UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-2363 (5:11-cv-00273-BO)

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 Acting Secretary of the N.C. Department of Health and Human Services

Defendant – Appellant

DEFENDANT-APPELLANT'S REPLY BRIEF

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INTRODUCTION

Defendant continues to rely on the arguments presented to the District Court and in his Opening Brief, and hereby responds to issues raised in the plaintiffs' Corrected Opening Brief, filed on 19 April 2012. D.E. 49. Plaintiffs have failed to show that the District Court followed the standard set forth in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), or that the named plaintiffs have standing to bring this lawsuit. It appears that plaintiffs simply want to restore injunctive relief until the transition to the 1915(i) waiver is complete, at which point plaintiffs' claims will be moot and a trial will be meaningless. Plaintiffs' brief exaggerates their evidence on harm, misstates defendant's position, and relies on inapposite or unavailing legal precedent. Faced with the Supreme Court's recent decision in *Douglas v. Independent Living Center*, 132 S. Ct. 1204 (2012), plaintiffs have conceded that the Center for Medicare and Medicaid Services' ("CMS") approval of the State Plan Amendment ("SPA") which prompted this lawsuit, as with all approved SPAs, was entitled to judicial deference. D.E. 49, p. 33. An erroneous holding to the contrary was the lynchpin of the District Court's Order ("Order"). For that reason and as set forth below, the Order should be vacated.

ARGUMENT

I. THE DISTRICT COURT FAILED TO APPLY THE HEIGHTENED STANDARD NECESSARY FOR DISFAVORED MANDATORY INJUNCTIONS.

The Order is a mandatory injunction which required the State to dismantle a federally-approved Medicaid program that had been in effect for nearly six months. Plaintiffs waited more than a year after the North Carolina General Assembly mandated stricter personal care services ("PCS") criteria, and more than a month after CMS approved the SPA implementing those criteria, before filing their lawsuit. Plaintiffs failed to seek a temporary restraining order or an expedited hearing on their motion for preliminary injunction. Altogether, those factors necessitated that the District Court apply the heightened standard set forth in *Sun Microsystems, Inc. v. Microsoft Corp.*, 333 F.3d 517, 524 (4th Cir. 2003) and *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994). The District Court failed to do so.

Plaintiffs argue that defendant's implementation of Policy 3E should not raise "the burden on Plaintiffs, who sought relief before the Policy took effect." D.E. 49 p. 13. This argument ignores the fact that plaintiffs did not challenge the underlying SPA, which *required* implementation of the criteria contained in Policy 3E, either in their Complaint or in their motion for preliminary injunction. Absent a court order to the contrary, defendant had no option but to continue with

implementation of the SPA requirements or risk disallowance of federal funds. Moreover, plaintiffs' motion was filed mere hours before Policy 3E formally took effect and weeks after implementation of criteria contained in the SPA had begun and notices had already been sent to Medicaid recipients. Plaintiffs' failure to press for injunctive relief demonstrates that they suffered no risk of harm, and such delay should not work to their advantage. *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75 (4th Cir. 1989).

Plaintiffs also argue that a heightened standard was unnecessary because the Order preserved the status quo ante, citing this Court's recent decision in *Aggarao v. MOL Ship Mgmt. Co., Ltd.,* 675 F.3d 355, *57 (4th Cir. Mar. 16, 2012). Defendant does not dispute that the status quo is defined as "the last uncontested status between the parties which preceded the controversy." *Aggarao*, *57. In this case, the last uncontested status prior to the lawsuit is that defendant was required by state law and authorized by CMS to implement stricter PCS eligibility criteria. The Order disturbed rather than maintained this status quo. Plaintiffs contend that "the last peaceable status between the parties was before Policy 3E was implemented." D.E. 49, p. 13. This statement ignores the existing SPA and state law and essentially concedes defendant's argument on this point.

This Court has previously held that one primary purpose of preliminary injunctive relief is "ultimately to preserve the court's ability to render a

meaningful judgment on the merits." *Sun Microsystems*, 333 F.3d at 524. Accordingly, the strict scrutiny described in *Sun Microsystems* is necessary "where an injunction – whether or not mandatory – will provide the movant with substantially 'all the relief that is sought' and thus render a trial on the merits largely or partly meaningless," i.e. will prevent the court from rendering a meaningful judgment. *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995), quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985).

