

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION**

5:17-cv-00581-FL

MARCIA ELENA QUINTEROS)
HAWKINS, ALICIA FRANKLIN and)
VANESSA LACHOWSKI on behalf of)
themselves and all others similarly situated,)
)
Plaintiffs,)
)
v.)
)
MANDY COHEN, in her official capacity as)
Secretary of the North Carolina Department)
of Health and Human Services,)
)
Defendant.)

**DEFENDANT’S RESPONSE
IN OPPOSITION TO
PLAINTIFFS’ MOTION FOR
PRELIMINARY INJUNCTION**

NOW COMES DEFENDANT Mandy K. Cohen (hereinafter referred to as Secretary Cohen), by and through undersigned counsel, and files this Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction.

STATEMENT OF THE CASE

Defendant was served with the Complaint herein on December 1, 2017 and an Amended Complaint was filed on December 4, 2017. [DE 1, 9] On December 6, pursuant to a Motion for Extension of Time, to which Counsel for Plaintiffs consented, this Honorable Court issued an Order extending the time for Defendant to file a responsive pleading to the Amended Complaint until February 5, 2018. [Text Order, No Docket Entry #] On December 6, 2017, Plaintiffs filed a Corrected Amended Complaint which corrected the spelling of the name of one of the Plaintiffs. [DE 12] Plaintiffs allege that the suit is brought as a statewide class action pursuant to Fed. R. Civ. Pro. 23(a) and (b)(2). Plaintiffs raise four (4) separate causes of action: (1) Violation of the

Medicaid Act, 42 U.S.C. §§1396a(a)(3), (8), (10); (2) Americans with Disabilities Act (ADA); (3) Section 1557 of the Affordable Care Act; and (4) Constitutional Due Process.

On December 21, 2017, Plaintiffs filed a Motion for Class Certification. [DE 17] Plaintiffs seek to define the class as: all individuals whose Medicaid coverage was, is, or will be interrupted or terminated, effective January 1, 2014 or later, by Defendant Secretary of the North Carolina Department of Health and Human Services (DHHS), or any of her employees, contractors, agents, or assigns, without first making an individualized determination of ineligibility under all Medicaid eligibility categories. Plaintiffs allege that the aforementioned class should be defined into three (3) distinct subcategories involving the individuals whose Medicaid coverage was interrupted as set forth previously and: (1) without sending the beneficiary at least 10-day prior written notice of the termination of Medicaid that describes the specific reasons for the termination, the specific regulation supporting the termination, and the right to a pre-termination hearing; (2) without accommodating the beneficiary's disability during the eligibility redetermination process; and (3) without communicating during the redetermination process in the beneficiary's primary language where the beneficiary has limited English proficiency.

On Feb. 5, 2018 Defendant filed a Motion to Dismiss the within action, which Motion is still currently pending before this Honorable Court. [DE 32, 33] By Order dated Feb. 8, 2018, Plaintiffs have been granted an extension until March 12, 2018 in which to file a Response to Defendant's Motion to Dismiss. [DE 35] On Feb. 9, 2018, Defendant filed a Response in Opposition to Plaintiffs' Motion for Class Certification. [DE 36] On Feb. 23, 2018 Plaintiffs filed a Reply in Support of Plaintiffs' Motion for Class Certification. [DE 50]

SUMMARY OF THE FACTS

Defendant Mandy Cohen is the Secretary of the North Carolina Department of Health and Human Services. She is charged with overall responsibility for the administration of DHHS, which administers the Medicaid program in North Carolina. She is sued in her official capacity. DHHS is designated as the “single state agency” with direct responsibility for administration of the state Medicaid plan. See 42 U.S.C. § 1396a(a)(5); N.C. Gen. Stat. § 108A-54. DHHS is a public entity within the meaning of the Americans with Disabilities Act. DE 12, ¶ 11. DHHS is a state agency within the executive branch of the North Carolina government. DHHS has responsibility for administering the North Carolina State Plan for Medicaid Assistance, also known as the North Carolina Medicaid program (“Medicaid”). *Id.* Medicaid is “a federal program that subsidizes the States’ provision of medical services to . . . ‘individuals, whose income and resources are insufficient to meet the costs of necessary medical services.’ [42 U.S.C.A.] §1396-1.” *Armstrong v. Exceptional Child Ctr., Inc.*, ___ U.S. ___, ___, 135 S. Ct. 1378, 1382, 191 L. Ed. 2d 471, 476 (2015).

