

II. THE BALANCE OF EQUITIES FAVORS PLAINTIFFS.

In trying to tip the balance of equities in its favor, the agency first asserts that each named Plaintiff currently is “receiving some form of Medicaid coverage,” later claiming that the fact that “the named Plaintiffs have had their Medicaid coverage restored in some form” is evidence “[t]he system has worked to [some] extent.” Def.’s Resp. at 8, 10. This half-hearted defense ignores the following undisputed facts: 1) Three out of four of the named Plaintiffs’ Medicaid coverage was reinstated only with the help of their attorneys, including the filing of this lawsuit. Lachowski Decl. ¶¶ 9-10, Feb. 9, 2018 (ECF No. 44); Allison Decl. Exs. 2, 3, 4, 6 (ECF No. 39); Franklin Decl. ¶ 3 (ECF No. 20). 2) Plaintiffs Hawkins and Shipp have Medicaid coverage only for “family planning,” which covers none of the medications and other treatment they need for their disabling conditions. Hawkins Decl. ¶¶ 10, 15-16, Feb. 9, 2018 (ECF No. 43); Def.’s Resp. Ex. 7 (ECF No. 51). 3) All of the named Plaintiffs and thousands of class members remain at risk of losing their Medicaid again under the challenged policies and procedures, which Defendant concedes are unchanged. Def.’s Resp. at 3-4, 10, 11.

Defendant next contests the accuracy of the data contained in its own reports but provides no other data which it claims to be more accurate. Def.’s Resp. at 9-10. The agency correctly states that *caseworkers* have been instructed not to terminate a case until the 10-day period for advance notice has run, but never disputes that its *computer* always automatically terminates Medicaid without any notice at the end of the month the eligibility review is due if the caseworker has not acted in a timely manner. Def.’s Resp. at 9. Defendant also asserts that notices of termination sent manually by the county worker instead of through NC FAST may not be reflected in its reports, but this is possible only if the caseworker didn’t enter the termination into NC FAST. Sea Decl. Ex. 22 ¶¶ 2, 7, Dec. 21, 2017 (ECF No. 24-22). This seems unlikely given that the worker must

enter information into NC FAST in order to complete the eligibility review in the first place. Sea Decl. Ex. 7, Feb. 9, 2018 (ECF No. 38-7). Defendant makes no effort to show how many of these unusual cases exist. Def.'s Resp. at 9-10. Assuming the rare situations raised by Defendant that are not reflected in its reports account for ten percent of the cases reported as past due recertifications, this makes no material difference in the magnitude of Defendant's undisputed and ongoing violation of federal law.

Defendant also relies on its "longstanding" and repeated instructions to county DSS workers to override its computer on a case-by-case basis to prevent automatic Medicaid terminations without notice. Def.'s Resp. at 3, 4-5, 10. But, the evidence clearly demonstrates that relying on this "system" is not adequate to stop the illegal terminations. Nor does the state agency's attempt to blame its own county agents change Defendant's non-delegable duty to assure that its agents—and its computer programmers—comply with federal law. *See* Pls.' Mem. Supp. Prelim. Inj. at 4.

Defendant never disputes that, to comply with federal law, the agency must continue Medicaid coverage until the beneficiary is determined ineligible under all Medicaid categories and timely, adequate notice is sent. Pls.' Mem. Supp. Prelim. Inj. at 11-13, 16-21. Far from "presum[ing] without evidence" that Defendant is failing to determine ineligibility under all Medicaid categories before termination, Def.'s Resp. at 11, Plaintiffs provided the court with Defendant's written manual instructions, which prohibit DSSs from considering alleged disabilities during redetermination, as well as proof that two named plaintiffs (Hawkins and Shipp) with alleged disabilities were terminated without a disability determination. Sea Decl. Ex. 24 at 22, Dec. 21, 2017 (ECF No. 24-24); Hardee Decl. Ex. 2 (ECF No. 42-2); Allison Decl. Ex. 5 (ECF No. 39-5). Indeed, Defendant concedes that unless a person alleging disability has *already* been

determined disabled, the state agency requires, "based on age," termination of that person's Medicaid and that the terminated beneficiary must then reapply for Medicaid based on her alleged disability. Def.'s Resp. at 10-11. The fact that the county DSS must send the case to a state agency (DDS) to determine disability does not change Defendant's duty, as the federal Medicaid agency has made clear, to make that disability determination *before* Medicaid is terminated. Pls.' Mem. Supp. Prelim. Inj. at 16-17. Until that disability determination is made and the beneficiary is provided the opportunity for a pre-termination hearing to contest that decision, it is Defendant who is presuming without evidence that Ms. Hawkins, Ms. Shipp, and many others alleging disability but receiving Medicaid under a non-disability category are "clearly not eligible." Def.'s Resp. at 11.

