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

Civil Case No. 5:11-cv-273-BO

HENRY PASHBY, ANNIE BAXLEY, MARGARET DREW, DEBORAH FORD, MELISSA GABIJAN, by her guardian and next friend JAMIE GABIJAN, MICHEAL 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 RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND DEFINITION OF THE CERTIFIED CLASS AND TO PROVIDE NOTICE TO THE CLASS**

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, Charles Whitehead Special Deputies Attorney General, and Olga E. Vysotskaya de Brito, Assistant Attorney General, and hereby submits this response in opposition to Plaintiffs' motion for leave to amend definition of the certified class and to provide notice to the class.

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 the provision of optional in-home Medicaid services to Medicaid recipients 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] With its pleadings, Plaintiffs exclusively contend that the alleged comparability issues associated with Clinical Coverage Policy 3E ("Policy 3E") between PCS provided to recipients living in the community, and PCS provided to recipients residing in licensed Adult Care Homes ("ACH"), constituted a violation of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act, and the Social Security Act. Plaintiffs further contend that the coverage notices sent to them were insufficient.

This Court entered an Order on 8 December 2011 granting Plaintiffs' motion to certify class, motion for leave to file declarations, and motion for a preliminary injunction. [DE 88] On 9 December 2011, Defendant gave notice of appeal to the U.S. Court of Appeals for the Fourth Circuit. [DE 90] On 18 January 2012, Plaintiffs filed a motion to enforce the Order granting preliminary injunction. [DE 102] On 1 March 2012, this Court entered an Order clarifying the 8 December 2011 Order granting the preliminary injunction. [Doc 115] On 6 March 2012, the Court of Appeals granted Defendant's Motion for a Stay of the 8 December 2011 Order. [DE 116] On 5 March 2013, the U.S. Court of Appeals for the Fourth Circuit issued a published opinion that affirmed this Court's class certification, preliminary injunction, but remanded the matter so that this Court could "clarify its order," describe the enjoined conduct in "reasonable detail," and address the issue of security. [DE 117] Formal mandate of the U.S. Court of Appeals for the Fourth Circuit's opinion issued on 10 April 2013. [DE 121] On 26 April 2013,

pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Defendant filed a motion to dismiss Plaintiffs' complaint for lack of subject matter premised upon the contention that this matter has been rendered moot by the termination of Policy 3E on 31 December 2012. [DE 128] Within hours after Defendant's motion to dismiss was filed, on 26 April 2013 Plaintiffs filed motions seeking leave to amend and supplement their first amended complaint to:

1. Add new facts
2. Add new claims challenging the current PCS Policy 3L "as implemented"
3. Add a novel issue regarding the N.C. General Assembly appropriations bill that establishes a temporary, short-term "Transitions to Community Living Fund" designed to assist adult care homes to serve individuals for whom community living has not yet been arranged during the transition period, N.C. Sessions Law 2012-142 §§10-23A(d-j). [DE 131, 132, 133]

Contemporaneous with their attempts to amend the existing action with novel issues unrelated to Policy 3E, on 26 April 2013 Plaintiffs filed a motion to amend the certified class and to provide notice to the prospective class of the newly raised issues. [DE 134]

BACKGROUND

Plaintiffs have constantly and exclusively alleged that Clinical Coverage Policy 3E ("Policy 3E") was facially invalid and illegally violated the ADA, the Rehabilitation Act, and the Medicaid Act by specifying that residents of an ACH meet less restrictive Medicaid criteria to qualify for PCS, than those living in their homes. According to Plaintiffs, the differing criteria consequently demanded that Medicaid PCS recipients move into an ACH or placing them at risk of institutionalization. [DE 44] Plaintiff's motion for a preliminary injunction specifically prayed

the court to enjoin Defendant from implementing "the provisions of In Home Care for Adults (IHCA) Clinical Policy 3E". [DE 14] By Order on 8 December 2011, the Court granted Plaintiffs' request, and noted that "Plaintiffs' Motion for Preliminary Injunction is also GRANTED. Defendant is hereby prohibited from implementing ICHA Policy 3E." [DE 115] Also by Order on 8 December 2011, the Court granted Plaintiffs motion for class certification. The class was certified 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 IHCA Policy 3E [DE 88]