Here, plaintiffs appear to concede that the case will be moot as soon as the 1915(i) criteria are approved by CMS, D.E. 53, p. 7, and do not dispute that they seek injunctive relief only until such time as the transition to the 1915(i) is complete. At that point a trial will be entirely meaningless and thus a heightened standard was necessary. In their futile attempt to counter this argument, plaintiffs contend that defendant will be free to return to the stricter PCS criteria if he prevails at trial. D.E. 53 p. 8. This overlooks the fact that the PCS criteria contained in disputed Policy 3E (and previous Policy 3C) will be superseded by the criteria contained in the forthcoming 1915(i) program, and ignores the cost to the State of having to pay for services in contravention of an approved SPA if the Order were upheld. The bottom line is that the State will have no recourse if it prevails at trial. The injunction was mandatory, and thus the plaintiffs were

required to meet a higher standard to obtain preliminary injunctive relief. The District Court failed to consider or apply this standard.

II. THE DISTRICT COURT FAILED TO PROPERLY APPLY THE *WINTER* STANDARD.

The District Court did not properly apply the test set forth in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). The District Court was required to find that all four elements of the test were *independently* satisfied, and it failed to do so. The Order failed to make adequate findings on irreparable harm, and failed to make separate findings on the balancing of equities and public interest factors. The Order also erroneously found that plaintiffs met the public interest factor *because* they showed a likelihood of success. Plaintiffs point to the few places where the Order cites *Winter*, apparently arguing that citation to the correct standard is sufficient, regardless of whether the District Court actually applied the test. Even if the District Court correctly applied *Winter*, the Order erroneously found that plaintiffs met each factor of the test.

A. The District Court's conclusion that plaintiffs met their burden of demonstrating irreparable harm was clearly erroneous.

The District Court failed to properly consider the requirement that plaintiffs demonstrate that they were likely to suffer irreparable harm in the absence of injunctive relief. The Order concludes that plaintiffs "will suffer" harm, based on findings that plaintiffs "risk" re-evaluation or termination of PCS and that a lack

of PCS "could" result in injury. J.A. 1459. Speculative potential for injury does not equate to a likelihood of injury. Plaintiffs failed to demonstrate irreparable harm at the hearing, as demonstrated by the lack of clear findings on harm in the Order.

Plaintiffs attempt to buttress the District Court's lack of findings on harm by mischaracterizing their own declarations. In their brief, they say that each plaintiff presented "abundant evidence" that without PCS, "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." D.E. 49, p. 15, emphasis added. To the contrary, the declarations merely stated that each plaintiff "might" need to enter a facility or "may" fall. *See, e.g.*, J.A. 22, ¶10; 26, ¶¶6 and ¶11; 32, ¶11; 44, ¶11; 45-46, ¶7 and ¶12; 51, ¶11; 61, ¶11; 66, ¶11; 71, ¶11. Two declarations do not even mention the possibility of institutionalization. J.A. 33-34, 55-56. Not a single sworn statement unequivocally declares that any plaintiff would be forced into an institution in the absence of PCS.[1] Plaintiffs' inaccurate portrayal of their own declarations highlights the lack of harm presented in this case.

[1] As discussed in defendant's Brief, the allegations of harm presented by plaintiffs comprise a classic example of harm that is "merely feared." *Newdow v. Bush*, 355 F. Supp. 2d 265, 291 (D.D.C. 2005). *See, e.g.,* J.A. 1014 ("I fear that an injury from a fall or other incident would cause me to hospitalized and I do not want to live in a facility.") Plaintiffs contend that the factual circumstances in *Newdow* bear little resemblance to this case. Defendant never suggested otherwise. *Newdow* stands for the principle that fear of harm does not rise to a level sufficient

Plaintiffs also imply that their declarations are supported by a "treating physician." D.E. 49, p. 15. There is no factual basis for this implication. The only physician to provide evidence in this case was Dr. Best, who opined that none of the plaintiffs' declarations support a conclusion that a lack of PCS might cause them to fall or enter a facility. J.A. 491. No physician treating any of the plaintiffs, or any other medical expert for that matter, claimed that any plaintiff's health or safety was jeopardized by a lack of PCS. The lack of expert testimony distinguishes this case from *M.R. v. Dreyfus*, in which the plaintiffs presented testimony from "an expert in the demography and epidemiology of disability."[2] 663 F.3d 1100, 1112 (9th Cir. 2011). Apart from their own declarations, the only evidence submitted by plaintiffs were statements from the very PCS providers whose profits are negatively impacted by the stricter criteria. None of them are physicians, and Ms. Webb has no medical background whatsoever. Moreover,

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for the grant of a preliminary injunction. Whether the fear is of prayer at a Presidential inauguration or of being placed in an institution, fear alone is insufficient to meet the standard.

