UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
Western Division
Civ. No. 5:11-cv-00273-BO

HENRY PASHBY, *et al*, individually and on behalf of all others similarly situated,	)
Plaintiffs	)
v.	)
ALDONA WOS, Secretary, North Carolina Department of Health and Human Services, in his official capacity,	)
Defendant.	)

MEMORANDUM IN SUPPORT OF MOTION TO AMEND CLASS DEFINITION AND TO PROVIDE NOTICE TO THE CLASS

Plaintiffs filed this civil action on May 31, 2011 seeking to enjoin changes in the N.C. Medicaid Personal Care Services (PCS) program under Clinical Policy 3E, which took effect on June 1, 2011. On December 8, 2011, this Court entered an Order (DE 88) granting Plaintiffs' motions for class certification and for a preliminary injunction. The certified class was defined as:

> all 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 ICHA Policy 3E.

December 8, 2011 Order at 15.

On March 6, 2012, the Fourth Circuit Court of Appeals granted Defendant's Motion for a Stay of the December 8, 2011 Order. Pursuant to the Stay, Defendant resumed applying Policy 3E to deny and terminate in-home PCS to class members in March 2012 and

continued to do so through December 31, 2012. Sea Dec., Exs. U, V. On March 5, 2013, the Court of Appeals issued an opinion (DE 117) affirming the relief granted in this Court's December 8, 2011 Order but instructing the District Court to clarify its Order and address the issue of security.

ARGUMENT

I. CHANGES IN DEFENDANT'S POLICIES AND PRACTICES REQUIRE A MINOR MODIFICATION OF THE CLASS DEFINITION.

Plaintiffs have moved to amend and supplement their complaint as a result of events occurring since the complaint was last amended on July 11, 2011. In their proposed amended and supplemental complaint, the definition of the class has been modified to reflect changes in Defendants' policies and practices since July 2011.

In 2012 the N.C. General Assembly enacted new legislation requiring the N.C. Department of Health and Human Services (DHHS) to change the PCS program to make the eligibility requirements uniform across all settings effective Jan 1, 2013. N.C. Session Laws 2012-142§ 10.9F.(c) (Attachment A). Effective January 1, 2013, Defendant issued Clinical Policy 3L, which purported to make eligibility requirements for Medicaid coverage of PCS uniform across all settings. Sea Dec. Ex. A. However, Defendant's implementation of Policy 3L has not been uniform. Defendant continues to favor the approval or continuation of PCS in Adult Care Homes (ACHs) over PCS provided in the homes of Medicaid recipients with comparable needs. As the amended complaint alleges and as the attached evidence demonstrates, the assessments of the need for PCS by Defendant's agent, the Carolinas Center for Medical Excellence (CCME), for those living in institutional adult care homes (ACHs) varies significantly from the assessment of those living in their homes. Differences include the following:

1. Clinical Policy 3L requires denial of PCS when a family member or other informal caregiver is ”willing, able, and available” on a regular basis to provide the care needed. Sea Dec. Ex. A, p.3. However, the in-home PCS assessment form does not ask whether a family member or other informal caregiver is “willing” or “able” to provide the care that is needed, only whether the family member or other caregiver is “available.” Hutter Dec. Ex. A, p. 2. *See also* Sea Dec. Ex. M. In contrast, the ACH assessment form and instructions make no inquiry at all as to this issue. Sea Dec. Ex. N. This is despite the fact that DHHS specifically anticipated that family members and other informal caregivers could provide care in ACHs. Sea Dec. Ex. O.

2. Clinical Policy 3L states that coverage for PCS is available only for “unmet needs with qualifying ADLs.” Sea Dec. Ex. A, p.4. In practice, however, DHHS treats assistance with meal preparation as a qualifying ADL for PCS in an ACH in all cases without inquiry into whether the resident is able to prepare his or her own meals. Sea Dec. Ex. R. Moreover, DHHS counts meal preparation alone as a qualifying ADL in an ACH despite the fact that the need is not “unmet” in ACH cases. *Id.* This is because ACH ‘s must provide meal preparation based on non-Medicaid funding they receive for room and board services. 10A NCAC . 13F .0904 (Attachment C). Thus, ACH residents by definition have no unmet need for meal preparation requiring Medicaid PCS. These practices plainly discriminate against applicants for in-home PCS whose eligibility for PCS is assessed based on their actual unmet need for Medicaid-funded assistance with meal preparation. Hutter Dec. Ex. A, p. 7.

3. The assessment form and procedures for ACH PCS require review of the individual’s medical records and requires the reviewer to list the records that were reviewed. Sea Dec. Exs. L, M, N, p.12. The in-home assessment form does not provide for any review

of medical records. Hutter Dec. Ex. A. In practice, in-home assessments do not include a review of medical records. Hutter, Percer, Pettigrew, Drew Decs.

