IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Case No.: 5:17-cv-00581-FL

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| MARCIA ELENA QUINTEROS HAWKINS, ALICIA FRANKLIN, VANESSA LACHOWSKI, and KYANNA SHIPP on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>MANDY COHEN, in her official capacity as Secretary of the North Carolina Department of Health and Human Services,<br><br>Defendant. | **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** |

## I. PLAINTIFFS MEET ALL REQUIREMENTS OF RULE 23(a).

### A. Plaintiffs Meet the Commonality Requirement.[1]

Defendant contends that factual differences between proposed class members preclude commonality. Def.'s Resp. Opp'n Class Cert. at 8-10 (ECF No. 36). The only factual differences mentioned, however, are that some class members who lost coverage may have been reinstated, may no longer need Medicaid coverage, or have since become ineligible for Medicaid. *Id*. These scenarios, which focus on what may happen *after* the Medicaid termination at issue, are plainly insufficient to avoid class certification, which requires only *one* common factual *or* legal issue. *Wal–Mart Stores v. Dukes*, 131 S. Ct. 2541, 2556 (2011). Some differences among class members are inherent in any class action. *See, e.g., L.S. v. Delia*, No. 5:11-CV-354-FL, 2012

[1] Defendant does not dispute that the numerosity requirement is met. Fed. R. Civ. P. 23(a)(1). Defendant also does not dispute that the requirements of Rule 23(b)(2) are met.

U.S. Dist. LEXIS 43822, *21 (E.D.N.C. Mar. 29, 2012) (finding that the fact some plaintiffs will receive an increase in Medicaid services in the future does not prevent class certification). If a class member dies or moves to another state, that person plainly is no longer a class member or at least is no longer entitled to reinstatement of benefits. If a class member terminated by Defendant has managed on her own to get her Medicaid coverage reinstated, that individual still requires injunctive relief to prevent Defendant from terminating her Medicaid benefits again based on the same challenged procedure. *See Pashby v. Cansler*, 279 F.R.D. 347, 352 (E.D.N.C. 2011) (finding that reinstatement of Medicaid services at issue to named plaintiffs did not moot their claims due to risk of future termination by Defendant under the challenged policy).

The Amended Complaint does challenge more than one of Defendant's policies and procedures; thus, not every class member was terminated as a result of the same challenged procedure. Pls.' Corrected Am. Compl. ¶¶ 51-76 (ECF No. 12). This complexity is fully addressed, however, by three proposed subclasses.[2] Within each subclass the commonality of both facts and legal claims are plainly sufficient under Rule 23(a) because the same procedure (or one or more of a closely related group of procedures) is alleged to have caused the termination for every member of each subclass. For the first subclass, the central common question of fact is whether the state agency is terminating Medicaid benefits without first determining ineligibility for Medicaid and then sending timely, adequate written notice. Am. Compl. ¶¶ 14, 51-66, 71-75. The central common legal question for this subclass is whether

[2] "When appropriate, a class may be divided into subclasses that are each treated as a class under this rule." Fed. R. Civ. P. 23(c)(5). *See Rodriguez v. Hayes*, 591 F.3d 1105, 1123-24 (9th Cir. 2010) ("To the extent there may be any concern that the differing statutes . . . will render class adjudication of class members' claims impractical or undermine effective representation of the class, it may counsel the formation of subclasses."). Absent conflicts of interest between subclasses, however, there is no rule that separate subclasses are required for each cause of action. *See, e.g., In re VMS Sec. Litig.*, 136 F.R.D. 466, 477-78 (N.D. Ill. 1991).

these procedures violate both the Medicaid Act and due process. *Id.* ¶¶ 14, 141-142, 152-153. For the second subclass, the central common question of fact is whether Defendant's instructions to county Departments of Social Services (DSSs) cause Medicaid terminations without first determining ineligibility and fail to reasonably accommodate subclass members' disabilities. *Id.* ¶¶ 14, 67-69, 71, 73-75, 76 (a-d, g-l, n-o). The central common legal questions for this subclass are whether Defendant's redetermination procedures violate the Americans with Disabilities Act or Section 1557 of the Affordable Care Act. *Id.* ¶¶ 14, 143-150. For the third subclass, the central common question of fact is whether Defendant's procedures cause Medicaid terminations without first determining ineligibility and fail to accommodate subclass members' limited English proficiency. *Id.* ¶¶ 14, 71, 76(e, f, m, n). The common legal question for this subclass is whether these redetermination procedures violate Section 1557 of the Affordable Care Act. *Id.* ¶¶ 14, 148-150. Resolving whether Defendant's challenged procedures exist, whether they cause terminations of Medicaid without determining ineligibility for Medicaid and without adequate, timely notice, and whether these procedures violate federal law will resolve the issues on the merits. The Complaint seeks uniform declaratory and injunctive relief for every member of each subclass, further evidencing the commonality of their claims. *Id.* § IX.

