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, and 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, in his official capacity, Defendant.	**REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION (MOOTNESS)** Local Civil Rule 7.1(f)(1), EDNC

Pursuant to Local Civil Rule 7.1(f)(1), EDNC, defendant respectfully submits this Reply to matters initially raised by plaintiffs in their Response to Defendant's Motion to Dismiss for Lack of Jurisdiction (Mootness).

INTRODUCTION

It is impossible to read Plaintiffs' Response to Defendant's Motion to Dismiss for Lack of Jurisdiction (Mootness) ("Response") without concluding that plaintiffs are uninformed about the elements of a due process claim, unaware of the appropriate standard for considering the mootness of their claims in light of the new North Carolina statute, and so inaccurate at times that they even misidentify somebody as a plaintiff![1]

[1] There is no "Plaintiff McMillan," (Pls. Res. at 12), and references to "Plaintiff McMillan" and his or her situation should not be considered by the Court on this motion.

According to plaintiffs, a host of "agency practices" constitute actionable violations of the due process clause or violate the Medicaid statute's "fair hearing" requirement, regardless of whether any hearing has been provided or is made available or whether any recognized property right has been lost as a result. Considering that unsound foundation, it is somewhat easier to understand why plaintiffs display a fundamental misunderstanding of the legal ramifications of the new statute, mistakenly contend the new "temporary" statute does not result in mootness, seem not to comprehend the concept of an "ongoing violation," and even question the relevance of defendant's legal authority.

ARGUMENT

I. PLAINTIFFS ARE WRONG ON THE STANDARD OF REVIEW.

Mootness is a constitutional limitation on the jurisdiction of federal courts. This action has become moot because of new State legislation, not because of defendant's voluntary cessation of behavior. Because plaintiffs are wrong about this being a "voluntary cessation" situation, both what they call the "standard of review" and nearly every case and legal principle they cite in their Response articulate legal standards that simply do not apply to this case. Moreover, as part of this erroneous process, plaintiffs continue to misstate the holdings of cases.[2]

New State legislation does not constitute a "voluntary cessation" attributable to State executive officials defending a legal challenge to some prior practice. *Brooks v. Vassar*, 462 F.3d

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[2] See, for example, *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992), where the Court said: "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." First, this case is not on appeal, but more importantly, the Court did *not* say - as plaintiffs would have this Court believe - this is the *only* basis upon which dismissal for mootness can be justified. *See* Pls. Res. at 2 (mootness justified *only if* . . .) (emphasis added).

341, 349 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2251 (2007) (citing *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000)). "[A] State legislature's amendment of a challenged law is not 'voluntary cessation' attributable to the State's executive officials defending a challenge to that law." *Id*.

Because *Friends of the Earth, Concentrated Phosphate* and *Doe v. Kidd* are all voluntary cessation cases, the burden falling on a defendant urging mootness in such cases does not apply here. For example, language in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979) about events having to "completely and irrevocably" eradicate "the effects" of an alleged violation is descriptive of the *exception* to the rule that the voluntary cessation of allegedly illegal conduct does not deprive a federal court of power to hear and determine a case. *Id.* at 631. Where, as here, the voluntary cessation doctrine does not apply, neither that rule nor its exception come into play.

Plaintiffs' seemingly never-ending quest to distort the burden on this issue includes quoting *Kidd* for the proposition that one must view "the facts in the light most favorable to the [plaintiff]." (Pls. Res. at 3) What plaintiffs *fail to say* is that the quoted language appears in that case only because the plaintiff there was defending against a summary judgment motion, and not because the substantive issue was mootness: "We review the district court's summary judgment ruling *de novo*, viewing the facts in the light most favorable to Doe as the nonmoving party and drawing all reasonable inferences in her favor." *Doe v. Kidd*, 501 F.3d 348, 354 (2007).

Defendant has presented evidence in support of his jurisdictional motions contesting the factual accuracy of plaintiffs' allegations, and plaintiffs have presented nothing. Plaintiffs' bare allegations are not entitled to deference in resolving the jurisdictional challenges. In particular, now that defendant has shown without contradiction that plaintiff McCartney is not receiving medical

assistance because he has not requested medical assistance, it is wrong for plaintiffs to continue to argue that he "remains without Medicaid services due to the illegal termination of those services." (Pls. Res. at 12)

II. THE FACT THAT THE NEW STATUTE HAS AN EXPIRATION DATE DOES NOT RENDER THE ALLEGED FAULTY PROCEDURES IN THIS CASE "CAPABLE OF REPETITION" FOR PURPOSES OF MOOTNESS.

