

Pashby v. Dr. Aldona Wos, Secretary  
and  
Bowditch v. DHHS

Presentation to the  
Joint Legislative Oversight Committee on  
Health and Human Services

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# Overview and Terms

- Personal Care Services (“PCS”)
- Adult Care Homes (“ACH”)
- In-Home Care for Adults (“IHCA”)
- Activities of Daily Living (“ADL”)

# Fundamental Issue

For the purposes of authorizing PCS services,  
does the North Carolina Medicaid program  
improperly favor those residing in Adult Care  
Homes over those living at home?

# Background

- The North Carolina Medicaid program has had three PCS Clinical Coverage Policy changes in the last three years.
  - Clinical Coverage Policy 3C
    - Effective pre June 2011.
  - Clinical Coverage Policy 3E
    - Effective June 1, 2011.
  - Clinical Coverage Policy 3L
    - Effective January 1, 2013.

# Pashby v. Dr. Aldona Wos, Secretary

U.S. District Court, Raleigh

Complaint filed in District Court on May 31, 2011, alleging violations of Federal law.

- United States District Judge Terrence W. Boyle assigned.
- Plaintiffs represent a class of PCS Medicaid recipients.
- Plaintiffs seek to prevent NC DHHS from implementing Clinical Coverage Policy 3E.

# Pashby Basic Claims

- Plaintiffs contend that the purported differences in eligibility criteria for PCS services puts them at risk of institutionalization.
- Plaintiffs also contend that these differences violate the ADA, Rehabilitation Act and Medicaid comparability requirements.

# Federal District Court Order

## Defining Class

Entered December 8, 2011

“[A]ll current or future NC Medicaid recipients age 21 or older who have, or will have, coverage of PCS denied, delayed, interrupted, terminated, or reduced by Defendant directly or through his agents or assigns as a result of the new eligibility requirements for in-home PCS and unlawful policies contained in IHCA Policy 3E.”

# District Court Preliminary Injunction

Entered December 8, 2011

- DHHS enjoined from implementing Policy 3E.
- DHHS appealed to the US Court of Appeals for the 4<sup>th</sup> Circuit.

# Prior to the 4<sup>th</sup> Circuit Opinion

- 4<sup>th</sup> Circuit stayed the District Court preliminary injunction, which generated more Office of Administrative Hearings “OAH” recipient appeals.
- DHHS resumed implementation of Policy 3E.

# 4<sup>th</sup> Circuit Opinion

Entered March 5, 2013

- Largely upheld preliminary injunction as being within the trial court's discretion.
- Opinion addressed risk of institutionalization, budget as a defense and comparability.

## 4<sup>th</sup> Circuit Opinion - 1

“In sum, individuals who must enter institutions to obtain Medicaid services for which they qualify may be able to raise successful Title II and Rehabilitation Act claims because they face a risk of institutionalization.”

## 4<sup>th</sup> Circuit Opinion - 2

“We join the Third, Ninth, and Tenth Circuits in holding that, although budgetary concerns are relevant to the fundamental alteration calculus, financial constraints alone cannot sustain a fundamental alteration defense.”

## 4<sup>th</sup> Circuit Opinion - 3

“Because individuals with comparable medical needs do not receive comparable medical care under IHCA Policy 3E, the district court did not abuse its discretion in finding that the PCS Recipients are likely to succeed on their comparability claim.”

# After 4<sup>th</sup> Circuit Opinion

- District Court Order modified injunction.
- Plaintiffs have amended complaint to address new Clinical Coverage Policy 3L, implemented January 1, 2013.
  - Contention is that Policy 3L, *as applied*, violates ADA, Rehabilitation Act and Medicaid law.
- District Court Order amended Class definition.

# Pashby Present Posture

- Currently pending in Federal District Court.
- Next scheduled step is to commence full discovery.

# Bowditch v. DHHS

- Single Medicaid PCS appeal filed at OAH.
- On July 8, 2011, OAH stayed all Medicaid recipient appeals of DHHS denials, terminations or reductions of PCS benefits pending the federal court's ruling on the preliminary injunction in *Pashby*.
- OAH has stated that current number of stayed appeals is approximately 4,400.

# Recipient Appeals filed with OAH

During Calendar Year 2013

- Approximately 17,500 recipient appeals filed to date.
- Approximately 11,000 were resolved in mediation or otherwise.
- Approximately 6,475 cases were scheduled for hearing and handled by an Assistant Attorney General.