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. LANIER CANSLER, in his official capacity as Secretary of the North Carolina Department of Health and Human Services, Defendant.	**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CERTIFICATION OF CLASS**

NOW COMES DEFENDANT Lanier Cansler (hereinafter referred to as Secretary Cansler), by and through his counsel, Roy A. Cooper, III, Attorney General of the State of North Carolina, Tracy J. Hayes, Lisa Granberry Corbett, and Eryn E. Linkous, Assistant Attorneys General, and files this Response in Opposition to Plaintiffs' Motion for Certification of Class.

INTRODUCTION

On June 6, 2011, plaintiffs moved to certify a statewide class of plaintiffs pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), defined as:

> all current or future North Carolina Medicaid recipients age 21 or older who have, or will have, coverage of PCS denied, delayed, interrupted, terminated, or reduced by Defendant directly or through his agents or assigns as a result of the new eligibility requirements for in-home PCS and unlawful policies contained in ICHA [sic] Policy 3E.

On behalf of themselves and the proposed class, the twelve named plaintiffs seek declaratory and injunctive relief preventing Secretary Cansler from implementing the federally-approved In-Home Care Medicaid State Plan Amendment ("SPA") mandated by the North Carolina General Assembly and the corresponding In-Home Care for Adults ("IHCA") Clinical Coverage Policy No.: 3E ("IHCA Policy 3E"), which was duly promulgated in accordance with state law.

IHCA is one of two new services approved by the federal Centers for Medicare and Medicaid Services ("CMS") on April 18, 2011. It is designed to replace a different Medicaid personal care services ("PCS") program for adults previously in effect through May 31, 2011. The creation of the IHCA program was mandated by the North Carolina General Assembly, which instructed the North Carolina Department of Health and Human Services ("Department") to "no longer provide services under PCS and PCS-Plus . . . whenever CMS approves the elimination of PCS and PCS-Plus programs and the implementation of the following two new services." N.C. Session Law 2010-31, Section 10.68A.(a)(3a). The two new services are IHCA and In-Home Care for Children ("IHCC").

IHCA provides the assistance of an in-home aide "to meet the eating, dressing, bathing, toileting, and mobility needs of individuals 21 years of age or older who, because of a medical condition, disability, or cognitive impairment, demonstrate unmet needs for, at a minimum: (i) three of the five qualifying activities of daily living (ADLs) with limited hands-on assistance; (ii) two ADLs, one of which requires extensive assistance; or (iii) two ADLs, one of which requires assistance at the full dependence level." N.C. Session Law 2010-31, Section 10.35. The Department submitted a SPA that included the legislatively-mandated eligibility criteria for IHCA to CMS on October 25, 2010. The SPA was approved on April 18, 2011, and the new IHCA Policy 3E, which implemented the SPA, took effect on June 1, 2011.

In order to comply with the June 1, 2011 effective date of the IHCA program, the contractor responsible for conducting in-home independent nurse assessments reviewed the assessment results on file for each of the more than 27,000 Medicaid recipients authorized to receive PCS to determine if those individuals met the new IHCA eligibility criteria. [D.E. # 42, ¶26.] Following this review, 2,405 recipients were notified that they do not meet the eligibility criteria for IHCA. As of May 22, 2011, 1,083 (45%) of those 2,405 recipients had filed a timely request for hearing at the Office of Administrative Hearings. [D.E. # 42, ¶ 21.]

To date, five of the named plaintiffs have mediated and voluntarily dismissed their administrative appeals contesting the denial of IHCA. Two others qualified for IHCA as a result of a new assessment performed by defendant's contractor. The remaining five plaintiffs have failed to exhaust their administrative remedies. No final agency decision has been rendered in any administrative appeal filed by any North Carolina Medicaid recipient contesting a denial of IHCA services. In what the Department believes is an improper attempt to preserve the viability of the putative class, the North Carolina Office of Administrative Hearings has stayed all appeals of IHCA denials until this court rules on plaintiffs' motion for preliminary injunction. *See* Exhibit 1.

As set forth below, this Court should deny certification because the plaintiffs lack standing, their claims are not ripe, and they cannot meet the requirements of Federal Rule of Civil Procedure 23(a). In the alternative, this Court should not rule on the remaining 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, the plaintiffs bear the burden of establishing that the proposed class satisfies all four prerequisites contained in Rule 23(a): (1) the 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*, No. 10-277, 564 U.S. ___, 2011 U.S. LEXIS 4567 (June 20, 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), which applies 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.

