No. 09-1441

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

D.T.M., a minor child, by his mother Penny McCartney; E.C., a minor child, by his mother Selena McMillan; K.T., a minor child, by her father, Greg Tipton, individually and on behalf of all others similarly situated,

***Plaintiff-Appellees*,**

v.

LANIER M. CANSLER, Secretary of North Carolina Department of Health and Human Services, in his official capacity,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Southern Division

REPLY BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 09-1441 Caption: D.T.M., et al. v. Cansler, Sec., NC DHHS, in his official capacity

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CERTIFICATE OF SERVICE

****

I certify that on this date I served this document on all parties as follows:

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(date)

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INTRODUCTION

In reply to the Brief of Appellees, Secretary Cansler respectfully submits the following additional points for this Court's consideration.

ARGUMENT

I. ARTICLE III JURISDICTIONAL ISSUES SHOULD BE CONSIDERED BY THIS COURT.

Contrary to plaintiffs' arguments (Pl.-Appellees' Br. at 38-43), Secretary Cansler does not seek review of any part of the order below other than the denial of his Eleventh Amendment immunity. Neither is he avoiding compliance with Rule 3 of the Rules of Appellate Procedure or 28 U.S.C. § 1292(b) by arguing lack of jurisdiction. Instead, the Secretary is merely appropriately urging this Court to be satisfied of its jurisdiction and that of the court below as a necessary independent evaluation. Just as the parties may not confer subject matter jurisdiction by consent, neither can they preclude this Court from performing its duty to evaluate its jurisdiction and that of the court below.

A. Plaintiffs' Refusal To Be Candid About The Facts Is Unhelpful To The Proper Resolution Of The Jurisdictional Issues Before This Court.

The original motion to dismiss (J.A. 87-160) included a proper factual challenge to the grounds for subject matter jurisdiction. The evidence submitted in support of that motion - which remains unrebutted to this day - shows that plaintiffs

lack standing because they are not suffering any legal injury in fact, their claims were not then (and are not now) ripe for adjudication, and they did not allege an ongoing violation of any enforceable federal right, despite the many alleged historical errors in paperwork and processes they enumerated.

The evidence in support of that motion related to and disputed several of the factual allegations in the amended complaint, and it included information about the then-existing system of informal and formal Medicaid appeals (J.A. 91-97), the limited duration of the Medicaid services at issue (90 days in the case of Community Support Services ("CSS")) (J.A. 99),[1] and the plaintiffs' history regarding their requested (or previously requested) Medicaid services (J.A. 98-113). The unrebutted evidence was that D.T.M. was not receiving CSS subsequent to 17 May 2008 because no services had been requested for him, and that payment for services during the last

[1] Plaintiffs argue that the Secretary cites no authority for the proposition that they have no due process rights because "Medicaid is 'time limited.'" (Pl.-Appellees' Br. at 50) Of course, that is not really the proposition set forth by the Secretary. What the Secretary has explained is that when certain medical assistance is authorized for discrete periods of time, no property right exists in the mere expectation that identical assistance will be authorized for subsequent periods of time. (Def.-Appellant's Br. at 48-49)

If, on the other hand, plaintiffs are suggesting that the Secretary has cited no authority for the proposition that the medical assistance at issue is time-limited, they have conveniently forgotten the evidence in support of the initial motion to dismiss, among other evidence. The Secretary's evidence that medical assistance for the services requested by plaintiffs is of limited duration is unrebutted. (J.A. 99-100)

authorized period of services, ending 17 May 2008, had not been made because the services (if any) had not been billed. (J.A. 100) The evidence also showed that K.T.'s father had filed an appeal (J.A. 114), which was then pending (J.A. 100).

The evidence also included the record of E.C.'s pending formal appeal (J.A. 115-61), which record established without contradiction that E.C. was represented by counsel (J.A. 116-24), pre-hearing discovery had been completed (J.A. 122), and at the hearing E.C. could continue to be represented by counsel, present evidence, and cross-examine witnesses (J.A. 139-41). Moreover, the issues and proposed adverse witnesses had been disclosed to E.C. in advance of the hearing. (J.A. 142-45) Most significantly, the record included a copy of the actual notice to E.C. advising that his prior authorization request had been denied. That notice explained the denial, explained his then-available appeal rights, and provided information about how he could learn more about the appeal process and how to seek legal assistance. (J.A. 146-48)

These facts were, and remain, highly relevant to the issues of standing, mootness and ripeness. In addition, they confirm the lack of any ongoing violation of any plaintiff's enforceable federal rights. Even today, however, plaintiffs completely ignore the factual record in this case, arguing instead that the allegations in their amended complaint constitute "the facts." (Pl.-Appellees' Br. at 3-6) They

have even moved to strike portions of the record from the Joint Appendix and part of the Addendum to the Secretary's brief on the ground the information was not considered by the district court. The Addendum includes the most current information about the progress of E.C.'s appeal, which in and of itself is the best evidence of the real process available to persons currently filing Medicaid appeals in North Carolina. That plaintiffs seek to conceal from this Court the unrebutted, up-to-date evidence about how E.C.'s appeal has progressed is simply astounding. Regardless of how relevant the actual facts are to the jurisdictional issues facing this Court, plaintiffs would restrict the Court to the bare allegations of their complaint.

The court below could (and should) have accepted and evaluated the evidence before it to determine whether plaintiffs had met their burden of showing jurisdiction. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (assuming court's ruling on jurisdictional motion to dismiss was based on evidence produced at hearing on motion); s*ee also McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) ("when considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction").

This appeal does not seek appellate review of the district court's order other than its denial of defendant's Eleventh Amendment immunity, but - unlike the plaintiffs - the Secretary believes this Court should be free to consider all available evidence not only on the Eleventh Amendment jurisdictional issue, but also on the Article III jurisdictional issues. When, as here, a defendant challenges the existence of subject matter jurisdiction in fact, the plaintiff bears the burden of proof. *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir.), *cert. denied*, 130 S. Ct. 229, 2009 U.S. LEXIS 7107 (2009). Plaintiffs mistakenly imply that they have heretofore lacked an opportunity to present evidence (Pl.-Appellees' Br. at 18), but nothing prevented them from attempting to controvert the evidence about their status and the process available to them in opposition to the initial motion to dismiss.