Defendant also contends that issuance of the injunction would "be a disincentive" for county DSS personnel to timely process Medicaid eligibility reviews. Def.'s Resp. at 10. Further, Defendant admits it was the cost of continuing Medicaid to those "who may be ineligible" which led to the agency's decision in 2016 to turn off NC FAST programming that prevented some automatic computer-generated terminations. Def.'s Resp. at 4. The state agency's position thus appears to be that the only way it can incentivize its agents to timely process eligibility reviews is to terminate Medicaid coverage without notice to persons who have not been determined ineligible. Defendant never disputes that this cynical position violates federal law and is causing irreparable harm to Medicaid beneficiaries. Moreover, Defendant's use of a process that illegally terminates Medicaid coverage in order to control costs ignores the other tools the agency has to correct DSS delays, including its powers to temporarily take over management of a county DSS or to recoup from the county's coffers any Medicaid payments made to ineligible persons due to DSS error. N.C. Gen. Stat. § 108A-70.50, 108A-25.1A.

Defendant nonetheless complains of the potential cost to the state and even speculates that harm to other beneficiaries may result if persons who “may be ineligible” continue to receive Medicaid. Def.’s Resp. at 4, 10. There are at least four additional problems with this defense. First, whether an eligibility redetermination is performed in a timely manner is entirely within the control of the Medicaid agency and its county agents. Defendant thus has the power to avoid the very cost it fears. Second, to the extent there will be some cost if the injunction is issued, a factor the agency makes no effort to quantify, this is simply the expense of complying with federal law, which the state undertook when it chose to participate in the Medicaid program. Third, as of December 2017, the N.C. Medicaid program is operating 3.5% *under* budget, so the agency is not at immediate risk of exhausting its funding. Division of Medical Assistance, Medicaid Budget Update (Dec. 8, 2017), https://files.nc.gov/ncdma/documents/GetInvolved/MCAC/MCAC_Budget%20_Update_2017_12_08.pdf. Fourth, numerous courts have held that the balance of equities does not tip to the defendant due to the cost of complying with federal law, particularly when the loss of essential health coverage to tens of thousands of indigent persons is on the other side of the scale. *See* Pls.’ Mem. Supp. Prelim. Inj. at 24. Defendant cites no authority to the contrary.

III. THE COURT SHOULD NOT DELAY ISSUANCE OF AN INJUNCTION, BUT ITS ORDER SHOULD BE PRECISE.

Given the ongoing, undisputed, irreparable harm being suffered by the Plaintiff class, issuance of a preliminary injunction should not be delayed. If an injunction is issued, the operational details of how to bring the agency into compliance with the court’s order would be up to the Defendant, at least as an initial matter. If Plaintiffs are not satisfied with Defendant’s compliance with the injunction, they would be able to move for enforcement of the court’s order.

Nor has the agency shown why it needs more time before being ordered to cease its illegal conduct. Defendant clearly has the ability to promptly program NC FAST to stop automatically terminating Medicaid when eligibility redeterminations have not been completed, because the agency did so until December 2016 for some Medicaid categories and was even able to adjust which counties that programming applied to from month to month. Def.'s Resp. at 4. Defendant also plainly has the ability to determine disability for persons alleging disability and to conduct hearings on the issue of disability because the agency already does all of this for persons who apply for Medicaid based on disability. Def.'s Resp. at 11. As for the other factors listed by Defendant in its request for more time (economic impact, most efficient method, impact on DSSs), those are for the agency to determine and are not relevant to the court's decision. Plaintiffs therefore request that the court issue its ruling without delay.

Plaintiffs agree with Defendant, however, that the terms of the injunction should be more precise than as worded in their motion, which did not specify clearly that automatic Medicaid terminations by Defendant's computer NC FAST must be stopped or that Defendant must make inquiry of beneficiaries about alleged disabilities if necessary to renew their Medicaid coverage. Plaintiffs therefore request that Defendant be ordered to: 1) immediately cease automatic computer-generated terminations of Medicaid without first sending timely, adequate notice; 2) immediately cease terminations of Medicaid where the beneficiary has not been determined ineligible under all Medicaid categories, including categories based on disability if disability is alleged during the redetermination process upon inquiry by Defendant; 3) provide the right to a *de novo* pre-termination hearing, including on the issue of disability.

CONCLUSION

For the reasons stated above and in their initial brief, Plaintiffs respectfully request that the court issue a decision granting Plaintiffs' motion and ordering Defendant to: 1) immediately cease automatic computer-generated terminations of Medicaid without first sending timely, adequate notice; 2) immediately cease terminations of Medicaid when the beneficiary has not been determined ineligible under all Medicaid categories, including categories based on disability if disability is alleged during the redetermination process upon inquiry by Defendant; 3) provide the right to a *de novo* pre-termination hearing, including on the issue of disability. Plaintiffs also request that the bond be set at a nominal amount.

Dated: March 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this day, I served a true copy of the Plaintiffs' Reply in Support of Motion for Preliminary Injunction upon the Defendant's attorney via electronic means through the CM/ECF system to:

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This the 14th day of March 2018.

/s/ Douglas Stuart Sea