UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

5:17-cv-00581-FL

MARCIA ELENA QUINTEROS HAWKINS, ALICIA FRANKLIN and VANESSA LACHOWSKI on behalf of themselves and all others similarly situated, Plaintiffs, v. MANDY COHEN, in her official capacity as Secretary of the North Carolina Department of Health and Human Services, Defendant.	)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

NOW COMES Defendant Mandy Cohen, in her official capacity as Secretary of the North Carolina Department of Health and Human Services, ("Defendant") by and through her attorneys, Attorney General Josh Stein, Special Deputy Attorney General Thomas J. Campbell and Assistant Attorney General Rajeev K. Premakumar and hereby files the following Memorandum of Law in Support of Motion to Dismiss.

STATEMENT OF THE CASE

Defendant was served with the Complaint herein on December 1, 2017 and an Amended Complaint was filed on December 4, 2017. [DE 1, 9] On December 6, pursuant to a Motion for Extension of Time, to which Counsel for Plaintiffs consented, this Honorable Court issued an Order extending the time for Defendant to file a responsive pleading to the Amended Complaint until February 5, 2018. [Text Order, No Docket Entry #] On December 6, 2017, Plaintiffs filed a

Corrected Amended Complaint which corrected the spelling of the name of one of the Plaintiffs. [DE 12] Plaintiffs allege that the suit is brought as a statewide class action pursuant to Fed. R. Civ. Pro. 23(a) and (b)(2). Plaintiffs raise four (4) separate causes of action: (1) Violation of the Medicaid Act, 42 U.S.C. §§1396a(a)(3), (8), (10); (2) Americans with Disabilities Act (ADA); (3) Section 1557 of the Affordable Care Act; and 4. Constitutional Due Process.

On December 21, 2017, Plaintiffs filed a Motion for Class Certification. [DE 17] Plaintiffs seek to define the class as: all individuals whose Medicaid coverage was, is, or will be interrupted or terminated, effective January 1, 2014 or later, by Defendant Secretary of the North Carolina Department of Health and Human Services (DHHS), or any of her employees, contractors, agents, or assigns, without first making an individualized determination of ineligibility under all Medicaid eligibility categories. Plaintiffs allege that the aforementioned class should be defined into three (3) distinct subcategories involving the individuals whose Medicaid coverage was interrupted as set forth previously and: (1) without sending the beneficiary at least 10-day prior written notice of the termination of Medicaid that describes the specific reasons for the termination, the specific regulation supporting the termination, and the right to a pre-termination hearing; (2) without accommodating the beneficiary's disability during the eligibility redetermination process; and (3) without communicating during the redetermination process in the beneficiary's primary language where the beneficiary has limited English proficiency. Pursuant to a Motion for Extension of Time to Respond to Plaintiffs' Motion for Class Certification, this Honorable Court entered an Order dated January 10, 2018 granting Defendant an extension until February 9, 2018 in which to file her response. [DE 29]

SUMMARY OF THE FACTS

Defendant Mandy Cohen is the Secretary of the North Carolina Department of Health and Human Services. She is charged with overall responsibility for the administration of DHHS, which administers the Medicaid program in North Carolina. She is sued in her official capacity. DHHS is designated as the "single state agency" with direct responsibility for administration of the state Medicaid plan. See 42 U.S.C. § 1396a(a)(5); N.C. Gen. Stat. § 108A-54. DHHS is a public entity within the meaning of the Americans with Disabilities Act. DE 12, ¶ 11. DHHS is a state agency within the executive branch of the North Carolina government. DHHS has responsibility for administering the North Carolina State Plan for Medicaid Assistance, also known as the North Carolina Medicaid program ("Medicaid"). Id. Medicaid is "a federal program that subsidizes the States' provision of medical services to . . . 'individuals, whose income and resources are insufficient to meet the costs of necessary medical services.' [42 U.S.C.A.] §1396-1." *Armstrong v. Exceptional Child Ctr., Inc.*, __ U.S. __, __, 135 S. Ct. 1378, 1382, 191 L. Ed. 2d 471, 476 (2015).

