RECORD NO. 11-2363

In The

United States Court of Appeals

For The Fourth Circuit

HENRY PASHBY; ANNIE BAXLEY; MARGARET DREW; DEBORAH FORD; MELISSA GABIJAN; MICHAEL HUTTER; JAMES MOORE; LUCRETIA MOORE; AYLEAH PHILLIPS; ALICE SHROPSHIRE; SANDY SPLAWN; ROBERT JONES; REBECCA PETTIGREW,

Plaintiffs – Appellees,

v.

ALBERT DELIA, In his official capacity as Secretary of the N.C. Department of Health and Human Services,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH

BRIEF OF APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Pursuant to FRAP 26.1 and Local Rule 26.1,

H. Pashby, A. Baxley, M. Drew, D. Ford, M. Gabijan, M. Hutter, J. Moore, L. Moore, A. Phillips,
(name of party/amicus)

A. Shropshire, S. Splawn, R. Jones and R. Pettigrew

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

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If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

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6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on December 20, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/John R. Rittelmeyer
(signature)

Dec 20, 2011
(date)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This Court has jurisdiction over Defendant's appeal of the preliminary injunction order under 28 U.S.C. § 1292(a), but does not have jurisdiction over the grant of class certification.

STATEMENT OF ISSUES FOR REVIEW

I. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN GRANTING A PROHIBITORY PRELIMINARY INJUNCTION IN THIS CASE TO RESTORE THE STATUS QUO ANTE?

II. DID THE DISTRICT COURT APPLY THE PROPER LEGAL STANDARDS IN ITS DECISION?

III. IS THE ISSUE OF CLASS CERTIFICATION BEFORE THIS COURT?

IV. DID THE DISTRICT COURT HAVE SUBJECT MATTER JURISDICTION?

STATEMENT OF FACTS

This suit challenges the legality of N.C. Medicaid Clinical Policy 3E (Policy 3E), which restricted coverage for personal care services (PCS) provided in the home, but not in institutional settings.[1] From May 13 through May 18, 2011, pursuant to Policy 3E, Defendant mailed notices to every named Plaintiff and almost 2,400 other elderly, blind, or disabled North Carolina citizens notifying them that their Medicaid-funded In-Home PCS would be terminated effective June

[1] Personal care services provide assistance to persons with disabilities and chronic conditions to enable them to accomplish tasks they would normally do for themselves if they did not have a disability. Assistance may be in the form of hands on assistance or cueing the person to provide the task for himself. (JA 944.)

1, 2011. (Joint Appendix (JA) 23, 28, 35, 40, 47, 52, 57, 62, 67, 72, 460, 1029.) On May 31, 2011, Plaintiffs filed this class action and a motion for a preliminary injunction to halt these In-Home PCS terminations pending a determination of their legality. (JA 17.)

Before implementation of Policy 3E, eligibility for In-Home PCS in North Carolina required hands-on assistance with two or more of the following five following activities of daily living (ADLs): eating, bathing, dressing, ambulating, and using the toilet.[2] (JA 130.) Policy 3E narrowed eligibility for In-Home PCS, limiting coverage to those requiring limited hands-on assistance with three or more of the five listed ADLs or requiring assistance with two or more of the five listed ADLs, one of which must be at the "extensive" or "dependent" level. (JA 274.)

Defendant reversed his decision and approved In-Home PCS for all but three named Plaintiffs after this suit was filed, but they continue to be threatened with termination of their PCS under Policy 3E, which permits Defendant to reassess any recipient's need for in-home PCS services "at any time." (JA 270.) Two named Plaintiffs and hundreds of class members continue to receive In-Home PCS only because they filed administrative appeals of Defendant's decision to terminate their PCS and those administrative appeals have been stayed pending the outcome of this appeal. (JA 1056.)

[2] Policy 3E renames In-Home PCS "In-Home Care for Adults" but the service is still reimbursed as PCS under federal Medicaid rules. (JA 169.)

Plaintiff Robert Jones and over 1,300 members of the certified Plaintiff class lost their In-Home PCS because they do not have pending administrative appeals and were not approved by Defendant under Policy 3E. (JA 460, 1005.) These individuals' PCS were reinstated in January 2012 pursuant to the District Court's Preliminary Injunction, but they are imminently threatened with termination once again pursuant to this Court's Order granting a Stay. (JA 1489); Order Granting Stay (Mar. 6, 2012) [DE 32]. In addition, approximately 1,600 other Medicaid recipients were recently denied In-Home PCS under Policy 3E so are currently without the service. *See* April 13, 2012 Declaration of John Rittelmeyer, Ex. 6 [DE-42-9].

All named Plaintiffs and class members are suffering or threatened with irreparable harm to their health and safety and/or institutionalization as a result of Policy 3E. Both a treating physician and Defendant's agent, the Carolina Center for Medical Excellence, determined that hands-on PCS is medically necessary for every Plaintiff and class member to be able to perform two of the five ADLs listed above. (JA 126-30, 1450.) Assistance with these fundamental self-care tasks is vital to permit the frail individuals in the Plaintiff class to remain in their homes. (JA 81-82, 211.) Loss of In-Home PCS can lead to failure to take medications as prescribed, failure to eat properly, infections, injuries, and a "downward spiral" that can end in a nursing home or even death. (JA 81-82, 212.) For example, class

member Bobby Hall was hospitalized and then placed in a nursing home after suffering a fall a few weeks after his In-Home PCS ended. (JA 1408-16.) At least 57 members of the Plaintiff class have been institutionalized since their In-Home PCS was denied or terminated. Rittelmeyer Decl. ¶6, Ex.5 [DE 42-2, 42-8].

Defendant also provides Medicaid-funded PCS in Adult Care Homes (ACHs), which are mostly large institutions. As of January 2011, there were 602 ACHs in North Carolina with a total of 36,159 beds (an average of 60.6 beds per facility). One hundred sixty-five ACHs in North Carolina have 80 or more beds, and 40 ACHs have 120 beds or more, up to 201 beds in the largest facility. (JA 183-203.) Nor are these beds empty: the average occupancy rate for ACHs is 87%. (JA 166.) It is significantly more expensive to care for individuals in ACH's and other institutional settings than in their homes. (JA 77, 82, 208-09, 212-13, 308-18, 993-1003, 1103-04.)

Uncontradicted evidence below demonstrated the institutional nature of ACHs. ACHs are licensed and regulated by the N.C. Division of Facility Services. N.C.G.S. 131D-2.4. The physical layout of most ACHs is institutional. (JA 73-75 ¶¶6, 8, 10, 11, 13, 14) ; 10A NCAC 13F .0305, .0306. Many ACHs have special locked units. 10 NCAC 13F .1303, .1304. In most ACHs, residents have little interaction with the outside world and rarely go out into the community. (JA 74 ¶16) Many of these facilities are in rural areas or located in areas with little to no

access to public transportation. (JA 183-203) Visits with family and friends may be regulated. (JA 74 ¶12); 10A NCAC § 13F.0906(f)(2). Privacy is very limited because residents are subject to 24 hour supervision. 10A NCAC § 13F.0901. Residents have little control over their daily schedule and activities are done in a group. (JA 74 ¶13-15.) Residents generally are prohibited from managing their own activities such as cooking, taking medication, cleaning, budgeting and handling their own money. *Id* at ¶9, 13, 18, 21. Chemical and physical restraints may be ordered against the resident's will. N.C.G.S. § 131D-21(5); 10A NCAC § 13F.1501. Residents may be assigned a roommate not of their choice. (JA 74.)

It is much easier to qualify for PCS in an ACH than it is to qualify when living in the home. (JA 151, 154-59, 208, 269.) Defendant has not published any clinical policy setting forth eligibility requirements to receive PCS in ACHs, but, under current practice, all or almost all Medicaid recipients in ACHs qualify for PCS. (JA 151, 182); *see* 10A N.C.A.C. § 13F.0901. Currently, to quality for In-Home PCS, Defendant's contractor must certify the need for "hands-on" assistance with *three* of *five* possible ADLs but ACH PCS only requires that the ACH itself document the need for "some" assistance, including supervision, with *one* of *seven* listed ADLs.[3] (JA 151, 208 ¶19.) Moreover, eligibility for In-Home PCS requires

[3] The seven ADLs listed for ACHs are eating, toileting, ambulation, bathing, dressing, grooming, and transferring. (JA 151.)

prior authorization and a link with a documented medical condition, neither of which are required for coverage of PCS in an ACH. (JA 208, 267-68.)

In April 2011, the federal Medicaid agency, Centers for Medicare & Medicaid Services (CMS), approved Medicaid State Plan Amendment (SPA) 11-031, which authorized Defendant to implement Policy 3E. However, SPA 11-031 also required Defendant to impose more strict criteria for PCS for residents of ACHs. (JA 169, 173.) One year after the federal approval, Defendant has not implemented any of the new restrictions on ACH PCS required by CMS's approval of the SPA. (JA 210 ¶26); Rittelmeyer Decl. Ex. 3 [DE 42-6]. In any case, CMS has recently terminated SPA 11-031 and instead approved a new SPA requiring Defendant to implement the same criteria for PCS in ACHs as for In-Home PCS effective May 1, 2012. Rittelmeyer Decl., Exs. 1, 2 [DE-42-4, 42-5]. Nonetheless, Defendant's "corrective action plan" includes no steps to implement any changes to the criteria to receive PCS in an ACH until December 31, 2012, which is the date that the new SPA expires. Rittelmeyer Decl. Ex. 3 [DE-42-6].

