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.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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. 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. *Pashby v. Delia*, 709 F.3d 307 (2013). On April 10, 2013, Plaintiffs filed a Motion [DE 122] to Clarify the December 8, 2001 Order. On April 26, 2013, Plaintiffs filed Motions to Amend and Supplement their Complaint [DE 131] and to Amend the Definition of the Certified Class [DE 134]. Also on April 26, 2013, Defendant filed a Motion to Dismiss for lack of subject matter jurisdiction [DE 128].

ARGUMENT

THE JANUARY 1, 2013 CHANGE IN DEFENDANT'S CLINICAL POLICY DOES NOT RENDER THIS CASE MOOT.

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). 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 [DE 134-2]. However, Defendant's implementation of Policy 3L has not been uniform. Defendant continues in practice to heavily favor the approval or continuation of PCS in Adult Care Homes (ACHs) over the provision of PCS in the homes of Medicaid recipients with comparable needs. *See* Pla. Memo in Supp. of Mot. to Amend Class Defin. at 2-6 [DE 135].

Defendant bears a "heavy burden" to establish that this case has become moot. *Friends of the Earth v. Laidlaw Envtl. Services (TOC), Inc*., 528 U.S. 167, 189 (2000). "A case becomes moot *only* when it is impossible for a court to grant *any* effectual relief whatever to the prevailing party." *Knox v. Serv.Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (internal quotation omitted) (emphasis added); *see also Ellis v. Ry. Clerks*, 466 U.S. 435, 442 (1984) ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."). Defendant's motion to dismiss this action as moot, which is not supported by any new evidence, is based entirely on the replacement of PCS Clinical Policy 3E with PCS Policy 3L. This motion must fail for four independent reasons.

A. Class members are suffering ongoing harm from Policy 3E.

As Defendant concedes, this case is not moot if any class members are suffering ongoing harm from Policy 3E. Def. Memo at 7 ("Absent a continuing harm to a class") [DE

129]. To demonstrate mootness, "a defendant's action must have completely eradicated the effects of the alleged violation." *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). As the Court of Appeals just stated in this case, once the class has been certified, Defendant must show mootness as to the entire certified class. *Pashby v. Delia*, 709 F.3d 307, 316 (2013) (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980)).

The facts show that Policy 3E is causing continuing harm to the class. Pursuant to the Stay issued by the Fourth Circuit Court of Appeals on March 6, 2012, 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 [DE 134-22, 134-23]. As a result, hundreds of class members whose services were denied or terminated under Policy 3E have not been reinstated or reassessed under Policy 3L. *Id.* This Court already ordered Defendant to provide relief to all class members terminated or denied under Policy 3E. Dec 8, 2011 Order at 15 [DE 88]. Because of the ongoing harm being suffered by those class members denied or terminated under Policy 3E who have yet to be reinstated or reassessed, the District Court plainly has jurisdiction to ensure that the relief sought by Plaintiffs and previously ordered by the Court is in fact provided by Defendant.

Defendant nonetheless claims that no class member is suffering ongoing harm from Policy 3E because all will be reassessed under Policy 3L. Def. Memo at 7 [DE 129]. This assertion, which is supported by no evidence or citation to the record, is not correct. Absent enforcement of this Court's preliminary injunction to first reinstate them, class members who were terminated or denied under Policy 3E will not be reassessed under Policy 3L unless they reapply for approval of in-home PCS. Sea Dec. Ex. A at 6 [DE 134-2]. Many of these class members are likely to have been discouraged from reapplying, even though their

conditions may have worsened, because they have twice been denied or terminated from PCS under Policy 3E, once in 2011 and again in 2012. Dec. 8, 2011 Order [DE 88]; Sea Dec. Exs. U, V [DE 134-22, 134-23]. Moreover, if those who were terminated under Policy 3E were to reapply now, they would have to wait for their reassessment before again receiving services and, if denied again, would not continue to receive services pending an administrative appeal of the new decision. Sea Dec. Ex. A at 5, Ex. [DE 134-2]; N.C.G.S. §108A-70.9A, B. Thus the relief sought by Plaintiffs-- reinstatement of those terminated under Policy 3E and reassessment of those denied under Policy 3E—is still needed and remains pending before the Court until Defendant takes these actions.

B. Voluntary Cessation of the Challenged Policy Does Not Establish Mootness.

In affirming this Court's previous ruling in this case, the Fourth Circuit held that Plaintiffs' claims were not rendered moot by Defendant's voluntary cessation of illegal conduct after suit had been filed because Defendant could not show that the illegal conduct might not recur in the future. *Pashby v. Delia*, 709 F.3d at 316. "It is well-settled that a defendants' voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 (1982).

Here, DHHS has not demonstrated that the agency will not return to Policy 3E in the future. New state legislation was passed in 2012, but the record in this case reflects changes in state legislation regarding in-home PCS policy every year since 2009. *See* Feasel Affid. (DE 42). Given this record of regular legislative changes to PCS coverage, the N.C. General Assembly's latest response to this litigation may prove as ephemeral as those in the recent

past. Repeal of challenged legislation does not result in mootness where nothing prevents the elected body from reenacting the challenged provision. *City of Mesquite*., 455 U.S. at 289.