In addition to this express two-step analysis, there are two implicit requirements contained within Rule 23. First, the plaintiffs must have standing. *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."). Second, 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)). Plaintiffs cannot satisfy these basic minimum requirements for establishing a claim suitable for class resolution. Failure to meet any one of them mandates denial of the motion for class certification.

ARGUMENT

I. Plaintiffs Lack Standing To Bring This Action.

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).

A. Seven of the named plaintiffs lack standing because they have qualified for IHCA services.

Five of the named plaintiffs — Henry Pashby, Alice Shropshire, Margaret Drew, Micheal Hutter, and Sandy Splawn — have already dismissed their administrative appeals at the state agency level because they resolved their disputes in mediation: Mr. Pashby has been approved for 50 hours of IHCA, Ms. Shropshire has been approved for 45 hours of IHCA, Ms. Drew has been approved for 28 hours of IHCA, Mr. Hutter has been approved for 60 hours of IHCA, and Ms. Splawn has been approved for 57 hours of IHCA. *See* Supplemental Affidavit of Karen Feasel in Support of Defendant's Opposition to Plaintiffs' Motion for Class Certification ("Supp. Feasel"), ¶¶ 4-5, 7. Additionally, Plaintiff Annie Baxley submitted a request for Change in Status to the Department's contractor, was approved for 51 hours of IHCA and subsequently

dismissed her appeal, and Plaintiff Melissa Gabijan underwent a new assessment as a result of mediation and was approved for 59 hours of IHCA (the dismissal of her administrative appeal is currently pending). Supp. Feasel ¶¶ 5, 8. Thus, seven of the twelve named plaintiffs have now qualified for IHCA and dismissed their individual claims.

The Fourth Circuit recently held "that when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, as happened in this case, there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III standing requirements." *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (2011), quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980). The *Rhodes* court recognized that a "case must be brought by a party with a 'personal stake' in the litigation," and that this "personal interest must continue throughout the litigation, including on appeal." *Id.* at 99, quoting *United States v. Hardy*, 545 F.3d 280, 283 (4th Cir. 2008) and *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980). If circumstances change while a case is pending, thereby leaving a plaintiff without the personal stake necessary to maintain Article III standing, "the district court or appellate court must dismiss the case for lack of subject-matter jurisdiction." *Id.*, citing *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 110-11 (4th Cir. 1993).

In reaching its ultimate conclusion that a putative class plaintiff who voluntarily settles his or her claim does not have a "sufficiently concrete interest in the certification question to satisfy the case-or-controversy requirement of Article III," the Fourth Circuit found that "[t]wo conditions must be met, however, to retain Article III jurisdiction." *Id.* "The 'imperatives of a dispute capable of judicial resolution [must be] sharply present,' and there must be 'self-interested parties vigorously advocating opposing positions.'" *Id.*, quoting *Geraghty*, 445 U.S. at

403. The seven plaintiffs who have qualified for IHCA no longer have a dispute against Secretary Cansler capable of judicial resolution.

Applying the principles set forth by the Supreme Court in *Geraghty* and the Fourth Circuit in *Rhodes*, this court must conclude that seven of the named plaintiffs do not satisfy Article III standing requirements and cannot serve as class representatives. The seven plaintiffs have qualified for services under the new eligibility requirements (most of them at levels higher than they were receiving prior to June 1, 2011). They have suffered no injury-in-fact and should be dismissed from the lawsuit.

B. The five remaining plaintiffs lack standing because their claims are not ripe for review.

Regardless of how the standing requirement is analyzed, federal courts agree that no class can be certified on behalf of individuals who fail to meet the Article III "case or controversy" requirement. *See, e.g., O'Shea v. Littleton*, 414 U.S. at 494; *Hall v. Beals*, 396 U.S. 45, 48-49 (1969); 7A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE § 1785.1. "For a case or controversy to be ripe for judicial review, it must involve 'an administrative decision [that] has been formalized and its effects felt in a concrete way by the challenging parties.'" *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 665 (4th Cir. 1997), citing *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208 (4th Cir. 1992) (citing *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 200, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983)). Here, each of the five remaining plaintiffs has filed a timely request for a fair hearing in accordance with federal and state law but no final administrative decision has been issued on the central question of whether they qualify for IHCA under the new eligibility requirements. Supp. Feasel ¶¶ 6, 10. Likewise, none of the Medicaid recipients who filed an appeal of an IHCA denial have had a hearing on the merits and been denied IHCA services after a final agency decision. Supp.