B. Plaintiffs' Allegations Do Not Establish Jurisdiction.

Even considering plaintiffs' interpretation of their claims as true, plaintiffs' amended complaint fails to allege injury in fact, fails to show their claim are ripe for adjudication, and shows in some instances that their claims are moot. Plaintiffs assert that their claims fit into three categories. The first, consisting of mistakes made during the initial decision-making process, includes failure to consider the opinions of treating clinicians, failure to request sufficient information to evaluate requests, failure to provide recipients with a meaningful opportunity to present evidence, and

"applying decisional standards that are not ascertainable by recipients." (Pl.-Appellees' Br. at 19)

Without discussing the factual accuracy of those allegations (a merits inquiry), it is obvious that by definition the initial stage of a process precedes all administrative hearings and any subsequent review thereof, such that mistakes at the initial stage do not deprive anyone of anything without due process of law. Instead, they are typically the very kind of issues about which people complain *during* due process review. Not only do the examples plaintiffs give not constitute deprivations without due process, they violate no statutory right created in 42 U.S.C. § 1396a(a)(3).[2] That statute does not create a substantive federal right to have all initial decisions based on the opinions of treating clinicians, or a substantive federal right to have initial decision-makers request sufficient information from others to evaluate requests, or a substantive federal right to a meaningful opportunity to present evidence before an initial decision on a request for approval of services is made, or a substantive federal right to understand the decisional standards in the first instance. Significantly, even

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[2] 42 U.S.C. § 1396a(a)(3) provides:

> 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.

if those matters did constitute rights, no plaintiff claims any such factor was the cause of them being deprived of medical assistance.[3] Therefore, plaintiffs lack standing to complain of these matters. *See Bishop v. Bartlett*, 575 F.3d 419, 425-26 (4th Cir. 2009) (plaintiffs lack standing to bring deprivation without due process claim without alleging specific, personal injury caused by the challenged practice).

The second category of claims is mistakenly said to consist of access to the hearing process, including oral denials of requests, discouragement and misinformation concerning requests, and improper notices. (Pl.-Appellees's Br. at 19-20) Without discussing the factual accuracy of those allegations (the merits), it is obvious that mistakes at this stage of the process, which again precede all administrative hearings and the subsequent review thereof, do not deprive anyone of anything without due process of law. Not only do the examples given not constitute deprivations without due process, they do not violate any substantive federal right created in § 1396a(a)(3). That statute does not create a substantive federal right to

[3] It bears repeating that medical assistance means payment of the cost of care and services. 42 U.S.C. § 1396d(a). The denial of a claim for medical assistance might well qualify as a legitimate legal injury under Medicaid law and as a deprivation of property under the due process clause of the Fourteenth Amendment, but such a claim relates to denial of payment for services rendered, not to a lack of perpetually uninterrupted services. *See Brown v. Tenn. Dep't of Fin. & Admin*., 561 F.3d 542, 545 (6th Cir. 2009) (state's duty under Medicaid is to pay for services, not to ensure they are provided).

have all initial decisions made in writing, or a substantive federal right to have initial decision-makers refrain from discouraging requests for services or from ever being the source of misinformation, or a substantive federal right to receive a "proper" notice, regardless of what happens thereafter. *See Mundell v. Bd. of County Comm'rs*, 2007 U.S. Dist. LEXIS 2635 (D. Colo. Jan. 12, 2007) (Def.-Appellant's Br., ADD. 39-43) (defective notice does not result in a violation of due process without a showing of prejudice). In any event, no plaintiff claims to have been deprived of medical assistance because of any such factor.

The final category of claims is said to occur during the hearing process. It includes dismissals of hearing requests, delays, interruption of services awaiting hearings, and denial of "meaningful" *de novo* hearings. (Pl.s-Appellees' Br. at 20) Without discussing the factual accuracy of those allegations (the merits), it is obvious that mistakes of this nature, which again precede the conclusion of administrative hearings and the subsequent review thereof, do not deprive anyone of anything without due process of law. Not only do the examples given not constitute deprivations without due process, they do not violate any statutory right created in § 1396a(a)(3). That statute does not create a substantive federal right never to have an appeal dismissed, a substantive federal right never to have an interruption in services pending appeal, a substantive federal right to have hearings without delay,

or a substantive federal right to meaningful *de novo* hearings. Further, no plaintiff claims to have been deprived of medical assistance because of any such factor.

It is vital to note that only plaintiff E.C. is even potentially positioned to have standing to complain about the hearing process, but his claims - whatever they might be - are not yet ripe for adjudication. The facts in his case are remarkably similar to those in *Summer H. v. Fukino*, 2009 U.S. Dist. LEXIS 38924 (D. Haw. May 4, 2009) (Def.-Appellant's Reply Br., ADD. 1-12), holding that although the plaintiffs had alleged a deprivation of Medicaid benefits without due process of law, their claims were not ripe for adjudication. In *Fukino* the plaintiffs were in the process of appealing proposed Medicaid cuts, and because - as here - adverse decisions were not certain to follow in the pending appeals, they had not yet suffered cognizable injuries and their claims were not ripe.[4] In *Fukino* the district court noted that "by bringing this claim prior to participating in the administrative appeals process, [plaintiffs] are attempting to avoid the very relief they purport to seek. [Plaintiffs] have not demonstrated that there is an actual or imminent denial of benefits without due process." 2009 U.S. Dist. LEXIS 38924, at *19 (Def.-Appellant's Reply Br., ADD. 9-10).

[4] This reasoning also shows that K.T.'s claims were not ripe when the amended complaint was filed and her administrative appeal was pending, and that D.T.M., having never appealed, had even less of a claim to which jurisdiction extends.

In addition to the foregoing constitutional bar, factually E.C. cannot complain of delay during the hearing process, for he requested the delay. (J.A. 131-35) His appeal was not dismissed, but instead has progressed all the way to judicial review in the North Carolina courts. (Def.-Appellant's Br., ADD. 16-28) It is not clear whether by *de novo* E.C. means the chance to have his claim reviewed without any deference given to the initial decision or to present evidence not previously available or considered at the time of the initial action, but in either case his hearing was demonstrably *de novo*. (J.A. 283-94) Finally, even if his services were interrupted at some point during the appeal (J.A. 100), his right to medical assistance was not, because it was authorized retroactive to 19 March 2008. (J.A. 275, ¶ 9)

Plaintiffs simply fail to grasp that there is no violation of due process for a federal court to redress unless there has been some deprivation of a property right.[5] First of all, the word "deprive" in the Due Process Clause suggests more than a negligent act, and "we should not open the federal courts to lawsuits where there has been no affirmative abuse of power." *Daniels v. Williams*, 474 U.S. 327, 330 (1986) (citations omitted). Even then, there is no *unconstitutional* deprivation unless the

[5] The Secretary has previously shown why plaintiffs have no property right in medical assistance for unapproved services, and he will not repeat that argument here.

deprivation is the result of inadequate procedural protections. Inadequate procedures or processes, in and of themselves, do not violate the Constitution.