On 6 March 2012, the Court of Appeals granted Defendant's Motion for a Stay of the 8 December 2011 Order. [DE 116] On 5 March 2013, the U.S. Court of Appeals for the Fourth Circuit affirmed the preliminary injunction, but pursuant to Rule 65 of the Federal Rules of Civil Procedure, remanded the matter back to the District Court for clarification on "prohibit[ing] the DHHS from implementing Policy 3E" and the issue of "which eligibility requirements should apply to individuals who sought in-home PCS after IHCA Policy 3E went into effect on June 1, 2011." Pashby v. Delia, 709 F.3d 307, 331 (4th Cir. N.C. 2013); [DE 117].

Meanwhile, the North Carolina General Assembly enacted "[t]he Current Operations and Capital Improvements Appropriations Act of 2012", which specified that all adult Medicaid recipients satisfy the same eligibility requirements to receive PCS, irrespective of their place of residence. 2012 N.C. Sess. Laws 142, sec. 10.9F.(c). On 30 November 2012, CMS approved the Department's State Plan Amendment ("SPA") that set forth the same PCS functional eligibility criteria for all Medicaid recipients 21 years or older, irrespective of the recipient's

residence. ("SPA 12-013") [DE 134-4] While the Court of Appeals stay was in place, Policy 3E was terminated on 31 December 2012, and was replaced by Clinical Coverage Policy 3L on 1 January 2013. In contrast to Policy 3E (which served as the sole predicate to Plaintiffs' complaint), Policy 3L reflects the mandate of the General Assembly to require uniform PCS eligibility criteria for Medicaid recipients residing in an ACH and in-home settings. [DE 134-2] Indeed, with their motion for leave [DE 131] and proposed second amended and supplemental complaint [DE 133], Plaintiffs implicitly concede that the facial comparability of Policy 3L eligibility criteria for ACH and in-home Medicaid recipients obviates the alleged inequities of Policy 3E. As a result, Plaintiffs have swapped the issue of Policy 3E comparability, with the alleged deficiencies in the manner that the new Policy 3L is implemented.

As such, on 26 April 2013 Plaintiffs moved to amend and supplement the First Amended Complaint and amend the defined class, pursuant to Federal Rule of Civil Procedure 23(c)(1)(C) and 23(c)(2)(A), as follows:

> all current or future North Carolina Medicaid recipients age 21 or older who had, or will have coverage of Personal Care Services (PCS) denied, delayed, interrupted, terminated, or reduced by Defendant directly or through his agents or assigns as a result of the eligibility requirements for in-home PCS and unlawful policies and practices in implementation of Clinical Coverage Policies 3E or 3L [DE 133]

On behalf of themselves and the proposed class, the named plaintiffs seek declaratory and injunctive relief pursuant to Federal Rule of Civil Procedure 23(b)(2). [DE 133]

Plaintiffs agree that Policy 3L standardizes the eligibility requirements for Medicaid PCS so that they are uniform and comparable for all Medicaid PCS recipients, across all residential settings. [DE 133, 135] Indeed, Policy 3L specifically provides that PCS may be 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, a family care home, a combination home, or a supervised living facility. [DE 134-2] Furthermore, Plaintiffs do not contest the current uniform and comparable PCS eligibility criteria of Clinical Coverage Policy 3L, which requires the eligible recipient to demonstrate an unmet need for; (a) limited hands-on assistance with three of the five Activities of Daily Living (ADLs), (b) hands on assistance with two ADLs, one of which requires extensive assistance or, or (c) hands on assistance with two ADLs, one of which requires assistance at the full dependence level.[1] That uniformity has caused Plaintiffs to abandon their complaints regarding Policy 3E, and propose to this Court the new issue regarding their satisfaction with the implementation of current PCS Clinical Coverage Policy 3L.

As set forth below, this Court should deny certification because the Plaintiffs lack standing and cannot meet the requirements of Federal Rule of Civil Procedure 23(a). In the alternative, this Court should not rule on the Plaintiffs' motion until Defendant has had the opportunity to conduct class discovery.

