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

MARCIA ELENA QUINTEROS HAWKINS, ALICIA FRANKLIN, VANESSA LACHOWSKI, and KYANNA SHIPP 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.	)	**PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

NOW COME PLAINTIFFS by and through undersigned counsel and file this Response to Defendant's February 5, 2018, Motion to Dismiss (ECF No. 32). Plaintiffs respectfully ask the court to deny the motion to dismiss on all grounds.

STANDARD OF REVIEW

A. Motions to dismiss for failure to state a claim

In a complaint, plaintiffs are required to provide "a short and plain statement of the claim showing that the pleader is entitled to relief" and give the defendant notice of the claims and the grounds upon which they rest. *Woods v. City of Greensboro*, 855 F.3d 639, 647 (4th Cir. 2017) (quoting Fed. R. Civ. P. 8(a)(2)); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

When considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), courts must "consider as true all well-pleaded allegations in the complaint." *Woods,* 855 F.3d at 642. The court should deny the motion to dismiss if the facts alleged "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 647 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The complaint must "includ[e] sufficient facts to state a claim that is 'plausible on its face.'" *Id.* at 647 (quoting *Twombly,* 550 U.S. at 570). Plausibility requires "more than a sheer possibility that a defendant has acted unlawfully," but it is not a "probability requirement." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556).

At the Rule 12(b)(6) stage, the question before the court is "'not whether [the defendant] will ultimately prevail' . . . but whether [the] complaint was sufficient to cross the federal court's threshold." *Woods*, 855 F.3d at 652-53 (quoting *Skinner v. Switzer*, 562 U.S. 521, 529-30 (2011)). A court, therefore, cannot grant a motion to dismiss for failure to state a claim "even if it strikes a savvy judge that . . . recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks and citation omitted).

On a motion to dismiss under Rule 12(b)(6), only documents "integral to and explicitly relied on in the complaint" can be considered. *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606-07 (4th Cir. 2015).

B. Motions to dismiss for lack of subject matter jurisdiction

"When a defendant challenges subject matter jurisdiction via a Rule 12(b)(1) motion to dismiss, the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary

judgment." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 333-34 (4th Cir. 2014) (quoting *Velasco v. Gov't of Indon.*, 370 F.3d 392, 398 (4th Cir. 2004)).

ARGUMENT

I. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THE § 1983 CLAIMS BECAUSE EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES IS NOT REQUIRED.

Defendant moves to dismiss the first and fourth causes of action under Rule 12(b)(1) for lack of subject matter jurisdiction because the Plaintiffs have failed to exhaust state administrative remedies. Def.'s Mem. in Supp. of Mot. to Dismiss ("Def.'s Mem.") at 6 (ECF No. 33). In support, the Defendant cites North Carolina state court cases requiring exhaustion of administrative remedies created by state statutes.[1] None of those cases involved claims under § 1983. Defendant's authority thus has no bearing on this federal lawsuit brought under § 1983.

The Supreme Court long ago made clear that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to [42 U.S.C.] § 1983." *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982); *see, e.g.*, *McCartney ex rel. McCartney v. Cansler*, 608 F. Supp. 2d 694, 701-02 (E.D.N.C. 2009) (rejecting defendant's ripeness argument for failure to exhaust administrative remedies), *aff'd sub nom. D.T.M. ex rel. McCartney v. Cansler*, 382 F. App'x 334 (4th Cir. 2010) (unpublished) (per curiam); *Westminster Nursing Ctr. v. Cohen*, No. 5:17-CV-96-FL, 2017 U.S. Dist. LEXIS 193330, at *16-17, 2017 WL 5632661, at *6 (E.D.N.C. Nov. 22, 2017) (rejecting defendant's argument for dismissal for failure to exhaust administrative remedies). The first and fourth causes of action are brought under federal law, via § 1983, to enforce federal rights under the Medicaid Act and the due process clause of the U.S.

[1] In the lone federal case and only § 1983 case cited by Defendant, administrative exhaustion had nothing to do with dismissal of the claim. *See Googerdy v. N.C. Agric. & Technical State Univ.* 386 F. Supp. 2d 618, 625 (M.D.N.C. 2005) (claim dismissed because the defendant was not a person under § 1983).

Constitution. Corrected Am. Compl. ("Compl.") ¶¶ 142, 153 (ECF No. 12). The North Carolina exhaustion requirements cited by the Defendant are inapplicable.