In arguing that a "temporary" statute cannot meet defendant's "heavy burden," plaintiffs again rely on cases and legal standards applicable to the voluntary cessation of allegedly illegal activity. As previously noted, *Friends of the Earth* and *Lyons* involved voluntary cessation, as does *Carpenter v. Dep't of Transp*., 13 F.3d 313 (9th Cir. 1994) (existing waiver did not make case moot because waiver program established by defendant agency could end at any time).

In *Brooks v. Vassar* the Fourth Circuit not only noted the inapplicability of the voluntary cessation doctrine when a State official is a defendant and the State legislature enacts new law controlling the official's behavior, the court also indicated that the "capable of repetition" exception applies to such a situation only when a plaintiff meets its burden of showing that repetition of the allegedly illegal activity is *probable*. In *Brooks* the court noted a case can become moot even though the power to reenact a prior challenged statute remains with the legislature, and that "[o]nly if reenactment is not merely possible *but appears probable* may we find the harm to be 'capable of repetition, yet evading review' and hold that the case is not moot." 462 F.3d at 348 (emphasis added).

In this regard *Brooks* properly applied the holding of *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283 (1982), in which after an ordinance passed by the City of Mesquite was declared unconstitutional, the City repealed the ordinance before the case reached the Supreme Court. The

Supreme Court held that the repeal did not moot the case because the City could reenact "precisely the same provision if the District Court's judgment were vacated." *Id*. at 289. Critical to the Court's decision was the City's announced intention to reenact the old ordinance if the case was dismissed as moot. *Id.* at 289-90. This decisive fact is completely absent from this case, as nothing even remotely comparable appears in the new statute. The new law does not expressly provide that when it expires on 1 July 2010 the former appeals procedures and forms of notices must or will resume, and this alone is sufficient to distinguish this case from *City of Mesquite* and *Hunt v. Cromartie*, 526 U.S. 541 (1999) (case not moot when state law *explicitly* provided for reversion to an earlier districting plan upon a favorable result on appeal).

Plaintiffs bear the burden of demonstrating that the "capable of repetition" exception to mootness applies by showing that the challenged action is too short in duration to be fully litigated prior to cessation or expiration, and there is a reasonable expectation that the same plaintiffs will be subject to the same action again. *Incumaa v. Ozmint*, 507 F.3d 281, 289 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 2056 (2008). Here, two plaintiffs have appealed initial decisions to deny them medical assistance in the future and the third has not applied for medical assistance since abandoning his appeal. Moreover, the new statute calls for the elimination of the informal appeal process on 1 October 2008, currently a matter of mere days.

III. CASES DISCUSSING THE EFFECT OF LEGISLATIVE CHANGES ARE ON POINT.

Beyond question, cases about the legal effect of changed legislation are on point. Entirely *new* legislation, as here, can itself moot ongoing litigation. *Ovadal v. City of Madison*, 469 F.3d 625

(7th Cir. 2006) (request for declaratory and injunctive relief rendered moot by passage of an ordinance governing subject matter of dispute), *cert. denied*, 127 S. Ct. 2914 (2007).

One point made by plaintiffs about the *Fusari* case merits comment. (Pls. Res at 14) It is true that in defendant's initial memorandum on this issue, defendant said the *Fusari* case arose out of "strikingly similar factual circumstances" (Mem. at 5), in that during the litigation of a procedural due process case the legislature amended the procedures. That was the *only* factual similarity defendant noted, and plaintiffs knowingly misstate the "similar" facts to which defendant referred.

IV. PLAINTIFFS MISAPPREHEND THE BASICS OF DUE PROCESS.

Applicable page limitations do not permit a blow-by-blow rebuttal to plaintiffs' regurgitation of their due process allegations. However, even assuming, *arguendo*, that plaintiffs have a property right in unapproved requests for medical assistance for future periods, *nobody* is deprived of that right at the initial decision stage, and no hearing is required or is conducted at that time. Nonetheless, plaintiffs contend the following "practices" violate their rights:

- Failing to consider the opinions of treating clinicians;
- Changing prior decisions without subsequent change in fact or law;
- Failing to request sufficient information;
- Failing to provide meaningful opportunity to present evidence; and
- Applying faulty, incomprehensible and inconsistent standards to requests.

