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

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

INTRODUCTION

This class action, brought on behalf of North Carolina Medicaid beneficiaries, challenges the failure of Defendant state official to ensure due process when Medicaid services are denied, reduced or terminated. According to the Amended Complaint, thousands of Medicaid beneficiaries in North Carolina are being illegally denied access to critically needed mental health and developmental disability services because of numerous illegal procedures and practices. (Am. Compl. ¶¶ 29-158.) According to the complaint, Defendant has either directed or ratified these continuing practices. (*Id.* ¶¶ 3, 12, 158.)

Among other things, Plaintiffs' Amended Complaint alleges that Defendant makes decisions to deny, reduce, or terminate Medicaid services under arbitrary procedures and fails to provide timely and adequate written notices of those decisions. (*Id.* ¶¶ 117-158.) In some circumstances, services are denied, reduced, or terminated with no written notice at all. (*Id.*)

When written notices are sent, they do not contain legally-required information that will allow Plaintiffs to understand the decision or what to do about it. (*Id.*) Notices are provided after services have been stopped so plaintiffs cannot continue to receive Medicaid services pending appeal as federal law requires. (*Id.*) As also alleged in the Amended Complaint, Defendant fails to ensure continued services pending appeal, delays for months before holding a hearing, and fails to permit *de novo* hearings as required by law. (*Id.*)

As alleged in the Amended Complaint, Plaintiff Devon Tyler McCartney lost all hours of Medicaid-funded community-based mental health services in the school as a result of multiple due process violations by Defendant, including oral denials, improper notice, use of arbitrary procedures in reducing and terminating his services, interruptions of service without notice, unreasonable delay in hearing his appeal, and denial of the right to a meaningful hearing, ultimately causing his administrative appeal to be dismissed and forcing him to seek relief from this Court. (*Id.* ¶¶ 29-60.) As alleged in the Amended Complaint, Plaintiff Eric McMillan's mental health services in the school were reduced without any written notice as a result of "misinformation, discouragement, and intimidation." (*Id.* ¶ 65.) This misinformation, while contrary to Defendant's written policy, is part of a pattern of illegal practices that are either directed or ratified by Defendant. (*Id.* ¶¶ 2, 3, 118-120 (both), 158.) Moreover, as alleged in the Amended Complaint, Defendant threatens Eric's right to a fair and *de novo* hearing with respect to his pending administrative appeal. (*Id.* ¶¶ 75, 148-50.) Plaintiff Katie Tipton also is the victim of Defendant's illegal practices, including failure to receive advance written notice before interruption of authorization for her services (*Id.* ¶¶ 89-116), and Defendant threatens her right to a timely, meaningful, *de novo* hearing in her pending administrative appeal. (*Id.* ¶¶ 106-08, 148-50.)

Plaintiffs allege that Defendant's ongoing policies and practices used in denying, reducing, and terminating services violate their Constitutional due process rights and their rights under the Medicaid Act. (*Id.* ¶¶ 3-4.) The Medicaid recipients seek prospective declaratory and injunctive relief to require Defendant to comply with the Medicaid Act and the Constitution. (*Id.*, ¶ 5, Prayer for Relief.) Defendant has asked the Court to dismiss the case without permitting Plaintiffs discovery or the opportunity to prove their allegations.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THE SUBJECT MATTER.

Defendant has moved to dismiss this action pursuant to Fed. R. Civ. P. Rule 12(b)(1), on the ground that this Court lacks subject matter jurisdiction. This motion is without basis.

A. Plaintiffs' allegations must be accepted for purposes of the 12(b)(1) motion.

Defendant asserts that, in determining whether this case should be dismissed for lack of subject matter jurisdiction, the allegations of the Amended Complaint need not be accepted as true, that Plaintiffs' allegations based on information and belief are not sufficient, and that the allegations are too "sketchy." (Defendant's Memorandum in Support of Motion to Dismiss (Def. Memo.) at 7-9.) On all counts, Defendant is incorrect.

Defendant intimates that facts alleged in the Amended Complaint are untrue and, therefore, the Court can weigh "extrinsic information" to decide jurisdiction. (Def. Memo. at 7-8.) However, none of the 164 detailed allegations in the Amended Complaint have been denied in an Answer. A *factual* jurisdictional dispute cannot occur until the defendant files an answer contraverting plaintiffs' allegations. *Mortenson v. First Fed. Sav. & Loan Assn*, 549 F.2d 884, n.17 (3d Cir. 1977); *Doctors Inc. v. Blue Cross,* 490 F.2d 48, 50 (3d Cir. 1973) (and cases cited therein). Moreover, Defendant's Motion to Dismiss and supporting papers do not spell out

which factual issues purportedly put jurisdiction at issue and Defendant has not offered any evidence that calls jurisdiction into question. Instead, his brief repeatedly makes assertions of fact without evidentiary support. (*See* Def. Memo. at 2-5, 7, 10-12, 18, 21, 24, 29.) It would be very convenient indeed for Defendant if the Amended Complaint could be dismissed based on Plaintiffs' failure to prove the facts establishing jurisdiction when Defendant has not even put those facts in issue through an Answer or extrinsic evidence or allowed development of the case through discovery and testimony.

Because a factual inquiry into jurisdiction is not appropriate at this stage, Plaintiffs are "afforded the same procedural protection as [they] would receive under a Rule 12(b)(6) consideration." *Adams v. Bain*, 697 F.3d 1213, 1219 (4th Cir. 1982) (holding Rule 12(b)(1) dismissal prior to trial inappropriate where the jurisdictional issues were intermingled with the merits of the case). *Accord United States v. N.C.,* 180 F.3d 574 (4th Cir. 1999). The facts in the complaint must be viewed in the "light most favorable to the plaintiff." *Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996). The court should presume that general allegations embrace those specific facts that are necessary to support the claim. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992); *Antrican v. Buell,* 158 F. Supp. 2d 663, 667 (E.D. N.C. 2001) (holding that "plaintiffs are entitled to reasonable inferences"), *aff'd,* 290 F.3d 178 (4th Cir. 2002). Assessed against these standards, there is clearly subject matter jurisdiction for the Court to hear this complaint.

Defendant also challenges certain allegations in the Amended Complaint because they were based, at least in part, upon information and belief. The cases cited by Defendant, however, do not support his argument. *Yount v. Shashek*, 472 F. Supp. 2d 1055 (S.D. Ill. 2006), concerns removal to federal court based on diversity, not federal question jurisdiction. At issue in

Yount were allegations in the notice of removal directly bearing on the state of residence of the parties, a core issue for jurisdiction and a matter unrelated to the merits of the case. *Id.* at 1057, n.1. Moreover, the court in *Yount* stated that the appropriate remedy for the jurisdictional defect would not be dismissal but rather allowing the party to clarify its allegations. *Id. Am. Best Inns, Inc. v. Best Inns of Abeline*, 980 F.2d 1072 (7th Cir. 1992), is also a diversity case. There, the court granted dismissal only after giving the plaintiff multiple opportunities over the course of the case to establish the state residence of the parties. *Id.* at 1074.