Without mentioning the controlling authority in *Patsy*, Defendant cites a North Carolina statute to argue that plaintiffs should have filed administrative appeals of their Medicaid terminations before suing. Def.'s Mem. at 7 (ECF No. 33) (citing N.C.G.S. § 108A-79). This position ignores the Complaint's allegations that the Defendant fails to timely notify Plaintiffs in writing of the termination of their Medicaid, which violates that same statute's requirement that "[e]ach . . . recipient *shall be notified in writing* of his right to appeal upon denial of his application for assistance and at the time of any subsequent action on his case." § 108A-79(a)) (emphasis added); *see* Compl. ¶¶ 57-61 (ECF No. 12) (alleging tens of thousands of terminations by Defendant's computer programming without written notice), ¶¶ 87 (Ms. Quinteros Hawkins terminated without written notice), ¶ 95 (same), ¶ 120 (Ms. Lachowski terminated without written notice), ¶¶ 133-34 (Ms. Shipp terminated without written notice). Defendant never explains how Plaintiffs could have filed administrative appeals to challenge notices that were never sent.[2] Moreover, even when notice of Medicaid termination is sent by Defendant, the notice is alleged to be inadequate. Compl. ¶¶ 69, 71-75, 92, 93, 107-09, 142, 152.

Requiring exhaustion of administrative remedies thus would be particularly inappropriate here, where the fairness of the administrative process itself is at issue. In circumstances such as these, courts will not require plaintiffs to use the agency's proffered "remedy" to enforce federal claims. *Delong v. Houston*, No. 00-CV-4332,

[2] Nor did Defendant explain how Ms. Quinteros Hawkins could appeal a termination when the Medicaid agency denied that the termination even occurred. Compl. ¶ 88 (ECF No. 12) (stating that a pharmacist told Ms. Quinteros Hawkins she had been terminated but "three different DSS caseworkers . . . all told her that she still had Medicaid coverage").

2000 U.S. Dist. LEXIS 16060, *3-52000 WL 1689077, at *2 (E.D. Penn. Oct. 26, 2000) (concluding that Medicaid's legislative history indicates Congress required states to establish administrative hearings but does not support the conclusion that Congress intended to require recipients always to use them before going to court); *Jones v. Blinziner*, 536 F. Supp. 1181, 1202 (D. Ind. 1982) (noting Medicaid administrative hearing process would not remedy state agency's systemic practices). This court has subject matter jurisdiction over the first and fourth causes of action.

II. PLAINTIFFS HAVE STATED A CLAIM FOR RELIEF UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT.

Defendant moves to dismiss the second cause of action under Rule 12(b)(6) for failure to state a claim. That cause of action is based on Secretary Cohen's use of procedures, criteria, and methods of administration that fail to accommodate disabilities and exclude people with disabilities from participating in Medicaid, in violation of Title II of the ADA. Compl. ¶¶ 145-47 (ECF No. 12); 42 U.S.C. § 12132.

In creating the ADA, "Congress explicitly found that [disability] discrimination was not limited to 'outright intentional exclusion,' but was also to be found in 'the failure to make modifications to existing facilities and practices.'" *Nat'l Fed'n of the Blind v. Lamone,* 813 F.3d 494, 505 (4th Cir. 2016) (citing *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674-75 (2001)) (internal quotations omitted). "Congress concluded that there was a 'compelling need' for a 'clear and comprehensive national mandate' to both eliminate discrimination *and* to integrate disabled individuals into the social mainstream of American life." *Id.* at 505-06 (quoting *PGA Tour,* 532 U.S. at 675).

Regulations implementing the ADA are at 28 C.F.R. § 35.101 *et seq.*, including regulations stating that entities such as N.C. Department of Health and Human Services (DHHS) and its county agents, Departments of Social Services (DSSs),

> may not, directly or through contractual or other arrangements, utilize criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability [or] [t]hat 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). Another regulation states that entities such as DHHS "shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." *Id.* at § 35.130(b)(7).