Contrary to plaintiffs' misunderstanding in this regard (Pl.-Appellees' Br. at 16, 30 n.5), the Secretary does not seek to insulate his Department from accountability for violations of due process. Instead, he appropriately insists that there be a deprivation resulting from deficient process before there is an issue of accountability. And, indeed, that means plaintiffs have no due process claim unless and until payment is refused for a service to which they are entitled, because - at best - that is the only property right of which they can be deprived. Plaintiffs neither have standing to bring such claims (or such claims are not yet ripe for adjudication) until a final decision on appeal has sustained an initial adverse decision denying an application for medical assistance, and the final decision is shown to have been tainted by some constitutionally-deficient process.

C. Plaintiffs Did Not Allege Sufficient Facts To Have Standing.

When a plaintiff fails to allege sufficient facts to support standing, his claims should be dismissed for lack of jurisdiction. *Bishop*, 575 F.3d at 425-26. The Supreme Court has called the rules of standing "threshold determinants" to jurisdiction:

> The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.

Warth v. Seldin, 422 U.S. 490, 517-18 (1975). As shown above, plaintiffs did not allege a legal injury (deprivation of medical assistance) caused by any of their enumerated process problems, even assuming them all to be true.

D. Plaintiffs' Claims Have Become Moot.

Events have simply overtaken the pace of this litigation. Plaintiffs purport to request prospective relief from a system that no longer exists. A judgment on the merits would not resolve any case or controversy arising out of the current system of Medicaid appeals, and it is pure speculation how the system will operate beyond 2010.

The former informal appeal system and the notices applicable thereto pose no ongoing or future threat to plaintiffs, and their challenges to the policies and practices associated with the former system are moot. Because their claims are moot, in accordance with established practice this Court should vacate the order below and remand with a direction to dismiss. Moreover, the discretionary power to withhold injunctive and declaratory relief for prudential reasons, even in a case not

constitutionally moot, is well established. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (to obtain prospective injunctive relief, a party must convince the court that there is some "cognizable danger" of recurrent violations, more than the "mere possibility" that suffices to keep the case alive for constitutional purposes). As previously argued, plaintiffs have failed to present any credible evidence that they face any realistic danger of recurrent violations of any substantive federal rights under the new system.

The Secretary has already explained why some of the familiar axioms of mootness jurisprudence do not apply when the changed circumstances are due to intervening legislation and not to the voluntary conduct of a litigant. In particular, neither the strict scrutiny associated with the voluntary cessation of challenged conduct cases (Def.-Appellant's Br. at 18), nor the doctrinal baggage included among the "capable of repetition" line of cases (Def.-Appellant's Br. at 19), applies when a case is mooted by legislative change, as this Court has recognized. Nonetheless, undeterred, plaintiffs have cited a bevy of such cases in urging this Court to reject the Secretary's position on mootness. In response, all the Secretary can do is remind this Court that the doctrines espoused in plaintiffs' cases do not apply to the situation at hand.

In arguing that the automatic substitution of officials provided for in Rule 25(d) precludes their claims from having been mooted, plaintiffs make a common error by confusing abatement with mootness. *See Nat'l Treasury Employees' Union v. Campbell*, 654 F.2d 784, 787 (D.C. Cir. 1981). It is quite true that the automatic substitution rule precludes the abatement of an action, but - as the Secretary has previously argued - that has nothing to do with mootness. Further, a claim of mootness can be raised at any time, and this Court considers Article III concerns whether raised below or not.

II. THE *EX PARTE YOUNG* DOCTRINE DOES NOT APPLY.

A. Plaintiffs Do Not Seek Prospective Relief.

Plaintiffs argue that they want the district court to "prospectively reinstate coverage for services that were improperly reduced or terminated." (Pl.-Appellees' Br. at 12) However, unlike the situation in *Kimble v. Solomon*, 599 F.2d 599 (4th Cir.), *cert. denied*, 444 U.S. 950 (1979), this is not a termination-of-benefits case to which the concept of "restoration" makes any sense. One cannot have "restored" that which was not taken away. Because the requested medical assistance was never approved, there is nothing for the court to "reinstate."

Plaintiffs fault the Secretary for stating that plaintiffs are receiving the medical assistance they have requested and that no plaintiff has been denied full and fair

reviews of past adverse decisions, without citation to the record. (Pl.-Appellees' Br. at 44) The following citations to the record are, therefore, provided: (1) Not only is D.T.M. receiving his currently requested services (J.A. 252-53, ¶¶ 19-21), he never appealed any denials of his former requests to OAH (J.A. 272-73); (2) K.T. is receiving her currently requested services (J.A. 296-97, ¶¶ 12-16), and she too never appealed any denials of her former requests to OAH (J.A. 272-73); and (3) E.C. is receiving his currently requested services (J.A. 276, ¶¶ 11-12), and is pursuing his appeal in North Carolina courts. (Def.-Appellant's Br., ADD. 16-28)

When considering whether the requested relief is prospective, it is important to distinguish employment reinstatement cases, such as *Nelson v. Univ. of Texas*, 535 F.3d 318 (5th Cir. 2008). If a person has lost or wrongly been denied employment to which he had a legitimate claim of entitlement, his loss is deemed an ongoing violation such that reinstatement is considered a prospective remedy to end an ongoing violation of his rights. However, even in those circumstances an award of back pay is not prospective. *Dwyer v. Regan*, 777 F.2d 825, 835 (2d Cir. 1985) (noting that demand for back pay would necessarily be paid from the state treasury in violation of the Eleventh Amendment).