Notably, Defendant's brief never explains how the information and belief allegations in the complaint put *jurisdiction* at issue. Jurisdiction here is based on two federal questions, whether Defendant is violating the constitutional Due Process Clause and whether Defendant is violating the Medicaid Act. Defendant's brief makes no mention of the dozens of allegations of ongoing violations of federal law that are *not* alleged on information and belief, beginning with paragraphs 1-5 and ending with paragraphs 159-164 of the complaint.

Finally, Defendant's argument that the complaint is "sketchy" (Def. Memo. at 8) ignores the modern rules of civil procedure, which are based on the concept of simplified notice pleading. Fed. R. Civ. P. Rule 8(a) requires only that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Cf. Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993) (rules of civil procedure require only notice pleading unless specifically stating otherwise). Plaintiffs' detailed Amended Complaint is more than adequate to meet the Rule 8(a) standard. Because Plaintiffs have properly alleged jurisdictional facts, Defendant's Rule 12(b)(1) motion must be denied.

B. This Action is not Barred by the Eleventh Amendment.

"[T]he Eleventh Amendment [does not] preclude a private citizen from suing a state officer in federal court 'to ensure that the officer's conduct is in compliance with federal law.'" *Antrican v. Odom*, 158 F. Supp. 2d 663 (E.D. N.C. 2001) (quoting *Litman v. George Mason Univ.*, 186 F.3d 544, 550 (4th Cir. 1999)).[1] Under the *Ex parte Young* exception, 209 U.S. 123 (1908), a federal court may enjoin the state officer's conduct, because an official who acts in violation of federal law "loses 'the cloak of State immunity.'" *Antrican v. Odom,* 290 F.3d 178, 184 (4th Cir. 2002)*, aff'g,* 158 F. Supp. 2d 663 (E.D. N.C. 2001)*, cert. denied,* 537 U.S.973 (2002) (quoting *Bragg v. W.V. Coal Ass'n,* 248 F.3d 275, 292 (4th Cir. 2001)).

In determining whether *Ex parte Young* applies, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Ins. v. Pub. Servs. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (internal quote omitted).

In this case, private citizens have named an individual state official as defendant. (Am. Compl. ¶ 12.) They allege that this official has failed to comply with mandatory federal laws and that the violations are ongoing. (*Id.*, *passim.*) Plaintiffs seek only prospective relief. (*Id.*, Prayer for Relief, 2-3.) Their suit is a textbook *Ex Parte Young* action. Ignoring the allegations of the Amended Complaint and the overwhelming authority allowing Plaintiffs' suit, however, Defendant's argues that the Eleventh Amendment applies because "plaintiffs do not seek

[1] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Court has construed the Amendment to apply to suits by a state's own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890).

exclusively prospective relief and there is no ongoing violation of a federal right." (Mot. to Dismiss at 1.)

1. Plaintiffs seek only prospective relief.

Defendant argues that Plaintiffs do not seek solely prospective relief but also "payment for services that have not been approved," and as a result, the action is "in essence one for recovery of money from the state." (Def. Memo. at 10.)

Antrican instructs that, in determining whether the type of relief sought is prospective, "focus on an injunction's impact on the State's treasury is misdirected. Rather the proper focus must be directed at whether the injunctive relief sought is prospective or retroactive in nature." 290 F.3d at 186; *see also Kimble v. v. Solomon*, 599 F.2d 599, 604 n.6 (4th Cir. 1979) (same). *Verizon* dictates that this determination is to be made using "a straightforward inquiry into whether the complaint . . . seeks relief properly characterized as prospective." 535 U.S. at 645. Plaintiffs' Amended Complaint requests relief as follows:

> Plaintiffs respectfully request that this Court:
>
> … 2. Issue a declaratory judgment pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 that Defendant's failure to provide behavioral health and developmental disability services under Medicaid due to the practices and procedures alleged herein violates the named Plaintiffs' and the Plaintiff class's rights under the Due Process Clause of the Fourteenth Amendment and the Social Security Act, 42 U.S.C. § 1396a(a)(3).
>
> 3. Grant a preliminary and permanent injunction requiring the Defendant, his agents, successors, and employees to:
>
> (a) continue to provide behavioral health and developmental disability services to all persons who have been receiving them, until Defendant corrects the practices and procedures alleged herein;
>
> (b) prospectively reinstate behavioral health and developmental disability services previously provided to the named Plaintiffs and members of the Plaintiff class that were improperly reduced or terminated under the illegal practices and procedures alleged herein;
>
> (c) comply with the Due Process Clause of the U.S. Constitution and the Medicaid Act.

(Am. Compl., Prayer for Relief.) Clearly, Plaintiffs are seeking only prospective relief from the date of entry of an injunction against Defendant. They are not seeking restitution, compensation or any other type of relief that is retroactive in nature. *Cf. Edelman v. Jordan*, 415 U.S. 656 n.5, 671 (1974) (upholding prospective relief but reversing that part of the district court's order requiring the state to "release and remit" welfare checks as compensation to individuals whose aid applications were not processed in a timely manner).

Plaintiffs' allegations squarely meet the Fourth Circuit's standard for application of *Ex Parte Young*. In *Kimble v. Solomon*, three Medicaid recipients challenged reductions in services that did not comply with federal requirements for individual notice. *See Kimble v. Solomon*, 599 F.2d 599 (4th Cir.), *cert. denied*, 444 US 950 (1979). The complaint sought, among other things, prospective restoration of benefits. The district court ordered the Medicaid agency to comply with federal law in the future but, finding the action "as distasteful as anything I have done in my capacity as a judicial officer," the court denied further relief believing there to be an eleventh amendment bar. *Id.* at 602-03. The court of appeals reversed, in part, holding: "[T]he eleventh amendment permits an order requiring the prospective restoration of benefits…." *Id.* at 600. The court ordered the state to restore Medicaid to class members and continue this "prospective restoration of benefits" until after the state had provided adequate notice that complied with the requirements of federal law. *Id.* at 605. *See also Cyrus v. Walker,* 409 F. Supp. 2d 748 (S.D.W.Va. 2005) (applying *Antrican* and *Kimble* and ordering the Medicaid director to make prospective adjustments in benefits where state Medicaid director was violating the

constitutional and Medicaid Act requirements for due process when she reduced or terminated home and community-based services for people who are aged or disabled). [2]

Plaintiffs are not seeking any recovery or remuneration from the state or a state official for the suffering and expenses caused by the improper terminations and denials of their behavioral health and developmental disability services. The Amended Complaint seeks only prospective relief, and Defendant's motion to dismiss is without merit.