STANDARD OF REVIEW

"The burden of establishing that a case meets the requirements for class certification under the Rule rests on the party seeking certification." *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989). The assessment required for class certification "is the responsibility of the District Court, which is to make its decision after 'a rigorous analysis' of the particular facts of the case." *Id.*, quoting *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 471-72 (5th Cir. 1986). Federal Rule of Civil Procedure 23 sets forth a two-part test that Plaintiffs must satisfy to demonstrate that their claims are suitable for class resolution. First, Plaintiffs bear the burden of establishing that the proposed class satisfies all four prerequisites featured in Rule 23(a): (1) the

[1] ADLs are defined as Bathing, Dressing, Mobility, Toileting and Eating. [DE 133, 134-2]

class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy of representation). FED. R. CIV. P. 23(a); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 180 L. Ed. 2d. 374 (2011); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318-319 (4th Cir. 2006).

Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). *See Gunnells v. Healthplan Servs.*, 348 F.3d 417, 423 (4th Cir. 2003). Here, Plaintiffs rely on Rule 23(b)(2) that is applicable when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b). Certification under Rule 23(b)(2) does not allow individuals to opt out of the class, so the result is binding on all members. *A.H. Robins Co.*, 880 F.2d at 728.

ARGUMENT

I. Plaintiffs Lack Standing To Bring This Action.

None of the named Plaintiffs have averred or alleged any facts or proof that they have been injured or harmed by the implementation of Policy 3L. Likewise, no named Plaintiff has alleged any nexus or causal connection between an alleged injury and the implementation of Policy 3L. [DE 133] Plaintiffs must have standing to raise their claims. *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 188 (4th Cir. 1993); *see also Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (5th Cir. 2000) ("Without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class.").

Article III of the Constitution limits the jurisdiction of the federal courts to the consideration of "cases" and "controversies." U.S. Const. art. III, § 2. In order for the class to be certified, the named plaintiffs must conclusively demonstrate that they have standing to bring the complaint. 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, 112 S. Ct. 2130, 119 L. Ed.2d 351 (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, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974). The Supreme Court has stated that "Article III requirements must be met 'at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23.'" *Id.*, quoting *Sosna v. Iowa*, 419 U.S. 393, 402, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975). It is "essential that named class representatives demonstrate standing through a 'requisite case or controversy between themselves personally and [defendants],' not merely allege that 'injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Id.*, quoting *Blum v. Yaretsky*, 457 U.S. 991, 1001 n.13, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982) (citations omitted). "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Policy 3L is facially valid and applies uniformly and comparably to all in-home and ACH PCS recipients across the board. Plaintiffs allege that certain portions of Policy 3L are not uniformly implemented. It should be noted, however, that Robert Jones is the only named Plaintiff to have been assessed and/or reassessed under Policy 3L. [DE 133, 134-26] Alonzo Percer, provided a Declaration on Mr. Jones' behalf. [DE 134-26] Mr. Jones was re-assessed for eligibility of PCS in his home on 3 April 2013. Based on the assessment, Mr. Jones was denied PCS services and has filed an appeal. [DE 134-26] Mr. Percer's Declaration does not aver or allege that any of the alleged implementation issues of Policy 3L, as claimed in Plaintiffs' Second Amended Complaint or their Motion to Amend Definition of the Certified Class, caused or contributed to that denial of PCS services. [DE 133,134-26, 135]

Again, Mr. Jones is the only named Plaintiff to be assessed under the new Policy 3L. As noted, the third minimum requirement for standing is the likelihood that "the injury will be redressed by a favorable decision." *Lujan* at 560. There are no facts in the record that the implementation of Policy 3L has adversely or unfairly affected the eligibility criteria for any of the named Plaintiffs. In turn, it should be correspondingly concluded that the record is devoid of any evidence to suggest that implementation of Policy 3L has had any effect upon the newly proposed class members. Moreover, because the record reveals no evidence that in-home PCS eligibility has been affected, there is none of the claimed institutional bias or increased risk of institutionalization. Plaintiffs have not, and indeed cannot, demonstrate that the alleged implementation issues of Policy 3L have had any effect on their in-home PCS eligibility status. Consequently, Plaintiffs lack the standing sufficient to swap their original action with a new claim that announces their new identity, new grievances, and newly demanded remedies.