SUMMARY OF ARGUMENT

The District Court was well within its discretion when it granted a preliminary injunction prohibiting the Defendant from implementing Policy 3E, which would have caused thousands of elderly and disabled Medicaid recipients to lose In-Home PCS. The District Court applied the correct legal standard, properly

treating the relationship between the parties prior to the date Plaintiffs filed their motion for preliminary relief as the status quo.

The District Court did not abuse its discretion in finding that Plaintiffs and hundreds of class members were threatened with irreparable harm from the denial or termination of In-Home PCS under Policy 3E. Indeed, Defendant's own agent determined that each Plaintiff and class member needs PCS in order to be able to perform two of the following activities of daily living: eat, ambulate, dress, bathe, and toilet. Bobby Hall and at least fifty-six other class members have been institutionalized since losing PCS under Policy 3E. The District Court also properly considered the balance of equities and the public interest before issuing its injunction.

The District Court did not err in finding Plaintiffs were likely to succeed on three of their legal claims. At the heart of Plaintiffs' claims is the undisputed fact that Defendant provides coverage for PCS under the federal Medicaid program in two different settings under two different sets of rules: very restrictive qualifications for PCS in the home but much more liberal rules for Medicaid coverage of PCS in large, institutional adult care homes (ACHs). Plaintiffs thus showed that they are likely to succeed on their claim that Defendant violated the community integration mandate of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act, as well as the comparability requirement in

the federal Medicaid statute. The District Court also was correct to find that Defendant likely violated due process by sending boilerplate PCS termination and denial notices to the Plaintiff class that did not give them enough factual information to challenge Defendant's decision at an administrative hearing. Defendant is wrong that the District Court failed to defer to a State Plan Approval (SPA) by the federal centers for Medicare & Medicaid Services (CMS) because CMS never approved Defendant's actions and, in fact, has recently instructed Defendant to immediately correct his noncompliance with the federal Medicaid statute. Nonetheless, Defendant's "corrective action plan" includes no changes to his criteria for PCS in ACHs during 2012, despite being repeatedly instructed by CMS, beginning in 2006, to do so.

The District Court's Order was sufficiently detailed to meet the requirements of Fed. R. Civ. P. 65 and, even if the issue were properly before this Court, the District Court did not abuse its discretion in waiving the requirement for security.

The issue of class certification is not properly before this court but, if it were, the District Court properly certified a class.

The court below had subject matter jurisdiction over this case. The District Court correctly found that Plaintiffs have standing to challenge Defendant's policy and that Plaintiffs' claims are not moot. Nor is Defendant correct that Plaintiffs'

only recourse is to file an Administrative Procedure Act claim against the federal government.

STANDARD OF REVIEW

This court reviews the grant or denial of a preliminary injunction for abuse of discretion. *Tech. Partners., Inc. v. Hart*, 298 F. App'x 238, 241 (4th Cir. 2008). A court abuses its discretion if its conclusion is guided by erroneous legal principles or rests upon clearly erroneous factual findings. *Westberry v. Gislaved Gummi AB.*, 178 F.3d 257, 261 (4th Cir. 1999). "A factual finding is clearly erroneous when [the court is] 'left with the definite and firm conviction that a mistake has been committed.'" *TFWS, Inc. v. Franchot*, 572 F.3d 186, 196 (4th Cir. 2009) (citation omitted). A reviewing court may not substitute its judgment for that of the district court, "rather, [it] must determine whether the court's exercise of discretion, considering the law and the facts, was arbitrary or capricious." *United States v. Mason*, 52 F.3d 1286, 1289 (4th Cir. 1995). Thus the reviewing court cannot reverse the District Court's decision merely because it would have come to a different result in the first instance. *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 322 (4th Cir. 2008).

ARGUMENT

I. THE DISTRICT COURT ORDER GRANTED A PROHIBITORY INJUNCTION TO PRESERVE THE STATUS QUO ANTE.

The injunction granted in the District Court's Order is prohibitory, not mandatory, and preserved the status quo. This Court has recently held that "the status quo to be preserved by a preliminary injunction ... is not the circumstances existing at the moment the lawsuit or injunction request was actually filed, but the last uncontested status between the parties which preceded the controversy." *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, ___ F.3d ___, No. 10-2211, 2012 U.S. App. LEXIS 5525, 56-57 (4th Cir. Mar. 16, 2012) (citation omitted). *See also* 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948, at 136 (2d ed. 1995).

"To be sure, it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions," but "[s]uch an injunction restores, rather than disturbs, the status quo ante." *Aggarao*, 2012 LEXIS 5525, 56-57, *citing O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004); *LaRouche v. Kezer*, 20 F.3d 68, 74 (2d Cir. 1994) (holding court may require the parties to act or to refrain from acting to preserve the status quo); *Bly v. McLeod*, 605 F.2d 134, 137 (4th Cir. 1979) (granting TRO requiring state to allow plaintiffs to vote by absentee ballot and holding it was a prohibitory injunction necessary to preserve the status quo).

Defendant's assertion that the District Court issued a mandatory injunction is plainly wrong. Plaintiffs filed their Motion for a Preliminary Injunction on May 31, 2011, requesting the Court to enjoin Defendant from implementing its policy which was to take effect on June 1, 2011. (JA 17.) Defendant thus had notice of the Motion before the disputed policy took effect. Moreover, the Order stated that "Defendant is hereby *prohibited from implementing* ICHA Policy 3E." (JA 1460-61 (emphasis added)).

Defendant further asserts that Plaintiffs should have filed their motion sooner because he had been working to prepare and submit the SPA for more than a year before suit was filed.[4] Def.'s Br. at 11-12. This argument is untenable because the SPA was not approved until April 18, 2011, and no Plaintiff received notice from Defendant that his In-Home PCS would be terminated until mid-May 2011.[5] Thus, the threat to individual Plaintiffs was not real and immediate until they were notified the policy was actually being applied to them to terminate their

[4] Defendant also argues that Plaintiffs should have asked for their motion to be heard more promptly, Def. Br. at 12, but the Motion specifically requested an expedited hearing. (JA 18.)

[5] *Quince Orchard Valley Citizens Association v. Hodel*, cited by Defendant at 11-12, is not analogous because, in that case Plaintiffs waited six months after the permit directly affecting plaintiffs had been issued, as opposed to six weeks after the SPA was approved and two weeks after notices were sent, as is the case here. 872 F.2d 75, 79 (4th Cir. 1989).

services. (JA 23, 28, 35, 40, 47, 52, 57, 62, 67, 72, 169,1029); *see City of L.A. v. Lyons*, 461 U.S. 95, 101-102 (U.S. 1983) ("The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'"). Indeed, Defendant argues elsewhere that, even when filed, Plaintiffs' claims were not yet ripe. *See* Def.'s Br. at 53.

Defendant also argues that, even if an injunction preserves the status quo, it may still be mandatory. But, his only support is a dissenting opinion from another Circuit that does not set forth a standard for such a distinction. Def.'s Br. at 10, *citing O Centro*, 389 F.3d at 975 (10th Cir. 2004). In any event, Defendant's novel theory is contradicted by the law in this Circuit. *Aggarao*, 2012 U.S. App. LEXIS 5525, at *56-57 (citing *O Centro*, holding that injunction requiring the non-moving party to take action is prohibitory if it "restores the status quo ante."); *see also United Steelworkers v. Textron, Inc.*, 836 F.2d 6, 10 (1st Cir. 1987)(finding

injunction prohibitory because it restored the status quo that existed at the last peaceable time preceding the litigation).[6]

Here, the last peaceable status between the parties was before Policy 3E was implemented. The fact that Defendant may have to exert effort to undo procedural steps he took to implement the Policy, despite having notice of Plaintiffs' motion, does not change this fact. Moreover, his implementation of his illegal policy should not work to his advantage by raising the burden on Plaintiffs, who sought relief before the Policy took effect in an effort to preserve the status quo. If the non-moving party in a motion for injunctive relief need only continue his illegal conduct after suit is filed in order to change a prohibitory injunction to a mandatory one, then the "heightened standard" for "disfavored" injunctions would become the rule, not the exception.

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[6] None of the cases cited by Defendant are to the contrary. In *Cornwell v. Sachs*, 99 F. Supp. 2d 695, 704 (E.D. Va. 2000), the court granted a mandatory preliminary injunction, noting that even under the heightened standard of review, plaintiff made a strong showing as to the probability of success and a clear showing of the likelihood of irreparable harm. The other cases cited by Defendant do not explain how the heightened standard should practicably be applied, and turn on readily distinguishable factual issues. *See Mercedes-Benz U.S. Int'l, Inc. v. Cobasys, LLC*, 605 F. Supp. 2d 1189, 1196 (N.D. Ala. 2009) (holding plaintiffs did not show irreparable harm stemming from a possible breach of contract and that requiring specific performance was against the public interest); *Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979) (holding prisoner seeking to enjoin state to pay legal bills did not show "probability of irreparable harm"); *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980) (vacating mandatory preliminary injunction because district court focused *solely* on irreparable harm issue without emphasis on other factors).

II. THE DISTRICT COURT PROPERLY APPLIED THE *WINTER* STANDARD WHEN ENTERING THE PRELIMINARY INJUNCTION.

The District Court properly applied the standard set forth in *Winter v. Natural Res. Def. Council, Inc.* when granting the preliminary injunction. 555 U.S. 7 (2008). It specifically noted that *Winter* supplants the "hardship balancing test" previously in effect in this Circuit, and held that, "applying the standards announced in *Winter*, the Court finds that the Plaintiffs are entitled to a preliminary injunction." (JA 1457.) Moreover, the District Court gave no indication that it assumed that there was "flexible interplay," Def.'s Br. at 13, between factors but instead made it clear that all four elements were fully satisfied. Finally, the lower court's findings, which are amply supported by the evidence in the record and consistent with governing law, demonstrate that it applied the *Winter* standard.