Longstanding Medicaid eligibility policy requires that the county caseworker extend eligibility for one month at a time when:

- The certification period is ending, requiring a recertification of eligibility and
- The caseworker is unable to complete the recertification, including appropriate notice to the recipient regarding ongoing eligibility or ineligibility.
- The extension is to allow time for the evaluation of ongoing eligibility and sending notice.

Affidavit of Carolyn McClanahan, Associate Director, Medicaid Eligibility Services, North Carolina Department of Health and Human Services. A copy of said Affidavit is attached hereto as Exhibit 1. *See also*, NC DHHS, Division of Medical Assistance, Aged, Blind and Disabled Manual, MA-2320 Redetermination of Eligibility, Sect. XX. C. A copy of the aforementioned section is attached hereto as Exhibit 2.

According to Ms. McClanahan, in 2014, processing of applications and re-certifications was significantly impacted by conversion to a new eligibility system, as well as implementation of the Affordable Care Act (ACA), which included receipt of applications from the Federally Facilitated Marketplace (FFM) as well as change in eligibility requirements for the Family & Children's Medicaid programs based on Modified Adjusted Gross Income (MAGI) methodology. Due to the receipt of tens of thousands of applications from the FFM within the first few months of 2014, and the aforementioned changes, counties fell behind in processing eligibility work. As a result, the state temporarily programmed NC FAST to automatically extend the certification periods for limited groups of MAGI programs to allow the counties to become current on the eligibility work. Counties were instructed to complete timely re-certifications for the other Medicaid programs and where coverage would not be available. For example, a women receiving Medicaid for Pregnant Women (MPW) cannot receive services under that program past the 60-day post-partum coverage.

As counties became current, automated extension of cases was stopped. The final extension was conducted in December, 2016. These extensions ended because the majority of county departments of social services were up to date on work and due to legitimate concerns of cost to the state in automatically extending individuals who may be ineligible. In the event that the 12 month recertification of a Medicaid beneficiary cannot be completed on time and if the county DSS fails to provide timely notice, Defendant requires the county DSS to manually extend the beneficiary's Medicaid coverage for one month while the recertification is completed. *See*, NC DHHS, Division of Medical Assistance, Aged, Blind and Disabled Manual, MA-2320 Redetermination of Eligibility, Sect. XX. C. *See also*, DMA Administrative Letter No: 05-17

(Extension of Eligibility at Recertification) dated Oct. 30, 2017, a copy of which is attached hereto as Exhibit 3.

The proposed class of Plaintiffs is represented in this action by four (4) individual named Plaintiffs. Plaintiff Marcia Elena Quinteros Hawkins (hereinafter “Hawkins”). Plaintiffs allege that Hawkins received a notice on June 30, 2018 indicating that her Medicaid coverage had been renewed through June 30, 2018 and that the notice was in English. [DE 12, ¶ 83] Plaintiffs further allege that Hawkins’ Medicaid coverage was terminated without notice on July 31, 2017 and that Hawkins was unaware of this until she tried to refill a prescription on Aug. 9, 2017. [DE 12, ¶¶ 85, 87-88] Plaintiffs then allege that on Sept. 20, 2017, after being told by DSS that her Medicaid would be reinstated, DSS sent Hawkins a notice that her Medicaid would again stop on Oct. 31, 2017. [DE 12, ¶ 90] On Oct. 26, 2017, Hawkins went to get a flu shot and could not, because she was told that she had no Medicaid coverage. [DE 12, ¶ 94.] Hawkins went back to Mecklenburg County DSS and was told that NCFASST had put a hold on her Medicaid for the month of October, “again suspending her Medicaid without any notice.” [DE 12, ¶ 95]

Hawkins had previously qualified for Medicaid as “a parent of a minor child with very low income and assets.” [DE 12, ¶ 81] On July 28, 2017, Hawkins’ youngest child turned 18 years of age. [DE 12, ¶ 84] Hawkins did not previously receive Medicaid coverage due to a disability and is no longer eligible to receive full Medicaid coverage as the caretaker of a minor child. Hawkins has been given Family Planning Medicaid coverage effective Nov. 1, 2017. A copy of the Notice to Hawkins is attached hereto as Exhibit 4. Upon information and belief, Mecklenburg County DSS has advised Hawkins that, in order to be considered for Medicaid coverage for disability, she must apply for that coverage.