The proposed class of Plaintiffs are represented in this action by four (4) individual named Plaintiffs. Plaintiff Marcia Elena Quinteros Hawkins (hereinafter "Hawkins"). Plaintiffs allege that she speaks Spanish and does not understand English." DE 12, ¶ 77. Plaintiffs allege that Hawkins went to or telephoned Mecklenburg County DSS on multiple occasions. See, DE 12, ¶¶ 82, 88, 90, and 95.

Plaintiffs allege that Hawkins received a notice on June 30, 2018 indicating that her Medicaid coverage had been renewed through June 30, 2018 and that the notice was in English. DE 12, ¶ 83. Plaintiffs further allege that Hawkins Medicaid coverage was terminated without notice on July 31, 2017 and that Hawkins was unaware of this until she tried to refill a prescription

on Aug. 9, 2017. DE 12, ¶¶ 85, 87-88. Plaintiffs then allege that on Sept. 20, 2017, after being told by DSS that her Medicaid would be reinstated, DSS sent Hawkins a notice that her Medicaid would again stop on Oct. 31, 2017 and that the notice was in English. DE 12, ¶ 90. On Oct. 26, 2017, Hawkins went to get a flu shot and could not, because she was told that she had no Medicaid coverage. DE 12, ¶ 94. Hawkins went back to Mecklenburg County DSS (the complaint is again silent about whether she requested or was provided language services), and was told that NCFast had put a hold on her Medicaid for the month of October, "again suspending her Medicaid without any notice." DE 12, ¶ 95.

Plaintiff Alicia Franklin (hereinafter "Franklin") allegedly "suffers from a mild intellectual disability." DE 12, ¶ 100. Franklin "received Social Security disability benefits until 2015 when her benefits stopped because she was able to return to work despite her disability." DE 12, ¶ 100.

Plaintiffs allege that on Sept. 5, 2017, Mecklenburg County DSS mailed a request to Franklin asking for information for the annual redetermination of her eligibility. The form "was written in complex language Ms. Franklin could not understand." DE 12, ¶¶ 102-103. According to Plaintiffs, "Mecklenburg DSS was aware of Ms. Franklin's disability but made no effort to telephone Ms. Franklin to explain the notice to her or to offer her assistance." DE 12, ¶ 104. Plaintiffs allege that Franklin went to DSS and talked to a caseworker. DE 12, ¶ 106.

Plaintiffs allege that on October 11, 2017, Mecklenburg County DSS sent written notice to Franklin that her Medicaid would stop on Oct. 31, 2017 due to her failure to provide the previously requested information. It is alleged that the "notice contained confusing, contradictory information about the reason for the termination, cited inapplicable and obsolete regulations to support the decision, and was written in complex language that Ms. Franklin could not understand." DE 12, ¶ 107. "Mecklenburg DSS made no effort to telephone Ms. Franklin to explain the termination

notice to her." DE 12, ¶ 110.

Plaintiff Vanessa Lachowski (hereinafter "Lachowski") is allegedly totally disabled due to severe spina bifuda. DE 12, ¶ 115. On Dec. 31, 2016, Lachowski's Medicaid coverage was allegedly terminated without notice. DE 12, ¶ 120. Her Medicaid coverage was reinstated after approximately ten (10) days. DE 12, ¶ 123. As of the date of the filing of the Corrected Amended Complaint, Lachowski was still receiving Medicaid coverage, although she was due to have her Medicaid eligibility reviewed by Dec. 31, 2017. DE 12, ¶ ¶ 124-125.

Plaintiff Kyanna Shipp (hereinafter "Shipp") allegedly suffers from severe epilepsy and needs medication to control her seizures. DE 12, ¶ 130. Until Nov. 30, 2017, Shipp was enrolled in Medicaid based on being under 19 years old. DE 12, ¶ 132. Plaintiffs allege that Shipp was terminated from Medicaid coverage without notice on Nov. 30, 2017 because she turned 19 years old. DE 12, ¶ 138.