Defendant's brief states that "a plaintiff seeking recovery under the ADA, or the Rehabilitation Act, 29 U.S.C. § 794, 'must allege that . . . she was excluded from participation in or denied the benefits of [a] service, program, or activity, or otherwise discriminated against, *on the basis of her disability*.'" Def.'s Mem. at 9 (ECF No. 33) (citing *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005)) (emphasis added).[3]

That quote is cited accurately but is incomplete. The quoted sentence from *Constantine* ends with this footnote:

> Although "[t]he ADA and Rehabilitation Act generally are construed to impose the same requirements," we have recognized that the causation standards under Title II of the ADA and § 504 of the Rehabilitation Act are "significantly dissimilar." *Baird*, 192 F.3d at 469. *A plaintiff seeking relief under Title II of the ADA must prove that disability "played a motivating role" in the adverse action*, while a plaintiff seeking relief under § 504 of the Rehabilitation Act must prove that the defendants' discriminatory conduct was "solely by reason" of the plaintiff's disability. *Id.* at 469–70.

[3] Secretary Cohen does not dispute the sufficiency of the allegations for the first two requirements: existence of a disability and entitlement to receive benefits. *See* Def.'s Mem. at 9-11.

Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 498 n.17 (4th Cir. 2005) (emphasis added); *see also Baird ex rel. Baird v. Rose*, 192 F.3d 462, 469 (4th Cir. 1999); *Betts v. Rector & Visitors of Univ. of Va.*, 145 F. App'x 7, 10 n.2 (4th Cir. 2005).[4]

So, to summarize, these Plaintiffs' ADA claims must only allege that a disability "played a motivating role" in their termination from Medicaid. The higher causation standard required for Rehabilitation Act claims—"solely by reason" of the disability—is inapplicable here, because the Plaintiffs make no claim under the Rehabilitation Act.

To further define the phrase "played a motivating role" under § 12132, the Fourth Circuit has turned to language used in Title VII cases. *Baird*, 192 F.3d at 470 (citing *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1033-34 (7th Cir. 1999); *Doane v. City of Omaha*, 115 F.3d 624, 629 (8th Cir. 1997)). Among the definitions used by those cases are that the disability "must contribute" to the adverse action "in some substantial way." *Foster*, 168 F.3d at 1033-34. An alternate phrasing is that the disability "played some part" in the adverse action. *Doane*, 115 F.3d at 629.

The allegations about Ms. Franklin are sufficient to meet these standards. She is alleged to have a "mild intellectual disability," and to have received disability benefits until 2015, when she began working despite her disability. Compl. ¶ 100 (ECF No. 12). Even though the county DSS was aware of her disability, *id.* ¶ 104, DSS sent Ms. Franklin an annual eligibility redetermination form on September 5, 2017 that was written in complex language she could not understand. *Id.* ¶¶ 102-03.

[4] *Westminster Nursing Center*, which was also cited by the Defendant, Def.'s Mem. at 10 (ECF No. 33), discusses the same language from *Constantine* but actually includes an accurate discussion of the language in the footnote. *See Westminster Nursing Ctr.*, 2017 U.S. Dist. LEXIS 193330, at *11-12, 2017 WL 5632661, at *4.

When Ms. Franklin went to DSS in person in early October 2017 to provide eligibility information and paystubs, the DSS worker asked for a bank statement but did not give a deadline for providing the bank statement, did not offer to assist Ms. Franklin by signing a release, and did not provide Ms. Franklin with a written request for the information. *Id.* ¶ 106. On October 11, 2017, DSS sent a second written notice to Ms. Franklin, this time terminating her Medicaid, which again contained confusing information, was written in complex language Ms. Franklin could not understand, and was missing important deadlines. *Id.* ¶¶ 107-09.

Throughout this redetermination process, DSS did not follow up with Ms. Franklin by phone or inform Ms. Franklin that the agency could communicate with her by email. *Id.* ¶¶ 110, 105. Ms. Franklin then lost Medicaid coverage, which put at risk her Medicare Part B and D coverage, a dentist appointment in November 2017, and a major surgery scheduled for December 2017. *Id.* ¶ 111.

Taking reasonable inferences from these allegations, *see Woods*, 855 F.3d at 647, Ms. Franklin has stated a claim that her disability contributed and played a substantial role in her termination from Medicaid. Ms. Franklin received a series of communications from DSS that were difficult for her to understand. She received no assistance from DSS to accommodate her intellectual disability or clarify those messages and thus ensure that communications with Ms. Franklin were "as effective as communications with others." 28 C.F.R. § 35.160. It is reasonable to infer, then, that Ms. Franklin's termination from Medicaid was the result of confusion, miscommunication, and failure of DSS to assist Ms. Franklin during the process, in which lack of accommodation of her intellectual disability played a substantial role.