Significantly, Defendant never explains how minor differences in facts between class members will prevent common answers to the issues raised in this case. The agency's brief ignores voluminous authority to the contrary in Plaintiffs' initial brief. Pls.' Mem. Supp. Class Cert. at 9-11 (ECF No. 18). All members of the proposed class have experienced or will experience the same injury—termination of their Medicaid coverage. Either Defendant is terminating Medicaid based on the challenged policies and procedures as alleged by Plaintiffs or the agency is not doing so. Either the challenged procedures causing terminations are legally

permissible or not. Determining the existence and legality of the alleged procedures thus "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart Stores,* 131 S. Ct. at 2545, 2551.

Defendant relies on *J.B. v. Valdez,* 186 F.3d 1280 (10th Cir. 1999). The district court there ruled that the plaintiffs failed to establish that a common question of law existed because "there [was] no one statutory or constitutional claim common to all named Plaintiffs and all putative class members." 186 F.3d at 1289 (citation omitted). In affirming, the Tenth Circuit noted that the named plaintiffs "merely attempt[ed] to broadly conflate a variety of claims to establish commonality via an allegation of 'systematic failures.'" *Id.* The *Valdez* plaintiffs also failed to show that at least one legal claim or factual issue was common to all putative class members. *Id.* at 1289-90. Here, as just discussed, there are discrete factual and legal questions common to all members of each subclass. Unlike the general, vague class definition provided by *Valdez* plaintiffs, *Id.* at 1287, Plaintiffs here have precisely defined subclasses and linked each subclass member to common factual and legal issues.

Defendant also asserts the class definition is too broad because not all county DSSs have had past due recertifications. Def.'s Resp. at 15. In fact, Plaintiffs both alleged and submitted evidence to the contrary. *See* Am. Compl. ¶ 64; Pls.' Mem. Supp. Prelim. Inj. at 5-9 (ECF No. 49). More importantly, Plaintiffs do not challenge any individual DSS's actions. Rather, Plaintiffs challenge the *state* agency's computer programming which automatically terminates Medicaid without notice; the *state* agency's written policy requiring termination without consideration of an alleged disability; the *state* agency's inadequate notices; and the *state* agency's policies, procedures, and forms for eligibility redetermination which discriminate against Medicaid beneficiaries with disabilities or limited English proficiency. *See, e.g.,* Am.

Compl. ¶ 76 ("DHHS has instructed county DSS workers to use forms and procedures for Medicaid eligibility review which have resulted in termination of Medicaid for unfair and discriminatory procedural reasons."). Plaintiffs thus meet the commonality test.

**B. The Named Plaintiffs' factual allegations are typical of those of the class.**

Defendant argues that the need to examine the individual circumstances of the named plaintiffs precludes class certification. Def.'s Resp. at 13-15. This argument fails because Plaintiffs only challenge state agency procedures; they do not seek to establish any Plaintiff's eligibility for Medicaid. Proof of Plaintiffs' case turns on the existence, legality, and harm of Defendant's challenged procedures, not the particular facts of any individual plaintiff's or class member's case.

At least one named plaintiff is a member of each proposed subclass. All four of the named plaintiffs are alleged to have lost Medicaid without adequate, timely notice or a determination of ineligibility under all Medicaid categories and are therefore members of Subclass One. Am. Compl. ¶¶ 87, 90, 92-93, 107-09, 119-20, 132-34, 138. All four of the named plaintiffs are persons with disabilities who are alleged to have lost Medicaid under procedures that failed to accommodate their disabilities and are therefore in Subclass Two. *Id.* ¶¶ 78-80, 91, 93, 100, 103-110, 115, 122, 127, 130-31, 136. One of the named plaintiffs, Ms. Hawkins, is a person with limited English proficiency who is alleged to have received written notice from DSS in English when she lost her Medicaid and is therefore in Subclass Three. *Id.*¶¶ 77, 92. The requirement for typicality is met by these allegations.

The only specific example offered by Defendant to support the need to examine Plaintiffs' individual circumstances is that Ms. Lachowski's Medicaid was reinstated. Def.'s Resp. at 15. As discussed above, this fact neither changes her past and threatened injuries from

the challenged procedures nor is it relevant to the legal claims arising from the alleged injury. The issue before the court is whether Medicaid terminations are occurring due to the challenged procedures and, if so, are the procedures legal. Ms. Lachowski, like many class members, may no longer need reinstatement of her Medicaid but needs an injunction to stop Defendant from terminating her again based on the same procedure.

