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' REPLY IN SUPPORT OF MOTION TO AMEND DEFINITION OF CLASS

Plaintiffs have filed a motion, based on Fed. R. Civ. P. 23(c)(1)(C), to amend the definition of the certified class to reflect factual developments in this case. [DE 135.] Contrary to Defendant's arguments, Plaintiffs are not adding new claims or altering their suit in any significant way. Rather, Plaintiffs raise the same claims against the same Defendant based on the same rationale – that Defendant applies a stricter eligibility process for coverage of Personal Care Services (PCS) for those living at home than for those living in institutional adult care homes (ACHs). Accordingly, this Court should reject the agency's arguments and allow amendment of the class definition.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CONTINUE THIS ACTION.

In order to demonstrate standing, Plaintiffs must show "injury in fact" that is "actual and imminent." *Pashby v. Delia,* 279 F.R.D. 347, 351-52 (1992); *citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, (1992). Standing is determined at the commencement of a

lawsuit. *Pashby v. Delia,* 709 F.3d 307, 316 (4th Cir. 2013), citing *Lujan* at 571. This Court has already determined that because each Plaintiff "faced, at the outset of this litigation, the termination of his or her in-home PCS due to the change in requirements that was to be implemented on June 1, 2011, each . . . had standing to challenge the implementation of Policy 3E." *Pashby,* at 351. Thus, the question of standing has already been determined.

Now, under Defendant's new regime, the named Plaintiffs and other members of the certified class continue to face the risk of termination of PCS pursuant to Defendant's implementation of Policy 3L. Indeed, the named Plaintiffs who are still living in their homes allege that they are subject to reevaluation under Policy 3L and the illegal practices attendant to that policy. 2d Amend Compl. ¶¶ 59, 69, 74, 81, 90, 99, 109, 120. Contrary to Defendant's argument, the individual Plaintiffs have specifically alleged that Defendant's ongoing practices for determining eligibility for in-home PCS are causing or threatening them with harm. Proposed Second Amendment and Supplemental Complaint ¶¶ 5, 16 (2d Amended Compl.) ¶¶ 3, 16, 206, 207, 217, 218. Accordingly, Plaintiffs have standing to raise their claims that the implementation of Policy 3L violates federal law.[1]

In particular, Defendant claims that the 2d Amended Complaint fails to allege harm to Robert Jones. Defendant is wrong. In fact, Mr. Jones' PCS has already been terminated pursuant to Policy 3L based on an assessment under Defendant's discriminatory implementation of Policy 3L. 2d Amended Compl. ¶ 127. Defendant also incorrectly claims that the declaration of Mr. Jones' witness, Alonzo Percer, does not show that any of the implementation problems with Policy 3L caused or contributed to the recent termination of

[1] As was the case with the original Complaint, Defendant may be confusing standing with mootness. This action is not moot, as Plaintiffs explained in their Response to Defendant's Motion to Dismiss. [DE 139.]

Mr. Jones' PCS services. Defendant misunderstands the significance of Mr. Percer's statements. Plaintiffs have alleged that Defendant has implemented Policy 3L differently for in-home PCS recipients and applicants than for ACH PCS applicants and that these discriminatory practices have caused class members to continue to be denied or terminated from in-home PCS, threatening them with institutionalization. 2d Amended Compl. ¶ 204-207. Mr. Percer's declaration illustrates some of these discriminatory practices, which occurred during a recent assessment that resulted in Mr. Jones' PCS being terminated by Defendant.

For example, Plaintiffs allege that, in contrast to the process for ACH residents, advance written notice of PCS assessments are not provided to Plaintiffs and their PCS providers and that the in-home assessment does not include review of medical records. 2d Amended Compl. ¶¶ 204.C, 204.D. This allegation is supported by Mr. Percer's statement that Mr. Jones did not receive advance written notice of the assessment, nor was there any indication that the assessor had reviewed Mr. Jones' medical records. Percer Decl. ¶¶ 10-11. Plaintiffs also allege that in-home PCS applicants and recipients are frequently denied or terminated based on a determination that a family member is available to provide care, without inquiring whether the caregiver is willing or able to do so. 2d Amended Compl. ¶ 204.A. Mr. Percer stated the assessor asked him "why can't you provide the care he needs?" Percer Decl. ¶ 12. In contrast, the ACH PCS assessment form makes no inquiry at all about this issue. Sea Decl., Ex. N. [DE 134-5]. Mr. Jones plainly has standing to challenge a discriminatory process which resulted in him losing PCS.

