

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

*BACH-TUYET TRAN, et al., o/b/o* )  
*NHI LUU-TRAN,* )  
 )  
*Plaintiffs* )  
 )  
*v.* )  
 )  
*KEVIN CONCANNON, Commissioner,* )  
*Maine Department of Human Services,* )  
 )  
*Defendant* )

*Docket No. 99-227-B-H*

**RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS**

The defendant, sued in his official capacity as the commissioner of the Department of Human Services of the State of Maine, moves to dismiss this action arising out of the denial of payment under the Medicaid program to a provider of speech therapy services to Nhi Luu-Tran, the seven-year-old autistic daughter of the named plaintiffs. I recommend that the court grant the motion in part and deny it in part.

**I. Factual Background**

The amended complaint<sup>1</sup> includes the following relevant factual allegations. Nhi Luu-

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<sup>1</sup> The plaintiffs have moved for leave to file an amended complaint. Docket No. 5. The defendant opposes this motion, contending that the proposed amendments would prejudice the defendant by rendering inapplicable his argument that the court should abstain and would be futile because they do not address the defendant’s argument that the action is moot. Defendant’s Opposition to Plaintiff’s [sic] Motion for Leave to Amend and Supplement Complaint (Docket No. 9) at 2-3. As noted in the body of this recommended decision, there is no basis for application of (continued...)

Tran (“Nhi”) is a seven-year-old autistic girl who lives in Augusta, Maine. Amended Complaint (attached to Plaintiffs’ Motion and Incorporated Memorandum of Law for Leave to Amend and Supplement Complaint) (Docket No. 5), ¶ 5. Her parents, who bring this action on her behalf, were divorced in 1997. *Id.* When the parents were divorced, the Maine District Court ordered that her father enroll Nhi in his employer-sponsored insurance policy, HealthSource. *Id.* ¶ 12. HealthSource is a private managed care health plan. *Id.* Nhi has been enrolled in this plan at all relevant times. *Id.*

From at least 1997 Nhi has received benefits under the federal Medicaid program, which is jointly funded by the state and federal governments, as a participant in the “Katie Beckett” program, which provides coverage to certain severely disabled children who would otherwise be institutionalized. *Id.* ¶¶ 8, 11. Federal law requires the Maine Medicaid program to pay for services under the Early and Periodic Screening, Diagnostic and Treatment program, which include speech therapy services. *Id.* ¶ 9. In 1997 Nhi began to receive speech therapy services two times a week from Lynda J. Mazzola, a speech therapist who is a Medicaid provider and the only qualified provider of such services for children with autism in the geographic area where Nhi resides. *Id.* ¶ 13. Mazzola is not a participating provider in the HealthSource plan. *Id.* ¶ 14.

From 1997 until some time in 1999, Mazzola submitted claims to the Maine Medicaid program, which is administered by the Maine Department of Human Services (“DHS”), for the speech therapy services she provided to Nhi. *Id.* ¶¶ 6, 15. The claims were denied. *Id.* ¶ 15.

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<sup>1</sup>(...continued)  
the abstention doctrine in this case regardless of which version of the complaint is in effect. However, I conclude that the action is not moot as to one claim concerning a three-month break in the provision of speech therapy services. Accordingly, the amendment is not futile and the motion for leave to amend is granted.

Mazzola also submitted these claims to HealthSource, which also denied them. *Id.* ¶ 16. In June 1999 Mazzola stopped providing speech therapy to Nhi. *Id.* ¶ 17. The Maine Medicaid program did not provide notice of its denial of Mazzola’s claims to Nhi or her parents. *Id.* ¶ 18. As of the commencement of this action, Nhi had gone without speech therapy services for over three months. *Id.* ¶ 19. After this action was filed, DHS agreed to provide Medicaid payment for all of Mazzola’s past speech therapy services to Nhi and for such services on an ongoing basis. *Id.* ¶ 20.