The allegations as to Ms. Franklin are far more substantial than those dismissed in *Westminster*, where the plaintiffs had only a blanket allegation that a "failure to afford [the

residents] their public benefits and services . . . and failure to grant them Medicaid benefits as a reasonable accommodation" constituted an ADA claim. 2017 U.S. Dist. LEXIS 193330, at *11-13, 2017 WL 5632661, at *4. The same is true of *Burke v. Hill*, also cited by Defendants, in which the plaintiff alleged that the governor of North Carolina was leading a racially discriminatory conspiracy to deny him Medicaid coverage for a visit with his gastroenterologist. No. 2:17-CV-1-FL, 2017 U.S. Dist. LEXIS 180041, at *11-14, 2017 WL 4969687, at *1-2, *4, (E.D.N.C. Oct. 31, 2017). The Defendant has cited no case where allegations similar to those here were dismissed at the 12(b)(6) stage.[5]

The complaint also adequately alleges that their disabilities contributed to the termination of two other named Plaintiffs, Ms. Quinteros Hawkins and Ms. Shipp, both of whom allege a disability. *See* Compl. ¶¶ 78-80, 115, 130-31 (ECF No. 12). As to these Plaintiffs, however, Secretary Cohen contends that their termination from Medicaid "was not by reason of" their disabilities and their disabilities "played no role," because the terminations occurred "automatically by the NCFast system." Def.'s Mem. at 9-10 (ECF No. 33).

This argument misreads Plaintiffs' allegations. Ms. Quinteros Hawkins was terminated the first time automatically by NC FAST but then was terminated a second time after receiving written notice. *Id.* ¶¶ 85-87, 90-93. In neither case did DSS make any effort to determine if she was eligible for Medicaid based on her disability before the termination. *Id.* ¶¶ 86, 91. This is because Defendant's written policy prohibited DSS from doing so. *Id.* ¶¶ 67-69. This challenged written policy has everything to do with discriminating against these Plaintiffs based on their disabilities because Medicaid eligibility based on their alleged disabilities cannot be considered under Defendant's policy before Medicaid is terminated. *Id.* Ms. Shipp's Medicaid was automatically

[5] *See also infra* p. 12 (discussing conclusory allegations in 4th Circuit cases that were dismissed on Rule 12(b)(6) motions post-*Twombly* and *Iqbal*).

terminated by the computer because she turned age 19, but Defendant could have prevented that termination by instructing the computer to continue her Medicaid until a disability determination was made. *Id.* ¶¶ 58, 136-38.

Moreover, the automatic terminations of Medicaid for Plaintiffs Hawkins and Shipp occurred because Defendant's programming of NC FAST ignores, by design, the alleged disabilities of Medicaid beneficiaries enrolled under a Medicaid category not requiring a disability. Ms. Hawkins was terminated by NC FAST because her oldest child turned age 18 and NC FAST is programmed to terminate Medicaid when that happens regardless of her potential eligibility based on disability. *Id.* ¶¶ 58, 84-85. Ms. Shipp was terminated by NC FAST because she turned age 19 and NC FAST is programmed to terminate Medicaid when that happens regardless of her potential eligibility based on disability. *Id.* at ¶¶ 59, 138. The adoption, use, and maintenance of this computer programming is what facilitated the discrimination against disabled beneficiaries; it does not matter that Defendant has delegated the discriminatory act to a computer so that it occurs automatically. The Defendant cannot absolve herself of responsibility under the ADA by blaming a computer system she has been using since 2014 that regularly terminates Medicaid beneficiaries without considering disability status. *See* Compl. ¶¶ 51, 58-59.[6]

These allegations are more than sufficient to avoid dismissal at this stage of the litigation.

III. PLAINTIFFS HAVE STATED CLAIMS FOR RELIEF UNDER § 1557 OF THE AFFORDABLE CARE ACT.

Defendant moves to dismiss the third cause of action under Rule 12(b)(6) for failure to state a claim. This cause of action alleges that the Defendant discriminated against persons with

[6] Ms. Lachowski's disability may not have directly contributed to her Medicaid termination, but only one plaintiff is needed for each legal claim. *L.S. v. Delia*, 2012 U.S. Dist. 43822, at *14-15. For this claim, there are three named plaintiffs.

limited English proficiency and against persons with disabilities, in violation of § 1557 of the Affordable Care Act, 42 U.S.C. § 18116. That provision states that

> individual[s] shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or section 504 of the Rehabilitation Act of 1973, 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 . . . .