II. PLAINTIFFS CONTINUE TO MEET THE REQUIREMENTS OF COMMONALITY AND TYPICALITY

A. Plaintiffs have sufficiently alleged commonality.

The facts and legal issues are essentially the same as those raised in the original Complaint, which this Court already found satisfied the requirements of Rule 23(a). *Pashby v. Cansler*, 279 F.R.D. 347, 353-54 (E.D.N.C. 2011) *aff'd, Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013). Plaintiffs continue to allege a number of common questions of fact, most of which are identical to those raised by the initial Complaint, for example, that they:

- Have been or are threatened with denial, delay, interruption, termination, or reduction of in-home PCS;
- Have disabilities and lack family caregivers who can provide the assistance that they need;
- Suffer discrimination as a result of Defendant's policies and practices favoring individuals living in ACHs;
- Have or will receive notices that do not comply with the Fourteenth Amendment of the U.S. Constitution;
- Will need to move into ACHs in order to receive the PCS they need or, in the alternative, the loss of PCS will cause their health to deteriorate to the point that they require hospitalization or placement in nursing facilities.

2d Amended Compl. at ¶¶ 1, 2, 3, 4, 5, 12, 16, 50-137, 201-207, 217-241.

Plaintiffs also raise identical questions of law to those in the original complaint:

- Whether Defendant's policies and practices violate Title II of the Americans with Disabilities Act, 42 U.S.C. § 12312 and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794;
- Whether Defendant's policies and practices violate Medicaid's comparability and reasonable standards requirements, 42 U.S.C. §§ 1396a(a)(10)(B), 1396a(a)(17).
- Whether Defendant's policies and practices violate the Due Process clause of the Fourteenth Amendment to the U.S. Constitution.

2d Amended Compl. at ¶¶ 219-241; 1st Amended Compl. at ¶¶ 193-217 [DE 44].

Defendant argues that Plaintiffs are asking this Court to determine whether every PCS assessment was performed correctly. This is incorrect. Rather, Plaintiffs continue to request an order compelling Defendant to end her systemic, across-the-board practices which continue to make it much easier to qualify for PCS in an institutional ACH than at home. 2d Amended Compl. ¶2. Defendant suggests that the Court will have to determine whether every plaintiff is at risk for institutionalization, but this is no more true now than it was when Plaintiffs initially requested class certification. *See* DE 48, at 11; DE 55, at 7-8. As they did in their original Complaint, Plaintiffs ask the Court to order Defendant to change the policies and practices that result in the violations of the ADA, Section 504, Medicaid, and the Fourteenth Amendment. 2d Amend. Compl., at 49-50. Accordingly, as it did when Defendant first made it, this Court should reject this argument. *Pashby v. Cansler*, 279 F.R.D. 347, 353-54 (E.D.N.C. 2011).

Defendant suggests that because Policy 3L, in contrast to Policy 3E, does not on its face impose different criteria for eligibility for PCS based on an individual's living situation, Plaintiffs no longer have valid claims. With regard to Plaintiffs' allegation that Defendant's *practice* continues to be discriminatory, Defendant simply asserts that this is not true.[2] DE 148, at 12. This is not surprising – the fact that parties disagree over allegations is the reason lawsuits are filed. To the extent proof is required at this stage, Plaintiffs have submitted Defendant's own assessment forms and training materials, which directly support their allegations. Defendant, in contrast, has said almost nothing about the documents filed by

[2] Defendant alleges that higher percentage of those evaluated for in-home PCS are found eligible than those in ACHs. 2d Amended Compl. at 12. This is perfectly consistent with Plaintiff's allegations that in-home PCS recipients have higher needs and more severe disabilities than those in ACHs. 2d Amended Compl. ¶¶ 138-89. This statistic is also very misleading, because it ignores the hundreds of class members who were terminated from in-home PCS for failure to meet the 3 ADL standard before Policy 3L was implemented.