4. The ACH staff to be providing PCS are provided advance written notice of the date and time of the assessment for PCS and are invited to be present and interviewed. Sea Dec. Exs. D, p.4, L, M, N, pp. 1, 12. None of this generally occurs for in-home PCS assessments. Hutter, Percer, Pettigrew, Drew Decs.

5. Both the referral form and the assessment form for ACH PCS asks whether the resident is at risk of falls, malnutrition, skin breakdown, or medication noncompliance in the absence of care. Sea Dec. Exs. E, I, N, p. 2. The in-home PCS referral form and assessment form do not make these inquiries. Sea Dec. Exs. G, H; Hutter Dec. Ex. A.

6. DHHS and its agent CCME appear to have been very liberal in interpreting Policy 3L in favor of ACH residents' eligibility for PCS both during the assessment process and in settling appeals. DHHS initially estimated that only 28% to 38% of ACH residents would qualify for PCS under a 3 ADL standard. Sea Dec. Ex. P. In fact, 56% of ACH residents have been approved for PCS. Sea Dec. Ex. S. These practices were not followed by DHHS or CCME when class members were terminated from in-home PCS in 2011 and 2012.

7. In April 2013, DHHS waived its rules to retroactively permit prior approval for PCS for approvals issued after January 1, 2013. Sea Dec. Ex. J. The effect of this decision is to protect ACH providers from losing payment for services provided during a backlog in ACH PCS assessments. Sea Dec. Ex. T. DHHS made no similar accommodations for in-home PCS during backlogs of assessments in 2011 and 2012.

8. In issuing notices in November and December 2012 to terminate PCS under Policy 3L for residents of ACHs , DHHS delayed the effective date of the terminations until

January 30, 2013 and permitted all of these ACH residents to wait until January 30, 2013 to file administrative appeals of these decisions. Sea Dec. Exs. F, K. By contrast, for terminations of in-home PCS in 2011 and 2012, the effective date of the termination generally was ten days after the notice was sent and the deadline to appeal was always 30 days.

9. In 2012, the N.C. General Assembly appropriated $39,700,000 for the express purpose of paying for PCS with state funds for ACH residents terminated from Medicaid coverage for PCS. N.C. Session Laws 2012-142§ 10.23A.(f) (Attachment B). *See also* Sea Dec. Ex. K. No state funding was made available to pay for in-home PCS for persons losing Medicaid coverage for in-home PCS under Policy 3E or Policy 3L.

This evidence shows that Defendant's implementation of Policy 3L continues to violate federal law by denying and terminating necessary health care services based on criteria that substantially discriminate against Medicaid recipients living at home in favor of those residing in facilities such as ACHs in violation of the Medicaid requirement that states must cover comparable Medicaid services for individuals with similar needs. 42 U.S.C. § 1396a(a)(10)(B). Defendant also continues to violate Title II of the Americans with Disabilities Act, 42 U.S.C. § 12312 ("ADA"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), by placing PCS applicants and recipients at imminent risk of unnecessary and unwanted out-of-home placement, including in ACHs, by discriminating in favor of ACH residents in assessment of need for PCS, and by providing state funding to continue PCS for ACH residents who lose Medicaid PCS but not for those losing Medicaid coverage of in-home PCS. Because Defendant continues to discriminate against persons needing PCS to remain in their homes in favor of PCS provided in

institutional settings under Policy 3L, the class definition should be amended to include persons denied or terminated from in-home PCS under Policy 3L.

II. CASELAW AND RULE 23(c)(1)(C) CONTEMPLATE AMENDING THE CLASS DEFINITION IN THIS CIRCUMSTANCE.

"[C]ertifications are not frozen once made. Rule 23 empowers district courts to "alte[r] or amen[d]" class-certification orders based on circumstances developing as the case unfolds." *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013), quoting Fed. R. Civ. P. 23(c). A judge remains free to modify a certification order to reflect subsequent developments in the litigation. *Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59 (M.D.N.C. 2008), citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 157 (1982). *See also Farrar & Farrar Dairy, Inc. v. Miller-St. Nazianz, Inc.*, No. 5:06-CV-160-D, 2007 WL 4118519, *4 (E.D.N.C. Nov. 16, 2007)

Leave to amend the complaint in a class action to redefine the class is to be freely given, except where prejudice may result to either the defendants or to those persons dropped from the class. *In re New York City Municipal Securities Litigation*, 87 F.R.D. 572 (S.D. N.Y. 1980). The class definition may be modified and subclasses defined as a result of discovery or even developments at trial. *Rodriguez by Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009 (W.D. Mich. 1987). A final, precise, and detailed class definition may have to await the presentation of evidence at trial. *Hammond v. Powell*, 462 F.2d 1053 (4th Cir. 1972).In this case, the period of time since the class was certified and the significant intervening events justify the minor modification requested here. No discovery has yet occurred and no dispositive pleadings have been filed so Defendant is not prejudiced.[1] The

[1] A motion to dismiss was filed by Defendant on the same date as this filing, after class counsel informed Defendant's counsel of their intention to file this motion and their motion to amend the complaint which is also

Footnotes continued on the next page.

proposed amendment is closely related to both the legal and factual issues raised in the original complaint. Defendant should not be able to avoid continuation of this suit by changing her policies on paper but not in practice.