Feasel ¶10. Thus, it remains entirely speculative whether, at some unspecified point in the future, any of these plaintiffs will ultimately be denied benefits as a result of the SPA and IHCA Policy 3E. *See, e.g., Egan v. Davis*, 118 F.3d 1148, 1150 (7th Cir. 1997) ("Persons who actually lose as a result of the administrative appeal would be appropriate plaintiffs, but as we have stressed no such person is before the court.") The plaintiffs in the present case have failed to demonstrate that their challenge is ripe for adjudication. Moreover, no member of the putative class has a claim that is ripe for review by this court at the present time.

C. None of the plaintiffs have standing to serve as class representatives as to the due process claims because they all filed a timely request for appeal.

In the complaint, plaintiffs' claim that defendant violated their due process rights because the IHCA denial notices were insufficient to advise them of their right or need to appeal. However, all twelve of the named plaintiffs filed a request for a "fair hearing" in accordance with N.C. Gen. Stat. §108A-70.9 and 42 C.F.R. Part 431. Supp. Feasel ¶6. This undisputed fact directly contradicts the plaintiffs' due process allegations.

There has been no deprivation of a protected interest without notice and an opportunity to be heard, which is all that due process requires. *Board of Regents v. Roth*, 408 U.S. 564, 569, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). "Meaningful notice must edify the receiver sufficiently so that he or she will have an opportunity to respond to the government action." *Wagner v. Duffy*, 700 F. Supp. 935, 943 (N.D. Ill. 1988). Clearly, the named plaintiffs understood the notices sufficiently to timely and properly file an appeal contesting the IHCA denial. Pursuant to state and federal law, each of the named plaintiffs continues to receive maintenance of their personal care services at the level each was receiving prior to notice of the IHCA denial. 42 C.F.R. §431.230; N.C. Gen. Stat. §108A-70.9. [D.E. # 40, ¶¶ 5-16] Accordingly, none of the named plaintiffs has a case or

controversy arising under Article III as to their due process claims, and lack standing to serve as class representatives on the fifth and sixth causes of action.

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.'" 2011 U.S. LEXIS at *18, 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. In their motion for class certification, plaintiffs gloss over these requirements and blithely assert, without any supporting evidence, that they share questions of law and fact common and typical to the class, and seek the same relief as do all class members.[1] These common factual and legal issues allegedly include Medicaid

[1] Because it is premature to address plaintiffs' entirely speculative and exaggerated claims as to numerosity without conducting class discovery, this response will focus on the remaining three factors.

eligibility status, pre-June 1, 2011 PCS eligibility status, disability status, lack of family caregivers, failure to meet the stricter IHCA eligibility criteria, a desire to live at home, threat of institutionalization, and receipt of "boilerplate" notices. [D.E. # 26, pp 6-7] Plaintiffs have presented no evidence that each of the named plaintiffs or all proposed class members are disabled, desire to live at home, lack family or other caregivers, are at risk of institutionalization, or that any plaintiff has received a final agency decision determining that the recipient fails to meet eligibility criteria for IHCA services.

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 this case, because each plaintiff's disability status, medical condition, personal care needs, alleged risk of institutionalization, desire or ability to live at home, and opportunity for a fair hearing must be decided on an individual, fact-specific basis, they cannot meet the requirements of Rule 23(a).

Plaintiffs cite the Eastern District of North Carolina's decision in *Rodger v. EDS*, 160 F.R.D. 532 (1995) for the proposition that the commonality factor should be "liberally construed." Defendant submits that the Supreme Court's recent decision in *Wal-Mart* is more persuasive authority. 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." 2011 U.S. LEXIS at *20 (emphasis added) (quoting Nagreda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U.L. REV. 97, 132 (2009)). 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 class does not meet the final three interrelated Rule 23(a) factors.

A. Each plaintiff's "risk of institutionalization" is dependent upon individual factual circumstances.

Plaintiffs argue that the new IHC State Plan Amendment and IHCA Policy 3E violate the Americans with Disabilities Act ("ADA") because they subject each plaintiff and each proposed class member to a discriminatory "risk of institutionalization." In support of this argument, each plaintiff filed practically identical declarations stating that without the help of a personal care assistant they "might" have no choice but to enter a facility. None of the five plaintiffs who still have pending IHCA administrative appeals have stated they *will* enter an institution if they do not prevail on their appeal. Each plaintiff's risk of institutionalization will depend upon highly individualized factual circumstances. Each plaintiff and each proposed class member do not share the same or even similar factual circumstances regarding their health and their living situation that would support a finding of commonality. Specific facts about each person's medical condition, health care needs, living situation, family and other supports, and other services received will impact whether an individual class member will be able to show whether the ADA has been violated. *See, e.g., J.B. v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999).