Defendant cites *Elizabeth M. v. Montenez*, 458 F.3d 779 (8th Cir. 2006), where the court upheld decertification of a class of women seeking declaratory and injunctive relief against a state agency for violations of their constitutional rights by failing to protect them from sexual and physical assaults by male patients and staff. *Id*. at 783. The court found that the nature of the failure-to-protect claim necessarily required individualized factual inquiries into the alleged assaults, and thus typicality was not met. *Id.* at 787-88. The *Elizabeth M.* plaintiffs also were unable to point to specific policies or procedures that led to their harm. *Id.* at 788. In contrast, this case involves precisely the same injury for each plaintiff and class member—termination of Medicaid benefits—resulting directly from specified uniform policies, procedures, and forms.

## II. PLAINTIFF VANESSA LACHOWSKI HAS STANDING, AND THE CLASS SHOULD NOT BE NARROWED TO EXCLUDE FUTURE MEDICAID TERMINATIONS.

Defendant asserts that Plaintiff Vanessa Lachowski lacks standing, and that because of this, future class members are not adequately represented. Def.'s Resp. at 10-13. This argument fails for at least three reasons.

First, Ms. Lachowski has standing, having alleged *both* past concrete injury and an imminent threat of repetition of that injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). She specifically alleged her Medicaid was terminated without notice despite her continuing eligibility, causing her to lose essential personal care services for over ten days. Am.

Compl. ¶¶ 119-23. She also alleged she was imminently threatened with another termination without notice less than one month after the Amended Complaint was filed. *Id.* ¶¶ 2, 127, 128. There was nothing imaginary or conjectural about this threat, as DSS had not contacted her regarding the renewal of her eligibility, just as had occurred a year earlier when she lost her Medicaid without notice. *Id.* Defendant took action *after* this suit was filed to prevent automatic termination of Ms. Lachowski's Medicaid from occurring two years in a row. *See* Lachowski Decl. Feb. 9, 2018 (ECF No. 44). This does not affect her standing, which is determined as of commencement of the suit. *Pashby*, 279 F.R.D. at 351. Nor does it make her claim moot. The court in *Pashby* rejected the argument that plaintiffs lacked standing or that their claims were moot where their Medicaid services had been reinstated, because they remained subject to the same challenged procedure in the future. *Id.* at 351-52 (stating that plaintiffs' "ability to seek redress and a more stable resolution through the court remains independent of the vagaries of Defendants." (citation omitted)); *see also L.S.*, 2012 U.S. Dist. 43822 at *19-21 (rejecting similar argument).

Second, assuming *arguendo* that Ms. Lachowski should be dismissed as a plaintiff, this would have no impact on class certification because the class would be adequately represented by the remaining three plaintiffs. As this court has stated, only one named plaintiff must have standing as to each claim. *L.S.*, 2012 U.S. Dist. 43822 at *14-15. Defendant cites no authority that named plaintiffs who suffered an injury in the past cannot adequately represent class members threatened with the same injury in the future, so long as future class members' threat of injury is based on the same challenged procedure which already injured the named plaintiffs. In both *L.S.* and *Pashby*, certified classes included future Medicaid beneficiaries even though the named plaintiffs had already suffered their injuries. *Id.* at *8, 15; *Pashby*, 279 F.R.D. at 351-52.

Third, assuming *arguendo* that a named plaintiff is required to be threatened with a future injury, and even had Ms. Lachowski not alleged precisely that, Am. Compl. ¶¶ 127-28, the remaining three plaintiffs are also at risk of termination of their Medicaid in the future because their Medicaid coverage may be reinstated and then terminated again. This has already happened to Plaintiff Kyanna Shipp, whose Medicaid was reinstated by Defendant in response to this lawsuit but now faces termination of her Medicaid again at the end of this month based on one of Defendant's challenged policies. Pls.' Mem. Supp. Prelim. Inj. at 15-16. Plaintiff Alicia Franklin also was reinstated to Medicaid coverage by Defendant in response to this suit but remains at risk so long as Defendant's practices continue. Allison Decl. Exs. 1-3 (ECF No. 39).