Here, plaintiffs have no issue with their current entitlement to Medicaid. Neither their current services nor their current medical assistance is challenged in this

litigation. Unlike the jobless person, plaintiffs' losses - if any - were for and during a prior period of time, and do not constitute an ongoing violation of anything. Their issues all deal with requests for medical assistance for prior blocks of time. Plaintiffs cannot be put back in time, and their current needs cannot be based upon disapproved medical assistance in the past. Their Medicaid "right" is not to receive services indefinitely, somewhat akin to the right to a job wrongfully denied, but to have payments made to and for those who have provided approved services in the past. There is nothing prospective about that.

B. Plaintiffs Are Wrong About Exhaustion.

The Supreme Court has clearly distinguished between a claim that an established state procedure does not afford procedural due process and a claim that a property right was lost because of a random and unauthorized act by a state actor. In the latter case, the existence of an adequate post-deprivation state remedy for the loss affords due process. *Hudson v. Palmer*, 468 U.S. 517, 531-33 (1984). A § 1983 action challenging mistakes made by state employees, rather than challenging the official state procedures themselves, is foreclosed by adequate post-deprivation process.

Plaintiffs continue to assert that they are not required to exhaust administrative remedies (Pl.-Appellees' Br. at 46), but plaintiffs are wrong. They are wrong because

they must show that official state procedural remedies are inadequate, and they may not seek relief under § 1983 without first pleading and proving the inadequacy of official state administrative processes and remedies to redress the alleged due process violations. *See Jefferson v. Jefferson County Pub. Sch. Sys*., 360 F.3d 583, 587-88 (6th Cir. 2004); *Birkenholz v. Sluyter*, 857 F.2d 1214 (8th Cir. 1988); *Marino v. Ameruso*, 837 F.2d 45 (2d Cir. 1988); *Ragnar v. Morrissey*, 630 F. Supp. 2d 111 (D. Mass. 2009). Plaintiffs have made no allegations whatsoever about deficiencies in the current official system of Medicaid appeals, and cannot therefore show any ongoing violation of a constitutional right.

Plaintiffs are also wrong because their failure to pursue their claims through available remedial procedures shows they have not suffered an injury in fact, or that their claims are not yet ripe for adjudication. *See, e.g., Fukino,* 2009 U.S. Dist. LEXIS 38924 (Def.-Appellant's Reply Br., ADD. 1-12)

One explanation for plaintiffs' position is that they know they have adequate administrative remedies. In *Gray Panthers v. Schweiker,* a Medicare case upon which plaintiffs rely in which only a "paper hearing" was provided to claimants and no appeal was permitted, the court opined:

> We believe, at a minimum, the claimant should be informed of or have access to the evidence on which the carrier relied in reaching its initial decision to deny the claim and, within a reasonable time

> thereafter, an opportunity to present evidence (in oral or written form) in support of his or her position. Where factual issues involving the credibility or veracity of the claimant are at stake, particular consideration of a policy granting on request an oral interview before the final denial on reconsideration should be given. At some point after the hearing, the claimant should receive a meaningful explanation of the reasons for whatever action is taken on the claim.

652 F.2d 146, 172 (D.C. Cir. 1980).

According to the evidence of record, in North Carolina Medicaid recipients are afforded the protections suggested in *Gray Panthers* and far, far more. (J.A. 91-97; Def.-Appellant's Br., ADD. 1-9) It is difficult to comprehend that anyone could sincerely contend that the process afforded to and followed by E.C., and available to all Medicaid recipients, is not "due process" under any standard, much less the *Gray Panthers* standard.

C. Plaintiffs' Ongoing Violation Cases Are Not Relevant To Claims Under § 1983.

Plaintiffs rely on two cases, *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007) and *In re Deposit Ins. Agency*, 482 F.3d 612 (2d Cir. 2007), in arguing that this Court should not determine whether plaintiffs have shown an ongoing violation of a substantive federal right as part of reviewing the order denying the Secretary's Eleventh Amendment immunity. However, those cases do not involve claims brought under 42 U.S.C. § 1983, and therefore they are not helpful in deciding

whether plaintiffs have shown an ongoing violation of a substantive federal right sufficient to overcome the Secretary's Eleventh Amendment immunity.

It is not a departure from *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), as plaintiffs argue (Pl.-Appellees' Br. at 23-25), for this Court to determine initially whether the amended complaint states a violation of some federal law in evaluating whether there is an ongoing violation to enjoin. There can be no ongoing violation of plaintiffs' federal rights if there is no federal right in the matter claimed. Moreover, inquiring into whether a complaint alleges conduct that actually violates some federal law is not a merits inquiry. *See Alaska v. EEOC*, 564 F.3d 1062, 1068 (9th Cir. 2009) (*en banc*):

> The merits of these claims (and Alaska's various defenses) aren't before us; we consider only whether each claim alleges conduct that, if it occurred and wasn't justified by a valid defense, would have violated the Fourteenth Amendment.

The *Alaska v. EEOC* analysis is very similar to that set forth in *United States v. Georgia*, 546 U.S. 151 (2006), in which questions of Eleventh Amendment immunity are to be reached only after finding some viable legal claim. In *Georgia*, the Supreme Court held that a court must apply the following three-part test on a claim-by-claim basis when confronted with an Eleventh Amendment defense:

> (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II, but did not violate

> the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

Id. at 159 (applying test to a Title II claim). Therefore, it is appropriate for this Court to evaluate each claim to determine whether it alleges conduct that, if it actually occurred and was not justified by a valid defense, would have deprived a plaintiff of a property right without due process of law or would have violated a substantive federal right created by § 1396a(a)(3). Then, assuming such a deprivation or violation were alleged, the question would be whether plaintiffs have alleged an ongoing violation or have merely referred to past wrongs. When this Court evaluates the allegations of the amended complaint, it will conclude that there is no ongoing violation of any federal right alleged by any plaintiff, and plaintiffs have not overcome the Secretary's Eleventh Amendment immunity.

CONCLUSION

For the foregoing reasons, in addition to their claims having become moot, plaintiffs have failed to demonstrate that they have standing to pursue their claims, or - alternatively - that their claims are ripe for adjudication. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000), *cert. denied,* 531 U.S. 1143 (2001) ("the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong.") Further, as previously argued, plaintiffs have failed to allege ongoing

violations of enforceable federal rights, and their claims must yield to the Secretary's Eleventh Amendment immunity. This case should be remanded with instructions to vacate and dismiss.