On August 8, 1999 the plaintiffs’ attorney filed an appeal of the denial of coverage for Mazzola’s services with DHS’s Bureau of Medical Services. Defendant’s Motion to Dismiss (“Motion”) (Docket No. 2) at 3. This action was filed on September 24, 1999. Docket. On September 28, 1999 the plaintiffs’ attorney requested that the administrative hearing on the appeal be postponed until this court acted on the instant complaint, and that request was granted. Motion at 3. The plaintiffs withdrew their request for a hearing on the denial by letter dated November 5, 1999. Letter from Jack Comart to James Bivens, Exh. E to Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Motion to Dismiss (“Plaintiffs’ Opposition”) (Docket No. 6). The defendant took the position that the administrative appeal nonetheless remained an active proceeding unless and until the defendant chose to grant the plaintiffs’ request to withdraw it. Defendant’s Reply to Plaintiff’s [sic] Objection to Defendant’s Motion to Dismiss (“Defendant’s Reply”) (Docket No. 8) at 4-5. By letter dated December 30, 1999 counsel for the defendant informed the court that the defendant had formally adopted the recommendation of the hearing officer to whom the plaintiffs’ appeal had been assigned that the hearing be dismissed. Maine Department of Human Services, In the Matter of Nhi Luu Tran, Final Decision (dated December 29, 1999), copy attached to letter from Jane Gregory, Assistant Attorney General, to Deborah L. Whitney, deputy clerk

(Docket No. 13).

The defendant adds the following fact through the Affidavit of Christine Zukas-Lessard (“Zukas-Lessard Aff.”) (Docket No. 3): DHS agreed to pay for Mazzola’s services as soon as it was provided with a letter from HealthSource stating that long-term speech therapy is not a covered service under the plan in which Nhi is enrolled. *Id.*

The amended complaint includes four claims for relief. Count I alleges violation of the Medicaid Act and its implementing regulations by requiring Nhi to comply with the terms of the HealthSource plan as a condition of receiving Medicaid benefits. Amended Complaint ¶ 23. Count II alleges violation of 42 U.S.C. § 1396a(a)(25)(E) by “denying Medicaid enrolled children the opportunity to obtain . . . services from a Medicaid provided without regard to the liability of a third party to pay for services.” *Id.* ¶ 25. Count III alleges that the defendant’s failure to provide Nhi with notice that Mazzola’s claim for payment was being denied constitutes a violation of the due process clause of the Constitution and 42 U.S.C. § 1396a(a)(3). *Id.* ¶¶ 27-28. Count IV alleges a violation of 42 U.S.C. § 1983. *Id.* ¶ 29.

## **II. Discussion**

The defendant argued in his motion to dismiss that this court should abstain in deference to the administrative hearing requested within DHS by the plaintiffs under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), and that the plaintiffs’ claims have been rendered moot by DHS’s decision to pay for Mazzola’s services. The defendant continued to assert that abstention was appropriate after the plaintiffs notified DHS that they wished to withdraw their request for an administrative hearing. Defendant’s Reply at 4-5 (“even if the Hearings Unit had dismissed the appeal,” abstention would be appropriate). Despite the fact that the administrative proceeding before

DHS has now been formally concluded, the defendant still has not withdrawn this argument.

There simply is no longer any ongoing proceeding to which this court could defer by abstaining. The essence of the *Younger* doctrine is that there is an ongoing proceeding in another forum that could be adversely affected or even negated should the federal court proceed to judgment on the claim before it. *See Chaulk Servs., Inc. v Massachusetts Comm'n Against Discrimination*, 70 F.3d 1361, 1367-68 (1st Cir. 1995). Here, the defendant's argument that this court should abstain because the administrative hearing was pending before the state agency when this action was filed, even though the administrative proceeding is no longer pending, Reply Memorandum at 4-5, not only is not supported by the authority cited by the defendant but also would make it impossible for a claimant who withdraws her request for administrative review to receive any review at all of an allegedly unconstitutional act by a state agency. The law does not yet place such great weight on the choice, often without benefit of legal counsel, of a recipient of state-administered governmental benefits concerning what avenues of potential relief to pursue. *See generally Planned Parenthood League of Mass. v. Bellotti*, 868 F.2d 459, 467 (1st Cir. 1989) (*Younger* not applicable where there is no state-initiated proceeding to enjoin). *Younger* does not apply when the state proceeding in question is not ongoing. *E.g., Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 637-38 (1st Cir. 1996). The defendant's motion should be denied insofar as it relies on *Younger* abstention.