Plaintiffs and has introduced no contrary evidence except a conclusory declaration which is not supported by a single instruction, form, case example, or any other document. *See* Terrell Affid. [DE 148-1]. Plaintiffs have satisfied their burden of showing that they meet the commonality requirement.

Finally, Plaintiffs' allegations conform with the direction of *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (2011). That decision makes clear that a class action must make a "common contention . . . that . . . is capable of classwide resolution – which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims at one stroke." *Id.* at 2551. Plaintiffs' case rests upon a number of common contentions: (1) Defendant has implemented specific written procedures and across-the-board practices, documented in Defendant's own assessment forms, referral forms, and training materials, which more liberally apply Policy 3L for those living in ACHs than for those living at home; (2) these procedures and practices violate the federal Medicaid statute, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act; (3) Defendant's standard written notice of PCS denial or termination, when not issued in response to a mass change in eligibility, violates due process; and (4) Plaintiffs are at risk of institutionalization in an ACH as a result of Defendant's discriminatory procedures and practices. These allegations sharply contrast with *Wal-Mart*, in which the plaintiffs did not allege that the defendant had any written or unwritten corporate policy or procedure that discriminated based on sex, but rather complained about the manner in which local supervisors in 3,400 stores around the U.S. exercised unfettered, *individual* discretion. *Id.* at 3-4. Moreover, Plaintiffs' contentions have remained essentially the same throughout this lawsuit, and this

Court already ruled that class certification is consistent with *Wal-Mart*. *Pashby*, 279 F.R.D. at 353.

B. Plaintiffs have satisfied the typicality requirement.

Claims and defenses of the representative parties must be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). As this Court has noted, "typicality does not require that each Plaintiff have an identical factual circumstance." *Pashby,* 279 F.R.D. at 354. The typicality requirement is generally satisfied when the named plaintiffs are subjected to the same statute, regulation, or policy. *Rodger v. Electronic Data Systems,* 160 F.R.D. 532, 535-36 (E.D.N.C. 1995).

Here, the individual Plaintiffs have been or will be subjected to assessment under Policies 3E or 3L, threatening them with termination of their PCS coverage pursuant to policies and practices that violate federal law. Moreover, like the rest of the class, they are subject to reassessment under Policy 3L soon. *See, e.g.* Decl. of Micheal Hutter [DE 134-30, ¶ 15]. Defendant claims that in order to determine whether Plaintiffs' claims are typical, this Court will need to determine whether every Plaintiff's PCS assessment is proper, but as noted above, this is not true. Rather, as with the original class definition and complaint, all Plaintiffs' claims are based on the same legal theory and the same factual premise – that the PCS eligibility process is not in fact the same for ACH and in-home residents, continuing an illegal institutional bias. The only difference now is that Defendant changed her written eligibility policy, but not the procedures which implement it.

III. PLAINTIFFS HAVE ALLEGED MORE THAN SUFFICIENT FACTS TO SUPPORT CLASS CERTIFICATION.

Plaintiffs have alleged that there are at least nine significant differences in the eligibility process used by Defendant for in-home PCS recipients and applicants and that

applied to ACH residents. 2d Amended Compl. ¶ 204. Each of these allegations has been supported by sworn testimony, documentary evidence, or both. *See e.g.* Sea Decl., DE-134-1, and exhibits thereto.

Defendant also asserts that some of the allegations are immaterial to Plaintiffs' claims, but she misunderstands them. For example, Plaintiffs allege that Defendant's referral and assessment forms for ACH PCS ask whether an individual is at risk for falls, malnutrition, skin breakdown, or medication non-compliance, but the in-home PCS forms do not. Defendant asserts that these questions are immaterial to PCS eligibility determinations. [DE 148, at 17] This assertion is implausible on its face. How, for example, can the question of whether an individual is at risk for a fall be unrelated to whether that person needs assistance with dressing or bathing? Determining the truth of the matter will require merits discovery. In any case, the fact that the parties disagree on this factual issue is no reason for Plaintiffs' motion to be denied.