II. Plaintiffs Do Not Meet The Requirements Of Rule 23(a).

As the Supreme Court recently reiterated in *Wal-Mart*, "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart,* 131 S. Ct. at 2550, quoting *Califano v. Yamasaki,* 442 U.S. 682, 700-701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979). "In order to justify a departure from that rule, 'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'" *Id.,* quoting *East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977). The purpose of Rule 23(a) is to ensure "that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Id.* The requirements of Rule 23 "effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *Id.,* citing *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 156, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) (quoting *General Telephone Co. of Northwest v. EEOC,* 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)).

"The requirements of Rule 23(a) are familiar: numerosity of parties, commonality of factual or legal issues, typicality of claims and defenses of class representatives, and adequacy of representation." *Thorn,* 445 F.3d at 318-319. As courts have noted, "the final three requirements of Rule 23(a) 'tend to merge, with commonality and typicality serving as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Lienhart v. Dryvit Sys.,* 255 F.3d 138, 147 (4th Cir. 2001), citing *Broussard v. Meineke Discount Muffler Shops, Inc.,* 155 F.3d 331, 337 (4th Cir. 1998), quoting *Falcon,* 457 U.S. at 157 n.13.

In *Wal-Mart*, the Supreme Court found that "what matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. *Dissimilarities within the proposed class* are what have the potential to impede the generation of common answers." *Wal-Mart*, 131 S. Ct. at 2550 (emphasis added) (quoting Nagreda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L. REV. 97, 132 (2009)). Commonality requires a "plaintiff to show that 'there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). "That language is easy to misread, since '[a]ny competently crafted class complaint literally raises common questions'". *Wal-Mart*, 131 S. Ct. at 2551. Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. "This does not mean merely that they have all suffered a violation of the same provision of law." *Wal-Mart*, 131 S. Ct. at 2551. Similarly, a question is not common "if its resolution 'turns on a consideration of the individual circumstances of each class member.'" *Thorn*, 445 F. 3d at 319, quoting 7A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE § 1763 (3d ed. 2005). Applying this analysis to the causes of action asserted herein shows that the proposed amended class does not meet the three interrelated Rule 23(a) factors.

A. Plaintiffs fail to meet the requirements of "commonality" and "typicality" pursuant to Rule 23(a).

i. Commonality

With the original order granting class certification of this claim, on 8 December 2011 this court noted that "Plaintiffs have sufficiently alleged commonality of their claims. A determination that Policy 3E is valid or invalid on its face will resolve the claims of all potential plaintiffs, irrespective of their factual circumstances." [DE 88, p. 10] Commonality is now at issue, as Policy 3L is valid on its face. As evidence of the uniform eligibility criteria of Policy

3L, Plaintiffs now are forced to allege that "Defendant's implementation of Policy 3L has not been uniform" and "Defendant's favor the approval or continuation of PCS in Adult Care Homes (ACHs) over PCS provided in the homes of Medicaid recipients." [DE 135, p.10] The implementation and history of Policy 3L demonstrate that these allegations are mistaken. Under Policy 3L, **57%** of all ACH Medicaid recipients assessed for PCS met the eligibility criteria. However, **86%** of all in-home Medicaid recipients assessed for PCS under Policy 3L met the eligibility criteria. [Terrell Dec, p. 10] Stated alternatively, roughly 30% more in-home Medicaid recipients met PCS eligibility criteria than ACH Medicaid recipients under the current Policy 3L. Despite the rhetorical "red herrings" the Plaintiffs allege regarding "implementation," eligibility numbers confirm there is no institutional bias or increased risk of institutionalization attendant to Policy 3L.

