UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 5:11-cv-00273-BO

HENRY PASHBY, ANNIE BAXLEY, MARGARET DREW, DEBORAH FORD, MELISSA GABIJAN, MICHAEL HUTTER, JAMES MOORE, LUCRETIA MOORE, AYLEAH PHILLIPS, ALICE SHROPSHIRE, SANDY SPLAWN, ROBERT JONES, REBECCA PETTIGREW, Plaintiffs, v. ALDONA WOS, in her official capacity as Secretary of the North Carolina Department of Health and Human Services, Defendant.	**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

NOW COMES Defendant, Aldona Wos, in her official capacity as Secretary of the North Carolina Department of Health and Human Services ("Department "), by and through Lisa Corbett, Amar Majmundar, Iain Stauffer, Special Deputies Attorney General, and Olga E. Vysotskaya de Brito, Assistant Attorney General, and hereby submits this Defendant's Memorandum of Law in Support of Motion to Dismiss.

STATEMENT OF THE CASE

Plaintiffs filed a complaint and motion for preliminary injunction on 31 May 2011 to prohibit Defendant from implementing amended eligibility requirements for optional in-home

Medicaid services known as personal care services ("PCS"). [DE 1] Plaintiffs filed a motion for class certification on 6 June 2011 [DE 25], and an amended complaint on 11 July 2011. [DE 44] Plaintiffs alleged that a different eligibility criteria for receiving PCS for Medicaid recipients living in their own home as compared to recipients living in an Adult Care Home ("ACH") constitutes a violation of the Medicaid Act, the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act, and the Social Security Act. Plaintiffs further contended that the notices sent to them were insufficient under the Fourteenth Amendment to the United States Constitution.

This Court entered an Order on 8 December 2011 to grant Plaintiffs' motion to certify class, motion for leave to file declarations and motion for preliminary injunction. [DE 88] On 9 December 2011, Defendant filed a notice of appeal to the U.S. Court of Appeals for the Fourth Circuit and an amended notice of appeal on December 12, 2011. [DE 90, 91] On 5 March 2013, the U.S. Court of Appeals for the Fourth Circuit issued a published opinion, affirming this Court's class certification and grant of a preliminary injunction, and remanding the matter for further proceedings. [DE 117] Defendant timely filed a petition for rehearing and rehearing *en banc*, which was denied on 2 April 2013. [DE 120] Formal mandate of the U.S. Court of Appeals for the Fourth Circuit issued on 10 April 2013. [DE 121] Plaintiffs filed a motion to clarify this Court's 8 December 2011 Order [DE 88] regarding the criteria for preliminary injunction and security. Defendant now respectfully moves to dismiss Plaintiffs' action for mootness, and submits this memorandum of law in support of the motion.

STATEMENT OF THE FACTS

The Medicaid program, established in 1965 by Title XIX of the Social Security Act, 42

U.S.C. §§1396 *et seq.*, is a cooperative federal-state program that provides federal financial assistance to participating states for the furnishment of medical assistance "as far as practicable under the conditions in such State." 42 U.S.C. §1396-1. In North Carolina, the Department of Health and Human Services ("Department") is the single state agency designated to administer the State's Medicaid program. 42 U.S.C. §1396a(a)(5); N.C. Gen. Stat. §108A-54. For a state to qualify for federal funds, the Centers for Medicare and Medicaid Services ("CMS") must approve the State's Medicaid Plan and State Plan amendments ("SPA"). Before approving a plan or amendment, CMS undertakes a review to ensure compliance with any applicable federal requirements. See 42 U.S.C. §1316(a)(1),(b); §1396a(a),(b); 42 C.F.R. §430.10 *et seq*.

Certain services are mandated for all state Medicaid Plans, while other services may be offered at the discretion of the state. 42 U.S.C. §§1396a(a)(10)(A), 1396a(a)(24). North Carolina's State Plan includes coverage for the optional service, PCS, which pays for an aide to provide a recipient assistance with defined activities of daily living ("ADLs") such as bathing, toileting, dressing, eating and mobility. "The [Medicaid] Act gives the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage." Alexander v. Choate, 469 U.S. 287, 303 (1985). Alexander manifestly contemplates the substantial discretion the state possesses with regard to the provision of optional Medicaid services. "Although serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage, it is hardly inconsistent with the objectives of the Act for a State to refuse to fund unnecessary -- though perhaps desirable -- medical services." Beal v. Doe, 432 U.S. 438, 444-45 (1977). States may place appropriate limits on available services based on "utilization control procedures." 42 C.F.R. §440.230(d).

