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

Civil Case No. 5:11-cv-273

HENRY PASHBY, ANNIE BAXLEY, MARGARET DREW, DEBORAH FORD, MELISSA GABIJAN, by her guardian and next friend JAMIE GABIJAN, MICHAEL HUTTER, BETTY MOORE, JAMES MOORE, LUCRETIA MOORE, AYLEAH PHILLIPS, ALICE SHROPSHIRE, and SANDY SPLAWN, on behalf of themselves and all others similarly situated Plaintiffs, v. ALDONA WOS, in her official capacity as Secretary of the North Carolina Department of Health and Human Services, Defendant.	**DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S 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 reply in support of her motion to dismiss.

NATURE OF THE CASE

Defendant adopts and incorporates by reference the Nature of the Case as set out in Defendant's Memorandum in Support of Motion to Dismiss. [DE 129] In addition, Defendant notes that on 26 April 2013, Plaintiffs filed a Motion to Amend and Supplement their Complaint,

[DE 131], and a Motion to Amend the Definition of the Certified Class. [DE 134] Subsequently, on 30 April 2013 Plaintiffs filed a Response in Opposition to Defendant's Motion to Dismiss. [DE 139]

STATEMENT OF THE FACTS

Defendant adopts and incorporates by reference the Statement of the Facts as set out in its Memorandum in Support of Motion to Dismiss. [DE 129]

ARGUMENT

Despite contentions made in response to Defendant's motion to dismiss, Plaintiffs have failed to demonstrate the existence of a live controversy between the parties. As a consequence, Defendant respectfully contends that the instant action is moot, and should be dismissed for a lack of subject matter jurisdiction.

I. THE IMPLEMENATION OF POLICY 3L HAS RENDERED THIS CASE MOOT.

A. Chronology.

Until 31 May 2011, Clinical Coverage Policy 3C governed the Personal Care Services ("PCS") program in North Carolina. [DE 42, ¶ 4] Thereafter, on 1 June 2011, In-Home Care for Adults Clinical Coverage Policy 3E ("Policy 3E") was implemented for the provision of PCS to adults. [DE 42, ¶ 4] As reflected by their complaint seeking declaratory and injunctive relief, the implementation of Policy 3E was the exclusive source of Plaintiffs' objections in the instant action. [DE 44, ¶¶ 2, 6] With that complaint, Plaintiffs contended that Policy 3E facially failed to utilize uniform PCS eligibility criteria to recipients in differing residential circumstances. However, Plaintiffs' complaint features no allegation or insinuation regarding any other existing, proposed, or contemplated PCS policy.

In response to Plaintiffs' complaint regarding the allegedly incomparable eligibility

requirements of Policy 3E, this Court entered a Preliminary Injunction on 7 December 2011 to enjoin Defendant from implementation of Policy 3E. [DE 88] Following and pending Defendant's appeal, on 6 March 2012 the U.S. Court of Appeals for the Fourth Circuit entered a stay of the Preliminary Injunction. [DE 116] In light of that stay, Defendant proceeded with the implementation of Policy 3E.

On 2 July 2012 the North Carolina General Assembly enacted Session Law 2012-142 that specifically subjected all adult Medicaid recipients to uniform PCS eligibility criteria, irrespective of a recipient's residence. 2012 N.C. Sess. Laws 142, sec. 10.9F(c). Defendant subsequently submitted State Plan Amendment ("SPA") #12-013 to the Centers for Medicare and Medicaid Services ("CMS") as part of the implementation of uniform PCS eligibility criteria. [DE's 134-3, 134-4] By letter dated 30 November 2012, CMS approved SPA #12-013, effective 1 January 2013. [DE's 134-3, 134-4].

Contemporaneous to SPA #12-013, the Department drafted Clinical Coverage Policy 3L to implement the eligibility requirements set out in N.C. Sess. Law 2012-142 and SPA #12-013. As a result, the policy at issue in the instant case, Policy 3E, was terminated and replaced by Policy 3L on 1 January 2013. [DE 134-2]

B. The U.S. Court Of Appeals For The Fourth Circuit Did Not Consider Policy 3L.

Both in their response to Defendant's motion, and in previous arguments to this Court, Plaintiffs have contended that the Fourth Circuit has already rendered an opinion on mootness, and by virtue of its remand to this Court, indicated that a viable controversy exists between these parties. Plaintiffs' assertion is entirely incorrect.