A. Plaintiffs demonstrated irreparable harm.

Most importantly, the District Court specifically found that "Plaintiffs have demonstrated that they *will suffer* irreparable harm." (JA 1459) (emphasis added). According to Defendant, because the District Court stated that the lack of in-home PCS "could" result in injury, it did not conform to *Winter's* instruction that injury must be likely before an injunction will be granted. Def.'s Br. at 14. But, Defendant's interpretation is not plausible, given that this sentence is immediately preceded by the finding that Plaintiffs *will* suffer harm without the injunction. (JA

1459.) Moreover, in its order denying a stay, the District Court noted that it already found that "termination of in-home PCS *would result* in potentially serious physical or mental injury" for the class.[7] ((JA 1545) (emphasis added).)

In addition, the District Court's finding is fully supported by the record. Plaintiffs presented abundant evidence, including sworn declarations, showing that they needed In-Home PCS and that, without it, their health and safety would be seriously endangered or they would be forced to enter institutional ACHs in order to get the care they needed.[8] (JA 21-22, 26-27, 31-34, 38-39, 45-46, 50-51, 55-56, 60-61, 65-66, 70-71, 73-84, 406-07, 1009-14, 1019-22, 1026-28, 1101-04, 1408-11, 1417-25.) A treating physician and Defendant's own agent both determined that each member of the Plaintiff class needs hands-on assistance in order to safely perform two of five listed ADL's (eating, bathing, toileting, dressing, ambulating)

[7] Defendant asserts that *Newdow v. Bush* is similar to this case because it dealt with harm that is "merely feared." 355 F. Supp. 2d 265, 291 (D.D.C. 2005). In *Newdow*, the plaintiff challenged inclusion of a prayer at the Presidential inauguration. The court held that there was no threat of irreparable harm because the plaintiff did not have to attend or listen to the inauguration ceremony. *Id.* Such a scenario bears very little resemblance to this case, where Plaintiffs have a documented need for PCS to safeguard their health and safety, and received notices that their PCS would be terminated.

[8] Defendant faults Plaintiffs' declarations for their similarity, but they are similar because Plaintiffs' circumstances are similar in many important respects: they all have disabilities, need PCS to live safely in their homes, have no family or friends to act as caregivers, and are at risk of institutionalization. *See M.R. v. Dreyfus*, 663 F.3d 1100, 1114 (9th Cir. 2011) (holding that the similarities in the structure and language of named plaintiffs' declarations were offset by details about their individual circumstances and finding likelihood of irreparable harm).

or else they would never have qualified for In-Home PCS in the first instance. (JA 126-30, 1450.) It is hard to imagine how losing the ability to perform two of these essential daily functions would not constitute irreparable harm. (JA 1447-48, 1460.)

Providers and others who work with In-Home PCS recipients predicted that if Plaintiff class members lost services, they would be harmed by the failure to take necessary medications; suffer isolation without food, medicine and other necessities; develop decubitis ulcers (bedsores) and infections; injure themselves or risk falls when attempting to bathe or clean without assistance; and risk premature death due to neglect and injuries. (JA 76-84, 204-15, 407). More than fifty class members, including Bobby Hall, have been institutionalized since being denied or terminated from In-Home PCS. (JA 1408-16); Rittelmeyer Decl. ¶ 6, Ex. 5 [DE 42-2, 42-8].

Defendant suggests that declarations submitted by Brenda Hutchens, Margaret Webb, and Kathie Smith are suspect because their employers would be negatively impacted by the stricter eligibility criteria for In-Home PCS. Def.'s Br. at 18. But, Defendant provides no concrete reason to disregard these sworn statements. Hutchens and Webb are Medicaid PCS providers, who, therefore, have been licensed and enrolled by Defendant. (JA 132); *see also* N.C. Gen. Stat. §§ 108C-1 - 108C-12. They must provide supervision by a "qualified and

experienced" registered nurse, undergo compliance reviews and audits by Defendant, and prove the necessity of the services they provide, in order to be reimbursed by the state. (JA 132-35). Hutchens is a nurse with fourteen years' experience with home health services. Her declaration regarding Plaintiff Splawn's condition and need for PCS states essentially the same conclusion reached by Defendant's agent in authorizing the service to be provided before it was terminated. (JA 76, 77, 80, 126-130, 269-70, 917). Webb's declaration is based on 23 years' experience with Medicaid PCS and her conclusions about the importance of PCS to elderly and disabled people are well supported by her experience as a PCS provider. (JA 81.) Defendant takes no issue with the content of Smith's declaration, nor could he. Her assertions are well-supported not only by her professional experience, but also by academic studies demonstrating increased institutionalization as a result of cuts to home-based services. (JA 213, 307-08.) Each of Defendant's declarants either work for or contract with the North Carolina Medicaid agency and, by Defendant's logic, would be just as biased as the Medicaid PCS providers who filed declarations.

Numerous courts have found that threatened or actual denial of necessary Medicaid services constitutes irreparable harm.[9] *See, e.g., M.R. v. Dreyfus*, 663 F.3d 1100, 1114-15 (9th Cir. 2011) (finding irreparable harm caused by reduction in PCS and collecting similar cases); *Camacho v. Tex. Workforce Comm'n*, 326 F. Supp. 2d 794, 802 (W.D. Tex. 2004) (holding loss of Medicaid benefits constitutes irreparable harm); *McMillan v. McCrimon*, 807 F. Supp. 475, 479 (C.D. Ill. 1992) ("the nature of [the] claim - a claim against the state for medical services - makes it impossible to say that any remedy at law could compensate them.").

Defendant acknowledges this authority, but claims that Plaintiffs failed to show that In-Home PCS is a necessary service. Def.'s Br. at 16. To the contrary, In-Home PCS cannot be authorized unless Defendant's own contractor first finds that the service is necessary to perform two different ADLs, which is based on an in-home assessment. (JA 124, 126-28, 130.) In addition, the recipient's treating physician must prescribe the service and attest that the requested hours of services are medically necessary. (JA 127-28.) Defendant regularly performs audits to verify that the services provided are medically necessary. (JA 134.)

[9] Defendant claims that one of the cases Plaintiff cites, *M.R. v. Dreyfus*, does not support Plaintiffs' position, because the *M.R* court was presented with evidence that one of the plaintiffs' conditions had deteriorated. Def. Br. at 16, citing 663 F.3d at 1114-15. But, the *M.R.* court based its finding of irreparable harm on other evidence, most of which related to plaintiffs whose conditions had not deteriorated. 663 F.3d at 1110-15. Moreover, unlike *M.R.*, many Plaintiffs in this case were receiving services pending administrative appeals that had been stayed so have been temporarily protected from harm.

Defendants make much of the fact that Plaintiffs did not introduce additional evidence that more individuals suffered harm in the six months between implementation of the policy and the hearing before the District Court. Def.'s Br. at 16-17. This charge is ironic given that Defendant argues that the District Court should not have permitted new evidence to be filed one week before the hearing.[10] Def.'s Br. at 20. Regardless, there are very good reasons that even more class members who had suffered harm were not before the District court at the time of the hearing.

First, all named Plaintiffs and nearly half of the Plaintiff class had filed requests for administrative hearings, so most were receiving services pending the outcome of those appeals.[11] All of those appeals were stayed by the North Carolina Office of Administrative Hearings because of this federal lawsuit. (JA 1056.) Many of those individuals will be imminently threatened with harm if the District Court's order is reversed because the stay on administrative hearings will

[10] Defendant argues, incorrectly, that it was an abuse of discretion to allow Plaintiffs' supplemental declarations because there was no good cause for their untimely filing. Def. Br. at 20-21. But, all but one event described in Plaintiffs' new evidence occurred after Plaintiffs filed their Motions for Preliminary Injunction and Class Certification. (JA 1440.) Plaintiffs did not learn of Bobby Hall and his September 2011 fall until shortly before their new evidence was filed. (JA 1382.) The emails included in the new evidence were not created until October 2011. (JA 1395).

[11] Medicaid regulations, as well as the principles of due process, require the agency to continue to cover services during an appeal if a claimant requests a hearing before the effective date of a termination. 42 C.F.R. § 431.230(a).

then be lifted and those persons will have to meet the stricter 3ADL standard in Policy 3E to keep their services.

Second, because no class was certified prior to the District Court's order, Plaintiffs' counsel had no feasible way to identify or contact class members. Indeed, for those class members who lost services because they did not request an administrative hearing, there was no longer any PCS provider in the home to know what harm they suffered or to advise them to come forward. (*See, e.g.*, JA at 1004-05, 1009-11, 1019-1022, 1026-28, 1408-11, 1422-25.) Third, as soon as suit was filed, Defendant began to approve services for most of the named Plaintiffs who had recently been determined to be ineligible under Policy 3E in an apparent effort to moot out their claims without reversing his policy. (JA 510-511, ¶¶6-7, 513 ¶10; 514 ¶11).