Respectfully submitted, this 30th day of November, 2009.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1441 **Caption:** McCartney, et al. v. Lanier M. Cansler

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(s) Ronald M. Marquette

Attorney for Defendant-Appellant

Dated: November 30, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this day, November 30, 2009, I electronically filed the foregoing **REPLY BRIEF OF APPELLANT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Douglas Sea, Jane Perkins and Sarah Somers, attorneys for Plaintiff,

and I hereby certify that I have mailed the document to the following non CM/ECF participates: none.

Two copies of the same were served by depositing one copy in the U.S. Mail to each of the following:

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ADDENDUM INDEX

LEXSEE 2009 U.S. DIST. LEXIS 38924

SUMMER H., individually and on behalf of her minor daughter, HANNAH H.; J. DANIEL M. and SHANA M., individually and on behalf of their minor daughter, HANNAH M.; FLORENCE P., individually and on behalf of her daughter WENDY P.; SUE G., individually and on behalf of her minor daughter FRANCES G., and her minor son, JERICHO G.; ALLEN K., individually and on behalf of his minor son, ANDREW K., Plaintiffs, vs. CHIYOME FUKINO, M.D., in her capacity as Director of the STATE OF HAWAII DEPARTMENT OF HEALTH; MICHELLE R. HILL, in her capacity as the Deputy Director for the DEVELOPMENTAL DISABILITIES DIVISION OF THE STATE OF HAWAII DEPARTMENT OF HEALTH; LILLIAN KOLLER, in her capacity as the Director for the STATE OF HAWAII DEPARTMENT OF HUMAN SERVICES; and STATE OF HAWAII, Defendants.

CIV. NO. 09-00047 SOM/BMK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII
2009 U.S. Dist. LEXIS 38924

May 4, 2009, Decided May 6, 2009, Filed

SUBSEQUENT HISTORY: Motion denied by Summer H. v. Fukino, 2009 U.S. Dist. LEXIS 48255 (D. Haw., June 9, 2009)

PRIOR HISTORY: Summer H. v. Chiyome Fukino, 2009 U.S. Dist. LEXIS 13993 (D. Haw., Feb. 20, 2009)

COUNSEL: [*1] For Summer H., individually and on behalf of her minor daughter, HANNAH H., J. Daniel M., individually and on behalf of their minor daughter HANNAH M., Shana M., individually and on behalf of their minor daughter HANNAH M., Florence P., individually and on behalf of her daughter, WENDY P., Plaintiffs: Carl M. Varady, LEAD ATTORNEY, Honolulu, HI; Stanley E. Levin, Susan K. Dorsey,

LEAD ATTORNEYS, Davis Levin Livingston Grande, Honolulu, HI.
For Alan K., individually and on behalf of his minor son, ANDREW K., Sue G., individually and on behalf of her minor children, FRANCIS G. and JERICHO G., Plaintiffs: Carl M. Varady, Honolulu, HI; Stanley E. Levin, Susan K. Dorsey, Davis Levin Livingston Grande, Honolulu, HI.

For Victoria A., for herself and her disabled adult child, AARON A., Intervenor Plaintiff: Carl M. Varady, LEAD ATTORNEY, Honolulu, HI.

For Chiyome Fukino, M.D., in her capacity as Director of the STATE OF HAWAII DEPARTMENT OF HEALTH, Michelle R. Hill, in her capacity as the Deputy Director for the DEVELOPMENTAL DISABILITIES DIVISION OF THE STATE OF HAWAII DEPARTMENT OF HEALTH, Hawaii, State of, Lillian Koller, in her capacity as the Director of the STATE OF HAWAII DEPARTMENT OF [*2] HUMAN SERVICES, Defendants: John F. Molay, LEAD ATTORNEY, Office of the Attorney General-State of Hawaii, Honolulu, HI.

JUDGES: Susan Oki Mollway, United States District Judge.

OPINION BY: Susan Oki Mollway

OPINION

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

This action arises out of a 15 percent cut in Medicaid benefits announced by the State of Hawaii as a means of addressing funding shortages. Plaintiffs are the parents of children who receive Medicaid benefits in the form of Home and Community-Based Services (HCBS) and Early Periodic Screening, Diagnosis, and Treatment (EPSDT). Plaintiffs assert that the cuts violate Title XIX of the Social Security Act, the Medicaid Act, Title II of the Americans with Disabilities Act ("the ADA"), section 504 of the Rehabilitation Act, and the Due Process Clause of the Fourteenth Amendment, in addition to state law. Defendants, officials at the State of Hawaii Department of Health and Department of Human Services ("the State"), move to dismiss this action for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

This court concludes that some Plaintiffs have not sustained cognizable injuries and so lack standing to bring [*3] any claims. Claims by those Plaintiffs are dismissed, as are some of the claims by other Plaintiffs.

I. *BACKGROUND FACTS.*

On December 26, 2008, the State issued a letter informing all Medicaid recipients that, because Hawaii's

economic conditions were affecting the funding available for Medicaid programs, benefit payments needed to be cut by 15 percent. Without this reduction, the State said, funds would run out before July 1, 2009, the end of the fiscal year. The State asked recipients to identify 15 percent of their services that could be cut. The State said that, if the recipients declined to do so, it would make the cuts for them. Plaintiffs' children--Frances G., Jericho G., Hannah M., Hannah H., and Wendy P.--submitted budget reduction worksheets. Andrew K. declined to do so.

On January 21, 2009, all Plaintiffs received letters from the State with a revised action plan reflecting their reduced benefits. The letters indicated that all Plaintiffs' children could file appeals, and that services would continue without any change during the pendency of the appeals. Plaintiffs' children appealed, and the State says their services were restored during the pendency of their appeals.

Plaintiffs [*4] filed this lawsuit on February 2, 2009, challenging the program-wide reduction in benefits. On March 4, 2009, Plaintiffs submitted their Second Amended Complaint. In the meantime, the number of Medicaid beneficiaries who accepted cuts was large enough to avoid the danger that funds would be exhausted.

Plaintiffs' first claim alleges due process violations based on the allegedly deficient notice of benefit reductions and on the alleged lack of pre-termination hearings. The second and third claims allege violations of state law. The fourth claim alleges deprivations of rights under 42 U.S.C. § 1983 based on reductions to EPSDT services in violation of the Medicare Act. The fifth and sixth claims allege violations of Title II of the ADA and section 504 of the Rehabilitation Act, respectively, based on the allegedly unjustified institutionalization of Medicaid beneficiaries. Plaintiffs seek declarative and injunctive relief, in addition to legal costs and attorneys' fees. They allege federal question jurisdiction and supplemental jurisdiction over the state claims.