The U.S. Court of Appeals for the Fourth Circuit did not address the specific issues presented with Defendant's instant Motion to Dismiss. With its opinion, the Fourth Circuit

opined that:

> The DHHS alleges that this case is moot for two reasons. First, the DHHS points out that many of the PCS Recipients dismissed their administrative appeals prior to class certification because mediators reversed the DHHS's decision to terminate their in-home PCS. The DHHS contends that this reinstatement of PCS mooted these PCS Recipients' claims. However, mootness does not result from a defendant's voluntary cessation of his allegedly illegal conduct unless it is clear that the behavior is unlikely to recur. In this case, the DHHS voluntarily reinstated in-home PCS for ten PCS Recipients, so their claims are not moot unless the DHHS is unlikely to repeat its allegedly illegal conduct. The DMA remains free to reassess the PCS Recipients' needs and cancel their PCS under IHCA Policy 3E at any time. Consequently, it is possible that the DMA will once again terminate their in-home PCS. Although the DHHS correctly contends that North Carolina has always reassessed in-home PCS recipients and that the risk of termination is not unique to IHCA Policy 3E, the DHHS overlooks an important distinction: the PCS Recipients do not challenge the practice of reassessment in general but rather take issue with IHCA Policy 3E's eligibility criteria. Because the DHHS voluntarily reinstated certain PCS Recipients' in-home PCS and could reassess them under IHCA Policy 3E, the fact that those PCS Recipients dismissed their administrative appeals does not moot their claims.
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> Second, the DHHS argues that the parties lack a "legally cognizable interest" in the outcome of this case because any comparability issues will disappear when North Carolina's § 1915(e)(2)(B)(i) waiver takes effect. However, the most recent SPA allows North Carolina to continue the current PCS program until December 31, 2012, and the DHHS has not completed its transition to the § 1915(e)(2)(B)(i) program. The fact that North Carolina plans to replace the current Medicaid program in the future does not prevent this case from presenting a live controversy. Notably, the DHHS could delay or abandon its implementation of the § 1915(e)(2)(B)(i) program, leaving IHCA Policy 3E as North Carolina's in-home PCS program for the foreseeable future. For these reasons, the PCS Recipients' claims are not moot.

Pashby v. Delia, 709 F.3d 307, 316-17 (4th Cir. 2013). On the issue of mootness, the Fourth Circuit considered whether the Department could replace Policy 3E with the § 1915(e)(2)(B)(i) waiver. However, at the time of the argument, Policy 3E remained in effect.

At the time of the opinion, the Fourth Circuit was unaware of the Department's termination of Policy 3E in favor of the uniform assessment standards of Policy 3L. Stated alternatively, the Fourth Circuit's opinion did not contemplate the facts that are presented with Defendant's present motion to this Court. Had the Fourth Circuit had the benefit of that change, it would not have been required to speculate as to whether "the DHHS could delay or abandon its implementation of the § 1915(e)(2)(B)(i) program, leaving IHCA Policy 3E as North Carolina's in-home PCS program for the foreseeable future." *Pashby*, 709 F.3d at 317

Likewise, the Fourth Circuit's stated concerns regarding the facially defective assessment criteria of Policy 3E would have been assuaged had the Court been cognizant of the comparable and uniform requirements mandated by the General Assembly under Policy 3L: "PCS is provided in the beneficiary's home, which may be the beneficiary's private residence or a residential facility licensed by the State of North Carolina as an adult care home . . . . " Policy 3L, sec. 5.4.1. [DE 134-2, p. 9] Indeed, this Court noted that change with its Order of 3 May 2013 when it noted the termination of Policy 3E, and that those subject to an assessment of eligibility criteria would be performed under the eligibility parameters as defined by Policy 3L. [DE 142]

These factual developments are critical in the assessment of the issue of mootness. "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. 395, 401 (U.S. 1975). A court "has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them. Its judgments must resolve a real and substantial controversy . . . , as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* (internal quotations and citations omitted). At this stage

of the proceedings, this dispute simply lacks a live controversy.