In *Valdez*, plaintiffs alleged that the state Defendants failed to provide protections and therapeutic services required under the ADA, Medicaid, and the Rehabilitation Act, among other federal statutes. *Id.* The U.S. District Court denied class certification because of divergent factual circumstances as to each of the named plaintiffs and the purported class members, and the Tenth Circuit affirmed, holding that "no common factual link joins these plaintiffs." *Id.* at 1289. *See also Hohider v. UPS*, 574 F.3d 169, 197 (3d. Cir. 2009) ("As discussed, the individualized inquiries necessary to determine whether UPS has engaged in a pattern or practice of unlawful discrimination under the ADA render certification of this class improper, even if plaintiffs were to seek solely injunctive or declaratory relief."); *Elizabeth M. v. Montenez*, 458 F.3d 779, 787 (8th Cir. 2006) ("The presence of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry," quoting *Parke v. First Reliance Std. Life Ins. Co.*, 368 F.3d 999, 1004-05 (8th Cir. 2004), and noting that "it is impossible to evaluate whether the treatment needs [of the named plaintiffs] are typical of other class members.")

B. Each plaintiff's "comparability" and "reasonableness" claims under the Medicaid Act are dependent upon an individual assessment of the plaintiff's health care needs that cannot be extrapolated to the proposed class.

In their complaint, plaintiffs acknowledge that the Medicaid comparability requirement only "mandates comparable services when recipients have comparable needs" and it is only violated "when some recipients are treated differently from other recipients where each has the same level of need." [D.E. #15 p 16]. A determination of whether any of the named plaintiffs have comparable needs with each other, with other members of the proposed class, or with residents of Adult Care Homes receiving personal care services will depend upon an individualized, fact-specific inquiry into each plaintiff's medical diagnoses, health conditions

and ADL needs. Plaintiffs have presented no evidence in support of this broad class allegation or even in support of a finding that the named plaintiffs have comparable needs.

The Medicaid Act requires that all participating states use "reasonable standards (which shall be comparable for all groups) . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives" of the program. 42 U.S.C. § 1396a(a)(17)(the "reasonableness" requirement). Courts analyzing the reasonableness question have determined that "[t]he regulatory criterion is not whether the treatment suffices for a cure in all cases, but whether the plan is sufficient for reasonable accomplishment of its purpose." *Curtis v. Taylor*, 625 F.2d 645, 653 (5th Cir. 1980); *see also Moore v. Reese*, 637 F.3d 1220 (11th Cir. 2011). In *Curtis*, plaintiffs challenged the State of Florida's implementation of a limitation in benefits for physicians' services to three visits per month. *Id.* at 647. The Fifth Circuit undertook a lengthy review of federal caselaw to reach its determination that the benefit limit was reasonable:

> The rationale adopted by the courts that have considered the meaning of the applicable regulations permits the state to place at least one type of limitation on its provision of required services: it may limit those services in a manner based upon a judgment of degree of medical necessity so long as it does not discriminate on the basis of the kind of medical condition that occasions the need. The proposed limitation in this case is not the type that courts of appeals have rejected in the past. It is based on a generally applicable standard of what is deemed reasonable adequacy.
>
> * * *
>
> Florida's regulation is not inconsistent with Title XIX's broad purpose of servicing the indigent. Nor is it inconsistent with the purpose of the provision of physicians' services to the Medicaid population as a whole.

Id., citing *Virginia Hospital Ass'n v. Kenley*, 427 F. Supp. 781, 785 (E.D.Va. 1977).

None of the named plaintiffs have alleged that the in-home independent assessments performed by defendant's contractor are an unreasonable standard for determining the extent of personal care services each plaintiff is entitled to receive. Instead, like the plaintiffs in *Curtis*,

the plaintiffs here allege that the stricter criteria for IHCA eligibility violate the reasonableness requirement, although they have not alleged that the policy discriminates on the basis of medical condition. Even if the court were to review each plaintiff's medical condition, health care needs and living situation to evaluate whether the new eligibility criteria are unreasonable or discriminatory as to each plaintiff, such an analysis could not possibly be applied to the proposed class as a whole. In *Wal-Mart*, the Supreme Court noted that "[w]ithout some glue holding together the alleged reasons for those decisions, it will be impossible to say that examination of all the class members' claims will produce a common answer to the crucial discrimination question." 2011 U.S. LEXIS at *24. Similarly, the basis for each individual determination that a plaintiff or class member is not eligible for IHCA will be separate and distinct for each individual. There is no "common glue" that binds this class together. Plaintiffs' claim that the stricter eligibility criteria are not reasonable is dependent upon the same individualized, fact-specific inquiry into each plaintiff's medical condition as the comparability claim, and class certification as to this cause of action must fail for the same reason.