With respect to the issue of mootness, the plaintiffs do not deny that the defendant has now agreed to pay for all of the speech therapy services that Nhi has received and for such services on an ongoing basis. Nonetheless, they contend that their claims are appropriate for review by this court, because "there is [a] reasonable expectation that [certain] violation[s] will recur," Plaintiffs' Opposition at 7, and because the defendant's agreement to pay for all of Mazzola's services "has not

addressed Plaintiff's [sic] other claims at all," *id.*

A "case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The plaintiffs' first argument rests on the exception to the mootness doctrine for controversies that, though capable of repetition, may evade review. *See Democratic Party v. Wisconsin*, 450 U.S. 107, 115 n.13 (1981). To fall within this exception, "the challenged action [must be] in its duration too short to be fully litigated prior to its cessation or expiration," and there must be "a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). Assuming *arguendo* that the plaintiffs have met the first prong of this test, *see Granato v. Bane*, 74 F.3d 406, 411 (2d Cir. 1996) (issue evaded review where plaintiff's benefits restored soon after filing suit), the record before the court does not establish the second prong. The plaintiffs argue that the burden of proof on this prong rests with the defendant, citing *Arkansas Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 529 (8th Cir. 1993) (defendant's burden to demonstrate that there is no reasonable expectation that wrong will be repeated is "a heavy one"). However, in the First Circuit, the burden of proof on this prong remains with the plaintiff. *E.g., Oakville Dev. Corp. v. Federal Deposit Ins. Corp.*, 986 F.2d 611, 615 (1st Cir. 1993) (plaintiff held not to have shown "the slightest prospect of suffering this fate anew"); *State of Maine v. United States Dep't of Labor*, 770 F.2d 236, 238 (1st Cir. 1985) (holding that plaintiff had not "given us any reason to believe it likely" that defendant, having changed its procedure, would violate regulations in future).<sup>2</sup> The Supreme Court has recently reiterated that the

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<sup>2</sup> The plaintiffs also cite *Metro-Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc.*, 183 F.3d 10, 15 (1st Cir. 1999), to suggest that the First Circuit overruled this line of cases *sub silentio* when it  
(continued...)

capable-of-repetition doctrine “applies only in exceptional situations.” *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 978, 988 (1998) (placing burden on plaintiff to demonstrate both prongs of test).

The plaintiffs argue that the mere fact that the defendant has voluntarily stopped a challenged practice does not meet the standard, citing *Honig v. Doe*, 484 U.S. 305 (1988), *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283 (1982), and *Davis*. That assertion is accurate, as far as it goes, but each of these cases is distinguishable from the instant case.<sup>3</sup> In *Honig*, the plaintiff at issue was no longer a resident of the school district whose actions were challenged, but he remained eligible for a free public education and, due to the nature of his disability, might, given the state’s “insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct,” 484 U.S. at 319, reasonably be expected to suffer an action similar to that which he had challenged. Here, the plaintiff currently receives the services that are the subject of her claim, and the only indication in the record is that she will continue to do so. *Zukas-Lessard Aff.* ¶ 6. In

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<sup>2</sup>(...continued)

stated, citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), that “[t]he burden of demonstrating mootness is a ‘heavy one.’” However, the issue in *MGM* was whether the party against whom an injunction had been entered had shown that it was unlikely to engage in the enjoined activity in the future to the extent that the injunction should not have issued, and it is not at all clear in *Davis* to which party the “heavy burden” was assigned. 440 U.S. at 631-33. In any event, the cited case law is distinguishable from the present case, where the issue is whether there is a live controversy for this court to address.

<sup>3</sup> The plaintiffs also rely on cases in which future recurrence was much more likely than it is here, given the factual circumstances. Thus, in *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 17 (1st Cir. 1996), the issue was the constitutionality of a statute that would affect expenditures that the plaintiff, a political action committee, could choose to make in future elections. It is the very nature of elections, unlike speech therapy, that they are single, separate events that recur. The same is true of *Allende v. Schultz*, 845 F.2d 1111, 1115 (1st Cir. 1988), where the issue involved was the granting of visas by the federal government. A visa by its nature has a limited term and must be sought again every time the individual seeks to enter the United States. Here, the plaintiffs have shown no “probability of resumption” of the particular challenged action. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953).

