UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
Southern Division
Civ. No. 7:08-CV-57-H

DEVON TYLER MCCARTNEY, a minor child, by his mother Penny McCartney; ERIC CROMARTIE, a minor child, by his mother Selena McMillan; KATIE TIPTON, a minor child, by her father, Greg Tipton, individually and on behalf of all others similarly situated, Plaintiffs, v. DEMPSEY BENTON, Secretary, North Carolina Department of Health and Human Services, Defendant.	)	**PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION (MOOTNESS)**

INTRODUCTION

Defendant's second motion to dismiss this class action argues that the case is moot.[1] (*See* Memo. in Supp. of Def's. Mot. to Dismiss for Lack of Jurisdiction (Mootness) (hereafter "Memo. in Supp. of Mot. to Dismiss for Mootness").) Defendant's argument is based on a single event: enactment of a temporary state statute that, effective October 1, 2008 through June 30, 2010, supplements and reinforces already-existing legal requirements when Medicaid services are denied, terminated, suspended, or reduced by Defendant.

Defendant's motion does not meet his heavy burden of establishing the mootness of Plaintiffs' claims that Defendant is systematically denying, terminating, and reducing services to

[1] Plaintiffs responded to Defendant's first motion to dismiss on August 11, 2008. (*See* Pls.' Resp. to Def's. Mot. to Dismiss (hereafter "Plf. Aug. 11 Response") .) The contents of Plaintiffs' August 11 Response are incorporated herein by reference.

Medicaid recipients in violation of due process and the Medicaid Act. Defendant's motion misapprehends the nature of Plaintiffs' allegations, which do not challenge any state statute or regulation but rather agency practices which violate the Constitution and the federal Medicaid statute. Defendant's arguments are without merit.

STANDARD OF REVIEW

To cause mootness, intervening events must have "completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citations omitted). *See also, e.g.*, *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) ("[M]ootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought."); *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (citation omitted) (mootness justified only if an event occurs that makes it "impossible for the court to grant any effectual relief whatever"). Even if all violations have ceased, the defendant also must show that "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.,*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)); *see also, e.g., Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, _ U.S. _, 127 S.Ct. 2738, 2751 (2007) (relying on *Friends of the Earth* to find case was not moot).

Where, as in this case, a request for class certification is pending, Defendant must show that the case is moot as to all putative class members, not merely the named plaintiffs. *See, e.g., County of Riverside v. McLaughlin,* 500 U.S. 44, 51-52 (1991); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Olson v. Wing*, 281 F.Supp.2d 476, 483-84 (E.D.N.Y. 2003) (Medicaid class action not moot even though named plaintiff's benefits were continued by

Defendant pending appeal because allegedly unconstitutional acts against plaintiff's proposed class continued). *Cf. Preiser v. Newkirk*, 422 U.S. 395, 404 (1975) (Marshall, J., concurring) (finding inmate's case moot after he was transferred back to his original facility "only because for some reason…[he]…did not file this case as a class action").

The standard for finding a case moot is "stringent," *Concentrated Phosphate*, 393 U.S. at 203, and "the 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth*, 528 U.S. at 189. In *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007), the Fourth Circuit rejected a Medicaid director's argument that events subsequent to the filing of the case had rendered it moot. "Viewing the facts in the light most favorable to the [plaintiff] Doe," the Court held the state agency had failed to show that it was "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at. 354 (citation omitted).

ARGUMENT

I. THE CASE IS NOT MOOT BECAUSE THE NEW STATE STATUTE MOSTLY CODIFIES EXISTING LEGAL PROTECTIONS THAT DEFENDANT DENIES HE IS VIOLATING.

The new state statute codifies protections that the U.S. Constitution, the federal Medicaid Act and regulations, and state regulations already require when Medicaid services are denied, terminated, suspended or reduced. *See* N.C. Session Law 2008-118 (Def. Ex. 1); 10 NCAC 22H .0101, .0104 (Ex. 1, hereto); 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.200, *et. seq.*; *see, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970). That the Defendant will soon be subject to yet another, fourth layer of legal duties in the form of state legislation does not render moot Plaintiffs' allegations that he is systematically violating the already-existing legal requirements.