Despite these obstacles, Plaintiffs filed declarations showing that named Plaintiff Jones, Hall, and at least three other class members already had been harmed.[12] (JA 1004-26, 1101-04, 1408-22.) Plaintiffs also provided other evidence

[12] Defendant's speculation that Mr. Hall would have fallen even if his PCS had not ended, Def. Br. at 20, is contradicted by the evidence. For the first eight months of this year, Mr. Hall's PCS worker was able to assure that he maintained a proper diet, was taking his medications, and was monitored for any emerging health problems. (JA 1422-23.) Shortly after his PCS ended, his cousin visited him and discovered a deterioration in his health and living conditions since his PCS ended. (JA 1410.) Less than three weeks later Mr. Hall fell and was hospitalized. (JA 1410.)

showing how critical part-time PCS is for its recipients. (JA 79-84, 204-14, 1417-21.) This evidence was plainly adequate at this preliminary stage to demonstrate a threat of severe, concrete, and irreparable harm from the termination of PCS services. It is undisputed that hundreds of North Carolina citizens lost the medical services which Defendant had previously determined, based on an in-home assessment, that they needed in order to perform two activities of daily living. The District Court's finding that this constitutes irreparable harm was not clearly erroneous.

B. Plaintiffs demonstrated that the injunction is in the public interest and that the balance of equities tilts decidedly in their favor.

The District Court properly rejected Defendant's fiscal concerns as no excuse for causing irreparable harm to vulnerable citizens in violation of the law and correctly held that the public interest lies with upholding the law. (JA 1460.) Indeed, evidence before the District Court demonstrated higher costs were likely from increased institutionalization if Policy 3E were not enjoined. (JA 77, 82, 208-09, 212-13, 308-18, 993-1003, 1103-04.)

Defendant nonetheless claims the District Court did not give proper consideration to the public interest and balancing of equities and continues to raise false alarms about the cost of complying with the law, speculating that this cost

will cause other Medicaid recipients to be harmed.[13] Defendant relies on his predecessor Secretary Cansler's "uncontroverted judgment" that the preliminary injunction would require the state to make other spending reductions to the Medicaid program. Def.'s Br. at 22. But this "judgment" is evidenced only by one sentence in Secretary Cansler's affidavit which refers to "the *potential* elimination of optional Medicaid services." (JA 1367, emphasis added.) The District Court properly discounted such speculation. *See Knowles v. Horn*, No. 3:08-CV-1492-K, 2010 WL 517591 (N.D. Tex. Feb. 10, 2010) (granting injunction and rejecting "as hypothetical" defendant's argument that others will lose Medicaid services as a result of order).

Indeed, Defendant's actions prove that his claim that it would be necessary to cut services to meet an emergency budget shortfall was a false alarm. The District Court's Order was issued on December 8, 2011, yet to date no such reductions have been proposed, much less enacted, even though the fiscal year in which the "emergency" shortfall exists is nearly over. Def.'s Br. at 24; D.E. #26-1

[13] Defendant claims that the cost of implementing the District Court's order will be about $40 million for fiscal years (FY) 2012 and 2013, based upon the estimates of their Business Operations Officer Steve Owen. Def. Br. at 24, citing Owen Aff. at 4, ¶12 (Feb. 8, 2012) [D.E. 24-3]. The District Court did not have that information before it when it ruled, therefore this evidence has no bearing on whether it abused its discretion. In any case, this evidence does not support Defendants' dire predictions. The entire shortfall for FYs 2012 and 2013, which ends on June 30, 2013, is more than $390 million. *Id.*, ¶¶12-13. Thus, even assuming Defendant's numbers are correct, the cost of implementing the District Court's order is only a small fraction of the budget shortfall. *Id.*

at 17; Rittelmeyer Decl. ¶11 [DE 42-2]. Indeed, Defendant has not even fully implemented this Court's Stay Order, despite his "budget crisis." *Id.* ¶10.

Regardless of their validity, the District Court properly found that "fiscal concerns cannot be held to outweigh harm to Plaintiffs' safety and health." Dist. Ct. Order at 15 (citing *Todd v. Sorrell*, 841 F.2d 87,88 (4th Cir. 1988)). (JA 1460.) *See also Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1115 (9th Cir. 2010) (granting injunction despite the state's argument that injunctions against payment reductions have forced the State to eliminate many optional Medicaid services), *vacated and remanded on other grounds*, 131 S. Ct. 1204 (2012); *L.S. v. Delia*, No. 5:11-CV-354-FL, 2012 U.S. Dist. LEXIS 43822, *55 (E.D.N.C. Mar. 29, 2012) (holding fiscal concerns cannot be held to outweigh harm to plaintiffs' safety, health, and well-being in determining whether to grant a preliminary injunction). *See also M.R. v. Dreyfus*, 663 F.3d at 1120 ("[T]here is a robust public interest in safeguarding access to health care for those eligible for Medicaid, whom Congress has recognized as the most needy in the country.") (citations omitted).

Finally, contrary to Defendant's contentions, Def.'s Br. at 23, the District Court's findings regarding the public interest factor do not impermissibly link it to the likelihood of success factor. The District Court made separate findings on each element, simply noting the rule, not affected by *Winter* or *Real Truth About Obama*, that requiring a defendant to comply with the law is in the public's

interest. (JA 1460.) *See Winter*, 555 U.S. at 7; *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009) (*vacated on other grounds*, 130 S. Ct. 2371 (Mem.) (2010)). Moreover, it is still permissible to balance equities after *Winter*, because, as this Court has recognized, *Winter* did not abolish that factor. *See Real Truth About Obama*, 575 F.3d at 346.

C. Plaintiffs demonstrated a strong likelihood of success on the merits of their claims.

Defendant argues that Plaintiffs did not make a clear showing that they were likely to prevail on the merits of their claims, but at this stage it is Defendant who must show that the District Court findings were clearly erroneous and thus an abuse of discretion. *Bowe Bell & Howell Co. v. Harris*, 145 F. App'x 401, 404 (4th Cir. 2005); *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 859 (4th Cir. 2001). Plaintiffs more than met their burden to show their likelihood of success on the merits of three legal claims.

1. Plaintiffs are likely to succeed on their ADA and Section 504 Claims.

The District Court held that Plaintiffs were likely to succeed on the merits of their Americans with Disabilities Act (ADA) and Section 504 claims. (JA 1458.) This holding is fully supported by the evidence and consistent with the law. Plaintiffs clearly demonstrated that it is significantly easier to qualify for PCS when living in institutional ACHs than it is to qualify at home. (JA 151, 154-59,

162, 208, 269.) Until the District Court acted, individuals who did not meet the eligibility requirements for In-Home PCS were faced with the choice of moving to an ACH to obtain the services they needed, or remaining at home until their conditions deteriorated enough for them to qualify for In-Home PCS and, in the process, risking injury, illness, or deterioration that would necessitate nursing home or other institutional care. (JA 21-22, 26-27, 31-34, 38-39, 45-46, 50-51, 55-56, 60-61, 65-66, 70-71, 73-84, 406-07, 1009-14, 1019-22, 1026-28, 1101-04, 1408-11, 1417-25.) This violates the ADA and Section 504.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, program, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132. Regulations clarify that Title II requires public entities to "administer services, programs, and activities in the most integrated settings appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).[14] The most integrated setting is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. § Pt. 35, App. A (2010). To comply with the

[14] Section 504 of the Rehabilitation Act prohibits disability-based discrimination by entitles by recipients of federal funds. 29 U.S.C. § 794(a); *see also* 28 C.F.R. § 41.51(d) (requiring public entities to administer services, programs, and activities in "the most integrated setting appropriate"). Claims under the ADA and Rehabilitation Act are treated identically. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

integration requirement, states must reasonably modify their policies, procedures, or practices when necessary to avoid discrimination. 28 C.F.R. § 35.130(b). The obligation to make reasonable modifications may be excused only where a state demonstrates that the requested modifications would "fundamentally alter" the programs or services at issue. *Id.*; *see also Olmstead ex rel. Zimring v. L.C.*, 527 U.S. 581, 604-07 (1999).

In *Olmstead*, the Supreme Court held that Title II prohibits unjustified segregation of individuals with disabilities. *Olmstead*, 527 U.S. at 596. A plurality of the Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving services from the entity. *Id.* at 607. It explained that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in public life." *Id.* at 600. Moreover, "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 601.

Defendant does not dispute that Plaintiffs need PCS or that they wish to live in the community and are capable of doing so if they have In-Home PCS. Def.'s Br. at 35-37. He does not – nor could he – claim that ACHs are not large, institutional settings. Instead, Defendant suggests that Plaintiffs are demanding that every qualified person with a disability receive a minimum level of community based services. Def.'s Br. at 35. This is not true. Plaintiffs sought, and the District Court granted, only an order preserving the status quo ante, under which Defendant's Medicaid program made PCS available to members of the Plaintiff class in their own homes, rather than requiring them to enter institutional ACHs to obtain the same service.

Courts have recognized it may violate the ADA when individuals are required to enter institutions in order to obtain Medicaid services for which they qualify. *See, e.g., Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003); *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1303 (M.D. Fla. 2010) (holding plaintiff likely to succeed on ADA claim because she showed she is likely to have to enter institution to obtain the services she needs to stay in the community). The U.S. Department of Justice has concurred. *See* U.S. Dep't of Justice, *Statement of the Department of Justice on the Integration Mandate of Title II of the ADA and Olmstead v. L.C.* (June 22, 2011) http://www.ada.gov/olmstead/q&a_olmstead.pdf (stating that the ADA and *Olmstead* require public entities to

provide services in the community persons with disabilities when it would otherwise provide such services in institutions).