[2] Moreover, *M.R. v. Dreyfus* is not binding on this Court, and defendant suggests that it was wrongly decided. *See, e.g.* dissenting opinion of Judge Rawlinson, supporting the district court's findings that the plaintiffs' declarations were "repeated verbatim" and "failed to make an adequate showing of a likely threat of harm," the "threatened injury (institutionalization) was not imminent," which is "particularly important where a party seeks to enjoin official action on the part of a State," and noting "the use of qualifying language in the declarations that rendered them 'speculative at best . . .'" 663 F.3d. at 1121-22.

plaintiffs' assertion that "Defendant takes no issue with the content of [AHHC Director Kathie] Smith's declaration," D.E. 49, p.17, is not correct. Defendant's declarants Dr. Best, Paula Botto, and Karen Feasel each found fault with, and strongly rebutted, the wildly exaggerated conclusions of Kathie Smith. J.A. 485, 501, and 915.

Plaintiffs also point to their untimely declarations concerning persons who are not named plaintiffs as supporting the District Court's finding that plaintiffs were likely to suffer irreparable harm.[3] Those declarations are equally unavailing. First, the Supreme Court has made clear that "named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976), quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Without a sufficient allegation of harm to the named plaintiffs in particular, plaintiffs cannot meet their burden of establishing standing.

Second, none of the declarations concerning these individuals actually state that they were harmed as a result of losing PCS. Instead, plaintiffs infer a cause

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[3] Contrary to plaintiffs' contention that defendant's objection to the Supplemental Declarations is "ironic" in light of defendant's argument that plaintiffs' failed to present evidence of harm at the hearing, D.E. 49, p. 19, the objection was based on plaintiffs' failure to show good cause and because they concerned individuals *who were not named plaintiffs*.

and effect relationship.[4] D.E. 49, p. 20, fn. 12. For example, the record does not explain how receiving PCS for less than one hour per day could have prevented Mr. Hall from falling any of the other 23 hours of the day. As to the three unnamed individuals, plaintiffs simply state that it was not an abuse of discretion for the District Court to allow the supplemental declarations, without directly addressing defendant's arguments. D.E. 49, p.19, fn. 10.

Relying on opinions from other Circuits, plaintiffs further argue that "*threatened* or actual denial of necessary Medicaid services constitutes irreparable harm." D.E. 49, p. 18 (emphasis added). This Court has never endorsed such a presumption, which contradicts the *Winter* instruction that a preliminary injunction may not be issued simply to prevent the *possibility* of irreparable harm. 555 U.S. at 22. Moreover, plaintiffs failed to show that the personal care services at issue in this case rise to the level of "necessary" medical care. *See, e.g., Dreyfus*, 663 F.3d at 1122 (Rawlinson, J., dissenting) (supporting the district court's findings that "the services at issue are personal care services, and not medical care").

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[4] Plaintiffs imply that Mr. Hall failed to take necessary medication because his PCS aide was not there to remind him, yet at the same time they claim that visitors observed an alleged deterioration in his condition, without explaining why none of those visitors helped him remember to take his medication. PCS is intended to supplement, not supplant, assistance offered by willing and able caregivers. J.A. 918.

Realizing that the evidence presented at the hearing was woefully insufficient to show harm, plaintiffs now attempt to rely on "new evidence" contained in a declaration from counsel that was not part of the record below and was not considered by the District Court. D.E. 49, p. 16; D.E. 42-2, 42-8. Even if this Court were to consider the "new evidence," it still fails to demonstrate how any of the named plaintiffs were harmed or to otherwise support plaintiffs' arguments. In any event, plaintiffs' rationale for failing to present this evidence of harm to the District Court is that "most" of the putative class "were receiving services pending … appeals,"[5] that counsel had no feasible way to identify or contact putative class members, and that defendant attempted to moot out the plaintiffs' claims. Each of these points is inaccurate, as set forth below.

