UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN 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, and 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, in his official capacity, Defendant	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** **Fed. R. Civ. P. 12(b)(1) and (6)**

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Dempsey Benton, Secretary of the North Carolina Department of Health and Human Services ("DHHS" or "defendant"), respectfully submits this memorandum in support of his Motion to Dismiss plaintiffs' amended complaint.

I. NATURE OF THE CASE AND STATEMENT OF FACTS

On 16 May 2008 plaintiffs filed their amended complaint, an action seeking relief under 42 U.S.C. § 1983, against defendant Benton for alleged violations of federal Medicaid law and the due process clause of the Fourteenth Amendment. Defendant was granted until 2 July 2008 to respond.

Jurisdiction is said to exist under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3) and (4). However, this Court lacks jurisdiction under § 1343 over plaintiffs' claim alleging a violation of the Medicaid Act. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979).

According to the allegations of the complaint, plaintiffs are three children, ranging in age from 4 to 12 years, who have not received a final agency decision on their claims (if any) that they are entitled to "medical assistance" for specified services which were recommended by their Medicaid providers. Under the North Carolina system for Medicaid appeals, set forth in 10A N.C.A.C. Subchapter 22H, *see* Exhibit 1 to Motion to Dismiss, any person who has had services denied, terminated, suspended or reduced can appeal to the Office of Administrative Hearings ("OAH"), with or without electing an intermediate informal appeal at the DHHS Hearing Office. The procedures governing appeals at OAH are set forth in the North Carolina Administrative Procedure Act, N.C.G.S. § 150B, Article 3. In some but not all cases, when a person has appealed a decision, payment for services continues to be authorized during the appeal. *See* 10A N.C.A.C. 22H .0104. Under this rule, DMA pays for some denied but previously-authorized services as if they had been reduced or terminated instead of denied. *See* ¶ 8 of Affidavit of Tara Larson, Exhibit 2 to Motion to Dismiss.

Plaintiff McCartney claims his Medicaid "community-based services" were terminated illegally. Those services consisted of a case worker attending public school with him for various periods each week. He alleges that his request for 28 hours of weekly services for the 90-day period beginning 18 May 2007 was reduced to 21 hours per week for a period ending 21 September 2007. His mother initially appealed this decision, but then withdrew the appeal. Because there was no appeal to act upon, there was no further agency action on this matter. Plaintiff McCartney continued to receive services until 23 January 2008. Another request for services was submitted in December 2007, but it was withdrawn by his case worker. Because there was no request to act upon, there was no final agency action on the December request. Another request for services was submitted by the

caseworker on 6 March 2008, requesting services for the 90-day period beginning 2 April 2008. In April Plaintiff McCartney was notified that some services would be provided through 17 May 2008, *see* ¶ 9 of Exhibit 2 to Motion to Dismiss, but otherwise the request was denied. There has been no appeal. There has also been no new request for services. *See* ¶ 10 of Exhibit 2 to Motion to Dismiss. Because there is no appeal or request to act upon, there is no need for "final" agency action on this matter.

Plaintiff Cromartie claims his services were reduced illegally. Those services consisted of a case worker attending pre-school and therapy with him for various periods each week. In December 2007, based on alleged "misinformation, discouragement, and intimidation" by a prior approval reviewer, which is admitted by plaintiffs to be contrary to DMA's official policy instructions, Plaintiff Cromartie's case worker requested services of 15 hours per week, an amount less than had been received in the prior period of authorized service. The request was approved. Then, in February 2008, a new request seeking more than 15 hours per week for the 90-day period beginning 19 March 2008 was submitted. When it was denied, Plaintiff Cromartie's mother appealed. The day she learned that the DHHS Hearing Office had dismissed the informal appeal for untimeliness, she appealed to OAH. *See* petition dated 18 April 2008, Exhibit 3 to Motion to Dismiss. Because that appeal is pending, there is no final agency action on this matter.

Plaintiff Tipton claims to be "threatened with" termination of services. Unlike the other plaintiffs, she is enrolled in the Community Alternatives Program for the Mentally Retarded/Developmentally Disabled. In March 2008 her caseworker requested the same services for the year beginning 1 April 2008 as were being provided at the time for the year ending 31 March 2008. In May Plaintiff Tipton's parents were notified in writing that the requested services were not

approved, but that different services would be provided. They requested an informal appeal, and *her services have continued at the prior level*. *See* ¶ 14 of Exhibit 2 to Motion to Dismiss. Because the appeal is pending, there is no final agency action on this matter.

Defendant Benton has taken no action on any of these matters. Indeed, defendant Benton does not take final agency action on administrative appeals of *any* Medicaid medical assistance decisions. *See* ¶ 15 of Exhibit 2 to Motion to Dismiss.

II. ARGUMENT

Stripped to its essence, plaintiffs' complaint is that defendant has deprived them (or may deprive them) of certain services that have been requested on their behalf under the North Carolina Medicaid program without affording them due process of law or a "fair hearing" under Medicaid law. This Court lacks subject matter jurisdiction over the amended complaint because of defendant Benton's Eleventh Amendment immunity, because plaintiffs lack standing and because their claims are not ripe for decision. To the extent the Court finds it has jurisdiction, the Court should abstain from reaching the merits of plaintiffs' claims. If not, plaintiffs' amended complaint nonetheless fails to state claims upon which this Court can grant relief, and it should be dismissed for that reason.

A. INTRODUCTION.

1. Medicaid.

Medicaid law defines "medical assistance" in 42 U.S.C. § 1396d(a) as "payment of part or all of the cost of the following care and services . . . for individuals . . . who are eligible:" Therefore, it is only when a State refuses to pay for a service that a person covered by Medicaid has already received that it can be said to have denied "medical assistance." Plaintiffs do not allege that any of them, at any time, has received medical assistance for which the providers have not been paid.