*Mesquite*, the defendant city revised the ordinance at issue to remove the challenged language while the case was pending in the court of appeals. 455 U.S. at 288. Noting that the appeals court might have regarded the challenge as moot if it had been advised of that fact, the Supreme Court merely held that the court was not required to abandon the case but only that it could choose to continue to consider the issue because the city was not precluded from re-enacting the same language if the district court's injunction were vacated. *Id.* at 288-89. Nothing in *Mesquite* prevents this court from finding the current case moot. Finally, in *Davis*, the issue was again whether a party was entitled to relief from an injunction already entered by a district court, and the Supreme Court found that the matter had in fact become moot during the pendency of the litigation, in part because “[t]here has been no suggestion by any of the parties, nor is there any reason to believe, that petitioners would significantly alter their present hiring practices if the injunction were dissolved.” 440 U.S. at 632, 634.

Here, there is nothing in the record to support the plaintiffs' speculation that “the wrongs complained of will be repeated.” Plaintiffs' Objection at 8. The only wrong complained of, the only injury to Nhi, was the denial of payment to her provider of speech therapy services, leading to a three-month cessation of those services. It is the *same controversy* that must be shown to be reasonably likely to recur, *Murphy*, 455 U.S. at 482, and the only evidence before this court in this case is that the defendant is not likely to deny such payment to Nhi's provider in the future. The plaintiffs also suggest that the defendant may deny payment for other medical services that Nhi might need in the future, Plaintiffs' Objection at 8, but, again, that would not be the same controversy.

The only possible exception to this conclusion among the claims raised by the plaintiffs is the allegation in Count III that Nhi was deprived of her constitutional right to due process by the

defendant's failure to notify her that Mazzola's claims for payment were being denied, which denial led to Mazzola's decision to discontinue the speech therapy, causing Nhi to go without such services for three months. This claim may not be moot at all, because the defendant's payment for past services cannot remedy this three-month deprivation. The defendant addresses this claim directly in cursory fashion, asserting without citation to authority that "state and federal Medicaid law only provide that the Department give notice to a Medicaid recipient when the Department denies the recipient's claim for a Medicaid service," suggesting that all that the defendant did was to deny the claim of Mazzola, a provider, because she failed to follow proper Medicaid procedure. Defendant's Reply at 1, n.1. However, the substance of the defendant's argument is set forth in his initial motion, in which he discusses Mazzola's failure to comply with Medicaid regulations in seeking payment for the services she provided to Nhi. Motion at 3-4, 5, 7.

As the defendant contends, Count III fails to state a claim upon which relief may be granted. This very issue was presented in *Banks v. Secretary of Indiana Family & Soc. Servs. Admin.*, 997 F.2d 231 (7th Cir. 1993), where a widow brought suit on behalf of a putative class of Medicaid recipients charging that the state agency defendant's failure to provide her with timely written notice of its denial of a provider's claim for payment for services to her late husband violated, *inter alia*, federal Medicaid regulations and the constitutional right to due process, *id.* at 234-35, as does Count III of the amended complaint here. The Seventh Circuit held that no such claim exists under the regulations, *id.* at 244, or the Constitution, *id.* at 247. I find the Seventh Circuit's reasoning persuasive and accordingly recommend that the motion to dismiss be granted as to Count III as well.<sup>4</sup>

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<sup>4</sup> Count IV asserts a claim under 42 U.S.C. § 1983 that, both by its own terms and as a matter of law, can only be derivative of the other claims asserted in the action. Section 1983 "is not itself (continued...)"

Finally, the plaintiffs list seven “issues” that they contend remain to be resolved in this case that were “not addressed . . . at all” by the defendant’s decision to pay for Mazzola’s services. Plaintiffs’ Objection at 1-3, 6-7. The problem for the plaintiffs is that this is not a class action, and Nhi is receiving her speech therapy. Still, some of these issues, limited to a considerably narrower scope than that proposed by the plaintiffs, are not moot and do present a current controversy that the court may resolve. I will address each of the listed issues briefly below.