Defendant also implies that individuals state a claim for violation of the ADA only if they are currently experiencing "unjustified institutionalization."[15] Def.'s Br. at 36. Such a notion, however, is clearly mistaken. No court has limited the reach of *Olmstead* in the manner proposed by the state. Every court to have addressed the issue has in fact held that current institutional placement is not a prerequisite to an ADA community integration claim. *See, e.g., Fisher*, 335 F.3d at 1181; *M.R. v. Dreyfus*, 663 F.3d at 1116-18; *V.L. v Wagner*, 669 F. Supp. 2d 1106, 1119 (N.D. Cal. 2011); *Haddad*, 784 F. Supp. 2d at 1307 (M.D. Fla. 2010).

Defendant also argues that the ADA does not require public entities to provide services of a personal nature, "such as assistance in eating, toileting, or dressing." Def.'s Br. at 36, citing 28 C.F.R. § 35.135 (2010). But, the Department of Justice has made it clear that this regulation does not apply to a program that already provides personal services. U.S. Dep't of Justice, *ADA Title II Technical Assistance Manual*, § II-3.6200, http://www.ada.gov/taman2.html#I-1.200 (stating "[o]f course, if personal services or devices are customarily provided to individuals served by a public entity, such as a hospital or nursing home, then these personal services should also be provided to individuals with disabilities."). *See Haddad v.*

[15] The lead *Olmstead* plaintiff was living in an institution when she filed suit. 527 U.S. at 594.

Dudek, 784 F. Supp. 2d 1308, 1366 (M.D. Fla. 2011) (rejecting argument that 29 C.F.R. § 35.135 relieves state Medicaid agency of obligation to cover personal care services when it has already elected to do so as part of Medicaid program).

Nor, contrary to Defendant's argument, does the Preliminary Injunction Order require a fundamental alteration of the Medicaid program. Def.'s Br. at 37. All Plaintiffs had been receiving personal care services prior to the revision of the eligibility criteria. As one court recently noted, the defendants in that case failed to cite "a single case where a state successfully relied on a fundamental alteration defense when the state was previously providing particular services to the Plaintiff in the community and later decided to curtail those services." *B.N. v. Murphy*, 3:90-cv-199-TLS, 2011 U.S. Dist. LEXIS 132482, *28 (N.D. Ind. Nov. 16, 2011). Nor has the Defendant cited any authority for that proposition here.

Defendant's reliance on the financial or administrative burden of maintaining services to the Plaintiff class is unavailing. As courts have recognized, "Budgetary concerns alone do not sustain a fundamental alteration defense." *M.R. v. Dreyfus*, 663 F.3d at 1118; *see also, e.g., Pa. Prot. & Advocacy, Inc. v. Pub. Welf. Dep't*, 402 F.3d 374, 380 (3d Cir. 2005) (same). As the District Court noted, the number of affected Medicaid recipients was not great, and nearly half of those were continuing to receive services owing to their pending administrative appeals. (JA 1544.) And, while Defendant has claimed that he may

have to make other cutbacks, there is no evidence in the record that supports this contention other than his own conclusory statement. (JA 1367.) Moreover, on closer examination, the cost of implementing the District Court's Order is a much smaller proportion of the Medicaid budget than Defendant suggests. *See* p. 21, *supra*. "[I]f every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed." *Fisher*, 335 F.3d at 1183. In sum, the District Court was correct to conclude that Plaintiffs' integration mandate claims are likely to succeed.

2. Plaintiffs are likely to succeed on their comparability claim.

The District Court did not abuse its discretion in finding that Defendant likely violated Medicaid's comparability requirement, 42 U.S.C. § 1396a(a)(10)(B), because "some recipients are treated differently than others where each has the same level of need." *V.L.*, 669 F. Supp. 2d at 1114-15. Plaintiffs submitted ample and unrebutted evidence that the needs of the two groups are the same or that those living at home have a higher level of need and that under Policy 3E it is much easier for Medicaid beneficiaries living in institutional ACHs to qualify for PCS than for those living at home. An individual requiring only supervision for five different ADLs and hands-on limited assistance with two other ADLs would be ineligible to receive PCS in the home, but a person

in an ACH needing only supervision for one of seven ADLs would be eligible to receive PCS in that setting. Assessments for Medicaid recipients seeking In-Home PCS are performed by Defendant's contractor, while assessments for ACH PCS are performed by staff of the facility that will be paid by Medicaid. 10A NCAC § 13F.0801. Admission to an ACH requires only "the opinion of the resident, physician, family or social worker, and the administrator [that] the services accommodations of the home will meet his particular needs." 10A N.C.A.C. § 13F.0701(a). There are few other restrictions on admission. *See* 10 N.C.A.C. § 13F.0701(b); N.C.G.S. § 131D-2.2(a). In order to qualify for In-Home PCS, applicants most show that there is no informal caregiver available, a link between a documented medical condition and the assistance needed, and that the recipient being under the direct care of a physician for that condition, none of which are required by Defendant for Medicaid coverage of PCS in an ACH. (JA 208 ¶19, 267-68.) Finally, In-Home PCS cannot be provided without prior approval by Defendant's agent, but coverage of PCS for residents of an ACH does not require prior approval. (JA 208, 269.) Therefore, many Medicaid recipients who do not qualify for In-Home PCS would easily qualify for admission to an ACH and the PCS that is provided there. According to two of Defendant's own assessments, on average, In-Home PCS recipients have at least as high a level of need for

assistance with ADLs as ACH residents. (JA 154-59); Rittelmeyer Decl. Ex. 7 [DE 42-10].

Defendant claims that individuals cannot be admitted to ACHs unless a doctor certifies that they cannot live safely at home. Def.'s Br. at 33. This is not true. In fact, admission to an ACH requires only "the opinion of the resident, physician, family, *or* social worker, and the administrator [that] the services accommodations of the home will meet his particular needs." 10A N.C.A.C. 13F.0701(a). According to Defendant's website, "People in adult care homes typically need a place to live, *some* help with personal care (such as dressing, grooming, and keeping up with medications), and *some limited* supervision." (JA 162 (emphasis added).) *See also* N.C.G.S. 131D-2.2(a) (setting forth requirements for admission, none of which include type of physician certification asserted by Defendants).[16]

While Defendant is correct that individuals who receive in-home PCS must be able to live safely at home, it is the receipt of PCS that enables them to do so. Defendant's Clinical Coverage Policy 3C states that the service ". . . is appropriate for recipients whose needs for assistance can be safely met in the home by family

[16] In support of his contention, Defendant cites the Adult Care Home Personal Care Physician Authorization and Care Plan. Def.'s Br. at 33, citing JA 149-53. Nowhere in that document, however, is there a requirement that a physician certify that an individual cannot live safely at home in order to qualify for PCS in an ACH.

members and other informal caregivers *supported by scheduled visits by specially trained PCS aides*." (JA 121) (emphasis added.) Nothing in the evidence Defendant cites suggests otherwise. Def.'s Br. at 33, citing Declarations of Randall Best, Karen Feasel, and Paul Botto.

Indeed, Defendant acknowledges that there are "comparability issues" with his PCS policies. Def.'s Br. at 32. He then claims that the implementation of the 1915(i) plan option, which would cure the comparability problems, has been delayed by the District Court's injunction and that the more restrictive eligibility criteria in Policy 3E is a critical step toward implementing 1915(i) plan amendment.[17] Def.'s Br. at 5. But, Defendant never explains the link between the two and there is no logical reason why restricting In-Home PCS makes it easier to liberalize those rules later. *See* Rittelmeyer Decl. Ex. 3 [DE 42-6].

Defendant's primary argument against Plaintiffs' comparability claim is that the federal Medicaid agency CMS approved the SPA on which Policy 3E is based. Def.'s Br. at 27. Though courts owe deference to SPA approvals, in this case CMS has never authorized Defendant's actions. Instead, the record shows that beginning in 2006 and as recently as this month, CMS has repeatedly informed Defendant that he is in violation of Medicaid's comparability requirement by having different rules for In-Home PCS than in ACH's. (JA 88, 93, 95, 98); Rittelmeyer Dec. Exs

[17] Section 1915(i) permits CMS to waive comparability requirements.

1, 2 [DE 42-4, 42-5]. The SPA approved by CMS in April 2011 included not only the criteria for In-Home PCS contained Policy 3E, but also new, more restrictive criteria for those receiving PCS in an ACH. (JA 173.) Defendant never implemented the SPA that CMS approved in 2011, a fact relied upon by the District Court. (JA 1457.) Indeed, despite CMS's most recent deadline of May 1, 2012 to end the comparability violation, Defendant's "corrective action plan" includes no mention of any changes in his policies until at least 2013. Rittelmeyer Dec. Exs. 1-3 [DE 42-4-6]. In these circumstances, it would turn the facts on their head to conclude that the 2011 SPA approval constitutes a finding by CMS that the way Defendant is providing PCS to the two groups complies with federal law.