Defendant does make a conclusory argument that he will revise notices and the hearing process at some unstated time in the future. However, he offers no evidence that any changes in

his actual practices have begun or of what the specific changes will be. (*See* Memo. in Supp. of Mot. to Dismiss for Mootness at 12.) At the same time, Defendant continues to vehemently deny that his existing practices violate the law. (*See, e.g.*, Def. Reply to Plf. Resp. to Def. [1st] Mot. to Dismiss at 5.)

Moreover, Defendant is taking contradictory legal positions regarding what these multiple layers of law require of him. For example, Defendant asserts he will comply with provisions of the new state law which require that services be continued pending an appeal (*see* Memo. in Supp. of Mot. to Dismiss for Mootness at 8) but then, eleven days later, asserts that state law provides no right to continuation of Medicaid services beyond a limited prior-approved period of time. (*See* Def. Reply to Plf. Resp. to Def. [1st] Mot. to Dismiss at 7-8.) It is far from clear what Defendant means when he assures the Court that he will comply with state law.

In cases such as this one, courts have repeatedly refused to find mootness. *See, e .g., Parents Involved in Cmty. Sch.*, 127 U.S. at 2751 (finding a lack of absolute clarity that challenged practices had ceased where the defendant "vigorously defends" the constitutionality of its actions); *Honing v. Doe*, 484 U.S. 305, 321 (1988) (finding the case was not moot where state officials argued that the injunctive relief was unlawful and, thus, gave the Court every reason to believe that, absent an injunction, the plaintiff would face a substantial threat of adverse action in the future). In *Virginia ex rel. Coleman v. Califano*, 631 F.2d 324 (4th Cir. 1980), the court was asked to decide the procedural safeguards a state agency is entitled to when the federal government refuses the state's request to amend its program. While the case was pending, the federal agency voluntarily provided the hearing that the state sought and, thereafter, argued the case was moot. The Fourth Circuit held the defendant failed to meet his "heavy burden of demonstrating that there is no reasonable expectation that the wrong will be repeated."

Id. at 326. The Court based its decision on the fact that Virginia submitted requests to the federal agency regularly, and the federal agency continued to maintain it could deny the hearing sought by the State. *Id.* at 326-27. *See also, e.g.*, *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004) (finding the government's "continued defense of the validity and soundness of the contract prevents the mootness argument from carrying much weight"); *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 35 (1st Cir. 1999) (finding statements of state attorney general in a brief did not moot the challenge because "the Attorney General must proffer more than a conclusory assertion of inapplicability to convince us that the Association no longer faces a credible threat of prosecution").

II. THE NEW STATE STATUTE DOES NOT MATERIALLY AFFECT THE UNDERLYING FACTS OF THE CASE OR ALLEVIATE THE ONGOING HARM FROM THE CHALLENGED BEVAVIOR.

Defendant's argument that the new state legislation addresses all of plaintiffs' allegations is fundamentally mistaken. Indeed, many of the challenged practices simply have nothing to do with the new state legislation. For example, preliminary documents already filed by Plaintiffs illustrate numerous allegedly illegal practices, some of which have been explicitly directed in writing by the Defendant. (*See* Plf. Memo. in Supp. of Class Certification at 8-9, Ex. A-R.) These policies have not been withdrawn by Defendant and, as shown below, generally are not prohibited by the new legislation.

Three types of due process violations are alleged in the Amended Complaint: those which occur in the *initial decision-making process*, those that deny *access to the hearing process*, and violations in *the hearing process itself*. (*See* Plf. Aug. 11 Resp. at 15-16.) As detailed below, these violations are not mooted by the new state legislation.

A. Violations in the initial decision-making process continue.

The legislation that is the basis for Defendant's motion addresses the Medicaid services appeal process and the notices sent to Medicaid recipients. *See* N.C. Session Law 2008-118 (Def. Ex. 1). This law will have little or no effect on the violations of due process which Plaintiffs have alleged occur during Defendant's decision-making process *before* providing notice and hearing rights. With the exception of one sentence in Section 10.15A(h5), which is discussed below, the new legislation says nothing about the process required before notice of Defendant's decision is provided to a recipient.