42 U.S.C. § 18116(a).

A. Ms. Quinteros Hawkins has stated a claim of discrimination against persons with limited English proficiency.

It is undisputed that "[a] covered entity [such as DHHS] 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); Def's Mem. at 13 (ECF No. 33).

Among other facts, the complaint alleges the following: Ms. Quinteros Hawkins' Medicaid coverage was renewed for a full year on June 30, 2017. Compl. ¶ 83 (ECF No. 12). On August 9, she discovered that her Medicaid coverage had been terminated. *Id.* ¶ 88. On September 20, 2017, a DSS worker told Ms. Quinteros Hawkins that her Medicaid coverage would be reinstated. *Id.* ¶ 90. That same day, DSS sent a written notice to Ms. Quinteros Hawkins stating that her Medicaid coverage would stop on October 31. *Id.* ¶¶ 90, 92. The notice was in English, a language that she does not understand. *Id.* ¶ 77. Had she been able to understand the notice, Ms. Quinteros Hawkins could have asked for a hearing within 10 days to challenge the termination and continued to receive benefits pending a decision on her appeal. *See id.* ¶¶ 48-49, 71. Instead, on October 26—a month after she had been told that her Medicaid was reinstated, and only four months into her one-year renewal from June—Ms. Quinteros Hawkins discovered that, in fact, she had no Medicaid

coverage. *Id.* ¶ 94. Ms. Quinteros Hawkins made this discovery because she was denied a flu shot and was told she could not fill her prescriptions. *Id.*

The Defendant nonetheless contends that "there is no allegation as to how the . . . notices which were sent to Hawkins in English harmed her in any way" and "the fact that the notices were in English is irrelevant." Def.'s Mem. at 15 (ECF No. 33).[7] This argument fails to consider reasonable inferences, as are required under a Rule 12(b)(6) motion. *See Woods*, 855 F.3d at 647. The allegations are that Ms. Quinteros Hawkins got conflicting information: she was told by a DSS worker that she had Medicaid coverage but, on the same day, was also mailed an English-only notice that contained new information—namely, that her Medicaid coverage would terminate at the end of the next month. However, because the notice was in a language she could not understand, Ms. Quinteros Hawkins was not alerted to the contradiction in those two pieces of information and was not able to contact DSS to clear up the confusion or appeal the termination. It is certainly reasonable to infer that Ms. Quinteros Hawkins disregarded the incomprehensible notice, took the DSS worker at her word, and believed that her Medicaid had been fully reinstated, only to discover too late that her Medicaid had been wrongfully terminated again. The notice sent in English thus discriminated against Ms. Quinteros Hawkins because, on the basis of her language, it denied her the opportunity to clarify with DSS the status of her Medicaid or to appeal the termination within ten days in order to obtain a pre-termination hearing.

These allegations are much more factually specific than those typically dismissed for failure to state a claim for discrimination after *Twombly* and *Iqbal*. *See, e.g.*, *Coleman v. Md. Ct. of Appeals*, 626 F.3d 187, 191 (4th Cir. 2010) (conclusory and speculative allegations that plaintiff

[7] Ms. Quinteros Hawkins also received an earlier English notice in June 2017. Compl. ¶ 83. This notice played a lesser role, but it is certainly reasonable to infer that it amplified the confusion and frustration of Ms. Quinteros Hawkins in dealing with DSS about her Medicaid coverage.

was terminated based on his race and "was treated differently as a result of his race"), *aff'd*, 566 U.S. 30 (2012); *Francis v. Giacomelli*, 588 F.3d 186, 195 (4th Cir. 2009) (only factual allegations were that plaintiffs were black, defendants were white, and defendants had never terminated white employees in a similar manner); *McCleary-Evans v. Md. Dep't of Transp.*, 780 F.3d 582, 585 (4th Cir. 2015) (naked allegations that defendant "predetermined to select" white job applicants instead of the non-white plaintiff). The allegations here are not conclusory; they lay out the day-by-day timeline of how an unreadable notice led to confusion, miscommunication, and inability to timely appeal termination from Medicaid. This is sufficient under Rule 12(b)(6).