MOTION TO DISMISS FIRST CAUSE OF ACTION: VIOLATION OF THE MEDICAID ACT, 42 U.S.C. §§ 1396a(a)(3), (8), and (10) AND FOURTH CAUSE: CONSTITUTIONAL DUE PROCESS PURSUANT TO FED. R. CIV. P. 12(b)(1)

Federal law requires that a state plan for medical assistance "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." 42 U.S.C. § 1396(a)(3). 42 C.F.R. Part 431, Subpart E ("Fair Hearings for Applicants and Beneficiaries") are the federal regulations that implement the federal law. Specifically, the State's hearing system must provide for a hearing before the Medicaid agency "or an evidentiary hearing at the local level, with the right of appeal to the Medicaid agency." 42 C.F.R. § 431.205(b)(2). Further requirements of the fair hearing process, including notice and procedural requirements, are found in 42 C.F.R. §§ 431.206 – 431.246. North Carolina has enacted legislation that adheres to the legal and

regulatory mandates established by the Federal government that pertain to the rights of Medicaid applicants to a fair hearing.

Pursuant to N.C.G.S. § 108A-79 (Medicaid recipients' right to appeal decisions) and N.C.G.S. § 150B-1 *et* seq. (the North Carolina Administrative Procedure Act), Medicaid applicants are afforded multiple opportunities for hearings and appeals of decisions to grant, deny, terminate, or modify Medicaid benefits. Each of the individual plaintiffs failed to exhaust these administrative remedies expressly granted to them by North Carolina law.

Exhaustion of administrative procedures under the NCAPA is a jurisdictional requirement. *Googerdy v. N. Carolina Agr. & Tech. State Univ.*, 386 F. Supp. 2d 618, 627 (M.D.N.C. 2005) (*Shell Island Homeowners Ass'n, Inc. v. Tomlinson,* 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999) ("An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies")). It is well-settled that "[w]here the legislature has provided by statute an effective remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Shell Island Homeowners' Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 220-21, 517 S.E.2d 406, 410 (1999); *Porter v. N.C. Dep't of Ins*., 40 N.C. App. 376, 380-81, 253 S.E.2d 44, 47 (1979) ("By enacting the provisions for administrative review of rules, the legislature wisely determined that the agency itself should have the first opportunity to review the propriety and applicability of its own rules."). An action is properly dismissed under Rule 12(b)(1) where the plaintiff has failed to exhaust its administrative remedies under the NCAPA. Where a "person aggrieved" by an agency decision has not exhausted its administrative remedies, "a trial court does not have subject matter jurisdiction to hear the matter." *Googerdy*, 386 F. Supp. at 627 (*quoting Huang v. North Carolina State Univ.*, 107 N.C. App. 710, 714, 421 S.E.2d 812, 815 (1992)).

In the case at hand, each of the named Plaintiffs allege that at some point in time, they learned that they had been dropped from Medicaid coverage. Plaintiffs fail to allege that that any of the named Plaintiffs attempted to appeal their termination upon learning of said termination in accordance with N.C.G.S. §108A-79. Plaintiffs further fail to allege that they were denied appeal rights by the county DSS office. Accordingly, Plaintiffs have failed to plead facts demonstrating that any of them have exhausted the administrative remedies afforded to them under N.C.G.S. §108A-79. Absent those fact being pled, this Honorable Court lacks subject matter jurisdiction over the First Cause of Action (Medicaid Act) and Fourth Cause of Action (Constitutional Due Process).

MOTION TO DISMISS SECOND CAUSE OF ACTION: AMERICANS WITH DISABILITIES ACT (ADA) PURSUANT TO FED. R. CIV. P. 12(b)(6).

A motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure will be granted when it clearly appears that the plaintiff can prove no set of facts to support a claim which would entitle him to the requested relief. A court must "take the facts in the light most favorable to the plaintiff," but "need not accept the legal conclusions drawn from the facts," and "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship,* 213 F.3d 175, 180 (4th Cir. 2000).

In support of their cause of action pursuant to the American with Disabilities Act (hereinafter "ADA"), Plaintiffs allege that

> Defendant's termination of Medicaid Coverage for Plaintiffs and many members of the Plaintiff class based [sic] upon procedures which fail to accommodate Medicaid beneficiaries' disabilities constitutes use of methods of administration which unlawfully discriminate in violation of Title II of the ADA, 42 U.S.C. §12132.
>
> Defendants [sic] have utilized criteria and methods of administration that fail to accommodate disabilities, exclude Plaintiffs with disabilities from participation in

> the Medicaid program, and subject Plaintiffs with disabilities to discrimination on the basis of their disability, by failing to ensure that Plaintiffs have access to Medicaid coverage to obtain the services they need in violation of Title II of the ADA, 42 U.S.C. §12132.