Plaintiff Alicia Franklin (hereinafter “Franklin”) allegedly “suffers from a mild intellectual

disability.” [DE 12, ¶ 100] Franklin “received Social Security disability benefits until 2015 when her benefits stopped because she was able to return to work despite her disability.” [DE 12, ¶ 100] Plaintiffs allege that on Sept. 5, 2017, Mecklenburg County DSS mailed a request to Franklin asking for information for the annual redetermination of her eligibility. The form “was written in complex language Ms. Franklin could not understand.” [DE 12, ¶¶ 102-103] According to Plaintiffs, “Mecklenburg DSS was aware of Ms. Franklin’s disability but made no effort to telephone Ms. Franklin to explain the notice to her or to offer her assistance.” [DE 12, ¶ 104] Plaintiffs allege that Franklin went to DSS and talked to a caseworker. [DE 12, ¶ 106] Plaintiffs allege that on October 11, 2017, Mecklenburg County DSS sent written notice to Franklin that her Medicaid would stop on Oct. 31, 2017 due to her failure to provide the previously requested information.

Franklin has had her full Medicaid coverage reinstated and is eligible through Oct. 31, 2018. A copy of the Approval Notice dated Dec. 8, 2017 is attached hereto as Exhibit 5.

Plaintiff Vanessa Lachowski (hereinafter “Lachowski”) is allegedly totally disabled due to severe spina bifida. [DE 12, ¶ 115] On Dec. 31, 2016, Lachowski’s Medicaid coverage was allegedly terminated without notice. [DE 12, ¶ 120] Her Medicaid coverage was reinstated after approximately ten (10) days. [DE 12, ¶ 123] Lachowski was receiving full Medicaid coverage at the time that this lawsuit was filed and Lachowski currently has full Medicaid coverage, for which she is eligible through Dec. 31, 2018. A copy of the Approval Notice dated Jan. 12, 2018 is attached hereto as Exhibit 6.

Plaintiff Kyanna Shipp (hereinafter “Shipp”) allegedly suffers from severe epilepsy and needs medication to control her seizures. [DE 12, ¶ 130] Until Nov. 30, 2017, Shipp was enrolled in Medicaid based on being under 19 years old. [DE 12, ¶ 132] Plaintiffs allege that Shipp was

terminated from Medicaid coverage without notice on Nov. 30, 2017 because she turned 19 years old. [DE 12, ¶ 138] Shipp was receiving Medicaid coverage as a minor and never had a finding that she was disabled. Shipp was reinstated to full Medicaid coverage through February 28, 2018 and then her Medicaid coverage was transferred to Family Planning Coverage effective March 1, 2018. A copy of the Notice sent to Shipp's mother, Lakeisha R. O'Fair, is attached hereto as Exhibit 7. Upon information and belief, Shipp has not applied for Medicaid coverage based upon a disability.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary and drastic remedy." *Munaf v. Green*, 553 U.S. 674, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008). A movant must establish each of four elements before a preliminary injunction may issue: 1) he is likely to succeed on the merits, 2) he is likely to suffer irreparable harm in the absence of preliminary relief, 3) the balance of equities tips in his favor, and 4) an injunction is in the public interest. *Winter v. Natural Res. Def. Counsel, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The plaintiff "must" satisfy "[a]ll four requirements." *Cantley v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 771 F.3d 201, 207 (4th Cir. 2014). Further, the terms of any injunction must be "precis[e]" (*Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013)) and "properly tailored to the wrong" (*Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993)).

ARGUMENT

I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS, THEREFORE THE MOTION FOR PRELIMINARY INJUNCTION SHOULD BE DENIED

Defendant has filed a Motion to Dismiss the within action, which Motion is still currently pending before this Honorable Court. [DE 32, 33] By Order dated Feb. 8, 2018, Plaintiffs have been granted an extension until March 12, 2018 in which to file a Response to Defendant's Motion to Dismiss. [DE 35] In the interests of judicial economy, Defendant incorporates the arguments raised in her Memorandum of Law In Support of Motion to Dismiss, as though fully set forth at length herein, to support the argument that the Plaintiffs are not likely to succeed on the merits in this action.