As to plaintiffs' contention that "most" class members were receiving services pending appeal, this is belied by the record, which shows that less than half of the putative class appealed and some of them voluntarily dismissed their claims without reaching a mediated settlement. J.A. 924-25; 1005. Likewise, plaintiffs' assertion that counsel had no way to contact putative plaintiffs is not supported by the record. North Carolina Medicaid providers receive a copy of all denial, reduction and termination notices sent to their Medicaid patients, J.A. 23 *et*

[5] Even if true, this would mean there was no evidence of harm to present at the hearing, which further demonstrates that the Order was erroneous.

seq., and counsel had the support of one of the largest associations for Medicaid providers in the State, the Association of Home and Hospice Care of North Carolina.[6] The Association's Director of Quality Initiatives and a paralegal for the Association's private counsel both filed declarations in support of the injunction. Disability Rights North Carolina, counsel for the plaintiffs, is the designated Protection and Advocacy organization for North Carolina, as required by The Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. Chapter 114, and The Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. 15043 §143. It is illogical for plaintiffs to claim they had no way of identifying other individuals whose PCS was terminated.

Finally, defendant did not intentionally moot out any of the plaintiffs' claims. Such an assertion reveals plaintiffs' misunderstanding of federal Medicaid regulations and the State Medicaid appeal process. The North Carolina Medicaid program can only pay for medically necessary services. 42 C.F.R. § 440.230(d); N.C. Admin. Code, Title 10A § 22O .0120, 0301. In North Carolina, recipients are offered the opportunity to participate in a voluntary mediation of their dispute concerning service authorization. J.A. 23-25 *et seq.*, 508-17, 925. These mediations are conducted by The Mediation Network of North Carolina, which is

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[6] AHHC represents over 800 home care, home health, and hospice providers serving patients throughout North Carolina. J.A. 204.

a private entity separate from the North Carolina Department of Health and Human Services. *Id.* Settlements arrived at these independent mediations are generally the result of a recipient presenting additional information in support of medical necessity that was not demonstrated during the assessment. The State cannot agree to a mediated settlement for a recipient unless there is evidence presented supporting medical necessity. Deliberately mooting plaintiffs' claims for purposes of this lawsuit would violate the federal and State medical necessity requirement. In addition, mediated settlements do not show that defendant voluntarily changed his conduct. Defendant has never changed the criteria of the SPA or Policy 3E.

Defendant has already rebutted the merits of plaintiffs' "new evidence" in his response to plaintiffs' motion to lift stay, and will not belabor those arguments here. In a nutshell, plaintiffs fail to assert, let alone prove, that *any* of the 57 persons they allege are now living in out-of-home placements moved *as a result of* the new PCS eligibility criteria contained in the SPA and Policy 3E. Instead, plaintiffs contend that lack of discovery put them at a "significant disadvantage" and prevented them from providing further evidence.[7] D.E. 53, p. 8, fn. 5.

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[7] It was plaintiffs who requested that discovery be stayed by the District Court, J.A. 14, and lack of formal discovery did not prevent counsel from contacting individuals on the list provided by defendant to learn more information.

Contrary to the new allegations contained in the unsupported declaration of counsel submitted as "evidence," the vast majority of the individuals described by plaintiffs were authorized to receive PCS (either due to a new assessment or as maintenance of service) at the time of their new placement, which demonstrates that the move had no causal relationship to the criteria contained in the SPA or Policy 3E. D.E. 51-2, ¶¶10-11. Individuals receiving PCS have medical needs that change over time. D.E. 51-2, ¶11; J.A. 486-87, 926. Some percentage inevitably will experience a deterioration of their medical condition and require skilled nursing facility level of care. D.E. 51-2, ¶11; J.A. 486-87, 926. Other individuals may have experienced a change in family or caregiver situations to the extent that PCS could no longer meet their needs. D.E. 51-2, ¶11; J.A. 918. For example, recipient Emma M., who was authorized to receive the maximum number of PCS hours at the time she entered a facility following hip surgery, D.E. 51-2, ¶10, perfectly illustrates how an individual's medical condition can deteriorate, ultimately resulting in placement outside of the home, regardless of whether PCS has been authorized. Policy 3E had no impact on her move to a facility. Similarly, individuals who have been admitted to skilled nursing facilities by definition require a higher level of care than what is provided under PCS. D.E. 51-2, ¶11; J.A. 918.

Nothing in plaintiffs' response undermines defendant's argument that the Order was erroneously based on plaintiffs' mere speculation of harm. Plaintiffs failed to demonstrate a likelihood of harm at the hearing before the District Court, and their arguments to this Court do not change that fact. The Order should be vacated.