2. The case involves ongoing violations of federal law.

Arguing for dismissal because "there is no ongoing violation of a federal right," Defendant simply misapplies the *Verizon* standard. (Mot. to Dismiss at 1; Def. Memo. at 9, 11.) In determining whether *Ex parte Young* applies, *Verizon* instructs courts to conduct a straightforward inquiry into whether the complaint alleges an "ongoing violation of federal law." 535 U.S. at 645. *See also, e.g., Antrican*, 290 F.3d at 186-87 (reviewing allegations of complaint and concluding that the complaint alleged ongoing violations of federal law).[3]

Plaintiffs' Amended Complaint contains numerous allegations of ongoing violations of federal law. For example, the Amended Complaint alleges that "Defendant's illegal policies and practices are denying the Plaintiffs and the Plaintiff class coverage of behavioral health services as prescribed by their treatment providers and as required under federal law" (Amended Complaint ¶ 3), and that "Defendant's policies and practices used in reducing and terminating services violate the procedural due process rights of Plaintiffs and Plaintiff class that are

[2] Defendant builds on this argument to say that the State is the real party in interest. (Def. Memo. at 11.) The Fourth Circuit has rejected this argument. *See, e.g., Antrican,* 290 F.3d at 188-89 (noting the argument applies to every *Ex parte Young* action); *Rehab. Ass'n of Va., Inc., v. Kozlowski*, 42 F.3d 1444, 1449 (4th Cir. 1994) (finding the argument "completely meritless").

[3] Defendant appears to confuse the *Verizon* standard with the standard for deciding whether a federal statute creates a "federal right" under 42 U.S.C. § 1983. (Def. Memo. at 9, 12).

guaranteed to them by the U.S. Constitution and also violate their rights under the Medicaid Act." (*Id.* ¶ 4.) (*See also, e.g., Id.* ¶¶ 5, 9, 10, 11, 49, 75, 78, 108-09, 118, 126, 144, 149-53, 158, 160, 163.)

Thus, the Amended Complaint seeks prospective relief and alleges ongoing violations of federal law, and according to more than a century of Supreme Court, Fourth Circuit and Eastern District jurisprudence, Defendant's Eleventh Amendment arguments should be rejected. [4]

II. PLAINTIFFS' DUE PROCESS CLAIMS ARE FULLY ENFORCEABLE BY THE COURT.

As explained above, it is premature to make a determination of the merits of Plaintiffs' due process claims, which are the heart of the merits of this case. *See* Section I.A., *supra*. Notwithstanding its unripeness, Defendant's assertion that Plaintiffs do not have enforceable due process claims is plainly without merit. The Amended Complaint clearly and repeatedly alleges widespread application of policies and practices that, in violation of due process, are causing ongoing harm to both the named Plaintiffs and thousands of other North Carolina citizens. (*See* Am. Compl.) Defendant has not denied, let alone disproved, any of the complaint's detailed allegations of misinformation, improper notice, use of arbitrary procedures in the denial and termination of services, unreasonable delays in acting on requests for services and in hearing appeals, interruptions of services without notice, and denials of the right to a meaningful hearing. Plaintiffs' due process allegations, which must be accepted as true at this stage, are certainly sufficient to survive a motion to dismiss.

[4] Defendant makes a contract argument that he admits the Fourth Circuit held to be "without merit" when he raised it in *Antrican*. (Def. Memo. at 27-28, n.5.) *See Antrican*, 290 F.3d at 188; *see also Antrican*, 158 F. Supp. 2d 563, 669 n.5 (E.D. N.C.) (holding the argument "without merit"). The argument still has no merit.

A. Plaintiffs and plaintiff class have an entitlement to Medicaid services which is protected by due process.

Defendant asserts that Plaintiffs have no property right in the receipt of Medicaid services to be protected by due process. (Def. Memo. at 18-20.) This argument has already been uniformly rejected by the courts. It is well-established that Medicaid recipients have a statutory entitlement to benefits that is protected by the Due Process Clause of the Fourteenth Amendment. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980) (Medicaid recipient has right protected by due process to continued Medicaid benefits to pay for services from the qualified provider of his choice). In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court noted that termination of public benefits "pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Id.* at 264. Thus, the Court held that such individuals (which include the Plaintiffs in this case) are entitled, under due process, to an evidentiary hearing before benefits can be discontinued. Such recipients must also be given an "opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Id.* at 267. These principles

> require that a recipient have timely and adequate notice detailing the reasons for a proposed termination . . .. The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard . . .. Welfare recipients must . . . be given an opportunity to confront and cross-examine the witnesses relied on by the department . . . [and] . . . the recipient must be allowed to retain an attorney if he so desires. . . And, of course, an impartial decision maker is essential.

Id. at 268-71.

The due process-protected property right to Medicaid has been repeatedly enforced by the courts in the context at issue here: the denial, reduction, or termination of requested services for Medicaid recipients. *See, e.g., Granato v. Bane*, 74 F.3d 406 (2d Cir. 1996); *Catanzano v. Dowling*, 60 F.3d 113 (2d Cir. 1995); *Featherston v. Stanton*, 626 F.2d 591 (7th Cir. 1980);

Jonathan C. v. Hawkins, No. 9:05-CV-43, 2007 WL 1138432 (E.D. Tex. Apr. 16, 2007) (Attach. 1, hereto); [5] *Cramer v. Chiles*, 33 F. Supp. 2d 1342, 1352 (S.D. Fla.1999); *Ladd v. Thomas*, 962 F.Supp. 284 (D. Conn. 1997); *Perry v. Chen*, 985 F. Supp. 1197 (D. Ariz. 1996); *Mayer v. Wing*, 922 F. Supp. 902 (S.D.N.Y. 1996); *Haymons v. Williams*, 795 F. Supp. 1511 (M.D. Fla. 1992); *Easley v. Ark. Dep't of Human Servs.*, 645 F. Supp. 1535 (E.D. Ark. 1986); *Moffitt v. Austin*, 600 F. Supp. 295 (W.D. Ky. 1984); *Greenstein v. Bane*, 833 F. Supp. 1054, 1076 (S.D. N.Y. 1993); *Frank v. Kizer*, 261 Cal. Rptr. 882 (Cal. App. 1989). *See also* 42 C.F.R. § 431.205(d) (federal Medicaid regulation incorporating due process requirements of *Goldberg*).