B. Three Plaintiffs have stated a claim of discrimination against people with disabilities.

The parties agree that federal regulations implementing Section 1557 and related to disabilities require that DHHS "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." 45 C.F.R. § 92.202(a); *see* Def.'s Mem. at 17 (ECF No. 33).

As used in the regulations, "Disability means, with respect to an individual, a physical *or mental* impairment that substantially limits one or more major life activities of such individual." 45 C.F.R. § 92.4 (emphasis added); *see also* 42 U.S.C. § 12102(4)(A) (stating that the definition of disability under the ADA "shall be construed in favor of broad coverage of individuals"); 42 U.S.C. § 12102(2)(A) (major life activities include "learning, reading, concentrating, [and] thinking").

As to Ms. Franklin, the complaint alleges the following facts: Ms. Franklin has "a mild intellectual disability" and DSS was aware of the disability. Compl. ¶¶ 99, 103 (ECF No. 12). In its review of Ms. Franklin's continuing eligibility for Medicaid, DSS sent a written request for

information in complex language that Ms. Franklin could not understand and that allowed her only twelve days to respond. *Id.* ¶¶ 102-03. DSS did not follow up on its written request with an accommodation, such as a phone call or offer to communicate with her by email. *Id.* ¶¶ 104-05.

Despite these failures to modify policies or procedures to accommodate her disability and ensure Ms. Franklin equal access to the program, Ms. Franklin eventually went to DSS in person to provide information to the agency. *Id.* ¶ 106. A DSS worker told Ms. Franklin that she needed to provide a bank statement but did not offer to assist her in obtaining that information or attempt to verify eligibility without the bank statement or even tell Ms. Franklin when the statement was due, despite Ms. Franklin's disability. *Id*. Only a few days later, DSS sent a notice to Ms. Franklin that her Medicaid would be terminated for failure to provide information. *Id.* ¶ 107. This notice "contained confusing, contradictory information . . . and was written in complex language that Ms. Franklin could not understand." *Id.* Again, DSS did not make any accommodations to account for Ms. Franklin's disability. *Id.* ¶ 110. Ms. Franklin then lost Medicaid coverage, which jeopardized her Medicare Part B and D coverage, a dentist appointment in November 2017, and a major surgery scheduled for December 2017. *Id.* ¶ 111.

The Defendant contends that the claim for discrimination against Plaintiffs with disabilities should be dismissed because the complaint does not describe "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 have contacted Franklin in a different manner." Def.'s Mem. at 19 (ECF No. 33). To the contrary, however, Plaintiffs alleged both the nature of Ms. Franklin's disability[8] and that, because of her disability, she was unable to understand the

[8] As to Defendant's challenge to "the nature of Franklin's disability," Def.'s Mem. at 19, the allegations in the claim must be taken as true. *Woods*, 855 F.3d at 642. Those allegations plainly state that Ms. Franklin has an intellectual disability, received Social Security disability benefits in the past, and recently received Medicaid benefits for the working disabled. Compl. ¶¶ 100-01.

notices sent to her and needed reasonable modifications to DHHS policies and procedures, including auxiliary aids and services, to keep her Medicaid coverage. Compl. ¶¶ 100, 103-110 (ECF No. 12). Including reasonable inferences from these allegations, Plaintiffs have more than adequately alleged that the communications by DSS with Ms. Franklin were not adequate to accommodate Ms. Franklin's disability, ensure effective communication, and allow her to maintain Medicaid coverage. *See* discussion *supra* p. 12 (citing *Coleman*, 626 F.3d at 191; *Francis*, 588 F.3d at 195; *McCleary-Evans*, 780 F.3d at 585).

Moreover, the Defendant points to no law that indicates that only certain disabilities "trigger[] an obligation" to provide accommodations while other disabilities do not. *See* Def.'s Mem. at 18-19 (ECF No. 33). Instead, the regulations state that DHHS "shall take appropriate steps to ensure that communications with individuals with disabilities are **as effective as** communications with others." 45 C.F.R. § 92.202(a) (emphasis added). The scope of the statutory language clearly includes mental disabilities and problems with reading, thinking, and concentrating. 42 U.S.C. § 12102(1)(A), (2)(A).