B. The District Court's findings that plaintiffs met their burden of showing that the injunction is in the public interest and that the balance of the equities is in their favor were clearly erroneous.

The District Court's finding that "fiscal concerns cannot be held to outweigh harm to Plaintiffs' safety and health" was erroneous because the competing equity was not the State's fiscal concerns but rather the negative impact on thousands of other Medicaid recipients who would lose other essential optional state services due to necessary cuts to the Medicaid program which would be caused by the injunction. In balancing the equities, it is clear that the likelihood of harm to other recipients clearly outweighed any speculative harm to plaintiffs. Plaintiffs' understanding of this point is evident in their citation to *Dreyfus*: "there 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." 663 F.3d at 1120. It is this very robust public interest in safeguarding access to health care for ***all*** North Carolina Medicaid recipients that the court below

erroneously disregarded in finding that the balance of equities tipped in favor of these few plaintiffs.

Plaintiffs further contend that there was evidence before the District Court demonstrating that "higher costs were likely from increased institutionalization if Policy 3E were not enjoined," citing two academic articles contained in the record before the District Court. D.E. 49, p. 21. Neither article dealt with facts specific to North Carolina. The conclusions of the articles are directly contradicted by the Affidavit of Karen Feasel, J.A. 927-30, and by defendant's argument in opposition to the admission into evidence of the U.S. Department of Justice findings letter. J.A. 1209.

Plaintiffs also contend that defendant was merely crying wolf and that because the potential harm of cutting optional Medicaid services has not yet happened, the Order was not erroneous. First, that is not the standard of review for this Court's determination of whether or not the District Court abused its discretion in entering the Order. Second, the dire need to cut optional Medicaid services has been alleviated by this Court's stay of the Order. Moreover, plaintiffs fail to address defendant's argument that the District Court's findings violated the Supreme Court's explicit instruction that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of

injunction." *Winter*, 555 U.S. at 24. The District Court failed to do so, and the Order was erroneous.

C. The District Court's finding that plaintiffs met their burden of demonstrating a likelihood of success on the merits was clearly erroneous.

Defendant set forth six arguments why the Order's findings that plaintiffs demonstrated a likelihood of success were erroneous. Plaintiffs' arguments in response continue to rely on inapposite authority, mischaracterize the requirements of the SPA at issue, fail to articulate the proper standard for their ADA claims, misstate defendant's position on the nature of adult care homes, and rely on a due process standard that is not supported by the plain language of *Goldberg v. Kelly*, 397 U.S. 254 (1970).

1. CMS's approval of the SPA is entitled to deference.

For the first time since this litigation began, plaintiffs acknowledge that courts owe deference to SPA approvals.[8] D.E. 49, p. 33. However, plaintiffs continue to argue that *this* SPA was not entitled to deference because CMS has "never authorized Defendant's actions." D.E. 49, p. 33. Plaintiffs are mistaken; CMS has expressly authorized defendant to implement the criteria contained in

[8] For example, plaintiffs argued to the District Court that "Defendant misstated the law, incorrectly claiming that the SPA approval by CMS should receive *Chevron* deference." J.A. 986. This view was staunchly rejected by *Independent Living*, 132 S. Ct. at 1206.

Policy 3E, which is the only Policy plaintiffs seek to enjoin. Even if plaintiffs were correct that defendant had not fully implemented the SPA, which defendant disputes, plaintiffs did not seek an injunction requiring defendant to do so. Plaintiffs cannot now use the alleged failure to implement the entire SPA as a basis to argue against CMS deference. The record in this case clearly shows that CMS has approved exactly what defendant has done. The SPA approval was entitled to significant deference and the District Court's conclusion to the contrary was legally erroneous.

2. The District Court erroneously found that plaintiffs were likely to prevail on the merits of their ADA claims.

Defendant argued that mere risk of institutionalization is insufficient to establish a claim under the Americans with Disabilities Act ("ADA"), there has been no showing that any plaintiff is actually at risk of institutionalization, and that the Order forces a fundamental alteration of the State Medicaid plan. Plaintiffs contend that they are likely to succeed on the merits of their ADA claims[9] because 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." D.E. 49, p. 27 (emphasis added). This Court has never upheld such

[9] Because this Court has held that the requirements for showing a violation of Title II of the ADA and Section 504 of the Rehabilitation Act are the same, defendant hereinafter refers to both of these claims as plaintiffs' "ADA claims."

a standard, defendant has never conceded that adult care homes ("ACHs") are institutional settings, individuals are not required to enter institutions in order to receive PCS, and the question of whether plaintiffs qualify for the service is precisely the purpose of the eligibility criteria about which plaintiffs complain.