Contrary to Defendant's repeated assertion (Def. Memo. at 11, 16, 19) all three named Plaintiffs and all class members are Medicaid recipients, not applicants. (*See* Am. Compl. at ¶¶ 9-11, 13.) However, even if Plaintiffs could somehow be characterized as Medicaid applicants, this would not be significant. Courts addressing the issue have uniformly held that applicants for Medicaid benefits also have notice and hearing rights protected by due process. *See, e.g.*, *Hamby v. Neel*, 368 F.3d 549 (6th Cir. 2004); *Ortiz v. Eichler*, 794 F.2d 889 (3d Cir. 1986); *Jonathan C.*, 2007 WL 1138432, at *42-44 (and cases cited therein). *See generally Mallette v. Arlington Co. Emp. Supp. Ret. Sys.,* 91 F.3d 630, 637-39 (4th Cir. 1996) (rejecting applicant/recipient distinction in applying due process protections in administration of public benefits statutes). Nothing in the decision cited by Defendant states otherwise. (*See* Def. Memo at 19 (citing *Johnson v. Guhl*, 166 F. Supp. 2d 42 (D. N.J. 2001), *aff'd,* 357 F.3d 403 (3d Cir. 2004).).

Finally, Defendant asserts that Plaintiffs have no due process rights because Medicaid is "time-limited." (Def. Memo. at 19.) He cites no law or court decision which supports this

[5] Pursuant to Local Civil Rule, E.D.N.C., 7.2(d), a copy of this and the other unpublished decisions cited in this brief are being furnished to the Court and opposing counsel.

assertion, and it is contradicted by the voluminous authority cited above. The sole authority cited by Defendant to demonstrate that Medicaid is a time-limited benefit is an internal unpublished state agency practice requiring periodic reauthorization of services as part of its utilization review function. (*Id.* at 19, n. 4.) This internal practice is of no relevance to Plaintiffs' continuing statutory entitlement to Medicaid benefits. The state agency has the right to conduct periodic utilization reviews in order to assure that recipients continue to meet the requirements to receive Medicaid payment for their services. *See* 42 C.F.R. §§ 435.916(a), 440.230(d). However, these periodic reviews in no way convert Medicaid into a time-limited benefit not protected by due process. To the contrary, the federal Medicaid Act requires the state agency to furnish Medicaid to all eligible individuals, 42 U.S.C. § 1396a(a)(8), and the implementing regulation specifies that the state agency must "continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." 42 C.F.R. §435.930(b).

Lacking support in the Medicaid context, Defendant's brief relies on decisions about programs other than Medicaid. (Def. Memo. at 19-20.) These programs and cases are clearly distinguishable. *Kaplan v. Cherthoff*, 481 F. Supp. 2d 370 (E.D. Pa. 2007), concerned the due process rights of non-citizen immigrants whose entitlement to SSI benefits was explicitly time-limited by Congress at 8 U.S.C. § 1612(a)(2). *Shvartsman v. Apfel*, 138 F.3d 1196 (7th Cir. 1998), concerned non-citizens whose entitlement to Food Stamps was explicitly terminated by Congress. *Holman v. Block*, 823 F.3d 56 (4th Cir. 1987), concerned the Food Stamp program which, unlike Medicaid, contains a time-limited entitlement in the statute at 7 U.S.C. § 2020(e)(10). And in *Holman*, the Court specified that there is a protected property interest in the right to seek recertification of Food Stamp benefits. *Id.* at 59, n.5. In sum, Plaintiffs have an

enforceable property interest in Medicaid benefits which is protected by the Due Process Clause of the U.S. Constitution.

III. PLAINTIFFS HAVE BEEN DEPRIVED OF ESSENTIAL MENTAL HEALTH SERVICES AND DO NOT HAVE AN ADEQUATE ADMINISTRATIVE REMEDY.

A. Exhaustion of administrative remedies is not required.

Defendant asserts that, because the named Plaintiffs have not exhausted their administrative remedies, they have somehow abandoned or failed to perfect their due process rights. (Def. Memo. at 2-4, 17-18, 24.) Defendant glibly treats Tyler McCartney's loss of services and failure to fully pursue his administrative appeal as if this were simply a voluntary choice made by his mother and case manager, instead of the result of multiple violations of Tyler's due process rights. (*Compare* Def. Memo. at 2-3, 17-18, 24 *with* Am. Compl. at ¶¶ 29-60.; s*ee, e.g., Id*, at ¶ 40-41 (alleging that Mrs. McCartney withdrew her appeal only after being told verbally and in writing by Defendant that the appeal would not address her child's current need for the service and thus would serve no meaningful purpose).) And while it is true that Plaintiffs McMillan and Tipton have pending administrative appeals, the Amended Complaint clearly alleges that systemic problems with the administrative process have caused and are causing them and others to experience multiple due process violations that cannot be fully cured through an administrative appeal, including reductions in services for which no appeal rights are given (Am. Compl. ¶¶ 63-65); improper interruptions in payment for services (*Id.* ¶¶ 76, 106); and the lack of a meaningful hearing and termination of services without notice after the appeal is completed, regardless of outcome. (*Id.* ¶¶ 75, 148-150.) The Amended Complaint also clearly alleges an imminent threat that Katie Tipton's services will be interrupted again pending her appeal. (*Id.* ¶ 108.) Indeed, Defendant's evidence indicates that services may not be continued

pending the outcome of the administrative appeals for any class member unless this Court acts. (*See* Tara Larson Aff. ¶¶ 7-8.) Finally, because all three named Plaintiffs continue to receive Medicaid services and will continue to be subject to periodic review of those services by Defendant, all continue to be threatened with the loss of those services due to Defendant's ongoing illegal policies and practices. (Am. Compl. ¶ 3) Thus, all three named Plaintiffs and thousands of class members similarly situated need injunctive relief from this Court to protect their right to due process prior to the denial, termination, or reduction of their Medicaid services.

Defendant's theory that no due process violation can occur until after the plaintiff has exhausted the administrative hearing process (Def. Memo. at 21) would mean there is no effective remedy for three types of due process violations alleged in this lawsuit. The first group of violations denies Plaintiffs and the putative class *access to the hearing process itself*, through such practices as oral discouragement and misinformation, delays in acting on requests for services, denials and interruptions of service without notice, and improper written notices. (*See* Am. Compl. ¶¶ 34, 37, 40-41, 44, 52, 63-65, 70-71, 118-120, 127-142, 154-155.) The second group of alleged violations involves *the hearing process*, including improper dismissals of hearing requests, long waits for hearings, illegal interruptions of services while waiting, denial of a meaningful hearing, and the termination of services without notice after the hearing, regardless of outcome. (*See Id.* ¶¶ 38-41, 72-73, 75, 76, 105-109, 124, 125, 143-157.) The third group of due process violations involves the *initial decision-making process* on requests for services, wherein Defendant is systemically denying, reducing and terminating essential mental health services under non-ascertainable, subjective, arbitrary standards and procedures that are not consistently and rationally applied. (*See Id.* ¶¶ 51, 53, 54, 74, 80, 81, 93-95, 101-103, 110, 111, 121-126.) Plaintiffs have requested injunctive relief to bring a halt to these due process

violations so that they will have access to a non-arbitrary and meaningful administrative process in the future.