Defendant also argues that the N.C. General Assembly's appropriation of more than $39 million in funds for short-term assistance to terminated ACH PCS recipients bears no relationship to Plaintiffs' allegations. DE 148, at 18. To the contrary, this new legislation is part of a set of policies and procedures which continue to favor coverage of PCS in institutional settings. No such funding has been appropriated to provide support for those losing Medicaid coverage of in-home PCS. This legislation, which Defendant is charged with implementing, directly provides that eligibility for PCS funding continues to be different in institutional ACHs than at home.[3]

[3] Defendant also states that "the General Assembly is not a party to this action." DE 148, at 19. This fact is immaterial. Defendant has the responsibility for implementing the challenged state legislation and for ensuring compliance with the ADA in doing so. Accordingly, she is
Footnotes continued on the next page.

IV. THERE ARE ADEQUATE CLASS REPRESENTATIVES FOR THE NOTICE ISSUES

Plaintiffs have alleged that Defendant's termination notices do not comply with due process because they do not contain certain individualized information about Plaintiffs' assessments. 2d Amended Compl. ¶ 44. While the Fourth Circuit held that Defendant's notice complied with the Fourteenth Amendment's due process requirements when issued as in response to "a broad statutory change," the Court of Appeals was silent on whether such notices were proper when provided as a result of an individual determination rather than a policy change. *Pashby,* 709 F.3d at 328. Plaintiffs are subject to reassessment and therefore at risk of harm from receiving such a notice, like the rest of the Plaintiff class. Because this claim was part of the original complaint, Plaintiffs certainly have the right to continue to pursue it.

Plaintiffs have also alleged in the 2d amended complaint that Defendant has a policy of sending termination and denial notices by certified mail, which means that in-home PCS recipients are more likely to get these notices late. [DE 133, ¶ 204.] Defendant argues this practice is consistent with due process, but this misunderstands the allegation. It is one example of how Policy 3L is being implemented in a way that favors ACH residents. When Plaintiffs are reassessed, they are at risk of harm from this policy.

V. THE AMENDED CERTIFIED CLASS PROPERLY DEFINES A CLASS.

Plaintiffs agree that a class definition must properly identify members and be presently ascertainable. Def. Brf. at 20. But Defendant is wrong when she argues that the

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the proper party to this suit. *Planned Parenthood v. Cansler,* 804 F. Supp. 2d 482, 490 (M.D.N.C. 2011).

proposed amended definition is not sufficiently definite. The amended definition is worded almost identically to the original one, which this Court has already determined to meet the requirements of Rule 23. The difference is the inclusion of Policy 3L. *Compare* Proposed 2d Amended Compl. ¶ 16 [DE 133] *with* 1st Amended Compl. ¶ 14. Plaintiffs are asserting that Defendant's discriminatory practices and procedures (most of which are memorialized in their assessment forms and training materials) infect all determinations under Policy 3L. *See* 2d Amended Compl. ¶¶ 3, 16, 206, 207, 217, 218. The class is therefore easy to ascertain – anyone who has been denied in-home PCS under Policies 3E or 3L. Therefore, there is no need for this Court to review each termination to determine who is a class member.

VI. THE COURT SHOULD NOT DELAY RULING ON THIS MOTION

Defendant asserts, without argument or case support, that this Court should allow her to conduct discovery before ruling on this motion. Defendant has offered no reason for such a delay, and it is not justified. All of the evidence that Plaintiffs have submitted in support of their motions to amend the class definition and complaint are Defendant's own documents. All of them are available to Defendant, as are any documents related to eligibility and medical conditions of the Named Plaintiffs and Plaintiff class members. Bifurcating discovery would only needlessly complicate and further delay this case.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court enter an Order granting their motion to amend the class definition and order that notice be given to the class.

Dated: May 31, 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' REPLY IN SUPPORT OF MOTION TO AMEND DEFINITION OF CLASS** upon the Defendant's attorneys via electronic means through the CM/ECF system to:

Lisa G. Corbett
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This the 31th day of May, 2013.

/s/Douglas Stuart Sea _______
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