Essentially, plaintiffs have asserted that defendant's actions place them at risk of being removed from the community and moved into institutions, in violation of the ADA and Rehabilitation Act. It is, therefore, critical that this Court determine at the outset first, whether plaintiffs demonstrated a likelihood of success on the question of whether adult care homes ("ACHs") are institutions, and second, whether risk of institutionalization alone is sufficient to state a claim under the ADA.[10] The latter question appears to be an issue of first impression for this Court.

With respect to the first question, plaintiffs contend that defendant "does not – nor could he – claim that ACHs are not large, institutional settings." D.E. 49, p. 27. This statement is not supported by the record. From the outset of this litigation, defendant has categorically denied that ACHs are institutions. J.A. 1136-39; 1198-1317. The District Court did not make any explicit findings as to the character of ACHs, and to the extent the Order was based on an implicit

[10] Defendant addressed this question at length in his memorandum of law before the District Court, and adopts those arguments herein. J.A. 474-75.

finding that ACHs are institutions, it is erroneous and contradicted by the record. J.A. 1276-80. Other courts appear to have recognized that community-based adult care homes are not institutions for purposes of an ADA claim. *Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003) (analyzing whether the State's requirement that long term care services be provided in a nursing home, rather than the "community-based adult home" where the plaintiff resided, violated the ADA). Similarly, North Carolina ACHs are community-based and are not institutional settings.[11]

With respect to the question of whether risk of institutionalization alone is sufficient to state an ADA claim, the Supreme Court's decision in *Olmstead v. L.C. by Zimring* expressly disavowed such a construction of the ADA. 527 U.S. 581, 605-06 (1999). Moreover, a close reading of the primary case cited by plaintiffs in support of their theory shows that its holding is limited to a question of standing. *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003). In *Fisher*, the State changed its Medicaid benefits such that unlimited prescriptions were provided to patients in nursing facilities, but patients residing in the community could only receive a maximum of five prescriptions per month. *Id.*

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[11] Plaintiffs' Amended Complaint does not specifically allege that ACHs are institutions. Rather, ¶127 states that "The physical layout of many ACHs is similar to that of an institution." J.A. 963

at 1178. The court found that a plaintiff need not submit to institutionalization before having standing to bring such a claim. *Id.* at 1181.

However, contrary to plaintiffs' assertion in their brief, while *Fisher* held that a plaintiff need not wait to become institutionalized to have standing to bring an *Olmstead* claim, it did not hold that risk of institutionalization alone is sufficient to prevail on the merits of an ADA claim. In any event, *Fisher* is easily distinguishable from the facts of this case, because there is no requirement that plaintiffs enter a nursing facility in order to receive PCS. Rather, plaintiffs need merely show that they require limited assistance with three activities of daily living ("ADLs"), or extensive assistance with two ADLs. J.A. 918-19.

Various district courts have held that plaintiffs must demonstrate more than mere "risk" of institutionalization in order to succeed on a claim that defendant has violated Title II of the ADA. *See, e.g. G. v. Hawaii*, 676 F. Supp. 2d 1046, 1057 (D. Haw. 2009) ("A state's reduction in services may violate the integration mandate where it unjustifiably forces or will ***likely*** force beneficiaries from an integrated environment into institutional care." (emphasis added); *Peter B. v. Sanford*, 2011 U.S. Dist. LEXIS 22790, *9 (D.S.C. March 7, 2011) ("The court finds that this evidence demonstrates that institutionalization is ***sufficiently likely*** and therefore, the issuance of a preliminary injunction is warranted.") (emphasis added); *Gaines v. Hadi*, 2006 WL 6035742, *28 (S.D. Fla. Jan. 30, 2006) ("What

remains to be shown is that the requested reductions will afford such inadequate services that it will ***likely*** force Plaintiffs to drop from the community-based program in order to seek proper care in an institutional setting. In other words, Plaintiffs need to show that ***the only way they can get needed services*** is to submit to an institutional facility.") (emphasis added); *Hiltibran v. Levy*, 793 F. Supp. 2d 1108, 1116 (W.D. Mo. 2011) (Plaintiffs "***must*** be institutionalized in order to obtain Medicaid coverage of their medically necessary incontinence briefs.") (emphasis added).