C. None of the named plaintiffs can represent the class on the due process claims.

As discussed above, the named plaintiffs have each filed a timely and proper appeal and thus have no claim that their procedural due process rights were violated. As of May 22, 2011, 45% of Medicaid recipients who received an IHCA denial notice have filed an appeal, which clearly contradicts the claim that the notices were insufficient. [D.E. # 42, ¶ 21.] Of those recipients who failed to timely appeal (who are not represented here because the named plaintiffs lack standing on this cause of action), only an individual inquiry can determine if the recipient's decision not to appeal has any basis in the claim that the notices were insufficient to properly advise recipients of the state's intended action. The mere fact that such a large percentage of the

affected recipients have already appealed tends to undermine this argument. Similarly, plaintiffs' assertion that the notices were not written in a manner that is understandable to individuals with cognitive impairments is not supported by the fact that so many of these allegedly disabled individuals filed a timely appeal. In any event, the Fourth Circuit has held that "we cannot assume that every disabled or chronically ill person is incapable of asserting his or her own claims." *Freilich v. Upper Chesapeake Health*, 313 F.3d 205, 215 (4th Cir. 2002).

III. In The Alternative, Further Development Of The Record Is Necessary Before The Court Can Rule On Plaintiffs' Motion For Class Certification.

At the class certification phase, "the district court must take a 'close look' at the facts relevant to the certification question and, if necessary, make specific findings on the propriety of certification." *Thorn*, 455 F.3d at 319, quoting *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004). Plaintiffs have not established an evidentiary record sufficient for this court to make specific findings as to the class allegations. Even if plaintiffs make the necessary *prima facie* showing, which they have not done here, defendant must then have the opportunity to submit affidavits to counter plaintiffs' evidence and seek class discovery. Should material facts remain in dispute, a hearing may be warranted. *See, e.g., Satterwhite v. City of Greenville*, 578 F.2d 987, 998 (5th Cir. 1978), *vac. and remanded on other grounds*, 445 U.S. 940, 100 S. Ct. 1334, 63 L. Ed. 2d 773 (1980) ("Although, in rare instances, maintainability may be determined on the basis of the pleadings, if there is any genuine doubt with respect to the propriety of a class action, a preliminary evidentiary hearing is essential.")(internal quotations omitted). In this case, certification on the pleadings alone would be premature and contrary to the requirements of Rule 23(a). This court should deny the motion for class certification or, in the alternative, refrain from ruling on the motion for class certification until the parties can complete discovery on the class issues.

CONCLUSION

Plaintiffs' request to certify a class of current and future Medicaid recipients over the age of 21 who have been found ineligible for personal care services under IHCA Policy 3E should be denied. Plaintiffs have utterly failed to meet their burden of establishing that any of the named plaintiffs have standing to bring the claims, 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. Given the wide disparity of factual circumstances concerning the health care needs and living situations of individuals seeking personal care benefits, class certification is not appropriate here. Plaintiffs' motion should be denied.

Respectfully submitted, this 11th day of July, 2011.

ROY COOPER
ATTORNEY GENERAL

/s/ Tracy J. Hayes
Tracy J. Hayes
North Carolina State Bar No. 35712
Assistant Attorney General
tjhayes@ncdoj.gov
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Phone: (919) 716-6800

/s/ Lisa Granberry Corbett
Lisa Granberry Corbett
North Carolina State Bar No. 15877
Assistant Attorney General
lcorbett@ncdoj.gov
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Phone: (919) 716-6880

/s/ Eryn E. Linkous
Eryn E. Linkous
Assistant Attorney General
North Carolina State Bar No. 38318
elinkous@ncdoj.gov
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Phone: (919) 716-6820
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this day, 11 July 2011, I electronically filed the forgoing DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS MOTION FOR CERTIFICATION OF 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, Jennifer L. Bills, Elizabeth Edwards, Jane Perkins, Sarah Somers and Douglas S. Sea, attorneys for Plaintiffs, and I hereby certify that I have mailed the document to the following non CM/ECF participants: none.

/s/ Tracy J. Hayes
Tracy J. Hayes
Assistant Attorney General