DE 12, ¶¶ 146-147.

The ADA, as referenced by the Plaintiffs provides that

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132.

The regulations implementing the ADA can be found at 28 C.F.R. §35.101 *et. seq*.

In their complaint, Plaintiffs specifically reference portions of 28 C.F.R. §35.130 as follows

> A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:
>
> (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;
>
> (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or
>
> (iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.
>
> . . .
>
> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. §35.130(b)(3) and (7).

Information concerning Medicaid eligibility requirements, available Medicaid services and the rights and responsibilities of applicants and beneficiaries must

> be provided to applicants and beneficiaries in plain language and in a manner that is accessible and timely to—
>
> (1) Individuals who are limited English proficient through the provision of language services at no cost to the individual including, oral interpretation and written translations;
>
> (2) Individuals living with disabilities through the provision of auxiliary aids and services at no cost to the individual in accordance with the Americans with Disabilities Act and section 504 of the Rehabilitation Act; and
>
> (3) Individuals must be informed of the availability of the accessible information and language services described in this paragraph and how to access such information and services, at a minimum through providing taglines in non-English languages indicating the availability of language services.

42 C.F.R. §435.905(b)(1)-(3).

> Additionally, with regard to Medicaid applications and renewals,
>
> [t]he agency must provide assistance to any individual seeking help with the application or renewal process in person, over the telephone, and online, and in a manner that is accessible to individuals with disabilities and those who are limited English proficient, consistent with § 435.905(b) of this subpart.

42 C.F.R. §435.908(a).

In general, a plaintiff seeking recovery under the ADA, or the Rehabilitation Act 29 USCS §794, "must allege that (1) she has a disability, (2) she is otherwise qualified to receive the benefits of a public service, program, or activity, and (3) she was excluded from participation in or denied the benefits of such service, program, or activity, or otherwise discriminated against, ***on the basis of her disability***." *Constantine v. Rectors & Visitors of George Mason Univ*., 411 F.3d 474, 498, 2005 U.S. App. LEXIS 11068, *65 (4th Cir. Jun. 13, 2005)(emphasis added).

The facts as alleged in the Corrected Amended Complaint do not support a claim pursuant to the ADA for any of the named Plaintiffs. Plaintiff Hawkins was allegedly terminated from Medicaid automatically by the NCFast system, as was Plaintiff Lachowski. Their respective disabilities played no role in their termination from Medicaid coverage. Plaintiff Shipp was

allegedly terminated from Medicaid coverage due to her reaching 19 years of age, and without any effort being made to determine whether she was otherwise disabled and entitled to Medicaid. Shipp's termination from Medicaid coverage was not by reason of her disability.

As set forth above, with regard to Plaintiff Franklin, it is alleged that the notices to and communications with Franklin were too complicated or difficult to understand. They also reference her "mild intellectual disability." However, Plaintiffs have failed to allege any facts that Franklin was terminated from Medicaid coverage by reason of her disability, or even that her disability was such that alternate methods of communication were required to have been used with Franklin.

Plaintiffs have failed to state a claim upon which relief may be granted under the ADA by virtue of their failure to satisfy the third element of an ADA claim. Plaintiffs have failed to allege any facts to support a claim that any of the named Plaintiffs have, ***by reason of their individual disability***, been "excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132.[1] Accordingly, the Second Cause of Action pursuant to the ADA should be dismissed. *See*, *Contantine supra*. *See also, Westminster Nursing Center v. Cohen*, 2017 U.S. Dist. LEXIS 193330, 2017 WL 5632661 (E.D.N.C. Nov. 22, 2017)(plaintiff's claim failed under "the third element of both the ADA and the Rehabilitation Act where plaintiff alleges no facts giving rise to an inference of discrimination ***on the basis of disability***")(emphasis added). *See also, Burke v. Hill*, 2017 U.S. Dist. LEXIS 180041, 2017 WL 4969687 (E.D.N.C. Oct. 31, 2017)("the well-pleaded factual allegations consist of plaintiff's charge that his claim for Medicaid benefits was denied and

[1] Plaintiffs have also not alleged any facts to support the claim that the methods of administration of the Medicaid program used by Defendant have "the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." 28 C.F.R. §35.130(b)(3)(ii).

that he received no notice of that determination nor any notice of his appeal rights. These well-pleaded allegations of procedural due process violations 'do not permit the court to infer more than the mere possibility' that said denial was motivated by racial animus or discriminatory policy.")