Even those few courts which have held that plaintiffs can bring an ADA claim based on risk of institutionalization alone used language indicating that the risk caused by the defendant's actions must be "serious," "severe," or "substantial." *See, e.g., Dreyfus*, 663 F.3d at 1116 ("[A] plaintiff need only show that the challenged state action creates a ***serious*** risk of institutionalization.") (emphasis added); *V.L. v Wagner*, 669 F. Supp. 2d 1106, 1119 (N.D. Cal. 2009) ("Plaintiffs have submitted substantial evidence…showing that class members face a ***severe*** risk of institutionalization… ") (emphasis added). Here, plaintiffs utterly failed to make such a showing.

An ADA claim that is based on mere "risk" of institutionalization is no claim at all. Individuals with underlying medical conditions such as diabetes or heart disease who may also have functional ADL limitations, can always be

described to be at some "risk" of institutionalization.[12] Even the *Olmstead* Court recognized that "[s]ome individuals … may need institutional care from time to time 'to stabilize acute psychiatric symptoms.'" 527 U.S. at 605. The same holds true for rehabilitative care or other treatment for individuals with personal care needs.

Plaintiffs presented no credible evidence at the hearing that any of the named plaintiffs, or even any putative class members, faced a severe or likely risk of institutionalization. Even assuming that the Court were to consider plaintiffs' new "evidence" concerning 57 persons who allegedly moved to out-of home placements, there is no credible evidence that those placements constituted institutionalization or are the result of the PCS eligibility changes, and not the result of other factors outside of defendant's control.

Plaintiffs' case was premised on the theory that if the PCS eligibility changes remained in effect, all of the plaintiffs would be forced into institutional placements. The fact that nearly one full year has elapsed since the June 2011 implementation of Policy 3E and plaintiffs have been unable to show that anyone has been institutionalized as a result of the eligibility changes speaks volumes

[12] In fact, many Medicaid waiver programs require as a condition of eligibility that individuals be at risk of institutionalization in order to qualify for services. *See* 42 U.S.C. §1396n(c). The mere fact that participating individuals are at risk does not mean those programs violate the ADA.

about whether Policy 3E caused them to be at serious risk of institutionalization. It did not.

3. The District Court erred as a matter of law in finding that plaintiffs are likely to succeed on the merits of their due process claims.

Defendant contends that plaintiffs lack standing to bring their due process claims, that 42 U.S.C. § 1396a(a)(3) is not enforceable under Section 1983, and that plaintiffs do not have a property right to continuation of benefits beyond the current authorization period that is protected by due process. In response, plaintiffs first argue that defendant is foreclosed from raising the latter two issues on appeal, citing *Bollech v. Charle County*, *Maryland,* 69 F. App'x 178, 183 (4th Cir. 2003). While it may be true that failure to raise an issue below prevents a party from raising that issue on appeal, this Court has specifically acknowledged that issues going to subject matter jurisdiction fall outside this general rule:

> A fundamental exception to the general rule, of course, involves issues relating to the court's subject-matter jurisdiction. "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Subject-matter jurisdiction cannot be conferred by the parties, nor can a defect in subject-matter jurisdiction be waived by the parties. *See United States v. Cotton*, 535 U.S. 625, 630 (2002). Accordingly, questions of subject-matter jurisdiction may be raised at any point during the proceedings and may (or, more precisely, must) be raised *sua sponte* by the court. *See Bender*, 475 U.S. at 541 ("Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that

of the lower courts in a cause under review, even though the parties are prepared to concede it.") (internal quotation marks omitted).

Brickwood Contractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385, 309 (4th Cir. 2004) (*en banc*).

Therefore, plaintiffs' concern about "new issues" misses the mark. The justiciability of plaintiffs' claims under 42 U.S.C. § 1396a(a)(3) raises an issue of subject matter jurisdiction, as do the arguments about plaintiffs' lack of standing to raise a due process claim due to the absence of any deprivation of property, much less a deprivation having occurred without due process of law. Defendant is not foreclosed from bringing these issues before this Court on appeal.

"The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). If one has prevailed in such a hearing, he has not been *deprived* of anything, regardless of the lack of detailed reasons contained in the notice or the inherent unfairness of the proceedings. If one has received notice and elected to pursue a hearing, so long as he retains his property (i.e. receives maintenance of services) he has not been *deprived* of anything. If one has received notice and elected to pursue a hearing, his subsequent settlement of his claim either moots his claim or deprives him of standing to complain of the lack of detailed reasons contained in the notice or the

inherent unfairness of the proceedings, because under such circumstances he has not been *deprived* of anything.