As discussed *infra*, Plaintiffs have suggested nine (9) alleged "differences" in the PCS eligibility assessments under Policy 3L for those living in an ACH and those living in their homes, and allege that assessment "varies significantly" between settings. [DE 135, p. 2]. However, a number of the alleged "differences" have nothing to do with eligibility criteria and are not germane to this action, or otherwise involve practices that were implemented under Policy 3E which have since been terminated. The "differences" cited by Plaintiffs that involve eligibility criteria under Policy 3L are either untrue or have not shown any potential or actual harm to any class representative: the record reflects an absence of evidence to substantiate Plaintiffs' allegations regarding the so-called harmful assessment "differences."

An assessment of a Medicaid recipient to determine PCS eligibility is, by its very definition, an individual assessment. The nurse assessor reviews the needs and circumstances of each individual recipient to determine their functional ability for each ADL. The assessments,

while guided by Policy, are dependent upon the needs, medical condition and situation of each individual recipient. Plaintiffs now ask this Court to certify a class that necessarily requires the Court to "look behind" each and every Policy 3L assessment, and determine whether that individual assessment was performed correctly. As an example, with respect to the implementation or effectuation of a Policy 3L assessment, this Court will need to determine whether it was sufficient for the assigned nurse assessor to review a list (provided by an ACH) of medications a recipient is taking (*see*, DE 135, p.3) versus an assessment performed in the recipient's home where the nurse assessor might ask to see all of a recipients medications. Despite the fact that both types of assessments address the same issue, with Plaintiffs' new complaints, the Court would now be tasked with determining whether one method was more effective than the other in gathering the information, and then decide whether the employment of the different methods resulting in a disparate or unfair assessment.

By virtue of Plaintiffs' new demands, any recipient's potential risk of institutionalization will depend upon an assessment of highly individualized factual circumstances. Specific facts about each person's medical condition, health care needs, living situation, family and other support, and other services received related to the implementation and assessments under Policy 3L will impact whether an individual class member will be able to show a violation of the ADA. *See, e.g., J.B. v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999). A class certification must address the claims of the class members. In *Wal-Mart*, the Supreme Court noted, "[t]hat common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart* 131 S. Ct. at 2551. In light of the allegations

featured in Plaintiffs' new complaint, there simply can be no finding that the proposed class features the commonality demanded by Rule 23(a).

ii. Typicality

With its 8 December 2011 Order granting class certification of Plaintiff's First Amended Complaint, the Court held that, "Plaintiffs have also satisfied the Rule 23(a)(3) typicality requirement, which requires that the claims and defenses of the class representative be typical of the claims of the other class members." [DE 88, p. 10] "All of the named Plaintiffs' claims arise from the same legal theory and the same factual circumstances as those of the class." (Id.) **As with the commonality element,** this finding was premised on the issue of whether Policy 3E is valid or invalid on its face. (Id.) Yet, despite the fact that Policy 3L is facially valid, Plaintiffs allege that the "implementation" of certain portions of Policy 3L favors the approval or continuation of PCS in an ACH, over PCS provided in-home. [DE 133, 135] Plaintiffs' accusations beg the question of whether only certain portions of Policy 3L are objectionable and those portions only apply to certain in-home PCS recipients, how can the claims and defenses of the class representative be typical of the claims of the other class members? As discussed, *supra*, a determination of whether Policy 3L has been "implemented" properly would require a review of each particular assessment, and the condition and need of each individual recipient. In fact, if an individual is dissatisfied with their assessment or denial of PCS services, they have full appeal rights. [DE 134-7] To that end, in light of their allegations and request for amended class certification, Plaintiffs do not adhere to the tenet that "as go[] the claim[s] of the named plaintiff[s], so go the claims of the class." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (internal citations omitted) In fact, the named Plaintiffs have failed to provide any facts or proof that they were harmed or even affected by the alleged

"implementation" issues. Absent that proof, Plaintiffs' new demands for class certification must fail.

III. Plaintiffs Have Failed To Allege Sufficient Facts To Allow Class Designation

"The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). "Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23…[a] court may certify a class under Rule 23(b)(3) only if it finds that all of the prerequisites have been demonstrated, and in addition the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Szabo at* 675-676.