It is well-settled that administrative remedies need not be exhausted before seeking injunctive relief under 42 U.S.C. § 1983 to challenge constitutional violations. *Patsy v. Bd. of Regents,* 457 U.S. 496 (1982). Requiring such exhaustion would be particularly inappropriate here, where it is the fairness of the administrative process itself which is at issue. Plaintiffs are alleging that Defendant's practices thwart access to meaningful administrative remedies. In circumstances such as these, courts do not require plaintiffs to use the agency's proffered "remedy" even to enforce federal statutory claims. *Delong v. Houston,* No. 00-CV-4332, 2000 WL 1689077, at *2 (E.D. Penn. Oct. 26, 2000) (Attach. 2, hereto) (Medicaid's legislative history indicates that 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). [6]

The cases cited by Defendant do not support his argument for requiring administrative exhaustion. In *Zinerman v. Burch*, 494 U.S. 113 (1990), the Supreme Court upheld the *reversal* of the district court's dismissal of due process claims, holding that post-deprivation remedies were not sufficient under due process and that the sufficiency of the process provided by the state was an

[6] Defendant suggests, without citation to case law, that this case is not ripe because Plaintiffs have not exhausted administrative remedies. (Def. Memo at 24.) However, the ripeness doctrine seeks only to ensure that courts will consider issues that are "clear-cut and concrete." *Atl. Marine Corps Communities v. Onslow Co.,* 497 F. Supp. 2d 743, 749 (E.D. N.C. 2007). The systemic due process issues raised in this case have already occurred and are sufficiently concrete for the court to consider. *See, e.g., Risinger v. Concannon,* 117 F. Supp. 2d 61, 65-66 (D. Me. 2000) (case was ripe when plaintiffs sought relief for concrete injuries caused by the defendants' failure to provide or arrange for treatment services required by federal Medicaid requirements.)

issue requiring a decision on the merits. *Riccio v. County of Fairfax*, 907 F.2d 1459 (4th Cir. 1990), is also inapposite because, there, the court found on the merits that the pre-deprivation procedures followed by the government were constitutionally adequate. In *Mundell v. Bd. of Co. Comm'rs*, No. 05-cv-00585-REB-MJW, 2005 WL 2124842 (D. Colo. Sept. 2, 2005) (Attach. 3, hereto), the court denied the defendant's motion to dismiss, holding that plaintiff's due process claim was enforceable under 42 U.S.C. §1983 and that the right was clearly established. The court did subsequently grant summary judgment to the defendant, but only because the plaintiff raised no objection to the lack of a pre-deprivation hearing and had already won his administrative appeal and been awarded all of his benefits before the lawsuit was filed. *See* 2007 WL 128805 (D. Colo. Jan. 12, 2007) (Attach. 4, hereto). Plaintiffs should not be required to complete the administrative appeal process before their case is heard in this Court.

B. Post-deprivation remedies do not satisfy due process.

Defendant also intimates that the problems complained of here are "random and unauthorized" acts and that Plaintiffs have failed to state a claim because they have not alleged inadequacy of post-deprivation remedies. (Def. Memo. at 28-29.) This argument ignores the numerous allegations in the Amended Complaint that specifically challenge the administrative remedies provided by Defendant. (*See* Am. Compl. at ¶¶ 117-158.) This argument also ignores the Amended Complaint's clear allegations that the due process violations at issue are not random or unauthorized, but rather systemic policies and practices "either directed or ratified" by Defendant. (*Id.* ¶ 2, *See also Id.* ¶¶ 117, 158.)

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IV. PLAINTIFFS' CLAIMS ARE ENFORCEABLE UNDER SECTION 1983.

The Amended Complaint seeks to enforce a provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(3), and the Due Process Clause of the U.S. Constitution pursuant to 42 U.S.C. § 1983. (Am. Compl. ¶¶ 159-64.) The Court should reject Defendant's argument that Plaintiffs cannot pursue their statutory claim. (*See* Def. Memo. at 6-7, 13-17.)

Defendant notes that to seek redress for a statutory violation under § 1983, a plaintiff must "assert the violation of a federal *right*, not merely some violation of federal law." (*Id.* at 6.) He then states that "Plaintiffs have alleged that defendant's policies and practices 'violate the Medicaid Act,' (Comp. ¶ 163), but they decline to elaborate…." (*Id.* at 6-7, *Id.* at 14.) Defendant's brief, however, ignores the very next sentence of the Amended Complaint, which asserts: "These violations [described in paragraphs 1-161], which have been repeated and knowing, entitle the Plaintiff and plaintiff class to relief under 42 U.S.C. § 1983 and 42 U.S.C. § 1396a(a)(3) of the Medicaid Act." (Am. Compl. ¶ 164.) Without question, the complaint is "broken down into manageable analytic bites" such that the Court can decide whether the claim can be enforced under § 1983. *Blessing v. Freestone,* 520 U.S. 329, 342 (1997).

In apparent comprehension that the Amended Complaint seeks to enforce 42 U.S.C. § 1396a(a)(3), Defendant spends the bulk of his time arguing that the provision is not privately enforceable. (Def. Memo. at 7, 13-17.)[7] The Supreme Court uses a three-part test for determining if Congress intended to create a privately enforceable right under § 1983.

[7] Defendant's arguments about the merits of the case (Def. Memo. at 7) are not relevant to deciding whether Congress intended to confer individually enforceable rights. "[T]he judicial function is exclusively one of determining what 'Congress intended' by enactment of the statute…." *Doe v. Kidd,* 501 F.3d 348, 365-66 (4th Cir. 2007) (quoting *Gonzaga Univ. v. Doe,* 536 U.S. 285-86 (2002). His mootness argument (Def. Memo. at 13 n.3) is also misplaced. *See, e.g., Id.,* 501 F.3d at 353-54. *See also*, Arg. III, *supra*.

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing v. Freestone, 520 U.S. 329, 340-41 (1997) (citations omitted); *see also Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 503 (1990) (applying factors to allow enforcement of a Medicaid Act provision).[8] When applying the test, "a court must be careful to ensure that the statute at issue contains 'rights-creating language' and that the language is phrased in terms of the person benefited, not in terms of a general 'policy.'" *Pee Dee Health Care v. Sanford,* 509 F.3d 204, 210 (4th Cir. 2007) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) and enforcing a Medicaid Act provision).