Defendant's argument assumes that the allegations in the complaint concern only the informal hearing process, which has been eliminated by the new legislation, but these allegations plainly also concern initial decision-making processes used by Defendant's agent, Value Options, which are unaffected by the new legislation. (*Compare* Memo. in Supp. of Mot. to Dismiss for Mootness at 7-11 *with* Am. Compl. ¶¶ 52, 53, 54, 56, , 79, 80, 81, 82, 93-95, 101-103, 110-112, 114, 118-128.) Alleged violations by Defendant and his agent in making initial decisions to deny, reduce, or terminate Medicaid services include failure to consider the opinions of treating clinicians; changing prior, final decisions with no intervening change in the facts or law; failure to request sufficient information to fairly evaluate requests; failure to provide Medicaid recipients and their clinicians with a meaningful opportunity to present evidence of medical eligibility for requested services; and applying medical eligibility standards that are arbitrary, not ascertainable by the Plaintiffs, and inconsistent with Defendant's published policies for such determinations. (*Id.*) The effect of these practices is that Defendant is systemically denying, reducing, and terminating essential mental health and developmental disability services

under non-ascertainable, subjective, arbitrary standards and procedures that are not consistently and rationally applied.

Due process requires that "decisions regarding entitlements to government benefits must be made according to 'ascertainable standards' that are applied in a rational and consistent manner." *Pressley Ridge Sch. v. Stottlemyer,* 947 F. Supp. 929, 940 (S.D. W.V. 1996) (citing *Holmes v. New York City Hous. Auth*., 398 F.2d 262, 265 (2d Cir. 1968)). *See also, e.g., Burke v. United States Dep't of Justice Drug Enforcement Agency*, 968 F. Supp. 672, 681 (M.D. Ala. 1997) ("To allow the [agency] to administer a...scheme using unwritten standards leads to rule by decree and not by law."). In sum, a live controversy exists between the parties because the new state law does not concern and, thus, cannot irrevocably eradicate the effects of the due process violations that are occurring during the initial decision-making phase.

B. Access to the hearing process continues to be denied.

The second type of alleged violation, denial of access to the hearing process, also is not cured by the new legislation. According to the complaint, Defendant's systemic practices include oral denials, discouragement, and misinformation; delays in acting on requests for services; interruptions of service without any notice; and improper written notices. (*See* Am. Compl. ¶¶ 34, 37, 42, 44, 51, 52, 55, 56, 58-60, 64-66, 68-71, 74, 79, 82-88, 93-95, 104, 105, 112-116, 118-120 (both), 127-142, 154-155.) This group of violations has resulted in the loss of Medicaid services without notice or a hearing to Tyler McCartney, Eric Cromartie, and thousands of other class members. (*Id*.; Plf. Mot. for Class Certification, Ex. A-R.)

Due process protects against unreasonable state agency actions which have the effect of denying access to the hearing process. "A system or procedure that deprives persons of their claims in a random manner…necessarily presents an unjustifiably high risk that meritorious

claims will be terminated." *Logan v. Zimmerman Brush*, 455 U.S. 422, 434-35 (1982). Without timely, adequate, and written notice of adverse actions taken on their claims for services and of their right to appeal, Plaintiffs' statutory right to a hearing is illusory. As stated by the D.C. Circuit, "It is universally agreed that adequate notice lies at the heart of due process. Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose and resembles more a scene from Kafka than a constitutional process." *Gray Panthers v. Schweiker*, 652 F. 2d 146, 168 (D.C. Cir. 1980).

Defendant does *not* claim that discouragement and verbal denials will cease because they are prohibited by the new legislation, but rather suggests that Section 10.15A(h5) of the new legislation "*specifically permits"* these practices under the guise of "informal discussions." (Memo. in Supp. of Mot. to Dismiss for Mootness at 8 (emphasis added).) Contrary to Defendant's claim, nothing in Section 10.15A(h5) specifically permits the practices alleged in paragraphs 118 through 120 (both) of the Amended Complaint. Given that the new legislation apparently is being interpreted by Defendant to authorize such practices, and given that these practices have been clearly alleged to be in conflict with due process and the federal Medicaid statute (Am. Compl. ¶¶ 159-164), the permissibility of these practices is very much a live issue.

Similarly, the new legislation requires written notice to parents of minor recipients or to legal guardians or attorneys-in-fact for incompetent Medicaid recipients *only* if they have requested in writing to receive the notice. *See* N.C. Session Law 2008-118, Section 10.15A(h1) (Def. Ex. 1). To the extent this provision purports to authorize Defendant's current practice, the complaint squarely presents the issue of whether this provision violates due process. (*See* Am. Compl. ¶¶ 132-33, 159-160.) Authorization by the state legislature to engage in a practice hardly moots the issue of whether the practice conflicts with the United States Constitution. Defendant also argues

that the names and addresses it uses when it sends written notices are sufficient, but this is an argument on the merits, not about mootness, and has nothing to do with the new legislation. (*Compare* Memo. in Supp. of Mot. to Dismiss for Mootness at 10 *with* Am. Compl. ¶¶ 132-34.)