MOTION TO DISMISS THIRD CAUSE OF ACTION: SECTION 1557 OF THE AFFORDABLE CARE ACT PURSUANT TO FED. R. Civ. P. 12(b)(6).

In their Third Cause of Action, Plaintiffs allege that

> Defendant and her agents have utilized methods of administration that subject Plaintiffs and many members of the Plaintiff class to discrimination on the basis of their disability or national origin (including limited English proficiency) or both, thus failing to ensure that Plaintiffs had continued access to Medicaid coverage.
>
> Defendant's actions violate Section 1557 of the ACA, 42 U.S.C. §18116. This violation of federal law is actionable pursuant to 42 U.S.C. §1983.

Corrected Amended Complaint, paragraphs 149 and 150.

Section 1557 of the Affordable Care Act ("ACA"), provides as follows:

> § 18116. Nondiscrimination
>
> (a) In general. Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.
> (b) Continued application of laws. Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or the Age Discrimination Act of 1975 (42 U.S.C. 611 et seq.), or to

> supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).
>
> (c) Regulations. The Secretary may promulgate regulations to implement this section.

42 U.S.C. §18116.

It is respectfully submitted that Plaintiffs have failed to state a claim upon which relief may be granted for Defendant's alleged violations of Section 1557 of the ACA.

A. Plaintiffs with Limited English Proficiency

A reading of the Corrected Amended Complaint and the allegations pertaining to the named Plaintiffs shows that the Plaintiffs' claims with regard alleged violations of the ACA can essentially be pared down to two types of Plaintiffs, one type of Plaintiff having limited English proficiency and the other with cognitive impairments or limited literacy. With regard to the Plaintiffs with limited English proficiency, Plaintiffs make the following allegations as to the Defendant's policies and procedures which are allegedly discriminatory:

> e. Failure to assure that each Medicaid beneficiary with limited English proficiency has access to a caseworker who speaks their language or to a qualified interpreter;
>
> f. Requesting information in English from persons with limited English proficiency:
>
> . . .
>
> n. Failure to provide information online, by mail, and verbally about the redetermination process in a manner that is accessible to persons with disabilities or limited English proficiency; . . .

DE 12, ¶¶ 76(e) (f) and (n).

The regulations implementing the ACA can be found at 45 C.F.R. §92.1 *et. seq*. The term individual with limited English proficiency "means an individual whose primary language for communication is not English and who has a limited ability to read, write, speak, or understand

English." 45 C.F.R. §92.4. Generally, with regard to an individual with limited English proficiency, "[a] covered entity shall take reasonable steps to provide meaningful access to each individual with limited English proficiency eligible to be served or likely to be encountered in its health programs and activities." 45 C.F.R. §92.201(a).

The C.F.R. also provides that, as far as entities providing health related coverage, that covered entities shall not, in providing or administering health-related insurance or health-related coverage, *inter alia*

> Deny, cancel, limit, or refuse to issue or renew a health-related insurance plan or policy or other health-related coverage, or deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, on the basis of race, color, national origin, sex, age, or disability; . . .

45 C.F.R. §92.207(b)(1).

As set forth above, the sections of the CFR specifically pertaining to Medicaid also have certain requirements of a covered entity with regard to individuals with limited English proficiency. Information concerning Medicaid eligibility requirements, available Medicaid services and the rights and responsibilities of applicants and beneficiaries must

> be provided to applicants and beneficiaries in plain language and in a manner that is accessible and timely to -
>
> (1) Individuals who are limited English proficient through the provision of language services at no cost to the individual including, oral interpretation and written translations;
>
> (2) Individuals living with disabilities through the provision of auxiliary aids and services at no cost to the individual in accordance with the Americans with Disabilities Act and section 504 of the Rehabilitation Act; and
>
> (3) Individuals must be informed of the availability of the accessible information and language services described in this paragraph and how to access such information and services, at a minimum through providing taglines in non-English languages indicating the availability of language services.