“1) Is it lawful for the Maine Medicaid program to consider as an available resource Nhi’s third party insurance for which the state is not paying?” Plaintiffs’ Objection at 2. The plaintiffs have alleged an injury to Nhi as a result of the defendant’s practice alleged in this question, if at all, only with respect to the three-month hiatus in her receipt of services. The issue is not implicated in any other context because Nhi is receiving her speech therapy services and all past services provided by Mazzola have been or will be paid for by the defendant. There are no other plaintiffs. To the extent that this question might be implicated in any future denial of payment for services to Nhi, no such denial has occurred or been shown in this record to be so likely that an actual case or controversy is presented to the court at this time. On the very limited basis of the three-month gap, the amended complaint appears to state a claim that raises this issue. Whether the break was solely Mazzola’s fault as contended by the defendant, Defendant’s Reply at 2, is a question not appropriately resolved in the context of a motion to dismiss.

“2) If it is lawful, what safeguards apply? Do federal Medicaid regulations . . . apply to the

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<sup>4</sup>(...continued)  
a source of substantive rights;” a plaintiff must show a violation of a right secured by federal law in order to succeed under section 1983. *Fournier v. Reardon*, 160 F.3d 754, 756 (1st Cir. 1998), quoting *Graham v. Connor*, 490 U.S. 386, 393 (1989). Accordingly, Count IV remains active only to the extent that any of the claims raised in Counts I-III survive this motion to dismiss.

[sic] Nhi's private HMO? Does the Maine Medicaid program have to consider extenuating circumstances . . .?" Plaintiffs' Objection at 2. This issue, as stated, arises out of the first and may not be considered in a context other than that of the three-month gap for the reasons discussed above.

"3). Is it lawful for the Maine Medicaid program to restrict Nhi's access to freely chose her own Medicaid provider, when she is also enrolled in a private HMO? Does it matter that Nhi is a child? Does it matter whether Nhi's enrollment in the private HMO was voluntary or involuntary?" Plaintiffs' Objection at 2. Again, Nhi's access to Mazzola, the only issue raised by the amended complaint, was possibly restricted only during the three-month gap in services. This issue is raised, if at all, only in this limited context and only by Count II of the amended complaint.

"4). Is the Maine Medicaid program obligated to pay the premiums for Nhi's enrollment in a private HMO?" Plaintiffs' Objection at 2. This issue does not present a live controversy, because the amended complaint does not allege any injury to Nhi from the defendant's failure to do so.

"5). What notices and information must Maine Medicaid provide to dual-eligible individuals, such as Nhi, regarding her rights and responsibilities?" Plaintiffs' Objection at 2. Nhi is the only beneficial plaintiff present in this action. Her only claim of injury due to lack of notice fails to state a claim upon which relief may be granted, as discussed above. This issue is not presented by this action.

"6). If Maine Medicaid denies a claim for payment submitted on behalf of a Maine Medicaid recipient who is also enrolled in a private HMO, must Maine Medicaid provide notice to the Medicaid recipient of the denial and provide an opportunity for a due process hearing?" Plaintiffs' Objection at 2. For Nhi, the answer to this question is "no." *Banks*, 977 F.2d at 247. There are no other plaintiffs in this action.

“7). When a child, such as the Plaintiff in this case, is enrolled in a private health care plan must Maine Medicaid pay first and then seek reimbursement from the third party, i.e. pay and chase, or may Maine Medicaid deny payment of claims until the third-party has acted?” Plaintiffs’ Objection at 2-3. Again, only the plaintiff’s situation is at issue in this proceeding. That being said, the amended complaint does allege that Nhi was injured by the three-month hiatus in speech therapy services. Amended Complaint ¶¶ 17, 19, 25. This issue, limited to Nhi, does appear to state a claim upon which relief might be granted. Accordingly, I recommend dismissal of Count II, which raises this claim, only as to issues other than the relatively narrow question whether the defendant harmed Nhi as set forth in the issues numbered 1-3 and 7 in the plaintiffs’ objection.

The plaintiffs restate these issues in a slightly different manner at pages 6-7 of their opposition, but no new issues are raised in that section of their memorandum and nothing further need be said about them.

### **III. Conclusion**

For the foregoing reasons, I recommend that the motion to dismiss be **GRANTED** as to Counts I and III of the amended complaint and **DENIED** as to Counts II and IV of the amended complaint, but only to the extent that those claims arise from the three-month break in the provision of speech therapy services to Nhi Luu-Tran by Lynda Mazzola.

### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,*

*within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

*Dated this 6th day of January, 2000.*

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*David M. Cohen  
United States Magistrate Judge*