Interruptions in services prior to written notice and inadequate written notices are in part prohibited by the new legislation. *See* N.C. Session Law 2008-118, Section 10.15A(h1)(1),(2) (Def. Ex. 1). Enactment of this statute does not bring the controversy to a close, however. Existing law already addressed these issues but, as alleged in the Amended Complaint, Defendant does not comply with the law. The controversy regarding the nature and content of written notices is, thus, ongoing. Moreover, significant issues remain about Defendant's interpretation of that new legislative language. For example, the legislative language reinstating services pending appeal to "the level provided on the day immediately proceeding the Department's adverse determination," Section (h1)(2)g, will not protect recipients whose services are stopped by Defendant prior to the mailing of the adverse action notice, nor will it protect those whose services are stopped with no written notice at all. (*See* Am. Compl. ¶¶ 118-120(both), 130, 154.) As to the content of notices, Section (h1)(2) of the legislation does not spell out the entire federally-required content of the notices (*See*, 42 C.F.R. § 431.210) and, of course, provides no guarantee that Defendant's notices will not continue to be misleading, confusing, contradictory, and improper. (*See* Am. Compl. ¶¶ 126, 135-41.) Finally, as discussed above, Defendant's practices which interrupt services with inadequate, late, or no written notice *already violate* both state and federal regulations and due process. The fact that some these practices will soon violate state legislation as well does not meet Defendant's "heavy burden" of proving that his illegal practices have ceased, let alone that they are not capable of repetition.

C. Violations in the hearing process have not ceased.

The final group of alleged violations occurs *during the hearing process*, including improper dismissals of hearing requests, long waits for hearings, illegal interruptions of services while waiting for a hearing, denial of a meaningful *de novo* hearing, and the termination of services without notice after the hearing, regardless of outcome. (*See* Am. Compl. ¶¶ 38-41, 72-73, 75, 76, 105-109, 124, 125, 143-157.) All three named plaintiffs and thousands of other class members have lost or are threatened with losing their Medicaid services because of these violations. (*Id.,* ¶¶ 38-41, 72-73, 75, 76, 105-109, 124, 125, 143-157.) The right to a hearing must include within it the right to effective redress or due process is violated. *Greenstein v. Bane*, 833 F. Supp. 1054, 1077 (S.D.N.Y. 1993) (and cases cited therein).

While some of these illegal practices may be improved by the new legislation, the impact remains to be seen. The legislation may reduce appeal delays by eliminating informal appeals and expediting formal appeals. *See* N.C. Session Law 2008-118, Sections 10.15A(h1)(3) & (5), (h2)(2) & (5) (Def. Ex. 1). However, given the large backlog of informal appeals which may be transferred to formal appeals on October 1, 2008 under Section 10.15A(h4), the continuing high volume of appeals filed each month, the many responsibilities of the Office of Administrative Hearings (OAH) for hearings other than Medicaid appeals, and the delay which occurs after the OAH decision is transmitted to the Defendant, the actual impact on appeal delays is uncertain at best. *See* N.C.G.S. § 150B-23 *et seq.*; Plf. Mot. for Class Certification, Ex. G.

Other violations during the hearing process, such as Defendant's failure to permit a *de novo* hearing, are largely unaffected by the new law. Contrary to Defendant's assertion, Plaintiffs have alleged violations in the formal as well as the informal hearing process. (*See* Am. Compl. ¶¶ 121, 143, 144, 145, 147-150, 152-53, 155-56.) Defendant's argument that he has "no

power" over what happens in the formal appeal process (Memo. in Supp. of Mot. to Dismiss for Mootness at 9-11) ignores both federal and state law to the contrary. The Medicaid Act requires a "single state agency" to administer or supervise administration of the state Medicaid Program. 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10. Defendant's duties–which include assurance of a fair hearing process for Medicaid appeals under 42 U.S.C. § 1396a(a)(3)–are non-delegable. (*See* Plf. Aug 11. Resp. at 23-24.) Among those duties is to assure that Medicaid recipients receive a *de novo* evidentiary hearing prior to the termination or reduction of their Medicaid services. *See* 42 C.F.R. §§ 431.205(b)(2); 431.232(c), 431.201; *Goldberg v. Kelly*, 397 U.S. 254 (1970); *see also, e.g., Heckler v. Campbell*, 461 U.S. 458, 471 n.1 (1983) (Brennan, J., concurring); *Manor v. Dep't of Pub. Welfare*, 796 A.2d 1020, 1029 (Pa. Commw. Ct. 2002).

