of deceased applicants. *See Estate of Gsellman v. Ohio Dept. of Job & Family Servs.*, 2012 WL 1207419 Not Reported in N.E.2d (2012) (Estate of deceased Medicaid applicant allowed to maintain appeal without discussion of mootness); *Appeal of Thi of New Hampshire at Derry, LLC d/b/a/ Pleasant Valley Nursing Home*, 2010 WL 11437243 (Assuming, without deciding, that a nursing home had standing to pursue and appeal of the denial of a deceased petitioner's long term care Medicaid application*); Estate of V.M. v. Division of Medical Assistance and Health Services*, 896 A.2d 503 (2006) (Appeal of fair hearing decision reviewed without discussion of mootness); *Wahl v. Morton County Social Services*, 574 N.W.2d 859 (1998) (considering, on the merits, denial of Medicaid

eligibility in appeal by deceased applicant's estate); *Grossi v. Division of Social Services of D.H.S.S. of State,* 1995 WL 562141 (Not Reported in A.2d) (1995) (considering post-humous appeal of deceased Medicaid applicant, noting that the request for fair hearing was the deceased applicant's "*right* under 42 CFR § 431.220."); *Dawson v. Ohio Dept. of Human Services*, 68 Ohio App.3d 262 (1990) (Executor of estate allowed to maintain court appeal of Medicaid denial, after death of applicant during fair hearing process); *S.R. v. Camden County Board of Social Services,* 2016 LW 2958383 (N.J. Adm.) *(May 13, 2016) (*representatives of the deceased petitioner authorized to appeal a Medicaid denial through the fair hearing process; denials were upheld on alternate grounds)*; G.S. v. Division of Medical Assistance & Health Services, 19999 WL 493551* (N.J. Adm.)(May 28, 1999) (same).

There is no known court or administrative decision (apart from the Board precedent under reconsideration) holding that a Medicaid *fair hearing* is moot – and assuming the existence of valid authorization of someone to pursue the appeal - due to the death of the applicant.[6] The

[6] It is recognized that the Board has consistently cited the Pickering v. Dept of PATH decision, an unpublished Vermont Supreme Court case, in finding appeals to be moot. However, Pickering – to the extent it may be cited as precedent - does not address whether a fair hearing decision may

requirements of federal law, recent caselaw, and provisions in the current rules compel the opposite result here. In this case, federal law and the Rules grant petitioner's son the authority to act on her behalf. Further, the nursing home has asserted that petitioner's son is liable for payment for the cost of petitioner's care for the period or time that is in dispute in petitioner's application for Medicaid. Therefore, this appeal remains an active dispute that is subject to the Board's fair hearing process.

While this decision varies from and overrules prior Board precedent, the analysis is based in substantial part on new caselaw as well as greater clarity in the Rules. And, nothing about this conclusion precludes the Board from reviewing individual Medicaid cases to determine whether representational status and an active dispute remain present.

For all of the above reasons, the Department's determinations that petitioner's son was without authority to represent her interests through the fair hearing appeal and that the case is moot are inconsistent with the Rules. As a hearing on the merits of the Department's denial of petitioner's application was held prior to the time that the

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be rendered moot in light of the essential requirements of the federal Medicaid statute. Whether a court appeal of a Medicaid-related decision becomes moot is a completely separate issue, and not relevant here.

mootness issue was raised, the case must be remanded to the hearing officer for a determination on the merits. *See* 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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