As discussed above in Section II, Plaintiffs have also properly alleged that Plaintiffs Hawkins and Shipp were discriminated against based on their disabilities, when their Medicaid was terminated without considering whether they remained eligible based on their disabilities. *See* discussion *supra* pp. 5-10. These allegations also state a plausible claim for discrimination based on disability, allow the court to reasonably infer that the Defendant is liable, and satisfy the bar required to survive a motion to dismiss. *Woods*, 855 F.3d at 647

IV. MS. LACHOWSKI HAS STANDING BECAUSE THE ANTICIPATED INJURY-IN-FACT HAD OCCURRED BEFORE AND WAS EXPECTED TO OCCUR AGAIN ON DECEMBER 31, 2017.

Finally, Secretary Cohen maintains that Ms. Lachowski lacks standing under Rule 12(b)(1) because she lacks an injury-in-fact.[9] The Defendant also made this argument in its opposition to the motion for class certification, and the Plaintiffs herein incorporate their response to that argument in their reply brief. Pls.' Reply Supp. Mot. for Class Cert. at 6-8 (ECF No. 45).

In arguing that Ms. Lachowski's injury is unduly prospective, the Defendant compares Ms. Lachowski's allegations to those in *Summers v. Earth Island Institute,* 555 U.S. 488 (2009) and *Whitmore v. Arkansas*, 495 U.S. 149 (1990). Def.'s Mem. at 21 (ECF No. 33). The alleged injury in those two cases was far more attenuated than the injury here. In *Summers*, the prospective injury was based on regulations about the sale of certain national forest land to a person who "plans to visit several unnamed national forests in the future." 555 U.S. at 495. That person identified some specific forests actually affected by the regulations, but he stated only that he "want[s] to go there." *Id*. at 496. This injury did not create standing, because an injury-in-fact must be "actual and imminent, not conjectural or hypothetical." *Id.* at 493. In *Whitmore*, a death row inmate sought to challenge the validity of a death sentence imposed on a different inmate who had decided not to appeal. 495 U.S. at 152-54. The plaintiff contended that, because Arkansas used comparative review to evaluate death penalty appeals, the other inmate's decision not to appeal would deprive the plaintiff of a potential basis from which to favorably compare his own crime and challenge his sentence. *Id.* at 156-57. Again, the court found no injury-in-fact.

[9] The Defendant does not challenge Ms. Lachowski's standing on any other basis. *See* Def.'s Mem. at 19-21.

No such conjecture is needed to identify the injury to Ms. Lachowski. The complaint alleges that Ms. Lachowski is totally disabled and has remained eligible for Medicaid yet was erroneously terminated from Medicaid without notice on December 31, 2016. Compl. ¶¶ 114-15, 119-20 (ECF No. 12). While her prior erroneous termination was being corrected with the help of her attorneys, Ms. Lachowski's aunt—who had to travel from Illinois—and 71-year-old mother had to take care of her. *Id.* ¶ 123. Ms. Lachowski's Medicaid eligibility was scheduled to be reviewed again before December 31, 2017, and, at the time of filing the complaint, Ms. Lachowski had not been contacted by DSS and there was already inadequate time for the correct renewal procedure to take place. *Id.* ¶ 125. Ms. Lachowski therefore reasonably anticipated, at the time of filing, that DSS would wrongfully terminate her Medicaid on December 31, 2017, just as DSS had done exactly a year before. *Id.* at ¶¶ 120, 126. Based on her experience from the year before, it would have been reckless *not* to anticipate the likelihood that her Medicaid would again be automatically terminated. The allegations that Defendant had not changed the computer programming that caused Ms. Lachowski's prior termination—as well as tens of thousands of others—only bolstered the need for Ms. Lachowski to be worried. *See id.* ¶¶ 61-64, 127. Furthermore, the termination of Ms. Lachowski's Medicaid without notice on December 31, 2016 establishes a past concrete injury, which the Defendant's brief fails to mention. *Id.* ¶¶ 119-23.

On a 12(b)(1) motion, the Court may also consider jurisdictional facts beyond the pleadings themselves. *In re KBR*, 744 F.3d at 333-34. Facts from Plaintiffs' motions for class certification and preliminary injunction further establish the credibility of Ms. Lachowski's anticipated injury. Pls.' Mem. Supp. Mot. for Class Certification (ECF No. 18); Pls.' Mem. Supp. Mot. for Prelim. Inj. (ECF No. 49).