Plaintiffs have requested this Court amend the current class certification to include in-home PCS recipients who have had their PCS coverage denied, delayed, interrupted, terminated, or reduced as a result of the *eligibility requirements* and unlawful *policies* and *procedures* in Defendant's implementation of Policy 3L (Emphasis added) [DE 135-4] Therefore, for the implementation issues alleged for Policy 3L to be germane to the lawsuit, they must have affected the named Plaintiffs who represent the class of plaintiffs. Yet, the named plaintiffs have failed to provide any facts or evidence that they have been affected (adversely or otherwise) by the alleged implementation issues under Policy 3L. Plaintiff's nevertheless suggest nine (9) "differences" between the implementation of Policy 3L to those residing in Adult Care Homes, and those residing in their own residence. Each of those alleged "differences" fail to withstand scrutiny:

Plaintiffs' First Allegation: 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. [DE 135, p.3]

Whether or not, and to what extent, beneficiary needs are met by a willing and able family member or other caregiver is addressed in the functional assessment sections of the assessment tool. The functional assessment sections of the assessment tool, which do effect eligibility determinations or service level authorizations, are identical for in-home and residential beneficiaries. [Terrell Affidavit, P 5] Plaintiffs' first allegation is incorrect.

Plaintiffs' Second Allegation: 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. [DE 135, p.3]

This allegation is incorrect. The applicable factors that may qualify individuals to receive PCS are comparable across all PCS settings. In all PCS settings, assessment of the eating ADL includes assessment of the beneficiary's ability to prepare food. [Terrell Affidavit, P 6]

Plaintiffs' Third Allegation: 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. [DE 135, p.3-4]

Regardless of residential setting, a Medicaid recipient's medical practitioner documents the current medical diagnoses on the PCS referral for the individual to receive the assessment, and the referral information is available at the time of the assessment. [Terrell Affidavit, P 7]

Plaintiffs' Fourth Allegation: 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. [DE 135, p.4]

Effective 1 January 2013, under Policy 3L, all assessments are scheduled by telephone. [Terrell Affidavit, P 8]

Plaintiffs' Fifth Allegation: 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. [DE 135, p.4]

The exacerbating conditions listed with these allegations do not affect eligibility determinations or service authorizations. [Terrell Affidavit, P 9]

Plaintiffs' Sixth Allegation: 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. [DE 135, p.4]

These allegations are unclear, vague and ambiguous. What is clear is that the percentages of residents qualifying for PCS both in-home and in an ACH have no bearing on eligibility

criteria. It should be noted, however, that 86% of those assessed in an in-home setting have qualified for PCS pursuant to Policy 3L. [Terrell Affidavit, P10]

> *Plaintiffs' Seventh Allegation: 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. [DE 135, p.4]*

The Department did not waive its rules to retroactively permit prior approvals for PCS due to a backlog in ACH PCS assessments. [Terrell Affidavit, P11] Moreover, this allegation has no bearing on eligibility criteria.

> *Plaintiffs' Eighth Allegation: 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. [DE 135, p.4-5]*

Under Policy 3L, on 1 January 2013, all recipients, regardless of setting, were afforded the same 10 day appeal process to receive uninterrupted Maintenance of Service (MOS) and could file their appeal up to 30 January 2013. [Terrell Affidavit, P 12]

> *Plaintiffs' Ninth Allegation: 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. [DE 135, p.5]*

The General Assembly's temporary appropriation of $39,700,000 in state funds for a short-term assistance to terminated Medicaid PCS recipients bears no rational relationship to the Plaintiff's allegations. The General Assembly appropriated specific funds to be used for a

specific and short-term transitional period. The Department did not have discretion in the use of the funds. [DE 135-2] The General Assembly is not a party to this action. Additionally, this allegation has no bearing on eligibility criteria.

Plaintiffs alleged "implementation" issues under Policy 3L are either not true or have no bearing in this matter. In fact, Plaintiffs cannot show any harm and fail to show any nexus or connection between the alleged "implementation" issues under Policy 3L and the risk of institutionalization or being "at risk" of institutionalization.