Plaintiffs have moved for certification of the class of all Medicaid recipients threatened with the 15 percent cut. Since then, [*5] an additional plaintiff has moved for intervention. This court put all matters aside pending a determination as to whether any Plaintiff had suffered an injury that conferred standing to bring this action.

Plaintiffs' claims are currently at varying stages in the administrative process. Andrew K. had his benefits fully restored after a review of his record and before formal administrative appeal proceedings. Hannah H. and Hannah M. are awaiting administrative decisions as to their benefits. Jericho G., Wendy P., and Frances G. have received initial administrative denials of their challenges to their proposed reductions. Given the varied statuses of Plaintiffs' claims, this

court addresses the standing of each Plaintiff individually.

II. *LEGAL STANDARD.*

Effective December 1, 2007, Rule 12(b)(1) of the Federal Rules of Civil Procedure has been amended. In relevant part, that rule now reads: "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction."

"The language of Rule 12 has been amended as part of the general restyling of the Civil [*6] Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." Rule 12 Advisory Committee Notes, 2007 Amendments. Because no substantive change in Rule 12(b)(1) was intended, the court interprets the new rule by applying precedent related to the prior version of Rule 12(b)(1).

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may either attack the allegations of the complaint as insufficient to confer upon the court subject matter jurisdiction, or attack the existence of subject matter jurisdiction in fact. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.,* 594 F.2d 730, 733 (9th Cir. 1979). When the motion to dismiss attacks the allegations of the complaint as insufficient to confer subject matter jurisdiction, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Fed'n of African Am. Contractors v. City of Oakland,* 96 F.3d 1204, 1207 (9th Cir. 1996). When the motion to dismiss is a factual attack on subject matter jurisdiction, however, no presumptive truthfulness attaches to the plaintiff's allegations, [*7] and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact. *Thornhill,* 594 F.2d at 733.

Defendants' motion to dismiss is a factual attack on this court's subject matter jurisdiction. Accordingly, the court may accept and evaluate evidence to determine whether jurisdiction exists. *See McCarthy v. United States,* 850 F.2d 558, 560 (9th Cir. 1988) ("when considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction"); *Biotics Research Corp. v. Heckler,* 710 F.2d 1375, 1379 (9th Cir. 1983) (consideration of material outside the pleadings does not convert a Rule 12(b)(1) motion into a motion for summary judgment).

III. *ANALYSIS.*

"When jurisdiction may not exist . . . the court must raise the issue even if the parties are willing to stipulate to federal

jurisdiction." *Washington Local v. International Brotherhood of Boilermakers,* 621 F.2d 1032, 1033 (9th Cir. 1980). *See* Fed. R. Civ. P. 12(h)(3). This court [*8] earlier questioned whether Plaintiffs had standing to bring their claims and asked the parties to brief the issue. The State responded by filing a Rule 12(b)(1) motion for lack of subject matter jurisdiction. The issue that this court addresses here is whether Plaintiffs allege injuries sufficient to satisfy the "case or controversy" requirement of Article III of the Constitution. Without a case or controversy, a federal court lacks subject matter jurisdiction over a lawsuit. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 101, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). In that event, the suit must be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *Cetacean Cmty v. Bush,* 386 F.3d 1169, 1174 (9th Cir. 2004).

Much of the State's motion goes not to subject matter jurisdiction but rather to the statutory and constitutional bases of the claims. The sufficiency of the allegations is analyzed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which addresses dismissal for failure to state a claim, not under Rule 12(b)(1). *Id.* For the purposes of this order, the court limits itself to considering the issue of subject matter jurisdiction. That is, the court here examines only whether [*9] Plaintiffs have suffered injuries that satisfy the "case or controversy" requirement of Article III, the precise issue the court invited the parties to brief on an expedited schedule. Any motion to dismiss on other grounds should be filed separately for consideration on the ordinary timetable.

The Supreme Court has identified three elements of Article III standing:

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 188-89, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Plaintiffs have the burden of establishing these elements, as they are invoking federal jurisdiction. *Lujan,* 504 U.S. at 561.

In many cases, another way of describing the "injury in fact" requirement is to say that the claim must be ripe. The Ninth Circuit has noted that [*10] "in

many cases, ripeness coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1138 (9th Cir. 2000).

The slight distinction between the two standards is that "ripeness is peculiarly a question of timing," *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 140, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974), such that it distinguishes between a projected harm and one that has occurred or is certain to occur. "Indeed, because the focus of our ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline." *Thomas,* 220 F.3d at 1138 ("Sorting out where standing ends and ripeness begins is not an easy task.").

The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner,* 387 U.S. 136, 156, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967).

Only part of the ripeness doctrine is presently at issue in the court's analysis of subject matter [*11] jurisdiction. "There are two components to ripeness: constitutional ripeness and prudential ripeness." *Thomas,* 220 F.3d 1134 at 1138. "The constitutional component of ripeness is a jurisdictional prerequisite." *United States v. Antelope,* 395 F.3d 1128, 1132 (9th Cir. 2005). The court therefore confines its analysis to constitutional ripeness.

The State does not expressly challenge ripeness, but this court is obliged to address the issue of its own accord. "[B]ecause issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,' we cannot rely upon concessions of the parties and must determine whether the issues are ripe for decision in the 'Case or Controversy' sense." *Reg'l Rail Reorg. Act Cases,* 419 U.S. at 138. [1]

1 The court notes that the parties' briefs addressed the issue of exhaustion in discussing whether or not this litigation is premature. However, concerns about judicial intervention at this stage of the administrative process raise ripeness, not exhaustion, issues. Ripeness is properly addressed in a Rule 12(b)(1) motion to dismiss because it concerns subject matter jurisdiction. *Gemtel Corp. v. Community Redevelopment Agency,* 23 F.3d 1542, 1544 (9th Cir. 1994).

Both [*12] constitutional ripeness and the issue of whether there is a live case or controversy involve the same standing analysis. *See Cal. Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1095 (9th Cir.