As Defendant has already argued to this Court, Secretary Benton has delegated to his employee, the Director of the Division of Medical Assistance, *not* to the N.C. Office of Administrative Hearings (OAH), responsibility for making final agency decisions in Medicaid administrative appeals. (*See* Def. Memo. in Supp. of [1st] Mot. to Dismiss at 23.) Thus, the decision by OAH is returned to the Director of the Division of Medical Assistance. Defendant through his designee is then free to review *de novo* all issues of law decided by OAH, including, for example, whether a *de novo* evidentiary hearing was appropriate, whether a change in circumstances was required before reducing or terminating services, and whether the opinion of the treating clinician is entitled to deference. (*See* Am. Compl. ¶¶ 121, 123, 148-49.) Because Defendant's active role in these continuing violations of federal law has been properly alleged and is not addressed by the new state legislation, dismissal at this stage is clearly inappropriate.

D. <u>The harm from Defendant's practices continues.</u>

Defendant's mootness motion also ignores that the Amended Complaint alleges ongoing harm from the state official's violations of due process and the Medicaid Act. Plaintiff McCartney remains without Medicaid services due to the illegal termination of those services by Defendant. (*See* Am. Compl. ¶ 43; Plf. Mot for Class Certification, Ex. P.) Plaintiff McMillan's services were illegally reduced from 25 to 15 hours per week without written notice, an action from which he continues to suffer harm and which is not at issue in his pending administrative appeal. (*See* Am. Compl. ¶¶ 65, 75, 78; Plf. Mot for Class Certification, Ex. R.) Even if Defendant could somehow meet his burden of showing that all alleged violations will soon cease and will not recur, this would not alleviate the ongoing harm to McCartney, McMillan, and class members still suffering from the due process violations that have already occurred. (*See* Am. Compl. ¶¶ 3, 4, 9, 10, 13, 49, 78, 117, 153; Plf. Mot for Class Certification, Ex. A-R.) The complaint asks the Court to redress these ongoing injuries under *Kimble v. Solomon*, 599 F.2d 599 (4th Cir. 1979), by ordering Defendant to prospectively reinstate services to Plaintiffs McCartney, Cromartie, and similarly situated class members. (*See* Am. Compl., Prayer for Relief, ¶ 3.a, b.) This relief is not provided by the new state legislation. *See also, e.g., Nelson v. Univ. of Texas*, No. 07-10660, 2008 U.S. App. LEXIS 14758 (5th Cir. 2008)(and cases cited therein) (Def. 8/21/08 Notice of Subsequently Decided Authority).

III. THIS CASE IS NOT MOOT BECAUSE, EVEN IF SOME VIOLATIONS DO CEASE AT SOME POINT IN THE FUTURE, THEY ARE CAPABLE OF REPETITION BECAUSE THE STATE STATUTE IS ONLY TEMPORARY.

The new state statute does not supply sufficient evidence that the challenged conduct has been "completely and irrevocably" eradicated because the statute is only temporary. The state statute does add a new section to govern the process used by a Medicaid applicant or recipient to appeal a determination made by the Department. *See* § 3.13(a), amending sec. 10.15A (Def. Ex.

1). The state statute, however, includes a sunset provision, Sec. 10.15A(h6), whereby the section automatically expires on July 1, 2010. *Id*.

Such a temporary measure cannot possibly meet Defendant's heavy burden. *See, e.g*., *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (noting that a citywide moratorium on police chokeholds would not moot an otherwise valid claim for injunctive relief, because the moratorium by its terms was not permanent); *Carpenter v. Dep't of Transp*., 13 F.3d 313, 314 n.1 (9th Cir. 1994) (finding case was not moot where the programmatic change cited by the defendant was only temporary and the defendant could again disqualify the plaintiff at any time). Without this Court's intervention, Defendant is "free to return to his old ways." *Friends of the Earth,* 528 U.S. at 189. *See generally Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999) (action by North Carolina residents was not moot where the state's new congressional redistricting plan provided for reversion to the old plan upon a favorable ruling from the Supreme Court).