Many other potential class plaintiffs experienced automatic, wrongful terminations of Medicaid at the end of a twelve-month certification period, just like Ms. Lachowski. Multiple members of Tarren Turrubiates' family were terminated by Medicaid without notice at the end of various certification periods, including her daughter in August 2016 and Ms. Turrubiates December 2016. Turrubiates Decl. ¶¶ 1, 7-9 (ECF No. 48). Leroy Rivers, a 74-year-old man who lives alone and relies on a wheelchair, was wrongfully terminated from Medicaid without notice at the end of a certification period—exactly like Ms. Lachowski—on January 1, 2015 and again in December 2017. Rivers Decl. ¶¶ 3, 21, 26-27 (ECF No. 47).

Reports from the DHHS Medicaid system, NCFAST, show that the experiences of Ms. Lachowski, Mr. Rivers, and Ms. Turrubiates are not isolated incidents. On December 31, 2016, for instance, Ms. Lachowski was just one of more than 5,000 Medicaid recipients who lost Medicaid without notice. Pls.' Mem. Supp. Mot. for Prelim. Inj. at 9 (ECF No. 49) (citing ECF Nos. 24-5, 24-6). Additionally, the Plaintiffs have provided evidence of thousands of other people who have been wrongfully terminated from Medicaid without timely notice in recent years. *See id.* at 10-11, 15-16, 18-19.

The injury in *Summers* was based on a tourist who *might* visit a forest that *could* be affected by a regulation at an unknown time the future. The injury in *Whitmore* was based on an inmate who *might* benefit from favorable law that *could* be created by another inmate's appeal. The injury to Ms. Lachowski is based on a person who *is* disabled, who *will* have to fall back on family members for care if she loses Medicaid, who *was*—along with thousands of others—wrongfully terminated from Medicaid last year at redetermination, and who faced another automatic termination of her Medicaid scheduled in Defendant's computer for December 31, 2017, only a few weeks after the amended complaint was filed.

The Defendant has identified no allegations comparable to those asserted by Ms. Lachowski that were dismissed for lack of standing. Rather, caselaw supports the right of people who face impending changes in Medicaid status to seek protection in federal court. In *Pashby v. Cansler*, 279 F.R.D. 347, 351-52 (E.D.N.C. 2011), *aff'd*, *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013), plaintiffs who faced an impending termination of in-home Medicaid services had "suffered an imminent injury in fact" and had standing, even though the services had not yet been taken away. *See also Pashby*, 279 F.R.D. at 352 ("Plaintiffs' . . . ability to seek redress and a more stable resolution through the court remains independent of the vagaries of Defendants."). Ms. Lachowski has made adequate allegations to show an imminent and concrete injury-in-fact.

The Defendant also briefly contends that Ms. Lachowski lacks an injury-in-fact because she had Medicaid benefits at the time of filing and "upon information and belief, [she] remains eligible and receiving Medicaid benefits at present." Def.'s Mem. at 21 (ECF No. 33). To the extent Defendant is making a mootness argument, that argument rests upon the notion that the challenged practice has stopped, thus sparing Plaintiffs from an imminent injury. However, "[m]ootness does not result from a defendant's voluntary cessation of his allegedly illegal conduct unless it is clear that the behavior is unlikely to recur." *Pashby*, 709 F.3d at 316. In *Pashby*, when the named plaintiffs' in-home services were reinstated after filing the lawsuit, the Fourth Circuit held that the court still had subject matter jurisdiction. *Id.* at 316-17. The court held that the defendants' actions were a voluntary cessation of the harm, because the agency "remain[ed] free to reassess" their eligibility and "cancel their [services] . . . at any time." *Id.* at 316. The same is true here: the fact that Ms. Lachowski may not have been terminated from Medicaid without notice on December 31, 2017 does not prevent the state from terminating her without notice at any subsequent time based on the same unchanged procedure challenged in the complaint. The

complaint and the supporting evidence thus are more than sufficient to allege that Ms. Lachowski has an injury-in-fact and has standing.

CONCLUSION

Plaintiffs respectfully ask this Court to deny the motion to dismiss.

Dated: March 9, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this day, I served a true copy of the Plaintiffs' Response to Defendant's Motion to Dismiss upon the Defendant's attorneys via electronic means through the CM/ECF system to:

Thomas Campbell
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This the 9th day of March, 2018.

/s/ Douglas S. Sea