II. THE BALANCE OF THE EQUITIES IN THIS MATTER TIPS IN FAVOR OF THE DEFENDANT SUCH THAT THE MOTION FOR PRELIMINARY INJUNCTION SHOULD BE DENIED.

In their Motion for Preliminary Injunction, the Plaintiffs ask this Honorable Court to

[p]reliminarily enjoin Defendant and her successors, agents, officers, servants, employees, attorneys and representatives and all persons acting in concert or participating with her, from terminating Medicaid benefits to the named plaintiffs and all others similarly situated until Defendant first determines ineligibility under all Medicaid categories, including Medicaid based on an alleged disability, and provides timely and adequate written notice and the opportunity for a fair hearing prior to the termination of Medicaid coverage.

[DE 37]

In balancing the equities in this case, it is critical to note that, despite how each named Plaintiff was at some point terminated from Medicaid coverage, they are all now eligible for and receiving some form of Medicaid coverage. As set forth above, Franklin and Lachowski are currently receiving full Medicaid coverage. As for Hawkins and Shipp, the county DSS properly

assessed whether they were eligible for any other Medicaid coverage and found that they were both eligible for Family Planning Services. This being the case, the injunctive relief requested by the Plaintiffs is not necessary for the named Plaintiffs.

To the extent that the Plaintiffs have alleged that thousands of Medicaid beneficiaries across the State are in danger of having their benefits terminated without notice, this is not a correct interpretation of the reports to which Plaintiffs cite. For example, in their Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, Plaintiffs allege that

For example, two NCFAST reports show that, as of September 21, 2017, 100 of 100 county DSSs had failed to complete eligibility reviews for a total of 30,595 Medicaid cases (21,328 MAGI plus 9,267 traditional) that were due to be terminated automatically by NC FAST on September 30, 2017. Feb. 9, 2018 Sea Decl. Exs. 5, 6. In each of these cases, the last day to mail timely notice of termination was September 20, the day before these reports were generated. 42 C.F.R. § 431.211. Two more NCFAST reports show that, as of October 5, 2017, review of 1,272 (840 MAGI plus 432 Traditional) of these cases due for review in September still had not been completed. Dec. 21, 2017 Sea Decl. Exs. 3-4. This means at least 1,272 families lost Medicaid coverage with no notice at all on September 30, 2017.

[DE 49, p. 8]

This is incorrect. Counties work through the month and continue to key, either approvals for ongoing coverage, or terminations when notice time frame runs out. The deadline for timely notices is usually around the second week of the month, and the caseworkers cannot terminate a case until the 10-day period has run. *See* Affidavit of Carolyn McClanahan. Moreover, counties send manual notices which are not reflected in NCFAST or in the cited report. That being the case, Plaintiffs' assertion presumes that every individual in every county whose recertification was not done in a timely manner, was terminated without notice. The reports simply do not provide that information.

The same goes for Plaintiffs' allegation that "there were still 540 cases where the recertification had been due in November 2017 but had not been completed as of December 22. Id. Every one of these 540 families lost Medicaid coverage on November 30, 2017 with no notice at all. Every one of these 540 families was still without Medicaid over three weeks later." [DE 49, p. 9] Again, that information is not in the cited report. The report does not indicate whether the families were terminated or received notice.

Plaintiffs are overstating the equities in favor of granting the requested preliminary injunction. The named Plaintiffs do not require the requested injunctive relief. The Defendant has a system in place wherein the county DSS offices are responsible for processing the recertifications and determining Medicaid eligibility in a timely manner. If the county DSS office is unable to do so, it is the county DSS' responsibility to extend the benefits until the recertification is complete. The system has worked to the extent that the named Plaintiffs have had their Medicaid coverage restored in some form.

Conversely, the requested preliminary injunction has the potential to do real harm to the State of North Carolina. Should automatic extensions be reinstated, there is the potential for numerous beneficiaries who are no longer eligible to receive Medicaid continuing to receive benefits. This would have the effect of depleting a finite pool of money to be spent providing Medicaid coverage to eligible beneficiaries throughout the State. Additionally, requiring the Defendant to institute automatic extensions of coverage in similar manner to that which was done when the NCTracks system first came online has the potential to be a disincentive to county DSS personnel to meet deadlines.