In response to concerns about abuse of the PCS program as well as the fiscal consequences of the national economic crisis, in 2010 the North Carolina General Assembly ("General Assembly") mandated that the Department "no longer provide services under PCS" and to instead implement a new service for recipients in the community, referred to as In-Home Care for Adults ("IHCA"), which featured stricter eligibility criteria. The General Assembly did not intend IHCA to be applicable to recipients in ACHs.

The Department began to implement the SPA immediately. Specifically, the Department promulgated Clinical Coverage Policy No. 3E ("Policy 3E")[1], which included the eligibility criteria set forth in the SPA. Policy 3E took effect on 1 June 2011, and did not apply to PCS provided to those in ACHs. As part of the implementation of Policy 3E, a contractor for the Department notified approximately 2,405 recipients that they did not meet the IHCA criteria. These notices included the statement of the decision, instructions on how to file a request for a hearing, and an appeal form.

All of the named Plaintiffs to this action were determined to be ineligible for IHCA services, and were notified of that determination. The named Plaintiffs subsequently filed requests for a fair hearing with the N.C. Office of Administrative Hearings ("OAH") to contest the termination of their PCS. Pending those appeals, each of the named Plaintiffs received maintenance of service ("MOS") of their PCS. Thereafter, ten of the named Plaintiffs dismissed their State appeals after they were approved for IHCA hours, while one named Plaintiff voluntarily dismissed his appeal for other reasons.

[1] "Clinical Care Policy No. 3E", NCDHHS website, http://www.ncdhhs.gov/dma/mp/3E.pdf.

Meanwhile, the General Assembly enacted "[t]he Current Operations and Capital Improvements Appropriations Act of 2012" to specify that all adult Medicaid recipients must satisfy the same eligibility requirements to receive PCS irrespective of their place of residence. 2012 N.C. Sess. Laws 142.[2] On 30 November 2012, CMS approved the Departments's SPA that set forth the same PCS functional eligibility criteria for all Medicaid recipients 21 years or older irrespective of their residential setting. ("SPA 12-013") In its approval letter, CMS concluded that the new policy satisfied comparability and sufficiency requirements under federal law.[3]

Policy 3E was subsequently terminated on 31 December 2012. In conformance with CMS approval, the Department promulgated Clinical Coverage Policy No. 3L ("Policy 3L")[4], which implemented the uniform PCS eligibility requirements for Medicaid recipients residing in an ACH and as well as those in in-home settings. Policy 3L went into effect on 1 January 2013, and to date, remains in effect. Since the termination of Policy 3E, and its allegedly attendant lack of comparability between Medicaid recipients, Plaintiffs' cause of action has been rendered moot in all respects, and should be dismissed.

ARGUMENT

The doctrine of mootness arises from the requirement that there must be an actual and justiciable controversy throughout litigation in order for a federal court to exercise its jurisdiction over the matter. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937). Article III of the

[2]"SL 2012-142", North Carolina General Assembly website, http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H950v7.pdf.

[3]"CMS Approval Letter" and "SPA 12-013, NCDHHS website, http://www.ncdhhs.gov/dma/pcs/NC12013_Approval_Letter_179.pdf.

[4]"Clinical Care Policy No. 3L", NCDHHS website, http://www.ncdhhs.gov/dma/mp/3L.pdf.

Constitution limits the jurisdiction of the federal courts to the consideration of "cases" and "controversies." U.S. Const. art. III, §2. The "irreducible constitutional minimum of standing," rooted in Article III's case-or-controversy requirement, consists of three elements: (1) an "injury in fact," by which is meant "an invasion of a legally protected interest"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood that "the injury will be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). "The rule in federal cases is that an actual controversy must be extant at all stages of review." Id., (quoting Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974)) (emphasis added).

"Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions[;]' our impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" North Carolina v. Rice, 404 U.S. 244, 246 (1971) (internal citations omitted). As with any defect involving subject matter jurisdiction, mootness may be raised by the parties at any time, or reviewed *sua sponte* by the Court. Id.; In re Kurtzman, 194 F.3d 54, 58 (2d Cir 1999).

Events occurring during the litigation of a matter can moot the case. Simmons v. United Mortg. & Loan Inv., LLC, 634 F3rd 754, 763 (4th Cir. 2011). Even if there is an actual and justiciable controversy at the commencement of litigation, when the controversy ceases to exist, the federal court must dismiss the action for lack of subject matter jurisdiction. See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937); Pashby v. Delia, 709 F.3d 307 (4th Cir. N.C. 2013). The burden of establishing mootness is on the moving party. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979).