42 C.F.R. §435.905(b)(1)-(3).

Additionally, with regard to Medicaid applications and renewals,

> [t]he agency must provide assistance to any individual seeking help with the application or renewal process in person, over the telephone, and online, and in a manner that is accessible to individuals with disabilities and those who are limited English proficient, consistent with § 435.905(b) of this subpart.

42 C.F.R. §435.908(a).

Only one of the four named Plaintiffs is alleged to be limited English proficient. Plaintiffs allege that Plaintiff Marcia Elena Quinteros Hawkins (hereinafter "Hawkins") "speaks Spanish and does not understand English." DE 12, ¶ 77. Plaintiffs do not allege that Defendant or her agents were aware that Hawkins did not understand English. Additionally, Plaintiffs allege that Hawkins went to or telephoned Mecklenburg County DSS on multiple occasions, but make no mention of Hawkins requesting or DSS providing language services. *See*, DE 12, ¶¶ 82, 88, 90, and 95.

Plaintiffs allege that Hawkins received a notice on June 30, 2018 indicating that her Medicaid coverage had been renewed through June 30, 2018 and that the notice was in English. DE 12, ¶ 83. However, Plaintiffs then allege that Hawkins Medicaid coverage was terminated without notice on July 31, 2017 and that Hawkins was unaware of this until she tried to refill a prescription on Aug. 9, 2017. DE 12, ¶¶ 85, 87-88. Plaintiffs then allege that on Sept. 20, 2017, after being told by DSS that her Medicaid would be reinstated, DSS sent Hawkins a notice that her Medicaid would again stop on Oct. 31, 2017 and that the notice was in English. DE 12, ¶ 90. However, it is then alleged that on Oct. 26, 2017, Hawkins went to get a flu shot and could not, because she was told that she had no Medicaid coverage. DE 12, ¶ 94. Hawkins went back to Mecklenburg County DSS (the complaint is again silent about whether she requested or was provided language services), and was told that NCFast had put a hold on her Medicaid for the month of October, "again suspending her Medicaid without any notice." DE 12, ¶ 95.

As set forth above, Plaintiffs have alleged that Defendant and her agents have utilized methods of administration that subject Plaintiffs and many members of the Plaintiff class to discrimination and that Defendant's actions violate Section 1557 of the ACA, 42 U.S.C. §18116.

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, . . . the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. . . . A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." . . . Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."

Ashcroft v. Iqbal, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 883-84 (2009)(citations omitted), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 929 (2007).

Plaintiffs have alleged that Defendant's methods of administration have discriminated against Plaintiffs, but with regard to Plaintiffs who are limited English proficient, Plaintiffs simply have not stated a claim upon which relief can be granted. Plaintiffs have not pled that Defendant or her agents were aware that Hawkins did not speak English. Plaintiffs have not alleged that Hawkins was taken off of or denied Medicaid because she spoke Spanish. They do plead that Hawkins communicated directly with Mecklenburg County DSS, however they do not allege that the communications had to be in Spanish. Most importantly, there is no allegation as to how the two (2) notices which were sent to Hawkins in English harmed her in any way. According to the facts alleged in the complaint, the fact that the notices were in English is irrelevant to Plaintiffs' claim. In fact, the Plaintiffs allege that Hawkins twice lost her Medicaid coverage ***without any notice***. *See* DE 12, ¶¶ 87 and 95.

In *Ashcroft v. Iqbal*, the Supreme Court concisely explained what is necessary in a complaint in Federal court in order to survive a 12(b)(6) motion to dismiss.

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. ***Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.*** *Id*., at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. ***Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.*** *Id*., at 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d at 157-158. But ***where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not "show[n]"--"that the pleader is entitled to relief."*** Fed. Rule Civ. Proc. 8(a)(2).

Ashcroft, 556 U.S. at 678, 129 S. Ct. at 1945-950, 173 L. Ed. 2d at 884, (emphasis added), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 929 (2007).

Plaintiffs have failed to state a claim upon which relief can be granted for Hawkins or any limited English proficient members of the proposed class. There have been no facts alleged that Plaintiffs were "excluded from participation in, be denied the benefits of, or be subjected to discrimination" as a result of being limited English proficient. 42 U.S.C. §18116(b). Plaintiffs' allegations that Defendant has discriminated against individuals who are limited English proficient, and therefore Defendant has violated the ACA, are legal conclusions unsupported by the facts as pled.