Defendant cites *American Legion Post 7 of Durham v. City of Durham,* 239 F.3d 601 (4th Cir. 2001), but there it was clear that the City would not reenact the challenged ordinance because the City had begun to revise the challenged ordinance prior to the lawsuit even being filed and well before it was declared invalid. 239 F.3d at 605-06. Also noteworthy in *American Legion* is the fact that the Plaintiff was permitted to amend its complaint to include claims similar to those raised in the original complaint regarding the new ordinance. 239 F.3d at 604. *Lewis v. Continental Bank Corp.,* 494 U.S. 472 (1990), also does not support Defendant. *Lewis* involved not only a change in the challenged state statute but also intervening action by Congress, which made it clear that the plaintiff's claim must fail regardless of the outcome of the state law challenge. 494 U.S. at 476. Even so, the Court in *Lewis* did not dismiss the case, but instead remanded to allow Plaintiffs to amend their complaint and produce new evidence based on the change in law. 494 U.S. at 482.

Moreover, the similarities between Policy 3E and Policy 3L prevent mootness. A challenge to a statute or regulation survives if the amended provision is "sufficiently similar … that it is permissible to say that the challenged conduct continues." *Ne. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (rejecting claim of mootness where successor ordinance disadvantaged plaintiffs in the same fundamental way as the prior ordinance). *See also Green v. City of Raleigh*, 53 F.3d 293 (4th Cir. 2008). As discussed below, that is precisely the situation before this Court.

C. Plaintiffs' Due Process Claim Is Not Moot.

The decision of the Fourth Circuit Court of Appeals upheld the PCS notices challenged herein, but did so only in the context of the "mass change" which occurred on June 1, 2011, when Clinical Policy 3E took effect. *Pashby v. Delia*, 709 F.3d at 325-28. The Court of Appeals did not address the legality of the challenged notices when used in the day-to day operation of the PCS program. *Id.* Because Defendant continues to defend the legality of the content of the challenged notices, Def. Memo at 8, n.5 [DE 129], this issue remains to be decided.

D. Defendant's Ongoing Practices Continue to Violate the Medicaid Act and the Americans with Disabilities Act.

Upon remand to the District Court, Plaintiffs promptly moved to amend their complaint and the definition of the certified class to challenge the implementation of Defendant's new PCS Policy 3L [DE 131, 134]. As the proposed amended complaint alleges and the evidence supporting the motions demonstrates, Defendant has changed her PCS policy on paper but in practice continues to discriminate against those seeking PCS at home and in favor of residents of ACHs. *See* Prop. Second Amended and Supplemental Complaint at ¶¶ 201-207 [DE 133]; Pla. Memo in Supp. of Mot. to Amend Class Defin. at 2-6 [DE 135]. Such discrimination was the underlying factual basis for rulings by both this Court and the Fourth Circuit Court of Appeals that Policy 3E likely violated both the Medicaid Act and the Americans with Disabilities Act. Dec. 8, 2011 Order [DE 88]; *Pashby v. Delia*, 709 F.3d 307 (2013). This Court plainly retains jurisdiction to permit discovery to determine the truth of Plaintiffs' allegations about Defendant's continuing discriminatory practices.

In a facial challenge to a statute that had been repealed, the United States Supreme Court held that the mere possibility "that [plaintiffs] may wish to amend their complaint so as to demonstrate that the repealed statute retains some continuing force or to attack the newly

enacted legislation" made it appropriate not to dismiss the case as moot but rather to give plaintiffs leave to amend their pleadings. *Diffenderfer v. Central Baptist Church of Miami,* 404 U.S. 412, 415 (1972). Here, Plaintiffs have already moved to amend their pleadings to allege continuing violations.

Defendant cites *Googerdy v. N.C. Agric. and Tech. State Univ*., 386 F. Supp. 2d 618 (M.D.N.C. 2005), for the proposition that motions to amend made solely to circumvent a previously filed motion to dismiss may be denied. But here it is Defendant who is trying to circumvent a valid continuing claim. Defendant concedes that her motion to dismiss was filed *after* being informed by class counsel of their intention to amend the complaint to challenge the implementation of Policy 3L. Def. Memo at 10 [DE 129]. Defendant cannot avoid a continuing live controversy by changing her policies on paper but not in practice and then moving to dismiss after being informed that the change in policy is inadequate.

CONCLUSION

For all of the foregoing reasons, it remains likely that plaintiffs' threatened injuries "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61. The district court should again find that it retains jurisdiction in this matter. Plaintiffs therefore request that the Court enter an Order denying Defendant's Motion to Dismiss.

Dated: April 30th, 2013 ATTORNEYS FOR PLAINTIFFS

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true copy of PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS upon the Defendant's attorneys via electronic means through the CM/ECF system to:

Lisa G. Corbett
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Olga E. Vysotskaya de Brito
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N.C. Department of Justice

This the 30th day of April, 2013.

/s/Douglas Stuart Sea _____
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