I. Plaintiffs' Cause Of Action Was Rendered Moot And the Controversy Ceased When the Challenged Policy 3E Was Terminated.

The instant action challenged the validity of Policy 3E and sought an injunction to prohibit the Department from implementing Policy 3E. As a consequence, Plaintiffs' Amended Complaint limited class certification to the North Carolina Medicaid recipients allegedly negatively affected by the PCS policies contained in Policy 3E. [DE 44 at ¶ 14, p 4]. The U.S. Court of Appeals for the Fourth Circuit affirmed this Court's decision to grant Plaintiffs' motion for class certification, and specifically defined the applicable class as:

> [A]ll current or future North Carolina Medicaid recipients age 21 or older who have, or will have, coverage of PCS denied, delayed, interrupted, terminated, or reduced by Defendant directly or through his agents or assigns as a result of the new eligibility requirements for in-home PCS and unlawful policies *contained in IHCA Policy 3E*.

Pashby v. Delia, 709 F.3d 307, 315 (4th Cir. N.C. 2013)(emphasis added). According to the Fourth Circuit, Plaintiffs' class definition is predicated exclusively upon the Department's PCS determinations made pursuant to Policy 3E. With the elimination of that policy, the binding and defined class certification related to those individuals affected by the "eligibility requirements for in-home PCS and unlawful policies contained in IHCA Policy 3E" no longer features any active injury. Absent a continuing harm to a class that is predicated upon the allegedly harmful application of Policy 3E, Plaintiffs' complained of damages have ceased to exist, and their challenge to the implementation of Policy 3E has been rendered moot. Medicaid beneficiaries are no longer subject to the eligibility assessments under terminated Policy 3E, and are to be reassessed for PCS eligibility under the comparable criteria set out in Policy 3L. Given the class definition, there exists no actual or justiciable case or controversy between the parties.

Moreover, Plaintiffs' class action now also fails as their stated causes of action and prayers for relief no longer present a live controversy. The U.S. Court of Appeals for the Fourth Circuit succinctly described Plaintiffs' substantive arguments in three parts:

> (1) *IHCA Policy 3E violates the ADA and section 501[sic] of the Rehabilitation Act* because it is easier to qualify for ACH PCS than it is to qualify for in-home PCS, which effectively relegates individuals who require PCS to ACHs; (2) *IHCA Policy 3E violates the Social Security Act's comparability requirement* by treating individuals differently even though they have the same level of need; and (3) the termination notices that the PCS Recipients received did not comport with the requirements of due process.[5]

Id. at 321. (emphasis added). Accordingly, the thrust of Plaintiffs' action against the Department is the alleged deficiency in comparability of eligibility criteria for services for PCS recipients residing in-home and for those residing in an ACH. Indeed, Plaintiffs' most recent motion to clarify the order granting preliminary injunction, seeks an order directing Defendant to:

- Implement portions of Clinical Policy 3E unrelated to the number of ADLs for in-home PCS;
- Reinstate in-home PCS and reassess class members who were terminated under Policy 3E;
- Reassess and issue new decisions to class members, whose PCS applications were denied under Policy 3E.

[DE 122 at pp 2-3]. As with the class certification, the relief Plaintiffs seek is founded upon the now obsolete and inapplicable provisions of Policy 3E. Again, the North Carolina General

[5] The U.S. Court of Appeals for the Fourth Circuit concluded that the Department letters terminating PCS comported with the due process requirements of the Fourteenth Amendment to the United States Constitution, and that the District Court abused its discretion in finding that the PCS recipient were likely to succeed on their due process claim. Pashby v. Delia, 709 F.3d 307 (4th Cir. N.C. 2013).

Assembly passed Session Law 2012-142 to require that all adult Medicaid recipients be subjected to the same eligibility criteria for PCS, irrespective of the place of residence. The Department terminated Policy 3E and implemented Policy 3L, which makes PCS services available to all adult PCS recipients (living in-home or in an ACH) on the basis of uniform functional eligibility criteria. The enactment of a new statute renders challenges to an old statute moot, and such challenges shall be dismissed for lack of jurisdiction. Maryland Highways Contractors Ass'n v. Maryland, 933 F.2d 1246, 1249-1250 (4th Cir. Md. 1991). Likewise, the repeal or amendment of a statute or ordinance may moot a challenge even where re-enactment of the statute at issue is within the power of the legislature. American Legion Post 7 v. City of Durham, 239 F.3d 601, 606 (4th Cir. N.C. 2001) (holding that Durham's repeal of the challenged ordinance moots claims based on that ordinance, when re-enactment of the ordinance was unlikely) (internal citations omitted); Aiona v. Judiciary of Hawaii, 17 F.3d 1244, 1248 (9th Cir 1994) (claims regarding the constitutionality of Hawaii's license revocation provisions were moot, when revocation of licenses was rescinded by the agency administratively during the pendency of the litigation); see Lewis v. Continental Bank Corp., 494 U.S. 472, 478 (1990) (banking issues represented by applicant are mooted by the subsequent amendment of the law).