B. Plaintiffs with disabilities

With regard to the Plaintiffs with disabilities, Plaintiffs make the following allegations as to the Defendant's policies and procedures which are allegedly discriminatory:

> h. Failure to allow blind and disabled beneficiaries thirty days to respond to a renewal form requesting information as an accommodation to their disabilities;
> . . .

> j. Failure to request information in language that is clear and understandable to beneficiaries, many of whom have cognitive impairments or limited literacy:
>
> k. Failure to provide information and assistance in an accessible manner during the redetermination process to persons with disabilities;
> . . .
> n. Failure to provide information online, by mail, and verbally about the redertermination process in a manner that is accessible to persons with disabilities or limited English proficiency; . . .

Corrected Amended Complaint, para. 76 (h), (j), (k) and (n).

In the implementing regulations for the ACA, the requirements for communicating with individuals with disabilities are as follows:

> Effective communication for individuals with disabilities.
>
> (a) A covered entity shall take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others in health programs and activities, in accordance with the standards found at 28 CFR 35.160 through 35.164. Where the regulatory provisions referenced in this section use the term ‘‘public entity,’’ the term ‘‘covered entity’’ shall apply in its place.
>
> (b) A recipient or State-based Marketplace shall provide appropriate auxiliary aids and services to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

45 C.F.R. §92.202 (a) and (b).

28 C.F.R. §35.160 provides that

> A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.
> . . .
> A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

28 C.F.R. §35.160(a)(1) and (b)(1).

As set forth above, the specific requirements in the CFR pertaining to Medicaid can be found at 42 C.F.R. §435.905(b)(1)-(3) and 42 C.F.R. §435.908(a).

In this case, Plaintiffs allege that Plaintiff Alicia Franklin (hereinafter "Franklin") "suffers from a mild intellectual disability." DE 12, ¶ 100. The nature or extent of Franklin's disability is not described. It is alleged that Franklin "received Social Security disability benefits until 2015 when her benefits stopped because she was able to return to work despite her disability." DE 12, ¶ 100.

Plaintiffs allege that on Sept. 5, 2017, Mecklenburg County DSS mailed a request to Franklin asking for information for the annual redetermination of her eligibility. It is alleged that the form "was written in complex language Ms. Franklin could not understand." DE 12, ¶¶ 102-103. According to Plaintiffs, "Mecklenburg DSS was aware of Ms. Franklin's disability but made no effort to telephone Ms. Franklin to explain the notice to her or to offer her assistance." DE 12, ¶ 104. Plaintiffs allege that Franklin went to DSS and talked to a caseworker, but despite being mildly disabled, Plaintiffs do not allege that Franklin needed any special assistance in communicating with the DSS caseworker.

Plaintiffs allege that on October 11, 2017, Mecklenburg County DSS sent written notice to Franklin that her Medicaid would stop on Oct. 31, 2017 due to her failure to provide the previously requested information. It is alleged that the "notice contained confusing, contradictory information about the reason for the termination, cited inapplicable and obsolete regulations to support the decision, and was written in complex language that Ms. Franklin could not understand." DE 12, ¶ 107. "Mecklenburg DSS made no effort to telephone Ms. Franklin to explain the termination notice to her." DE 12, ¶ 110.

"[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft, supra*, 556 U.S. at 678, 129 S. Ct. 1949, 173 L. Ed. 2d at 883. While the factual

allegations raised by the Plaintiffs arguably support the causes of action under the Medicaid Act and Due Process, which is not conceded or admitted herein, there have been no facts pled to support a cause of action under the ACA. The Plaintiffs have not pled the nature of Franklin's disability or that said disability was to such an extent that would have triggered an obligation on the part of the Defendant to have provided altered notices or to have contacted Franklin in a different manner. In fact, Plaintiffs alleged that Franklin was no longer receiving Social Security disability due to her ability to return to work. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'--that the pleader is entitled to relief." *Ashcroft, supra*. citing Fed. Rule Civ. Proc. 8(a)(2).