Moreover, the April 2011 CMS approval of the prior SPA was based upon misstatements and incomplete information from Defendant about the two programs and the needs of the population. Defendant informed CMS that ACH residents have a higher level of need, including the need for ongoing supervision and for PCS on a 24/7 basis and being unable to live safely alone in their homes. (JA 95.) In reality, Defendant's own assessments show that in-home PCS recipients have at least as high a level of need for assistance with ADLs as do ACH residents. (JA 154-59.) If CMS approved the SPA based on the mistaken belief that the two populations had different needs or that ACH's had more rigorous admission requirements, CMS's decision does not amount to a finding that Defendant's

policies comply with comparability. *See Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 289 (2006) (refusing to defer to federal agency decisions because they addressed a different issue than the one posed in the case); *Neb. Pharmacists Ass'n v. Neb. Dep't of Social Services*, 863 F. Supp. 1037, 1047 (D. Neb. 1994).[18]

Defendants argue, incorrectly, that *Neb. Pharmacists* does not support Plaintiffs. Def.'s Br. at 28-29. In that case, Medicaid providers filed suit challenging the manner in which HHS calculated copayments for prescription drugs under federal law. 863 F. Supp. at 1038. Defendant argued that the court should defer to the federal agency's approval of their state plan and find that the calculation of copayments complied with Medicaid law. But, the court found that "nowhere in the plan amendments did Nebraska explain how it calculated the copayments" and therefore there was "no reason to think that CMS approved the accuracy of the mathematical calculation since it was not revealed." *Id.* at 1047.

[18] Even if CMS had knowingly approved Defendant's failure to comply with comparability, such a decision would not be entitled to deference in this case. Though federal agency actions are entitled to significant deference, courts are not required to give them the force of law when "reasoning couples internal inconsistency with conscious disregard for statutory text." *Ark. Dep't of Health Human Servs.*, 547 U.S. at 292; *see also Rehab. Ass'n v. Kozlowski*, 42 F.3d 1444, 1451 (4th Cir. 1994) (rejecting federal agency's interpretation of Medicare and Medicaid Acts as contrary to language and intent of statute); *Detsel by Detsel v. Sullivan*, 895 F.2d 58, 59 (2d Cir. 1990) (reversing federal agency's decision to deny Medicaid payment to state because Secretary's decision contradicted previous guidance on the same issue).

Similarly, in this case, nothing in the SPA that CMS approved in 2011 indicated that the state was not actually going to implement the more restrictive criteria for PCS in ACHs.

Finally, as Defendant appears to concede, CMS's actions are relevant only the comparability and reasonable standards claims.[19] The notices found by the District Court to violate due process were not included in SPA and Defendant has never claimed, much less presented evidence, that CMS has ever seen or approved them. (JA 686, 726-47.) Moreover, the approval of the SPA has no bearing on the ADA and Section 504 claims, because CMS's 2011 SPA approval letter specifically says it "*does not in any way address the State's independent obligation*

[19] The District Court did not rule on Plaintiffs' claim that Defendant failed to use reasonable standards to determine the scope of PCS, in violation of 42 U.S.C. § 1396a(a)(17) (reasonable standards provision). (JA 1457-59.) Thus, this issue is not properly before this court. *Bollech v. Charles Cnty., Md.*, 69 F. App'x 178, 183 (4th Cir. 2003). In any case, contrary to Defendant's assertion, numerous courts have held that the provision can be enforced through the Supremacy Clause. *See, e.g.*, *Lankford v. Sherman*, 451 F.3d 496, 509 (8th Cir. 2006) (finding state law restricting coverage of medical equipment was preempted by reasonable standards provision); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 992 (N.D. Cal. 2010) (enforcing provision through supremacy clause); *V.L.*, 669 F. Supp. 2d at 1118 (same). *Douglas v. Indep. Living Ctr.* does not compel a contrary result because, as Defendant acknowledges, the Court did not reach the question of whether Medicaid providers and recipients could maintain a cause of action under the Supremacy Clause. 132 S. Ct. 1204, 1211 (2012). Defendant claims that the majority opinion indicates that there is no cause of action when CMS has approved the SPA at issue, Def.'s Br. at 34, but this is merely dicta. Moreover, as discussed above, CMS did not approve the actions that Defendant has taken here.

under the Americans with Disabilities Act or the Supreme Court's Olmstead decision." (JA 169, emphasis added.)

3. The District Court did not abuse its discretion in ruling that Plaintiffs are likely to prevail on their statutory and constitutional due process claims.

a. Defendant failed to raise the enforceability of Section 1396a(a)(3) or the issue of whether plaintiffs have an enforceable property right below and thus may not do so on appeal.

Defendant makes two due process arguments on appeal that were not raised before the District Court: that 42 U.S.C. § 1396a(a)(3) is not enforceable and Plaintiffs do not have a property right protected by due process. (*Cf.* JA 454-483, 1033-1051; Def.'s Br. at 39-45.) Defendant is foreclosed from raising these issues on appeal. *Bollech*, 69 F. App'x at 183 (holding that, except in exceptional circumstances, issues not raised before the District Court are waived on appeal). Whether § 1396(a)(3) is enforceable under Section 1983 also is not before the Court because the district court did not rely on Section (a)(3) as a basis for its decision. (JA 1459.)[20]

[20] Even if the issue were before this Court, section 1396(a)(3)'s requirement that the state must grant an opportunity for a fair hearing "to any individual" whose claim for assistance is denied or not acted on with reasonable promptness has been consistently held to be enforceable under Section 1983. *See e.g. McCartney v. Cansler*, 608 F. Supp. 2d 694, 698 (E.D.N.C. 2009), *aff'd, D.T.M. ex rel. McCartney v. Cansler*, 382 F. App'x 334 (4th Cir. 2010); *Gean v. Hattaway*, 330 F.3d 758, 772-73 (6th Cir. 2003). *See also Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007) (allowing enforcement of similarly worded 1396(a)(8) under section 1983).

b. Even if before the Court, Plaintiffs Medicaid services are an entitlement protected by the due process clause of the Fourteenth Amendment.

Defendant asserts, for the first time, that Plaintiffs have no property right in the continued receipt of Medicaid services to be protected by due process. (Def.'s Br. at 43-45.) This argument ignores well settled law. It is established that Medicaid recipients have a statutory entitlement to benefits that is protected by the Due Process Clause of the Fourteenth Amendment. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

The due process-protected property right to continued receipt of Medicaid has been repeatedly enforced by the courts in the precise context at issue here: the termination of services received by Medicaid recipients. *See, e.g., McCartney*, 608 F. Supp. 2d at 698-99, *aff'd, D.T.M. v. Cansler*, 382 F. App'x 334 (4th Cir. 2010); *Granato v. Bane*, 74 F.3d 406 (2d Cir. 1996); *Catanzano v. Dowling*, 60 F.3d 113, (2d Cir. 1995); *Featherston v. Stanton*, 626 F.2d 591 (7th Cir. 1980); *Jonathan C. v. Hawkins*, No. 9:05-CV-43, 2007 WL 1138432 (E.D. Tex. Apr. 16, 2007). *See also* 42 C.F.R. § 431.205(d) (federal Medicaid regulation incorporating due process requirements of *Goldberg*). Nothing in the decisions cited by Defendant indicates otherwise. *See* Def.'s Br. at 44.

Finally, Defendant argues that Plaintiffs have no property right to a hearing because their termination was the result of a change in law. Def.'s Br. at 44-45. But, the change in law relied upon, CMS's 2011 SPA approval, specified that Plaintiffs must be given proper notice and hearing rights prior to termination of their benefits. (JA 170, 882-83.) CMS required notice and hearing rights because Plaintiffs had the right to show on appeal that they met the stricter standard established by Policy 3E and thus the "sole issue" was not a change in law requiring an automatic change. 42 C.F.R. § 431.220(b). *See e.g. Soskin v. Reinertson*, 353 F.3d 1242, 1263 (10th Cir. 2004); *Cramer v. Chiles*, 33 F.Supp.2d 1342 (S.D. Fla. 1999). In sum, Plaintiffs have an enforceable property interest in Medicaid benefits which is protected by the Due Process Clause of the U.S. Constitution.

c. Defendant deprived Plaintiffs of due process because he failed to provide adequate notice of the reasons for termination of their Medicaid services.

Defendant also argues that Plaintiffs are not likely to prevail on their due process claims because "plaintiffs have not been deprived of anything" because all named Plaintiffs filed administrative appeals. Def.'s Br. at 45-46. Plaintiffs do not complain, however, that they were not able to appeal in a timely manner. Instead, as the District Court held, the notices did not contain sufficient detail to enable plaintiffs to understand the reasons for the denial of services. (JA 1459). Plaintiffs

thus did not have adequate information to prepare for their hearing. Plaintiff Robert Jones dropped his administrative appeal because he did not understand the basis on which he could challenge Defendant's decision. (JA 1005, 1021 ¶ 14) In addition, Defendant's argument ignores the hundreds of class members who did not appeal after receiving Defendant's inadequate notice. (JA 924 ¶21)

Before terminating Medicaid services, Defendant was required to provide recipients with "adequate and timely notice detailing the reasons for termination and an effective opportunity to defend" against the proposed action. *Goldberg*, 397 U.S. at 262-63. The notices in this case were boilerplate forms that contained no information about the individual facts of each case, including which or even how many ADLs the individual did or did not need help with according to Defendant. (JA 23, 28, 35, 40, 47, 52.) The recipient thus could not determine from the notice what must be proven at the hearing to demonstrate that he met the new criteria.