The instant controversy was derived from the alleged invalidity of Policy 3E, and has been resolved by the termination of Policy 3E during the pendency of this action. Moreover, there exists neither an indication nor evidence that the Department would simply reinstate the challenged Policy 3E as the Department operates under the General Assembly's legislative constraints and CMS' SPA approval guidance, as discussed supra. As our State Legislature and

the Department have discontinued the challenged policy, Plaintiffs' action against Defendant lacks a live controversy, and should be dismissed as moot for lack of subject matter jurisdiction.

Plaintiffs have informed the Defendant that they will now attempt to draft an amended complaint as a challenge to the validity of Policy 3L. However, the present action has neither challenged nor contemplated Policy 3L in any way, either before this Court or before the Fourth Circuit Court of Appeals. Despite the nature of Plaintiffs' potential new contentions, it is manifest that Policy 3L resolves the exact comparability issues for which Plaintiffs have sought their injunction. The U.S. Court of Appeals for the Fourth Circuit concluded that "[t]he North Carolina General Assembly took preliminary steps to assuage the CMS's concerns when it passed Session Law 2012-142, which specifies that Medicaid recipients must satisfy the same requirements to receive PCS regardless of whether they reside at home or in an ACH." Pashby v. Delia, 709 F.3d 307, 315 (4th Cir. N.C. 2013). CMS reviewed and approved SPA 12-013, and specifically found that the new eligibility criteria satisfy the comparability and sufficiency requirements of 42 C.F.R. § 440.240 and 42 C.F.R. § 440.230. These new eligibility criteria and Policy 3L both went into effect on January 1, 2013. There is no evidence that the Departments is likely to reenact policy 3E.

Any attempt by Plaintiffs to seek this Court's sanction to modify their factual allegations, causes of actions, class definitions and prayers for relief in order to confer subject matter jurisdiction is an explicit concession that the allegations and factual underpinnings of their complaint have been rendered moot and obviated by the implementation of Policy 3L. Moreover, given the fact that such an attempt by Plaintiffs is emblematic of the mootness of their action, any potential motion to amend would be unfairly prejudicial to Defendant and should not be allowed

for purpose of conferring jurisdiction. "[C]ourts look disfavorably on motions to amend brought for the purpose of circumventing dispositive motions[;]" and "cannot allow Plaintiff to amend simply to defeat Defendant's motion to dismiss." Googerdy v. N.C. Agric. & Tech. State Univ., 386 F. Supp. 2d 618, 623 (M.D.N.C. 2005) (internal citations omitted). "Where leave to amend is required, an amended complaint cannot be operative until that leave has been granted. Simply put, in federal court, there is simply no such thing as 'contingent' subject matter jurisdiction." Bottom v. Bailey, 2013 U.S. Dist. LEXIS 14666, 9-10 (W.D.N.C. Feb. 4, 2013) (quoting McDonough v. UGL UNICCO, 766 F.Supp.2d 544, 546 (E.D.Pa. 2011)). Any attempt by Plaintiffs to add any allegations and causes of action arising from Department policies, other than Policy 3E, should be accomplished, if necessary, through a filing of a new cause of action that contemplates a new class certification and new factual and legal theories. In the interim, Plaintiffs' action based on alleged illegality of Policy 3E is moot and should be dismissed with prejudice by this Court for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, Defendant asks that the Plaintiffs' Amended Complaint be dismissed with prejudice as moot.

Respectfully submitted this the 26th day of April, 2013.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this day, April 26, 2013, I electronically filed the forgoing **DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: John R. Rittelmeyer, Douglas S. Sea, Sarah Somers, Elizabeth Edwards, Martha J. Perkins, Jennifer L. Bills, attorneys for Plaintiffs, and I hereby certify that I have mailed the document to the following non CM/ECF participates: none.

This the 26th day of April, 2013.

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