To the extent that Plaintiffs suggest that Medicaid beneficiaries who stand in the same position as Hawkins and Shipp, i.e. losing Medicaid coverage due to age and not disability, should

continue to receive full Medicaid coverage while the county DSS office determines eligibility under all Medicaid categories, including Medicaid based on an alleged disability, this presumes without evidence, that the county DSS offices are failing to consider eligibility under other Medicaid categories. Lachowski, Franklin and beneficiaries like them, who have Medicaid coverage due to disability and who are due for recertification, have already had their disability established. In North Carolina, the county DSS office determines an individual's eligibility for Medicaid. However, Disability Determination Services (DDS) is charged with determining whether an individual is disabled. *See*, NC DHHS, Division of Medical Assistance, Aged, Blind and Disabled Manual, MA-2525 Disability, Sect. II. E., a copy of which is attached hereto as Exhibit 8. If a Medicaid beneficiary's disability has not already been established, the county DSS must refer the matter to DDS for a disability determination. *See*, *Id.* Section III, A.1.b.

As set forth above, neither Hawkins nor Shipp had previously been determined to be disabled and were receiving Medicaid coverage due to other reasons (Hawkins for being the parent of a minor child and Shipp for being a minor under the age of 19). In order to be considered for Medicaid coverage due to disability, they must apply for said coverage and DDS must then make a disability determination. The county DSS cannot make an eligibility determination based on disability until the DDS determines that the individual is disabled. If Hawkins', Shipp's or any similarly situated Medicaid beneficiary's full Medicaid coverage is automatically extended while a disability determination is made, that will put the State in the position of providing full Medicaid coverage to individuals who are clearly not eligible. This is contrary to the law that Defendant is charged with administering.

Plaintiffs have failed to prove that the balance of the equities tip in their favor. The named Plaintiffs are all receiving some form of Medicaid coverage and do not require the requested relief.

Plaintiffs have also overstated how many Medicaid beneficiaries in the State are at risk of automatic terminations without notice. On the other hand, granting the requested relief puts the Defendant at risk of providing Medicaid coverage to ineligible individuals to the detriment of eligible Medicaid beneficiaries. As for beneficiaries for whom there has never been a determination of a disability, the requested relief puts the Defendant in the position of providing Medicaid coverage to individuals who are clearly ineligible due to age. In view of the foregoing, the Motion for Preliminary Injunction should be denied.

III. ALTERNATIVELY, SHOULD THIS HONORABLE COURT DETERMINE THAT A PRELIMINARY INJUNCTION IS NECESSARY, DEFENDANT REQUESTS ADDITIONAL TIME TO SUBMIT A PROPOSAL FOR PROVIDING THE REQUESTED RELIEF.

As set forth above, the terms of any injunction must be “precis[e]” (*Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013)) and “properly tailored to the wrong” (*Hayes v. N. State Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993)). The Plaintiffs are asking this Honorable Court to

[p]reliminarily enjoin Defendant and her successors, agents, officers, servants, employees, attorneys and representatives and all persons acting in concert or participating with her, from terminating Medicaid benefits to the named plaintiffs and all others similarly situated until Defendant first determines ineligibility under all Medicaid categories, including Medicaid based on an alleged disability, and provides timely and adequate written notice and the opportunity for a fair hearing prior to the termination of Medicaid coverage.

[DE 37]

This is a very broad request and there is potentially more than one way for the Defendant to comply, should this Honorable Court decide to order it. In that event, it is respectfully requested that the Defendant be given thirty (30) days from the date that this Honorable Court comes to its

decision, in which to submit a proposal for implementing the Court's order. Defendant must consider: the most efficient method for implementing the requested relief; the economic impact to the Medicaid program, the extent to which it needs to implement methods not previously used; the time frame necessary to implement the program (it is virtually impossible to have any change to the NCFAST system implemented immediately); and how any proposal would impact the county DSS offices. Plaintiffs would then have the opportunity to review the proposed plan and raise any objections to the Court.

Respectfully submitted this 6th day of March, 2018.

JOSH STEIN
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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to the following:

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This the 6th day of March, 2018.

s/Thomas J. Campbell
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Special Deputy Attorney General