II. PLAINTIFFS' CONTRARY CONTENTIONS ARE SUPPORTED NEITHER BY THE LAW NOR THE FACTS OF THIS CASE.

A. The Record Reveals No Evidence of A "Continuing Harm."

In order to sustain the vitality of their claim, Plaintiffs now argue that class members suffer a continuing harm as a result of the transient implementation of Policy 3E. According to Plaintiffs, those who were terminated under that policy were "likely to have been discouraged from reapplying." [DE 139, p. 3] Despite these new allegations, there is simply no evidence to substantiate Plaintiffs' contention that any beneficiary was discouraged from reapplying to the PCS program. Speculation and innuendo should be insufficient to resuscitate this claim, especially in light of the fact that upon proper referral, a beneficiary can apply and be assessed for PCS, at any time. [DE 134-2, p. 10] Plaintiffs commenced this action for declaratory and injunctive relief to stop the implementation of Policy 3E. Whether Policy 3E was unilaterally terminated by the Department or by judicial decree, the result is the same: the challenged assessment practices under Policy 3E are no longer in effect, and no live controversy exists between these parties.

B. Plaintiff's Speculation Regarding Reversion To Policy 3E

As further ballast to their claims, Plaintiffs contend that although the Department voluntarily ceased implementation of Policy 3E, their claims survive because the North Carolina General Assembly retains the discretion to enact new legislation to revert back to Policy 3E PCS eligibility standards. [DE 139, pp. 4-5] Plaintiffs' fears are misplaced, and certainly do not call for the continued pursuit of their moot claims.

It should be first noted that given the termination of Policy 3E, in favor of the uniform eligibility requirements of Policy 3L, Plaintiffs have conceded that the underlying matter (the

prevention of Policy 3E implementation) has been rendered moot. It should be further noted that Plaintiffs argument rests on an assumption that the Defendant controls the General Assembly, and by extension, can simply instruct the legislative branch to pass statutes to suit the Department's apparently discriminatory intent. However, "statutory changes that discontinue a challenged practice are 'usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.'" *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000). "The practical likelihood of reenactment of the challenged law appears to be the key to the Supreme Court's mootness jurisprudence in situations such as this one." *American Legion Post 7 of Durham v. City of Durham*, 239 F.3d 601, 606 (4th Cir. 2001).

In the instant case, other than unsubstantiated conjecture, there is no evidence or indication that the Department intends to revert to Policy 3E, or that it would otherwise wield its influence to cajole the General Assembly into doing its bidding. Instead, the opposite is true: the Department is compelled to abide by the directives of the General Assembly as set out in Session Law 2012-142. The clearest reflection of that mandate is the adoption and implementation of Policy 3L, and the utter paucity of any expression that the Department wishes to return to Policy 3E.

Plaintiffs' rely on *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982) to support the notion that a live controversy still exists in the present action. However, that reliance is wholly misplaced as the Supreme Court in *Mesquite* noted that that the city in that case had a*nnounced that it intended to reenact the challenged provision*, if the case were to be dismissed. *Id.* at 289 n. 11. (Emphasis added). As a result, the matter remained as a live controversy and was not subject to dismissal for mootness. *Id.* "[W]e are convinced that *Mesquite* is generally

limited to the circumstance, and like circumstances, in which a defendant openly announces its intention to reenact 'precisely the same provision' held unconstitutional below." *Valero Terrestrial Corp.*, 211 F.3d at 116. Despite reliance upon *Mesquite*, the record in this case reveals no indication that upon dismissal, the Department intends to return to Policy 3E.