"The purpose of the notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978); *see also Mallette v. Arlington Cnty. Emps. Supplemental Ret. Sys. II*, 91 F.3d 630, 640-41 (4th Cir. 1996) (finding notice was not "reasonably calculated" to afford claimant a meaningful opportunity to present her side of the story). In *Allen v. Alaska Dep't of Health & Soc. Servs.*, 203 P.3d 1155 (Alaska 2009), the court found no authority

for the assertion that failure of the agency to comply "with an explicit federal regulation notice requirement can be cured if a recipient, through her own initiative, challenges the Agency action, and eventually obtains the information that the federal regulations specifically required the Agency's initial notice to contain." *Id.* at 1169, n.68 (collecting cases).[21]

Defendant also asserts that his notice need not give "detailed" reasons for the termination of services, Def.'s Br. at 47, but cites no case approving a boilerplate notice of the sort used here. In *Goldberg*, the Supreme Court held that due process requires written notice "*detailing* the reasons for a proposed [public assistance] termination." 397 U.S. at 267-68 (emphasis added). In *Baker v. State*, 191 P.3d 1005 (Alaska 2008), the court rejected notices on facts very similar to

[21] The case law cited by Defendant is not to the contrary. In *Riccio v. Cnty of Fairfax, Va.*, 907 F.2d 1459, 1469 (4th Cir. Va. 1990), the Court found that the plaintiff had received effective notice and that the alleged violations would not have "affected the likelihood of a proper resolution of [his] case to any appreciable extent." *Wagner v. Duffy*, 700 F. Supp. 935, 943 (N.D. Ill. 1988), held that when a state gives notice to a less sophisticated population, the notice should "fulfill its essential purpose of assuring ... a *meaningful* chance to respond to the government's action before a deprivation occurs" by being tailored to assist recipients to understand the reasons for or defenses to the deprivation. *Id.* (emphasis added). In *Boyland v. Wing*, 487 F. Supp. 2d 161 (E.D.N.Y. 2007), plaintiffs failed to provide any evidence of the alleged due process violation beyond mere speculation. *Boyland*, 187 F. Supp. 2d at 177. *Schroeder v. Hegstrom*, 590 F. Supp. 121 (D. Or. 1984), fully supports the District Court's Order, citing voluminous authority that notice is inadequate when it does not "include sufficient detail to enable a recipient to determine whether an error has been made." *Schroeder*, 550 F. Supp. At 128.

this case because they did not contain factual information about the Medicaid PCS recipient. *See also Ortiz v. Eichler*, 794 F.2d 889, 894 (3d Cir. 1986).

Finally, Defendant argues the district court erred in relying on plaintiffs' "brutal need" for Medicaid services, Def.'s Br. at 46, but the court's analysis is fully supported by settled law. In *Goldberg*, the Court required high due process safeguards because termination of public benefits for the poor:

> may deprive an *eligible* recipient of the very means by which to live while he waits.... By hypothesis, a welfare recipient is destitute, without funds or assets. ... Suffice it to say that to cut off a welfare recipient in the face of ... 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.

397 U.S. at 261 (citations omitted). As discussed above, numerous courts and federal regulations have applied *Goldberg* to Medicaid services such as PCS. The District Court thus did not abuse its discretion in finding Plaintiffs were likely to prevail on their due process claims.

III. THE DISTRICT COURT'S ORDER COMPLIES WITH THE RULE 65 REQUIREMENTS FOR AN INJUNCTION.

"Rule 65 requires only that the enjoined conduct be described in reasonable, not excessive, detail ...." *Reliance Ins. Co. v. Mast Constr. Co.*, 159 F.3d 1311, 1316 (10th Cir. 1998). Defendant's assertion that the District Court's Order "violates Rule 65 by its lack of specificity ..." relies primarily on the fact that Plaintiffs successfully moved the District Court to issue an second order

"clarifying that the Court intended something different from the plain meaning of the Order...". Def.'s Br. at 47-48. This argument fails for two reasons. First, the District Court did not issue a clarification or impose any new obligation, but instead enforced an order that the court viewed as already clear. (JA 1580-81.) Even if this were not so, it has long been recognized that "clarification of a prior order is appropriate to 'add certainty to an implicated party's efforts to comply with the order and provide fair warning as to what future conduct may be found contemptuous.'" *Am. ORT, Inc. v. ORT Israel*, No. 07-civ. 2332 (RJS), 2009 U.S. Dist. LEXIS 10202, 8-9 (S.D.N.Y. Jan. 21, 2009), *quoting N.A. Sales Co. v. Chapman Inds. Corp.*, 736 F.2d 854, 858 (2d Cir. 1984). Thus, the District Court's enforcement order in no way demonstrates that the underlying order is insufficiently specific to be valid.

Defendant then claims the District Court erred in failing to address the issue of security. Def.'s Br. at 49. Because Defendant did not raise this issue before the District Court ruled on the Motion for Preliminary Injunction, he is foreclosed from doing so on appeal. *Bollech*, 69 F. App'x at 183. Moreover , there is ample precedent for a court to waive bond for indigent plaintiffs, as Plaintiffs requested here. (JA 422-23.) *See, e.g., Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 385, n.42 (C.D. Cal. 1982); *Bartels v. Biernat*, 405 F. Supp. 1012, 1019 (E.D. Wis. 1975); *Denny v. Health & Soc. Servs. Bd.*, 285 F. Supp. 526, 527 (E.D. Wis. 1968).

Finally, federal courts regularly waive bond requirements in suits to enforce important federal rights. *See, e.g., Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996); *Motan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (collecting cases).

IV. THIS COURT DOES NOT HAVE JURISDICTION OVER THE CERTIFICATION OF THE CLASS AND, IN ANY EVENT, THE CLASS WAS PROPERLY CERTIFIED.

A. This issue is not properly before the Court.

The Federal Rules allow a party to petition a Court of Appeals to review an order granting or denying class certification "if a petition for permission to appeal *is filed with the circuit clerk* within 14 days after the order is entered." FED. R. CIV. P. 23(f) (emphasis added). The petition must include the question presented, the facts necessary to understand the question, the relief requested, reasons why the appeal is authorized and should be allowed, and an attached copy of the order being appealed. FED. R. APP. P. 5(a).

Defendant has never submitted to the Court of Appeals a petition for permission to appeal the District Court's grant of class certification, nor did his Notice of Appeal provide the information and documentation required by FRAP 5(a) to the Fourth Circuit. Def.'s Notice of App., D.E. #1; *see also* JA 91. The Fourth Circuit has noted that "[e]very court of appeals which has considered the effect of a late filing of a petition to appeal" has found the failure to file on time

"deprives the appellate court of jurisdiction to consider the appeal." *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989). Thus, this Court cannot entertain Defendant's arguments attacking class certification.

Citing *Allstate Ins. Co. v. McNeill*, 382 F.2d 84, 88 (4th Cir. 1967), Defendant argues that because he used the proper procedure to appeal the preliminary injunction order pursuant to 28 U.S.C. § 1292(a), the grant of class certification is also before the Fourth Circuit for review. Def.'s Br. at 49. But, *Allstate* does not help Defendant because it was decided nearly 30 years before Federal Rule 23 was amended to provide the mechanism for interlocutory appeal of class certification orders. FED. R. CIV. P. 23(f), Advisory Committee's Note to 1998 Amendment. When *Allstate* was decided, § 1292(a) was the only route available to make such an appeal. Defendants do not cite a single case decided after the 1998 Amendments that allows a party to make an end-run around Rule 23(f) and the 14-day deadline set forth therein.

Even before the 1998 amendment of Rule 23, the power to apply pendent appellate jurisdiction over class certification orders via appeals taken under section 1292(a)(1) was to be used sparingly and only in narrow circumstances. "A pendent class certification order is not appealable under § 1292(a)(1) unless the preliminary injunction issue cannot properly be decided without reference to the class certification question." *Kershner v. Mazurkiewicz*, 670 F.2d 440, 448-449 (3d

Cir. 1982). Appellate courts have consistently disfavored using § 1292(a)(1) to bring in pendent issues from the order granting a preliminary injunction and have held that class certification is not "inextricably bound up with the injunction." *FDIC v. Bell*, 106 F.3d 258, 262 (8th Cir. Ark. 1997); *see also Shaffer v. Globe Protection, Inc.*, 721 F.2d 1121, 1124 (7th Cir. 1983); *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 814, 820 (11th Cir. 2010); *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 808 (5th Cir. 1982). The issues of class certification and preliminary injunctions are legally distinct issues "in the absence of extraordinary circumstances," and it would invite abuse to allow Defendant to bring the issue of class certification before this Court when it did not properly appeal this separate issue. *Kershner*, 670 F.2d at 449.[22]

Defendant never explains how the class certification order meets this high standard, nor could he. The preliminary injunction order does not explicitly rely upon the decision to certify the class. (JA 1460-61.) Further, the preliminary injunction order does not imply that the grant of the preliminary injunction was

[22] Plaintiffs did not find a decision from this Court addressing pendent jurisdiction over class certification, but this Court has repeatedly refused to allow such jurisdiction in other interlocutory appeals. *See, e.g., D.T.M. v. Cansler*, 382 F. App'x at 337 n. (4th Cir. 2010) (declining to reach standing, mootness and other issues in an interlocutory appeal); *Antrican v. Odom*, 290 F.3d 178, 191 (4th Cir. 2002) (holding other issues were not "inextricably intertwined" with the Eleventh Amendment claim, nor "necessary to ensure meaningful review of the ... immunity question."); *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996) (declining to exercise jurisdiction over other rulings of the district court on an appeal of denial of qualified immunity).

dependent upon there being a certified class. Indeed, the defendant conceded that the District Court could enjoin Policy 3E as to unnamed class members without certifying a class if irreparable harm were shown. (JA 468). The converse is also true: the decision to certify a class did not rely upon the preliminary injunction, but instead upon the factors of commonality, typicality, numerosity, and adequate representation, factors independent of whether the preliminary injunction were granted or denied. (JA 1453-56.). *Cf. Swint v. Chambers Cnt. Comm'n*, 514 U.S. 35, 50-51 (1995) (declining to decide whether or when pendent appellate jurisdiction may be obtainable since neither party asserted that the pendent issues were inextricably intertwined with the issue on appeal).