IV. None Of The Named Plaintiffs Can Represent The Class On The Notice Issues.

The U.S. Court of Appeals for the Fourth Circuit Court considered the Plaintiffs' allegations regarding notices, and noted that they complied with the requirements of due process. *Pashby*, 709 F.3d 307, 325-28. In the Second Amended Complaint, Plaintiffs allege the termination and denial notices issued by DHHS and CCME are sent by certified mail which "sometimes causes" notices not to be received or received late. [DE 133]. Yet, Plaintiffs have not provided any information or evidence that any of the class representatives failed to receive or belatedly received any notice following the commencement of Policy 3L. In fact, all of the 13 named Plaintiffs have timely filed appeals of their Medicaid PCS determinations. [DE 133] Additionally, Plaintiffs fail to raise this issue in their Motion to Amend Definition of Certified Class. [DE 134]

V. Plaintiff's Proposed Amended Certified Class Fails To Properly Define The Class Pursuant To Federal Rule Of Civil Procedure 23(c)(1)(b)

Pursuant to Federal Rule of Civil Procedure 23(c)(1)(b), an order that certifies a class action must define the class and the class claims, issues, defenses and must appoint class counsel. In other words, the text of the order or an incorporated opinion must include (1) a readily

discernible, clear and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of claims, issues or defenses to be treated on a class basis. *Watchel v Guardian Life Ins. Co. of Am.*, 453 F3d 179, 188-189 (3rd Cir. 2006). Plaintiffs' proposed order asks this Court to certify a class based on the "eligibility requirements for in-home PCS and unlawful policies and practices in Defendant's implementation of Clinical Coverage Polices 3E and 3L." [DE 135-4] The nondescript and feckless phrase "unlawful policies and practices" does not provide a clear and readily discernible statement of the parameters of the class. Clinical Coverage Policy 3L is 23 pages long and contains many different provisions. [DE 134-2] Defendant would be unable to determine if any of Policy 3L's "policies and practices" apply, and therefore would be unable to determine if any Medicaid recipient meets the class definition.

Plaintiffs casually request that the "class definition should be amended to include persons denied or terminated from in-home PCs under policy 3L". [DE 135] However, Policy 3L is NOT facially invalid and applies comparably to all PCS recipients. Plaintiffs have alleged a few Policy 3L "implementation" issues which may or may not apply. To be certain, and at best, only those in-home Medicaid PCS recipients who can prove that the alleged "implementation" issues affected their eligibility criteria should be considered for the amended class certification.

Plaintiffs also seek an order that Defendant shall provide an updated list of class members. [DE135-4] The class definition must be "precise, objective and presently ascertainable." *Crane v. Int'l Paper Co.*, 2005 U.S. Dist. LEXIS 15590, 2005-01 Trade Cas. (CCH) P74, 789 (D.S.C. 2005), quoting MANUAL FOR COMPLEX LITIGATION, Fourth, § 21.222 (FJC 2004); *see also Bratcher v. Nat'l Standard Life Ins. Co.*, 365 F.3d 408, 413 (5th Cir. 2004) ("A precise class definition is necessary to identify properly 'those entitled to relief, those bound

by the judgment, and those entitled to notice.'" MOORE'S FEDERAL PRACTICE § 23.21[6], at 23-62.2 (3d ed. 2003)). For the reasons stated above, absent a clearly articulated and readily discernible class definition, Defendant cannot provide to Plaintiffs their demanded list. Plaintiffs cannot satisfy the basic minimum requirements for establishing a claim suitable for class resolution set forth in *Watchel* and the motion for class certification should be denied.

CONCLUSION

Plaintiffs' request to amend the current certified class should be denied. Plaintiffs have failed to meet their burden of establishing that any of the named Plaintiffs have standing to bring the alleged claims. Moreover, Plaintiffs have failed to establish that there are questions of law and fact common to the putative class, that the claims of the named Plaintiffs are typical of those of the putative class members or that the named Plaintiffs can adequately represent putative class members.

Respectfully submitted, this 17th day of May, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, 17 May 2013, I electronically filed the forgoing **RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND DEFINITION OF THE CERTIFIED CLASS AND TO PROVIDE NOTICE TO THE CLASS** 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 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.

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