Cal. 2003)("In deciding whether [Plaintiff] has suffered an injury-in-fact making this case justiciable, we need not quibble with semantics. Whether we frame our jurisdictional inquiry as one of standing or of ripeness, the analysis is the same."). Particularly where declarative relief is sought, "standing and ripeness boil down to the same question." *United States v. Antelope,* 395 F.3d 1128, 1132-33 (9th Cir. 2005).

"The constitutional ripeness of a declaratory judgment action depends upon whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *United States v. Braren,* 338 F.3d 971, 975 (9th Cir. 2003). Ultimately, when resolution of a plaintiff's claim "does not depend on any future factual developments, the claim is ripe." *Gemtel Corp. v. Community Redevelopment Agency,* 23 F.3d 1542, 1545-46 (9th Cir. 1994).

The [*13] court must avoid passing judgment on a hypothetical set of facts. "Where a dispute hangs on future contingencies that may or may not occur, it may be too impermissibly speculative to present a justiciable controversy." *Educ. Credit Mgmt. Corp. v. Coleman (In re Coleman),* 560 F.3d 1000 (9th Cir. 2009)(citations omitted). *See also San Diego County Gun Rights Comm. v. Reno,* 98 F.3d 1121, 1133 (9th Cir. 1996) ("[T]o hold that their claims are ripe for adjudication in the absence of any factual context would essentially transform district courts into the general repository of citizen complaints against every legislative action.").

Still, a claim may be ripe, though the injury has not yet been sustained. "Courts have long recognized that one does not have to await the consummation of threatened injury to obtain preventive relief." *Ariz. Right to Life Political Action Comm. v. Bayless,* 320 F.3d 1002, 1006 (9th Cir. 2003) (citations omitted). The standard is that the injury be certain to occur, so that it "is in no way hypothetical or speculative." *Reg'l Rail Reorg. Act Cases,* 419 U.S. at 143 ("Where the inevitability of the operation of a statute against certain individuals is patent, it is [*14] irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect."). In accordance with the "injury in fact" analysis, the harm at issue need not be "actual," so long as it is "imminent." *See Lujan,* 504 U.S. at 578.

Turning to the facts of this case, the court notes that "ripeness is assessed based on the facts as they exist at the present moment." *W. Radio Servs. Co. v. Qwest,* 530 F.3d 1186, 1205-1206 (9th Cir. 2008). It differs from exhaustion in this way, such that later developments can render a claim "ripe," though they occurred after the inception of the lawsuit.

See Buckley v. Valeo, 424 U.S. 1, 114-17, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (reversing the D.C. Circuit's decision that claims were not ripe because, in the interim between the D.C. Circuit's decision and Supreme Court consideration of the case, agency action had been taken, making the claims ripe for review); *Reg'l Rail Reorg. Act Cases,* 419 U.S. at 139-40 (reversing lower court holding that case was not ripe for review because "[i]t is the situation now rather than the situation at the time of the district court's decision that must govern"). This court therefore analyzes [*15] the Plaintiffs' circumstances based on the present record.

The ripeness analysis is what distinguishes this case from *Independent Living Center v. Shewry,* 543 F.3d 1050 (9th Cir. 2008), which Plaintiffs cite in support of their claims. That case addressed a Supremacy Clause challenge by Medicaid service providers to state legislation reducing provider payments by 10 percent. [2] In *Shewry,* the Ninth Circuit held that the providers had a clearly identifiable injury given the legislative pronouncement that all provider payments would be reduced. There was no question that the reduction would be implemented, and no flexibility in its application. That case therefore concerned a concrete, imminent injury certain to occur.

2 It expressly distinguished that cause of action from one that, like the present case, is brought by recipients under 42 U.S.C. § 1983.

The presence of an injury in fact is also what distinguishes *Katie A. v. Los Angeles County,* 481 F.3d 1150, 1153 (9th Cir. 2007), to which Plaintiffs direct this court, pursuant to Local Rule 7.8. In that case, the Ninth Circuit accepted a district court's conclusion that there was a private right to challenge a denial of EPSDT services under [*16] 42 U.S.C. § 1983, a determination the defendants had not challenged. In the present case, the statutory basis for Plaintiffs' claims is not in issue; this court has isolated the issue of subject matter jurisdiction for expedited consideration.

The court in *Katie A.* had jurisdiction over the plaintiffs' challenge to the state's refusal to provide certain services that they characterized as medically necessary EPSDT services. There was no dispute that the members of the class of plaintiffs were not receiving these services and so were alleging an existing injury. The dispute was over whether the services fell within the state's EPSDT obligations.

Here, while Plaintiffs describe the State's intent to reduce services as a "policy" of general applicability, that "policy" is being applied to individuals in fact-specific ways. Medicaid recipients are not all facing guaranteed cuts. Therefore, the court must examine each Plaintiff's standing separately.

A. *Andrew K.*

Andrew K. identifies no injury in fact. Andrew K. joined this lawsuit on

February 12, 2009, seven days after the State conducted an informal review of his record and determined that his services should not be reduced at all. He had [*17] declined to identify any services in response to the initial request for reductions, and the State had originally notified him that it planned to cut his personal habilitation services by $ 2000 a month. After he appealed in February, the State kept its promise to continue his benefits pending the outcome of that appeal. The state then conducted an informal review of his situation and agreed with him that his was a case in which no cuts were appropriate. This agreement mooted out the need for any further appeal. No cuts were made prior to the decision to "restore" his benefits, and no further reductions are planned for him despite the 15 percent cuts proposed for other recipients. As Andrew K. cannot identify an injury in fact, his claims are dismissed.

Plaintiffs point to the State's declaration of intent to cut services by 15 percent as evidence that injuries to all Medicaid recipients are imminent, notwithstanding Andrew K.'s experience. They claim that the State withdrew its stated intention to cut Andrew K.'s benefits only because of this litigation and in an attempt to evade judicial review. However, this court notes that Plaintiffs' claims are premised on very specific cuts to [*18] their benefits. That is, Plaintiffs are not alleging that Medicare benefits may never be cut; rather, they maintain that EPSDT services in particular may not be cut, that individuals may not be arbitrarily institutionalized, and that due process must be afforded all recipients prior to any reduction in services. To the extent that these specific actions are challenged, Andrew K. makes no showing that he will suffer the particular injuries in issue.