B. If the Court reaches this issue, the District Court did not abuse its discretion in finding that the requirements of Rule 23(a) were met.

Defendant argues that, because each Plaintiff has different medical needs, disabilities, and other characteristics, the District Court erred in finding that the requirements of Rule 23(a) were met. Def.'s Br. at 54. This argument fails because Plaintiffs are not asking for a determination of whether each individual class member is eligible for PCS. Rather, Plaintiffs seek an order requiring Defendant to change its written policies pursuant to which those determinations are made and to change the standard notice by which it notifies class members of that decision.

Nor does the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), indicate that Plaintiffs fail to meet the commonality or any other requirement of Rule 23. There, plaintiffs alleged a pattern and practice of discrimination that was not based on any written policy. Here, in contrast, Plaintiffs make a facial challenge to Defendant's written policy and boilerplate due process notices. As *Wal-Mart* requires, determination of the truth or falsity of the claims in this case – whether Policy 3E complies with the Medicaid Act and the integration mandate of the ADA and Section 504, and whether the termination notices comply with due process – can be resolved "in one stroke." *Id.* at 2551.

V. THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS.

A. Plaintiffs have standing and their claims are not moot.

As the District Court correctly held, standing is measured at the time the complaint is filed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571, n.5 (1992). (JA 1450.) Defendant does not argue that Plaintiffs lacked standing when they filed this action, and thus must show that subsequent events made their claims

moot.[23] Defendant is correct that most named Plaintiffs' personal care services were reinstated by Defendant *after* suit was filed. Def.'s Br. at 51-52. For no Plaintiff, however, does that fact make their claims moot. In-Home PCS for Plaintiffs Phillips and Pettigrew were reinstated only pending the outcome of their administrative appeals, and those appeals are stayed only because of this federal lawsuit. (JA 1053-57, 1059-61). Defendant will be free to rule against Plaintiffs in those appeals if this Court does not uphold the District Court Order. A third Plaintiff, Robert Jones, had services reinstated pursuant to the District Court's Order. Jones is imminently threatened with another termination of his In-Home PCS pursuant to this Court's Stay Order.

The remaining Plaintiffs also have live claims. Defendant's agreements to reinstate services for these Plaintiffs were settlement agreements in their administrative appeals which expressly were effective only until March 2012 or the next assessment, whichever was sooner. *See, e.g.*, Notice of Settlement, Sandy Splawn (Exh. A to Pl. Reply in Support of Motion for Class Certification (Dist. Ct. D.E. #55) (This document is the subject of Appellees' Motion for Leave to File a

[23] *Rhodes v. E.I. du Pont de Nemours & Co.*, is cited by Defendant in support of the argument that Plaintiffs lack standing, but there the Fourth Circuit found that plaintiffs who had voluntarily dismissed a single claim in the District Court did not have standing to contest the lower court's denial of class certification for that particular claim. 636 F.3d 88, 100 (4th Cir. 2011). In this case, Named Plaintiffs are raising a separate claim in a different forum from the one that some of them settled in the office of administrative hearings, thus *Rhodes* is inapposite.

Supplemental Appendix)). Defendant's challenged policy states that "DMA, at its sole discretion, shall conduct a review of a recipient's [in-home PCS] services or order a re-assessment of the unmet need for [in-home PCS] services *at any time*." (JA 270) (emphasis added.)[24]

Thus, it remains likely that Plaintiffs' threatened injuries "will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61. "It is well-settled that a defendants' voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). To demonstrate mootness, "a defendant's action must have completely eradicated the events of the alleged violation." *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). In *Doe v. Kidd*, the defendant began providing plaintiff with Medicaid-covered community based services after a federal court complaint was filed. The Court held that the provision of services did not moot plaintiff's claim, as defendant made it clear that the decision to provide services was subject to determination of her "true status." *Doe*, 501 F.3d at 354. *See also, Peter B. v. Sanford*, No. 6:10–CV–00767, 2011 WL 824584 *1 (D.S.C. March 7, 2011) (recognizing that while Plaintiffs'

[24] Defendant also asserts that the expected termination of the PCS State Plan Amendment on May 1, 2011 renders Plaintiffs' claims moot. Def.'s Br. at 52. In fact, CMS has recently authorized continuation of PCS but, like the District Court, has ordered Defendant to end his violation of the Medicaid statute's comparability requirement. Rittelmeyer Decl. Exs. 1, 2. [DE 42-4, 42-5].

"services have been temporarily stayed at the discretion of Defendants, their ability to seek redress and a more stable resolution through the court remains independent of the vagaries of Defendants"). Here, some of the Plaintiffs have been approved to receive services, but only until Defendant performs another assessment, which could be at any time. Defendants have not admitted that their policy is illegal or agreed to not apply it to any of the Plaintiffs the next time they are assessed. Such an action does not moot the claims of any Plaintiff, Indeed, because this is a class action, Defendant must demonstrate mootness as to all class members. *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980). The District Court thus did not abuse its discretion in finding that Plaintiffs continue to be threatened by Defendant's challenged Policy 3E. (JA 1451-52.)

B. Plaintiffs' claims are ripe.

Defendant also contends that two Plaintiffs' claims are not ripe because they have not received a final decision in their administrative hearings. Def.'s Br. at 53. The District Court properly rejected this argument because it is the implementation of Policy 3E, not the results of individual administrative appeals, which is being challenged. (JA 1452-53.) Exhaustion of administrative remedies is not required in claims brought pursuant to Section 1983. *Patsy v. Bd. of Regents.*, 457 U.S. 496 (1982); *McCartney v. Cansler*, 608 F. Supp. 2d 694 (E.D.N.C. 2009). Moreover,

the ripeness doctrine seeks only to ensure that courts will consider issues that are "clear-cut and concrete." *Atl. Marine Corps Cmtys. v. Onslow Cnty.*, 497 F. Supp. 2d 743, 749 (E.D.N.C. 2007). It is undisputed that all named Plaintiffs have had Policy 3E applied to them and that all are threatened with or have already suffered termination of their Medicaid services as a result. Every named Plaintiff has received from Defendant the notice of termination of services which is challenged in this suit. This issue is sufficiently concrete for the court to address. *See, e.g.*, *Risinger v. Concannon*, 117 F. Supp. 2d 61, 65-66 (D. Me. 2000) (case was ripe when plaintiffs sought relief for concrete injuries caused by defendants' failure to provide or arrange for treatment services required by federal Medicaid requirements); *Peachlum v. City of York*, 333 F.3d 429, 436-437 (3d Cir. 2003) (ripeness is not to be confused with exhaustion); *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) ("[T]he question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable.").

C. Plaintiffs have standing on their due process claims.

Defendant also argues that the fact that the named Plaintiffs and others were able to appeal termination of their PCS in a timely manner deprives them of standing to assert their due process claim. Def.'s Br. at 55. This is not correct, because Plaintiffs did not allege that notice was not timely but, rather, that it failed

to properly apprise them of the reason for the termination of their services. *See*, pp. 39-42, *supra*. Two Named Plaintiffs, Rebecca Pettigrew and Ayaleah Phillips, have yet to have their administrative hearings and thus continue to be threatened with injury due to their inability to discern the specific reason that they were found ineligible for In-Home PCS. Plaintiff Jones has already been harmed by Defendant's notice; he dismissed his hearing request because he did not understand the issues on which he could appeal. (JA 1005.) These plaintiffs plainly have standing to assert this due process claim and are appropriate class representatives for this claim. Moreover, the fact that the named Plaintiffs filed administrative appeals does not render them unfit to represent class members who did not appeal. There is no requirement that

> the proposed class representatives each personally experience every difficulty outlined in the complaint. Rather, it is sufficient that the claims of the proposed class representative are substantially similar to the claims of the class.... Furthermore, where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice.

Kenny A. v. Perdue 218 F.R.D. 277, 300-01 (N.D. Ga. 2003) (citations omitted).

D. Plaintiffs are not relegated to an APA action against the federal government.

Defendants assert, citing *Douglas v. Independent Living*, that Plaintiffs' Medicaid claims should be dismissed and they should be required to proceed

against CMS under the Administrative Procedures Act (APA).[25] 132 S. Ct. 1204 (2012). Def.'s Br. at 56. But, Plaintiffs' dispute is not with CMS, because CMS did not promulgate Policy 3E, or prepare or approve the faulty notices, or create the system of institutional ACHs. CMS did not give permission to Defendant to implement widely divergent eligibility criteria for the in-home and ACH populations or to violate the Americans with Disabilities Act. *See* p. 36, *supra.* This dispute is with Defendant, who has acted under color of law within the meaning of 42 U.S.C. § 1983. The District Court did not abuse its discretion in enforcing Plaintiffs claims under that well-established cause of action.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the District Court to grant Plaintiffs' Motion for a Preliminary Injunction.

[25] Moreover, the statement from *Independent Living Center* upon which Defendant relies is dicta. 132 S. Ct. at 1210. That case is also distinguishable because there CMS specifically approved the exact rate reductions that Plaintiffs were claiming violated the Medicaid Act. *Id.* at 1209.

Dated: April 17, 2012

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Dated: April 17, 2012

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of April, 2012, I caused this Brief of Appellees to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 17th day of April, 2012, I caused the required copies of the Brief of Appellees to be hand filed with the Clerk of the Court.

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