Defendant's argument ultimately is circular and self-defeating: Ms. Lachowski has no standing because her threat of injury is in the future, but the portion of the proposed class that will suffer injury in the future has no representative because no plaintiff is at risk of injury in the future. Given the Eleventh Amendment bar on retroactive relief from the state, *Edelman v. Jordan*, 415 U.S. 651 (1974), and the irreparable harm from the loss of Medicaid that has been demonstrated here, Pls.' Mem. Supp. Prelim. Inj. at 21-24, it would be convenient indeed for Defendant if the court could not enjoin the state agency's future conduct based on both the past results and the future threats resulting from its ongoing policies and procedures.[3]

[3] Defendant also asserts that the class definition is not "precise or ascertainable" but never explains why this is so. Def.'s Resp. at 10. In *L.S. v. Delia*, this court rejected a fully developed argument that the proposed class definition was unclear. 2012 U.S. Dist. LEXIS 43822 at *15-16. Defendant suggests the class must be "presently ascertainable," Def.'s Resp. at 10, but this requirement clearly cannot apply literally to a case where the class includes persons who will be injured by an agency procedure in the future. *See, e.g*, *Pashby*, 279 F.R.D. at 353, (stating that "the fluid composition of the [Medicaid recipient] population is particularly well suited for status as a class because while the identity of the individuals involved may change, the nature of the harm and the basic parameters of the group affected remain constant" (citation omitted)); *see also L.S.*, 2012 U.S. Dist. LEXIS 43822 at *15 (certifying a class including persons who will be affected by Defendant's practices in the future).

## III. CLASS CERTIFICATION SHOULD NOT BE DELAYED.

Failing to provide any valid basis for denying class certification, Defendant requests the court to delay certification to permit the agency the opportunity to submit affidavits. Def.'s Resp. at 16. In fact, Defendant had every opportunity to submit affidavits in opposition to the motion, and to contest the six declarations and twenty-eight exhibits filed with Plaintiffs' Motion for Class Certification (ECF Nos. 19-24). Defendant chose not to file any evidence with her response, despite being granted a total of fifty days to respond to the motion. Defendant will have another opportunity to file evidence in response to Plaintiffs' pending Motion for Preliminary Injunction. Plaintiffs have no objection to the court waiting for that response before ruling on this motion. If the Court decides an evidentiary hearing on the motions is warranted, it may order one.

Defendant also requests the opportunity to conduct discovery before class certification but fails to identify a single specific factual issue on which the agency needs discovery before the class is certified. Def.'s Resp. at 16. Defendant does not need discovery as to the agency's own policies and procedures or how many Medicaid beneficiaries are being terminated under those procedures because all of that information is in the agency's possession. Plaintiffs, on the other hand, will be unable to obtain discovery about class members that Plaintiffs' counsel do not represent individually until after the class is certified due to privacy protections for putative class members. *See* 45 C.F.R. § 164.501 *et seq.*; N.C. Gen. Stat. § 108A-80. In any event, as noted in Plaintiffs' initial brief, the truth of plaintiffs' allegations is not at issue in deciding whether to certify the class. *See Sanchez-Rodriguez v. Jackson's Farming Co. of Autryville*, No. 7:16-CV-28-D, 2017 U.S. Dist. LEXIS 11215, *2 (E.D.N.C. Jan. 27, 2017) (citation omitted). Defendant will be able to pursue discovery on the merits of Plaintiffs' claims before any final ruling is

issued and can move for decertification of the class if the discovery results warrant same. Fed. R. Civ. P. 23(c)(1)(C).

## CONCLUSION

For the reasons stated above and in their initial brief, Plaintiffs respectfully request that the court order that the proposed Plaintiff Class meets the requisites of Rule 23(a) and (b)(2); certify this action as a class action, with the class defined as Plaintiff have proposed in their motion; and appoint undersigned counsel at the Charlotte Center for Legal Advocacy and National Health Law Program as Class Counsel pursuant to Rule 23(g).

Dated: February 23, 2018

Respectfully submitted,

ATTORNEYS FOR PLAINTIFFS

/s/ Douglas S. Sea
Douglas Stuart Sea
State Bar No. 9455
CHARLOTTE CENTER FOR LEGAL ADVOCACY
1431 Elizabeth Avenue
Charlotte, North Carolina 28204
Telephone: (704) 971-2593
dougs@charlottelegaladvocacy.org

/s/ Jane Perkins
Jane Perkins
State Bar No. 9993
Joseph Williams McLean
State Bar No. 49399
NATIONAL HEALTH LAW PROGRAM
200 N. Greensboro Street,
Ste. D-13
Carrboro, NC 27510
Telephone: (919) 968-6308
perkins@healthlaw.org
mclean@healthlaw.org

**CERTIFICATE OF SERVICE**

I certify that on this day, I served a true copy of the Plaintiffs' Reply in Support of Motion for Class Certification upon the Defendant's attorney via electronic means through the CM/ECF system to:

Thomas Campbell
Special Deputy Attorney General
N.C. Department of Justice

Rajeev K. Premakumar
Assistant Attorney General
N.C. Department of Justice

This the 23rd day of February 2018.

/s/ Douglas Stuart Sea