MOTION TO DISMISS PLAINTIFF LACHOWSKI FOR LACK OF STANDING PURSUANT TO FED. R. CIV. P. 12(b)(1)

A. Requirements for Standing

The United States Constitution extends jurisdiction to the federal courts only over "cases" and "controversies." U.S. Const., art. III, § 2. The Supreme Court has held that the "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, the plaintiff must have suffered an "injury-in-fact" which is both: (a) "concrete and particularized"; and (b) "actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks omitted). Second, a plaintiff must establish a "causal connection" between the injury and defendant's acts. *Id.* Finally, the injury must be "likely to be redressed by a favorable decision." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

In addition to the constitutional requirements, "[s]tanding doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of

generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

A plaintiff seeking to establish standing "must clearly and specifically set forth facts" sufficient to satisfy constitutional requirements. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). And while it is true "that threatened rather than actual injury can satisfy Article III standing requirements," not all threatened injuries constitute an injury-in-fact. *Beck v. McDonald*, 848 F.3d 262, 270-71 (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 160 (4th Cir. 2000)*(en banc)). The "complainant must allege an injury to himself that is distinct and palpable, as opposed to merely abstract." *Whitmore*, 495 U.S. 149, 155 (1990). A court lacks subject matter jurisdiction over a claim if the plaintiff does not have standing to bring the action. *See, Beck v. McDonald, supra.*

B. Plaintiff Lachowski's Alleged Injury Does Not Confer Standing

At the outset, the injury that Plaintiff Lachowski is alleged to have suffered is not clear. The Corrected Amended Complaint states that Plaintiff Lachowski "began receiving Medicaid services under the Community Alternative Program for Disabled Adults (CAP-DA). Ms. Lachowski had waited over a year on the waiting list for this program, under which Medicaid increased the amount of her personal care services significantly to almost 30 hours per week. This increase in services has been of great benefit to Ms. Lachowski's health and well-being." D.E. 12, ¶124.

It appears from the Corrected Amended Complaint, that the injury-in-fact that Plaintiff Lachowski *could have* suffered was the *possibility* that her Medicaid benefits *might* have been terminated effective December 31, 2017. D.E. 12, ¶¶ 125-127. Indeed, the operative facts alleged

in the Corrected Amended Complaint confirm that Plaintiff Lachowski was eligible, and was to remain eligible, for Medicaid for at least two more months. D.E. 12, ¶¶ 124-125.

To the extent that the injury at issue is the possibility that Plaintiff Lachowski might lose her Medicaid eligibility at some future date, Plaintiff Lachowski lacks standing to bring a claim because she has not suffered an "injury-in-fact." The Plaintiff must show that she is "under threat of suffering" an injury that is "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst.*, 555 U.S. 488, 455 (2009). Plaintiff Lachowski does not allege an actual injury-in-fact, and the pleading adopts a conjectural and hypothetical posture: "*If* Ms. Lachowski's Medicaid is terminated again, her personal care services will stop again. Also, *if* she loses her Medicaid coverage, Ms. Lachowski will be terminated from the CAP-DA program. *If* that occurs, she is *likely* to have to wait another year or more on the waiting list to get CAP-DA services again." D.E. 12, ¶ 128. This conjectural and hypothetical threat is precisely of the kind contemplated by the Supreme Court in *Whitmore* and *Summers*. Plaintiff Lachowski is asking the Court to imagine the circumstances that could arise that could lead to an injury-in-fact.

Moreover, as stated above, the Corrected Amended Complaint confirms that Plaintiff Lachowski was eligible and receiving Medicaid benefits at the time the Corrected Amended Complaint was filed and, upon information and belief, remains eligible and receiving Medicaid benefits at present. Therefore, Plaintiff Lachowski fails the first element of standing analysis by failing to allege that she has suffered an "injury-in-fact" which is both: (a) "concrete and particularized"; and (b) "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. 555, 560 (1992).

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Plaintiffs' First Cause of Action (Violation of Medicaid Act) and Fourth Cause of Action (Constitutional Due Process) be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Defendant respectfully requests that Second Cause of Action (ADA) and Third Cause of Action (ACA) be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Defendant also respectfully requests that Plaintiff Lachowski be dismissed as a Plaintiff for lack of standing pursuant to Rule 12(b)(1).

Respectfully submitted this 5th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to the following:

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This the 5th day of February, 2018.

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