III. NOTICE TO THE AMENDED CLASS IS WARRANTED.

Rule 23(c)(2)(A) Fed. R. Civ. P. provides that notice to a class certified under Rule 23(b)(2) may be ordered where "appropriate." The district court thus has discretion to order notice at any time in the lawsuit for the protection of class members or the fair conduct of the litigation. *In re Integra Realty Resources Inc.*, 262 F.3d 1089, 1109 (10th Cir. 2001) (whether notice is required within discretion of court); *Molski v. Gleich*, 318 F.3d 947 (9th Cir. 2003); *See generally Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1309 (4th Cir.1978). The district court also has discretion to order the defendant to develop a list of class members. James Wm. Moore *et al*., MOORE'S FEDERAL PRACTICE - Civil § 23.106 (2011).

In its December 8, 2011 Order certifying the Plaintiff class, the Court also ordered that class counsel provide notice to the class. After receiving a list of class members from DHHS on February 29, 2012, class counsel began mailing notices to class members. Rittelmeyer Dec. Upon entry of the stay of the December 8, 2011 Order by the Fourth Circuit Court of Appeals on March 6, 2012, class counsel ceased mailing notices to the class to avoid further confusion. *Id.* As a result, approximately 1400 class members on the February 29, 2012 list have yet to be notified. *Id.* Plaintiffs have moved the Court to order Defendant to provide an updated class list so that class counsel can mail these 1400 notices to the correct address and send a supplemental notice to other class members.

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filed on this date. Plaintiffs' motions, if granted, plainly render Defendant's motion unwarranted at this time as no discovery has yet taken place to prove or disprove Plaintiffs' new allegations.

A new list and new notice are needed for the following reasons.First, the class list needs to be updated because the addresses for some class members who have not received notice yet have changed and some class members have died or moved out of state. Second, because no notice has been provided to the class since early 2012, a supplemental notice is warranted to update class members on the current status of the litigation. Third, new class members need to be identified and notified because of denials and terminations of in-home PCS which occurred under Policy 3E after the date of the class notice. Fourth, if the Court grants the motion to amend the class definition, this will result in the addition of other new class members who need to be identified and notified.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court enter an Order amending the definition of the certified class, ordering Defendant to provide to class counsel within 20 days an updated list of class members which reflects the new class definition, changes in address, and denials and terminations of in-home PCS since the prior list of class members was provided, and ordering class counsel to provide written notice to class members of the current status of the litigation.

Dated: April 26th, 2013 ATTORNEYS FOR PLAINTIFFS

/s/ John R. Rittelmeyer_____
John R. Rittelmeyer
N.C. State Bar No. 17204
Jennifer L. Bills
N.C. State Bar No. 37467
Elizabeth D. Edwards
N.C. State Bar No. 35262
DISABILITY RIGHTS NC
2626 Glenwood Avenue, Suite 550
Raleigh, NC 27608
Phone: (919) 856-2195

Fax: (919) 856-2244
john.rittelmeyer@disabilityrightsnc.org
jennifer.bills@disabilityrightsnc.org
elizabeth.edwards@disabilityrightsnc.org

/s/ Douglas S. Sea_____
Douglas Stuart Sea
State Bar No. 9455
LEGAL SERVICES OF SOUTHERN PIEDMONT, INC.
1431 Elizabeth Avenue
Charlotte, North Carolina 28204
Telephone: (704) 376-1600
dougs@lssp.org

/s/ Sarah Somers_____
Sarah Somers
State Bar No. 33165
Jane Perkins
State Bar No. 9993
NATIONAL HEALTH LAW PROGRAM
101 E. Weaver Street, Ste. G-7
Carrboro, NC 27510
Telephone: (919) 968-6308
somers@healthlaw.org
perkins@healthlaw.org

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true copy of MEMORANDUM IN SUPPORT OF MOTION TO AMEND CLASS DEFINITION AND TO PROVIDE NOTICE TO THE CLASS and supporting DECLARATIONS of DOUGLAS SEA, JOHN RITTELMEYER, MICHAEL HUTTER, MARGERET DREW, ALONZO PERCER and REBECCA PETTIGREW upon the Defendant's attorneys via electronic means through the CM/ECF system to:

Lisa G. Corbett
Iain Stauffer
Olga E. Vysotskaya de Brito
Amar Majmundar
N.C. Department of Justice

This the 26th day of April, 2013

/s/Douglas Stuart Sea
Douglas Stuart Sea