(Pls. Res. at 6-7) Each of these alleged faulty practices can and should be dealt with in fair hearings. They do not independently violate the rights of Medicaid recipients. Under the new statute, those issues will be dealt with at the North Carolina Office of Administrative Hearings upon proper appeal, and not in informal hearings.

But perhaps the plainest evidence that plaintiffs do not comprehend due process comes from this claim: "The final group of alleged violations [includes] . . . the termination of services without

notice after the hearing, *regardless of outcome*." (Pls. Res. at 10 (emphasis added)) Plaintiffs contend their rights are violated if their medical assistance is terminated without notice after they lose a hearing. So, they claim, even after proper notice and a proper hearing, if plaintiffs lose they are entitled to *further* notice before the State can stop paying for medical assistance to which they have failed to convince an impartial administrative law judge they are entitled. To be sure, defendant will concede that the new statute does not moot a due process claim that one is entitled to additional notice after losing at a fair hearing, but surely there is no such claim over which this Court has jurisdiction quite independent of whether it is mooted by the new statute.

Contrary to plaintiffs' contention, the new statute does not codify pre-existing obligations. There is nothing difficult about the proposition that defendant will follow North Carolina law, even if that law requires more than either the federal constitution or any federal statute enforceable in a § 1983 action. However, plaintiffs appear confused about defendant's commitment to abide by state law in the face of his contention that plaintiffs' claims do not involve a matter of federal right. To eliminate any potential confusion, defendant states as follows: (1) Defendant is not violating (and has not violated) the "fair hearing" statutory right or the constitutional property rights of any plaintiff; (2) The new North Carolina law requires changes in what have been Medicaid practices and procedures in North Carolina; (3) Plaintiffs alone say the legislative changes add nothing whatsoever to the enforceable rights they already enjoy under federal law; (4) Defendant disagrees with plaintiffs because the provisions of the new statute provide things beyond that required by federal law; and (5) Defendant will comply with the requirements of the new North Carolina law. Moreover, the provisions of the statute moot plaintiffs' statutory "fair hearing" claims related to the former informal appeals process and all constitutional due process claims related to the timing and

content of notices. Plaintiffs' contention that the notice portion of the mootness defense is actually a defense to the merits is just wrong. Were this a merits defense, defendant would note that plaintiffs can point to nothing facially unconstitutional in the notice provisions of the new statute, and therefore they have no "ongoing" due process claim based on faulty notice procedures for purposes of Rule 12(b)(1), nor have they stated a claim upon which relief can be granted under Rule 12(b)(6). However, the new statutory notice provisions have *replaced* former procedures and practices. Therefore, plaintiffs' current claim seeks an advisory opinion as to whether *past* practices involving informal appeals and notices violated their rights, which this Court cannot render.

Finally, plaintiffs raise the issue of "ongoing harm" and remind the Court they seek redress in the form of an order to defendant under *Kimble v. Solomon*, 599 F.2d 599, *cert. denied*, 444 U.S. 950 (1979), to "prospectively reinstate services" to plaintiffs and similarly situated class members. (Pls. Res. at 12) One significant problem with this request is that such relief is specifically forbidden by *Kimble* itself:

> Thus, a plaintiff who has acquired enough assets since 1976 that he is no longer financially eligible for any benefits, or a plaintiff who does not require any medical services during the period of reinstatement, should not receive benefits simply because he was financially needy or required medical services in early 1976. To base the state's current Medicaid obligations on financial and medical needs as they existed in 1976 would constitute retrospective rather than prospective relief.

Id. at 606. In other words, to be entitled to prospective relief consistent with the Eleventh Amendment, only plaintiffs who currently need medical assistance are constitutionally entitled to such assistance, and the fact that the individual may have needed such assistance in the past - even assuming that to be true - is of no particular consequence.

CONCLUSION

Defendant's motion to dismiss on grounds of mootness because of the enactment of new North Carolina law should be granted.

Respectfully submitted, this the 16th day of September, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, 16 September 2008, I electronically filed the forgoing **REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION (MOOTNESS)** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Douglas Sea, Jane Perkins and Sarah Somers, attorneys for Plaintiff, and I hereby certify that I have mailed the document to the following non CM/ECF participates: none.

/s/ Ronald M. Marquette
Ronald M. Marquette
Special Deputy Attorney General