The provision at issue here states:

> *A state* plan for medical assistance *must* … 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. § 1396a(a)(3) (emphasis added). This provision is enforceable under § 1983. It is expressly intended to benefit "any individual" whose claim for medical assistance is denied or not acted on promptly, a group that clearly includes Plaintiffs. The provision is not so vague or amorphous that a judge cannot competently enforce it: the state Medicaid agency must provide for granting an opportunity for a fair hearing when an individual's Medicaid claim is denied or not acted on with reasonable promptness. Federal regulations implementing the provision

[8] If the factors are met, the provision is enforceable unless the Act provides a private remedy that forecloses use of § 1983. *Blessing*, 520 U.S. at 341. The Medicaid Act does not foreclose a § 1983 action. *See, e.g., City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 122 (2005) (citing *Wilder*, 496 U.S. at 521, and listing the Medicaid Act as a statute that does not provide a private remedy).

further define what it means to "provide for granting an opportunity for a fair hearing." *See* 42 C.F.R. §§ 431.200-431.246.[9] Finally, (a)(3) uses mandatory rather than precatory terms, providing that the State "must" provide for the opportunity for a fair hearing.

Courts uniformly hold that § 1396a(a)(3) meets the *Gonzaga/Blessing/Wilder* test. *Gean v. Hattaway,* 330 F.3d 758 (6th Cir. 2003), for example, held that § 1396a(a)(3) meets the test because it creates an obligation on the State and is phrased in terms benefitting Medicaid recipients. *Id.* at 772-73. "Moreover, given that the judiciary regularly determines whether an individual has been afforded procedural due process rights, a right to a fair hearing is not so vague and amorphous that its enforcement is beyond the abilities of a competent judiciary." *Id.* at 773. *See also Valdez v. N.M. Human Servs. Dep't,* No. CIV 05-451 MV/ACT, slip op. at 8 (D.N.M. March 14, 2006) (Attach. 5, hereto) ("Indisputably, … [§ 1396a(a)(3)] … create[s] law, binding on those states choosing to accept Medicaid funding" and the rights to be enforced are not "vague and amorphous"); *Monez v. Reinertson*, 140 P.3d 242, 245-46 (Colo. Ct. App. 2006); *Kerr v. Holsinger*, No. A-03-68-H, 2004 WL 882203, at *5 (E.D. Ky. Mar. 25, 2004) (Attach. 6, hereto).[10]

While it has not addressed § 1396a(a)(3), the Fourth Circuit recently found that a similarly-worded Medicaid provision creates a federal right. *See Doe v. Kidd,* 501 F.3d 348 (4th

[9] The Supreme Court has consistently considered statutes and regulations in determining whether there is an enforceable right under § 1983. *See, e.g., Gonzaga,* 536 U.S. at 289-90; *Wilder,* 496 U.S. at 519. *Cf. Wright v. City of Roanoke Redev. & Hous. Auth.,* 479 U.S. 418, 420 (1987) ("[I]t is clear that the regulations gave low-income tenants an enforceable right [under § 1983] ... and the regulations were fully authorized by the statute"). *See also, e.g., Doe v. Kidd,* 501 F.3d 348, 356 (4th Cir. 2007) (citing the relevant federal regulation to define the Medicaid requirement in 42 U.S.C. § 1396a(a)(8) for "reasonable promptness").

[10] *Rosie D v. Swift*, 310 F.3d 230 (1st Cir. 2002), cited by Defendant, is not on point. That case is not applying the G*onzaga/Blessing/Wilder* factors. It is applying *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996) and deciding that the Medicaid Act does not contain an intricate remedial scheme that displaces relief through an *Ex parte Young* action.

Cir. 2007). *Doe* allows Medicaid recipients to enforce § 1396a(a)(8), which says the state Medicaid agency "must" provide that "all individuals" will be able to apply for medical assistance and that such assistance will be furnished with "reasonable promptness." In reaching its decision, the Court noted that (a)(8) is expressly intended to benefit "all" individuals. The Court next looked at the words of the statute, as informed by the relevant federal regulations, to find that "reasonable promptness" is not a concept that is too vague or amorphous for the judiciary to competently enforce. Third, *Doe* found that the provision uses mandatory rather than precatory terms (e.g. state plans "must" provide). *Id.* at 356. This Court should apply this same reasoning and decide that the provision at issue here is enforceable. *See also, e.g., S.D. v. Hood,* 391 F.3d 581, 603 (5th Cir. 2004) (allowing Medicaid recipient to enforce § 1396a(a)(10)(A) [requiring medical assistance for "all individuals"], because the provision contains "precisely the sort of 'rights-creating' language identified in *Gonzaga*"); *Sabree v. Richman*, 367 F.3d 180, 190 (3d Cir. 2004) (enforcing §§ 1396a(a)(10)(A) and 1396a(a)(8), because "Congress conferred specific entitlements on individuals in terms that could not be clearer"); *McCree v. Odom*, 4:00-CV-173(H)(4), slip op. at 27 n.7 (E.D. N.C. Nov. 26, 2002) (Attach. 7, hereto) (discussing *Gonzaga* and allowing Medicaid recipients to enforce §§ 1396a(a)(10(A) and a(a)(8)). *Cf. Bio-Med. Applications of N.C. v. Elec. Data Sys.,* 412 F. Supp. 2d 549, 553-54 (E.D. N.C. 2006) (refusing to extend (a)(8) enforcement to health care providers).

Defendant cites *Hunt v. Robeson Co. Dep't of Social Servs.*, 816 F.2d 150 (4th Cir. 1987) and *Boyland v. Wing*, 487 F. Supp. 2d 161 (E.D.N.Y. 2007), cases that concern the Low Income Housing Energy Assistance Act (LIHEAA). Comparing the "text and structure" of these two statutes, *see Gonzaga,* 536 U.S. at 286, it is clear that there are significant differences that will