Likewise, the Fourth Circuit Court of Appeals noted in *American Legion Post 7 v City of Durham*, 239 F.3d 601, 606 (4th Cir. 2001) that the matter was moot given the fact that there was no evidence that the municipality would reenact the offending ordinance, after it had been amended. Similarly, although Plaintiffs' attempt to distinguish *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990), their attempts are unpersuasive. *Lewis* involved a claim challenging several laws that were amended during the course of the litigation and appeal. The Supreme Court concluded that by virtue of the enactment of the subsequent amendments, the underlying controversy and the underpinnings of the claim were rendered moot as the challenged portions of the law were no longer in controversy. *Id.* at 474. According to the Supreme Court, "it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals. The parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Id.* at 477-78. As Policy 3E has been terminated, Plaintiffs no longer have a personal stake in the present litigation.[1]

C. Plaintiffs' Alleged Due Process Concerns

Despite the fact that the Fourth Circuit Court considered Plaintiffs' allegations with respect to due process, and determined that the notices complied with the requirements of due

[1] As an extension of their argument, Plaintiffs contend that similarities between Policy 3E and Policy 3L justify the continuance of their present lawsuit. However, that assertion defies even cursory scrutiny. Again, the present action implicates the alleged facially discriminatory eligibility requirements under Policy 3E. Plaintiffs concede that Policy 3L features uniform and nondiscriminatory eligibility PCS requirements. If any controversy exists, it pertains to the actual implementation of the uniform eligibility requirements of Policy 3L rather than the facially deficient eligibility requirements of Policy 3E. Even if Plaintiffs' contentions regarding those matters are valid, they are not properly the subject of this current litigation.

process, *Pashby*, 709 F.3d 307, 325-28, Plaintiffs nevertheless remain unsatisfied. Plaintiffs contend that the Fourth Circuit opinion pertained only to those notices issued "in the context of a 'mass change.'" [DE 139, p. 6] The notices of which the Plaintiffs complained of were sent in the context of a "broad statutory change." *Pashby*, 709 F.3d at 328. The notices sent by the Department were in that context. The Plaintiffs allegations regarding due process in its first amended complaint are consistent with the notice being issued in a transition from PCS Policy 3C to IHCA, Policy 3E. [DE 44, #186, 187]

D. Plaintiffs' New Allegations

Finally, Plaintiffs argue that the new allegations found in their Motion to Amend demonstrate a live controversy between them and the Department. [DE's 131, 139, pp. 6-7] However, despite their characterizations, Plaintiffs' new proposed complaint, various new allegations regarding the previously unmentioned Policy 3L, and the new class that must attend to the new claim demonstrate that the current action lacks any vitality. Plaintiffs argue that "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." [DE 139, p. 6] These allegations stand in stark contrast to the allegations of facially deficient policies enumerated in Policy 3E, as addressed by this Court and the Fourth Circuit. Interestingly, similar to their argument against a finding of mootness, this argument is an implicit concession of the uniform eligibility requirements dictated by Policy 3L. Moreover, Plaintiffs manage an argument that Defendant is acting improperly by filing her motion to dismiss after learning of the Plaintiffs' motion to amend the complaint. [DE 139, p. 7] According to Plaintiffs, Defendant's motion to dismiss somehow acts as an attempt to circumvent a valid continuing claim. [DE 139, p. 7] Yet, Plaintiffs fail to acknowledge that Defendant filed a proper motion that is grounded in law and

fact, when their own responses to the motion (including their admissions regarding the uniform eligibility requirements under Policy 3L) demonstrate that their present action features no live controversy. Indeed, why would Plaintiffs seek to amend their existing complaint to include brand new issues and a brand new class as they pertain to a brand new and previously unscrutinized policy? Plaintiff's own actions defy their protestations.

Plaintiffs nevertheless argue that since they have already filed a motion to amend, *Diffenderfer v. Central Baptist Church of Miami*, 404 U.S. 412 (1972) demands that they be permitted to amend their pleadings despite the mootness of the present action. That argument is without merit, as the Court in *Diffenderfer* noted that the sought after declaratory and injunctive relief "is, of course, inappropriate now that the statute has been repealed." *Id.* at 415. That is exactly the reasoning that should control in this case: Plaintiffs have sought declaratory and injunctive relief to prevent the implementation and continuation of Policy 3E, which has been terminated in full. No live controversy remains, and this case should therefore be dismissed.

CONCLUSION

This Court should dismiss the Plaintiffs' complaint because their action is moot.

Respectfully submitted, this 14th day of May, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, 14 May 2013, I electronically filed the forgoing **DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S 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, Jane Perkins, Elizabeth Edwards and Jennifer L. Bills attorneys for Plaintiffs, and I hereby certify that I have mailed the document to the following non CM/ECF participates: none.

/s/ Iain Stauffer
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