IV. THE CASES CITED BY DEFENDANT DO NOT SUPPORT THE CONCLUSION THAT THIS CASE IS MOOT.

Defendant's cases do not support a finding that this case is moot. The majority of his cases involve facial challenges to the legality of a statute or regulation: *Massachusetts v. Oakes*, 491 U.S. 576, 582 (1989); *Dep't of Treasury v. Galioto*, 477 U.S. 556 , 559 (1986); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982); *Hall v. Beals,* 396 U.S. 45, 47-48 (1969); *Allee v. Medrano*, 416 U.S. 802 (1974); *Maryland Highway Contractors Ass'n v. State of Maryland*, 933 F.2d 1246, 1249 (4th Cir. 1991); *Commw. of Virginia v. Reno*, No. 97-1371, 1997 U.S. App. LEXIS 23712 (4th Cir. Sept. 9, 1997). (*See* Memo. in Supp. of Mot. to Dismiss for Mootness at 4-6, 7 n.1.) After the district courts in these cases had decided that the challenged laws were illegal, the laws were repealed or amended so that the provisions challenged by the plaintiffs no longer existed. These cases became moot because any opinion from the appellate court would be

advisory in nature—the subject matter of the dispute (the challenged law) no longer existed. *See also Maryland Highway*, 933 F.2d at 1249 (noting that an opinion would also be advisory because it would be based on a record that was developed when the old law was in place); *but compare City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982) (finding that city's repeal of a challenged ordinance did not render the case moot because the city could reenact precisely the same provision if the district court's judgment were vacated).

The case before this Court is not like the Defendant's cases. Here, Plaintiffs are not challenging the legality of a statute or regulation on its face. Rather, they challenge systemic practices of the Defendant that violate existing provisions of the United States Constitution, Medicaid Act, and controlling case law. Plaintiffs ask this Court to order Defendant to comply with existing law, not enjoin one that no longer exists. Thus, the recent enactment of the temporary state law, which for the most part reinforces the requirements of already-existing laws, does not make Plaintiffs' case moot.

Defendant also discusses *Fusari v. Steinberg*, 419 U.S. 379 (1975). In *Fusari,* the plaintiff class consisted of individuals whose worker compensation benefits were terminated by the Connecticut Department of Labor. The plaintiffs filed suit because they were experiencing "significant delays," often more than 100 days, in obtaining administrative reviews of the terminations. *Id.* at 537-38. Following presentation of evidence, the district court held the defendant violated due process because "a property interest had been denied at an inadequate hearing that is not reviewable *de novo* until an unreasonable length of time." 419 U.S. at 384 (citing 364 F. Supp. at 937-38). These facts, as Defendant points out, are "strikingly similar" to acts that are at issue in the case now before this Court. (*See* Memo. in Supp. of Mot. to Dismiss for Mootness at 5). However, this is where the similarities end. The defendant in *Fusari*

appealed. After the Supreme Court had noted probable jurisdiction, the state legislature revised the process to remedy the delays in administrative reviews. *See* 419 U.S. at 387. The Supreme Court found that it could not meaningfully assess the issues in the appeal on a record that did not reflect the new system. *Id*. at 387, 389. The Court did not, however, find the case moot and dismiss it. Rather, it kept the case alive and instructed the district court to consider the plaintiffs' claims in light of the intervening changes in the state law. *Id.* at 390. In sum, *Fusari* reflects the principle that complaints should be judged against the law in effect at the time the judgment is considered—a principle which Plaintiffs do not question.[2]

CONCLUSION

For the reasons stated above, the Plaintiffs respectfully ask this Court to deny Defendant's Motion to Dismiss for Mootness.

Dated: September 2, 2008 ATTORNEYS FOR PLAINTIFFS

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[2] The three other cases cited by Defendant also do not concern mootness and, thus, do not apply the standard of review that the Supreme Court has developed for deciding whether a case is moot. (*See* Memo. in Supp. of Mot. to Dismiss for Mootness at 7.)

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true copy of the Plaintiffs' RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION (MOOTNESS) and attachments thereto upon the Defendant's attorneys via electronic means through the CM/ECF system to:

Mr. Ronald Marquette
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This the 2nd day of September, 2008.

_/s/Douglas Stuart Sea_____
Douglas Stuart Sea