result in different conclusions regarding private enforcement. LIHEAA provides participating states with an annual lump sum, such that individuals may not receive a benefit if the sum has been expended, *see Hunt* 816 F.2d at 153; *Boyland,* 487 F. Supp. 2d at 169; 42 U.S.C. § 8624. Under the Medicaid Act, participating states receive an ongoing "federal medical assistance percentage" for the services that are consumed by Medicaid recipients. 42 U.S.C. §§ 1396b(a), 1396d(b). LIHEAA is not structured as a "state plan" program; the Medicaid Act is. *Cf.* 42 U.S.C. § 8624(a)-(b) *with* 42 U.S.C. § 1396a ("The state plan shall…"). Congress has stated its intent that State plan programs be privately enforceable. *See* 42 U.S.C. § 1320a-2.[11] Moreover, the text of the LIHEAA fair hearing provision refers to providing a fair hearing "to individuals" whose claims are denied or not acted on promptly. 42 U.S.C. § 8624(b)(13). By contrast, the Medicaid person-centered provision refers to providing a fair hearing "to *all* individuals" whose claims are denied or not acted on promptly. 42 U.S.C. § 1396a(a)(3) (emphasis added). *See Doe*, 501 F.3d at 356 (finding Medicaid reasonable promptness requirement, § 1396a(a)(8), is privately enforceable, in part, because "the provision is expressly intended to benefit 'all' individuals eligible for Medicaid assistance"). *See Boyland,* 487 F. Supp. 2d at 170-71(describing additional differences between LIHEAA and Medicaid to explain why Medicaid Act provisions could be enforced but LIHEAA could not). *Compare Gean,* 330 F.3d 758 (6th Cir. 2003) (holding the Medicaid fair hearing provision, § 1396a(a)(3), creates privately

[11] "[I]n an action brought to enforce a provision of this chapter [the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. § 1320a-2. "The intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in federal courts to the extent they were able to prior to the decision in *Suter v. Artist M.,* 503 U.S. 347 (1992)." 104 *Cong. Rec*. H 10009, 10250 (Sept. 28, 1994).

enforceable rights) *with Cabinet for Human Res. Comm'n Ky. v. N. Ky. Welfare Rights Ass'n*, 954 F.2d 1179 (6th Cir. 1992) (holding LIHEAA does not create privately enforceable rights).

42 U.S.C. § 1396a(a)(3) meets the *Gonzaga/Blessing/Wilder* test for private enforcement under § 1983. Plaintiffs' should be allowed to pursue their statutory claim.

V. DEFRENDANT BENTON IS RESPONSIBLE FOR THE ALLEGED VIOLATIONS OF PLAINTIFFS' RIGHTS.

Defendant argues that Secretary Benton is not liable under § 1983 for the actions of either his employees or his agent, Value Options. (Def. Memo. at 21-24.) This argument must fail under both the law and the facts: Secretary Benton has violated and is violating nondelegable duties to Plaintiffs and the putative class, and the Amended Complaint clearly alleges his direction or ratification of the challenged policies and practices.

The Medicaid Act requires a "single state agency" to administer or supervise administration of the state Medicaid Program. *See, e.g.,* 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10. It is the duty of the single state agency to ensure that federal Medicaid laws are followed. *Id.* These duties–which include assurance of procedural due process protections–are non-delegable. *See, e.g.,* 42 U.S.C. § 1396a(a)(5); 42 C.F.R. 431.10 (single state agency may not delegate to others its authority to "issue policies, rules, and regulations on program matters"). *See also, e.g.***,** *Wood v. Tompkins,* 33 F.3d 600, 608 n. 16 (6th Cir. 1994) (holding that "it would make no sense for Congress to require a participating state to assure in its Medicaid plan that it will protect the health and welfare of … recipients, without also requiring the state to actually implement the promised safeguards"); *J.K. v. Dillenberg,* 836 F. Supp. 694, 699 (D. Ariz. 1993) ("The law demands that the designated single state Medicaid agency must oversee and remain accountable for uniform statewide utilization review procedures conforming to bona fide standards of medical necessity."). *See generally Gen. Bldg. Contractors Ass'n v. Penn.,* 458

U.S. 375, 395-96 (1982) ("The concept of a nondelegable duty imposes upon the principal not merely an obligation to exercise care in his own activities, but to answer for the well-being of those persons to whom the duty runs.… The duty is not discharged by using care in delegating it to an independent contractor.").

In North Carolina, the Department of Health and Human Services is the single state Medicaid agency. *See* N.C.G.S. § 108A-54. As the director of the single state Medicaid agency, Secretary Benton may not delegate his responsibility under federal law to ensure that beneficiaries receive notice and opportunity to be heard whenever their claims are denied, reduced, terminated, or not acted upon with reasonable promptness.

The Fourth Circuit Court of Appeals has repeatedly refused to allow single state agencies with nondelegable duties to insulate themselves from liability under § 1983 by claiming that the buck stopped with someone or something other than the single state agency. *See, e.g., Alexander v. Hill,* 549 F. Supp. 1355, 1356, 1359-62 (W.D. N.C. 1982), *aff'd*, 707 F. 2d 780 (4th Cir. 1983) (holding the single state agency liable for counties' failure to process AFDC and Medicaid applications in a timely manner as required under federal law); *Robertson v. Jackson,* 972 F.2d 529 (4th Cir. 1992) (holding state Food Stamp agency responsible in § 1983 class action for the noncompliance of county departments).[12]

Ignoring the single state agency duty and cases enforcing it, Defendant argues that Plaintiffs must allege that the state is the "moving force" behind the challenged deprivations.

[12] The holding has been applied to the Medicaid agency's delegation to private contractors. In *Morgan v. Cohen,* 665 F. Supp. 1164, 1177 (E.D. Pa. 1987), the court held that the state Medicaid agency impermissibly delegated to private providers excessive discretion with respect to assuring transportation services. *See, e.g., Salazar v. D.C.*, 954 F. Supp. 278, 329-30 (D.D.C. 1996) (holding defendant liable for failure to ensure Medicaid services were provided by private contractors).

(Def. Memo. at 22.) That is exactly what the Amended Complaint does when it alleges that Secretary Benton, who is sued in his official capacity, "directed or ratified" each of the challenged policies and practices pursuant to his non-delegable duty to administer the N.C. Medicaid program in accordance with federal law. (Am. Compl., ¶¶ 2; *see also Id. ¶¶* 12, 117, 158.) These allegations certainly are sufficient, for purposes of a motion to dismiss, to show that the state agency is the "moving force" behind the deprivations of due process, and they distinguish this case from *Reynolds v. Guiliani*, 506 F.3d 183, 191 (2d Cir. 2007), upon which the Defendant relies.[13] Nor is it relevant that Defendant has delegated the responsibility for making the final decisions on claimants' administrative appeals to the director of the Division of Medical Assistance. (Def. Memo. at 23.) This case is about ongoing, systemic due process violations that have been initiated or ratified by Defendant Dempsey. The director of Medical Assistance is simply executing his delegated responsibility within the problem-plagued system described in the Amended Complaint. At any rate, all that *Ex Parte Young* requires is that the named government official "must have *some connection*" with the alleged violation of federal law. 209 U.S. 123, 157 (1908) (emphasis added). The Amended Complaint alleges more than sufficient connection between Defendant Dempsey and the alleged violations of federal law.