In response to defendant's arguments on these points, plaintiffs contend that their deprivation does not arise from an inability to appeal in a timely manner, but rather because "the notices did not contain sufficient detail to enable plaintiffs to understand the reasons for the denial of services." D.E. 49, p. 39. However, no declaration or other statement by any plaintiff contends that the notice he or she received caused them to misunderstand their right to request a hearing. No declaration or other statement by any plaintiff states that their failure to retain their property was due to some particular confusion caused by the notice they received.

Moreover, the *Goldberg* Court never intended that their opinion be used to impose upon the States "any procedural requirements beyond those demanded by rudimentary due process." 397 U.S. at 268. Nor does *Goldberg* require the State to use a notice that emphasizes form over substance, which is what plaintiffs seek in this case:

> Nor do we see any constitutional deficiency in the content or form of the notice. New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. *Evidently* the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with recipients.

Id. at 268 (emphasis added).

Similarly, the plaintiffs herein were notified by letter that they did not meet criteria for PCS and advised in lengthy detail of their right to appeal and how to do so. If the recipient chooses to appeal, they are provided a copy of their entire case file and given the opportunity to participate in mediation with the nurse who conducted the assessment. Plaintiffs' allegation that this system violates due process is not supported by *Goldberg*.

No plaintiff has been deprived of any property. Most settled their claims, some are still pursuing their claims, and one abandoned his claim. Without a deprivation of property, no plaintiff has standing to complain about due process. So not only do plaintiffs lack standing to bring a due process claim, they also are unable to represent other individuals who may have such claims.

Even plaintiff Jones, who dismissed his appeal and waived his right to a hearing, presented no evidence whatsoever that his "lack of understanding" of the basis on which to challenge defendant's actions or of the issues which he could appeal was due to a deficiency in the *notice* he received. His sole claim is that his representative dismissed his appeal based upon an accurate representation at his mediation about what it would take for him to prevail on appeal. J.A. 961, ¶115. The notice itself was indisputably clear enough for him to exercise his right to appeal, and he fails to say that any misunderstanding on his part was due to some problem with that notice. Absent such an allegation, he has no standing to

complain of the form or quality of his notice, and cannot represent those who might have such a claim.

III. THIS COURT HAS JURISDICTION OVER THE ENTIRE ORDER.

Defendant's Opening Brief relied on this Court's well-settled opinion that an appeal brought under 28 U.S.C. § 1292(a) "brings before the appellate court the entire order, not merely the propriety of injunctive relief." *Allstate Ins. Co. v. McNeill*, 382 F.2d 84, 88 (4th Cir. 1967). Plaintiffs appear to argue that 1998 revisions to the Federal Rules of Civil Procedure somehow overruled this basic principle. However, plaintiffs cite no case of this Court suggesting that amendments to Rule 23 altered the general rule governing appeals brought under § 1292(a): "It is elementary that an appeal from the denial of injunctive relief brings the whole record before the appellate court and that the 'scope of review may extend further [than the immediate question on which the District Court ruled] to allow disposition of all matters appropriately raised by the record, including entry of final judgment.'" *United States v. Michigan*, 940 F.2d 143 (6th Cir. 1991), quoting 16 Wright & Miller Federal Practice § 3921 (1977). This Court has "'jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the Court of Appeals without further trial court development.'" *Ibid.*

Moreover, contrary to plaintiffs' argument, the class certification issues are "inextricably intertwined" with the propriety of injunctive relief, because the District Court considered harm to class members as a basis for injunctive relief, J.A. 1459, and because none of the named plaintiffs have standing to bring this lawsuit. Therefore, even under the cases cited by plaintiffs, this Court has jurisdiction to review the propriety of class certification.

CONCLUSION

Wherefore, for the aforementioned reasons, defendant respectfully requests that this Honorable Court vacate the Order of the District Court and DENY plaintiffs' motions for preliminary injunction, class certification and leave to file additional declarations, and further, that the Court DISMISS plaintiffs' claims with prejudice.

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND LENGTH LIMITS

Undersigned counsel certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this Reply Brief contains 6,714 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Respectfully submitted, this 1st day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, 1 May 2012, I electronically filed the foregoing **DEFENDANT-APPELLANT'S REPLY BRIEF** 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
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