B. *Hannah H. and Hannah M.*

Hannah H. and Hannah M. have not suffered cognizable injuries. They are in the process of appealing their proposed cuts, and in the meantime have suffered no reductions in service. Their claims of injury are mere conjecture at this point. There is no indication that adverse decisions are certain to follow the pending administrative reviews, and so Hannah H. and Hannah M.'s claims cannot be said to be ripe.

The court is being asked to address the legality of a potential cut to Hannah H. and Hannah M.'s EPSDT services or potential cuts that would threaten them with institutionalization. These are hypothetical situations over which this court has no jurisdiction. The State has given no indication that it will actually [*19] make any cuts to Hannah H.'s or Hannah M.'s services. To the extent Hannah H. and Hannah M. are challenging a deprivation of benefits without due process, the court notes that, by bringing this claim prior to participating in the administrative appeals

process, they are attempting to avoid the very relief they purport to seek. Hannah H. and Hannah M. have not demonstrated that there is an actual or imminent denial of benefits without due process. All of their claims are dismissed.

C. *Jericho G.*

Jericho G. appealed the proposed HCBS cut. Following an informal review of his case in light of his appeal, the State determined that services should indeed be reduced. Jericho G. may seek formal administrative review, but this court has no indication that he has done so to date.

There is some dispute as to whether Jericho G.'s benefits were cut pending the informal review. The State represents that, as his appeal was not brought to the attention of the proper authorities until two weeks after it was lodged, he did not receive assurances that his benefits would continue during that time. However, the State points out that no notice was sent to Jericho G. regarding this mistake. Therefore, the State [*20] contends, Jericho G. must have relied on the earlier representations he received, guaranteeing that all services would continue in full once an appeal was lodged.

For its part, the State contends that Jericho G.'s benefits were not actually cut, as the State recognized that he had appealed before any payments or reimbursements came due. Jericho G. counters that the lack of assurances from the State functioned as a deprivation of benefits, given the family's financial constraints and inability to schedule services when repayment was uncertain. For the purposes of standing and in light of the State's burden on this motion, this court proceeds as if Jericho G. has suffered an injury, especially given the preliminary determination of April 16, 2009, cutting his services. The court does not now resolve the conflicting representations as to whether he suffered cuts before that determination.

Of course, Jericho G. may challenge the informal determination, and it is the court's understanding that his benefits will not be cut during the pendency of any such administrative challenge. However, exhaustion of administrative remedies is not a jurisdictional issue. Plaintiffs sue under 42 U.S.C. § 1983, [*21] which contains no statutory exhaustion requirement. [3] *See Heath v. Cleary,* 708 F.2d 1376, 1378 (9th Cir. 1983) (noting that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.")(citing *Patsy v. Board of Regents,* 457 U.S. 496, 501, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982)). "Exhaustion of administrative remedies, when not made mandatory by statute, is . . . a prudential doctrine." *Santiago v. Rumsfeld,* 425 F.3d 549, 554 (9th Cir. 2005), *cf. Anderson v. Babbitt,* 230 F.3d 1158, 1162 (9th Cir. 2000) ("A statute requiring exhaustion of administrative remedies may be jurisdictional if it is more than a codified requirement of

administrative exhaustion and contains sweeping and direct statutory language that goes beyond a requirement that only exhausted claims be brought.").

> 3 This court notes that the Medicare Statute has incorporated the statutory exhaustion requirement of the Social Security Act, 42 U.S.C. § 405(h), by 42 U.S.C. § 1395ii. That provision requires that suits against the federal government for denials of Medicare benefits not be brought prior to exhaustion of administrative remedies (subject to certain exceptions). *See Bowen v. New York,* 476 U.S. 467, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986). [*22] However, because Plaintiffs have brought this suit against state officials, who do not appear to have acted solely as agents of the federal government, the statutory exhaustion requirement of § 405(h) appears inapplicable. *See Hooker v. United States Dep't of Health & Human Servs.,* 858 F.2d 525 (9th Cir. 1988) (finding that the statutory exhaustion requirement in § 405(h) forecloses a claim against state defendants only if that claim is "merely a disguised dispute with the Secretary [of the Department of Health].").

There may be nonjurisdictional reasons that Jericho G.'s § 1983 claims should not proceed absent exhaustion of administrative remedies, but any nonjurisdictional argument is left for future proceedings. The court at this time is confining itself to Rule 12(b)(1) issues. The present record does not indicate that Jericho G. is pursuing formal administrative review. Instead, the present record shows only that Jericho G. has had an adverse HCBS determination through an informal review.

Without opining on exhaustion or other nonjurisdictional issues, this court concludes that, for purposes of ripeness, Jericho G. has sustained a concrete injury that gives him standing in the present [*23] case. This standing, however, does not apply to any EPSDT claim, as there is no indication that Jericho G. has had any EPSDT benefit cut.

D. *Wendy P. and Frances G.*

Wendy P. and Frances G. have similarly received adverse HCBS determinations as a result of their preliminary administrative reviews. The State's proposal to implement 15 percent cuts to their HCBS benefits makes harm imminent for standing purposes. Like Jericho G., however, Wendy P. and Frances G. have not had any EPSDT services cut, and therefore they do not have standing to challenge that particular injury. The court leaves for further proceedings substantive challenges to claims not based on EPSDT services.

E. *Institutionalization Issues.*

It is unclear from the present record whether Jericho G., Wendy P., or Frances

G. is at risk of institutionalization if required to accept any cuts. Jericho G., Wendy P., and Frances G. have not shown that any actual benefit cut increases the risk of institutionalization. For the moment, the fifth and sixth claims remain, alleging violations of Title II of the ADA and section 504 of the Rehabilitation Act based on unjustified institutionalization of Medicaid beneficiaries. The claims, however, [*24] will not likely survive further motions unless Jericho G., Wendy P., and Frances G. detail their injuries in this regard.

IV. *CONCLUSION.*

The court GRANTS the motion to dismiss for lack of subject matter jurisdiction all claims by Andrew K., Hannah H., and Hannah M. By contrast, Jericho G., Wendy P., and Frances G. have identified certain injuries in fact. The court accordingly DENIES the motion to dismiss with regard to Jericho G., Wendy P., and Frances G, except to the extent the motion seeks dismissal of the fourth claim, alleging deprivations of rights based on reductions to EPSDT services in violation of the Medicare Act. The fourth claim is DISMISSED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 4, 2009.

/s/ Susan Oki Mollway

Susan Oki Mollway

United States District Judge