VI. PLAINTIFFS HAVE STANDING TO PURSUE THIS CASE.

Defendant also attacks Plaintiffs' standing by arguing that the services they have been deprived of in the past are long gone and they have not alleged that their rights will be violated if they apply for medical assistance in the future. (Def. Memo. at 24.) Once again, Defendant ignores multiple paragraphs of the Amended Complaint that allege ongoing and future harm to

[13] In addition to recognizing the § 1983 claim where the State is the "moving force" behind the deprivation, *Reynolds* also finds liability where there is inaction by a state agency that was aware of the "pattern of misconduct and [did] nothing." *Reynolds*, 506 F.3d at 192.

the named Plaintiffs from the state officials' violations of due process and the Medicaid Act. (*See* Am. Compl., ¶¶ 3, 43, 49, 78, 109.) For example, the complaint alleges that Defendant's policies and practices "imminently threaten Plaintiffs and the Plaintiff class with further illegal denials, reductions, and terminations of coverage in the future." (*Id.*, ¶ 3.)

The complaint also clearly alleges that it is likely that plaintiffs' injuries "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Plaintiff McCartney remains without Medicaid services due to the illegal termination of those services. (Am. Compl., ¶ 43.) This injury can be redressed by the injunctive relief sought: reinstatement of his services and cessation of defendant's illegal practices. (*Id*., Prayer for Relief, ¶¶ 3.a., 3.b.) Plaintiffs Cromartie and Tipton have had payments for their services interrupted and are again imminently threatened with the loss of services. (*Id*, ¶¶ 75, 78, 106-09.) They ask the Court to redress their ongoing and threatened injuries by ordering Defendant to reinstate and continue their services until the illegal policies and practices are corrected. (*Id*., Prayer for Relief.) These allegations are more than sufficient to establish Plaintiffs' standing to pursue their due process claims.

VII. THE COURT SHOULD NOT ABSTAIN FROM HEARING PLAINTIFFS'CLAIMS.

Defendant argues that the Court should abstain from deciding this case under *Younger v. Harris* because it will interfere with ongoing state appeals. (Def. Memo at 25.) Defendant is incorrect because there are no ongoing state proceedings that justify invocation of *Younger*. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colo. River Conservation Dist. v. United States,* 424 U.S. 800, 813 (1976); *Richmond, Fredericksburg, & Potomac River Co. v. Forst,* 4 F.3d 244, 251 (4th Cir. 1995) (internal quotations omitted). The doctrine of abstention is "an extraordinary and narrow exception to the duty of a District Court to

adjudicate a controversy properly before it." *Colorado River,* 424 U.S. at 813. *Younger* abstention is only appropriate when: (1) there is an ongoing state administrative or judicial proceeding; (2) the proceeding implicates important state interests; and (3) there is an adequate opportunity to present the federal claims in that forum. *Forst,* 4 F.3d at 251; *see, e.g., Moore v. Medows,* No. 1:07-CV-631-TWT, 2007 WL 1876017 (N.D. Ga. June 28, 2007) (Attach. 8, hereto).

Younger is inapplicable to this case. First, it does not apply to named plaintiff Devon McCarthy nor to numerous class members because they have no administrative hearings pending. (*See* Am. Complaint, ¶¶ 40, 118-120, 131, 142, 150-52, 154-55.) The Supreme Court has noted that "we have never applied the notions of comity so crucial to *Younger's* 'Our Federalism' when no state proceeding was pending. . . ." *Marisol A. v. Giuliani,* 929 F. Supp. 662, 688 (S.D. N.Y. 1996) (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992)).

Nor is abstention appropriate with regard to Eric Cromartie, Katie Tipton or any other class members who have administrative hearings pending, because the administrative forum would not allow effective redress of their claims. *Younger* does not "compel federal courts to refrain from hearing federal statutory and constitutional claims when the pending state proceeding is an inadequate or inappropriate forum for pursuing these claims." *LaShawn A. v. Kelly,* 990 F.2d 1319, 1322 (D.C. Cir. 1993). As already discussed, the due process violations of which Plaintiffs Cromartie, Tipton and similarly situated class members complain are not curable through an administrative appeal, including termination of services without notice, reductions in services for which no appeal rights are given, lack of a meaningful hearing, and failure to continue services pending the outcome of an appeal.

Courts have declined to abstain when state proceedings would not afford plaintiffs with a forum that allows full and effective redress of their claims. *See, e.g.*, *Kenny A. v. Perdue,* 218 F.R.D. 277, 287 (N.D. Ga. 2003) (holding that abstention was inappropriate in class action challenging systemic deficiencies in foster care system, including due process problems, despite ongoing state juvenile court proceeding because they "do not afford plaintiffs an adequate opportunity to raise their federal claims" nor could the state court "order class-based relief"); *LaShawn A.,* 990 F.2d at 1323 (holding that abstention was inappropriate because state family court proceedings was a "questionable" and inappropriate forum for "multi-faceted class-action challenge" based on federal statutory and constitutional violations to the District of Columbia's administration of its foster-care system.)

Before *Younger* abstention is invoked, the burden is on the state to establish that an important state interest is implicated, *Phillip Morris v. Blumenthal,* 123 F.3d 103, 106 (2d Cir. 1997), however, Defendant has failed to do so. The administrative process at issue in this case is required by the federal Constitution and Medicaid statute and regulations, accordingly, it does not implicate any important issue of state law. *Cf. Meachem v. Wing,* 77 F. Supp. 2d 431, 443 (S.D.N.Y. 1999) (holding that suit involved important constitutional and Medicaid issues, accordingly, no important state interests sufficient to invoke the *Burford* abstention existed). The Fourth Circuit has enumerated vital state interests for *Younger* purposes, including adoption, abuse and neglect, and regulation of public health and hygiene, none of which involve federal programs like Medicaid. *See Harper v. Pub. Serv. Comm'n of W. Va.,* 396 F.3d 348, 352-53 (4th Cir. 2005). The court should not abstain from deciding this case.

CONCLUSION

Plaintiffs respectfully ask this Court to deny Defendant's Motion to Dismiss.

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ATTORNEYS FOR PLAINTIFFS

/s/ Douglas Stuart Sea
Douglas Stuart Sea
Dorothee Alsentzer
Legal Services of Southern Piedmont, Inc.
1431 Elizabeth Avenue
Charlotte, North Carolina 28204
Telephone: (704) 376-1600
dougs@lssp.org

/s/ Jane Perkins
Jane Perkins
Sarah Somers
National Health Law Program
211 N. Columbia Street
Chapel Hill, NC 27514
Telephone: (919) 968-6308
perkins@healthlaw.org