As explained in *Alexander v. Choate*, 469 U.S. 287 (1985):

> But Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage. That package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered -- not "adequate health care."
>
> The federal Medicaid Act makes this point clear. The Act gives the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage. . . .

Id., at 303. Therefore, persons like the plaintiffs are subject to substantial State discretion in the "mix of amount, scope, and duration" of the services for which a State will pay.

North Carolina participates in the Medicaid program under an approved plan. DHHS is the state agency responsible for administering the North Carolina Medicaid program. The complaint does not specifically allege that North Carolina's Medicaid plan fails to comport with any federal statute, nor does it allege that DHHS is failing to abide by or follow its approved plan. The plan does not commit to providing the same medical assistance for each subsequent application *ad infinitum*. *See* ¶ 7 of Exhibit 2 to Motion to Dismiss.

The complaint alleges that irregularities and errors have taken place at or by ValueOptions, DMA's utilization review contractor, including typographical errors, misdated correspondence, other inaccuracies, unauthorized advice, coercion, and inferior practices and decisions. According to plaintiffs, because of these faults the Medicaid system in North Carolina fails to provide them with due process of law when their applications for medical assistance are not approved. There is no allegation that defendant Benton countenances any of the mistakes, faulty practices or deviations from official policy set forth in the amended complaint. Nor would it be possible for Secretary

Benton to *preclude* a multitude of errors from taking place in a system that processes hundreds of thousands of requests for medical assistance annually. *See*, *e.g.*, Plaintiff's (sic) Exhibit F in support of Motion for Class Certification.

2. Section 1983 Litigation.

Because the Social Security Act affords no private cause of action against a state, *Edelman v. Jordan*, 415 U.S. 651, 673-74 (1974), the only basis for jurisdiction over this action is if it constitutes an authorized private enforcement of a constitutional or statutory right pursuant to 42 U.S.C. § 1983 ("§ 1983"). However, § 1983 does not permit an action against a State official merely because he or she is alleged to be acting in violation of federal law in some way. Instead, to bring a claim under § 1983, a plaintiff must allege that a defendant is violating a right secured "by the Constitution and laws" of the United States. The focus is not on whether a federal statute confers a right generally, but rather on whether a single, specific statutory provision confers a particular right. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)*; Blessing v. Freestone*, 520 U.S. 329, 342-43 (1997). In *Blessing* the Court held that the Social Security Act did not grant individuals a right to compel "substantial compliance" with the Act by the State agency responsible for enforcement. "Only by manageably breaking down the complaint into specific allegations can the District Court proceed to determine whether any specific claim asserts an individual federal right." *Id.,* 520 U.S. at 346.

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. However, to seek redress under § 1983, a plaintiff must assert the violation of a federal *right*, not merely some violation of federal law. *Blessing*, 520 U.S. at 340. Plaintiffs have alleged that defendant's policies and practices

"violate the Medicaid Act," (Comp. ¶ 163), but they decline to elaborate - as required by *Blessing* - what *right* has been violated. The allegation that defendant violates federal law simply does not state a claim under § 1983.

In their amended complaint plaintiffs ultimately allege only that some practices and procedures by ValueOptions violate federal Medicaid *law*, meaning federal regulatory provision. The gist of their complaint is that too many mistakes are made. However, plaintiffs do not specifically identify any personal right they have under federal Medicaid law that is enforceable under 42 U.S.C. § 1983. At best, they may be said to claim a right to a "fair hearing" under 42 U.S.C. § 1396a(a)(3), but none of them have pursued a hearing to conclusion yet. Therefore, they lack standing to complain of being subjected to an unfair hearing. Also, any claim about an unfair hearing that has yet to take place is not ripe for adjudication. Whether their hearing will be "unfair" is pure speculation.

3. Jurisdictional Motions and Evidence.

A motion to dismiss made under Federal Rules of Civil Procedure 12(b)(1) tests the subject matter jurisdiction of the court to hear a complaint. There are two ways to present a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), each of which triggers a different standard of review. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). First, if the Rule 12(b)(1) motion attacks subject matter jurisdiction by asserting that "a complaint simply fails to allege facts upon which subject matter jurisdiction can be based," then "the facts alleged in the complaint are assumed to be true and the plaintiff . . . is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *See Adams*, 697 F.2d at 1219. Second, if the 12(b)(1) motion challenges the alleged jurisdictional basis of a complaint by asserting that,

although facially adequate, the allegations are factually untrue, the district court may then consider extrinsic information beyond the complaint to determine whether the subject matter jurisdiction exists. *See Thigpen v. United States*, 800 F.2d 393, 401 n.15 (4th Cir. 1986) (citing *Adams*, 697 F.2d at 1219). Because the court's "very power to hear the case" is at issue in such a motion, the trial court is free to weigh the evidence to determine the existence of its jurisdiction. *Materson v. Stokes*, 166 F.R.D. 368, 371 (E.D. Va. 1996). No presumptive truthfulness attaches to a plaintiff's allegations, and the plaintiff retains the burden of proving that jurisdiction exists. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). Under Rule 12(b)(1), the plaintiff bears the burden of showing that federal jurisdiction exists when that is challenged by the defendant. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Adams v. Bain*, 697 F.2d 1213.

A plaintiff's allegations of subject matter jurisdiction may not be made on the basis of information and belief, only personal knowledge. *Yount v. Shashek*, 472 F. Supp. 2d 1055, 1058 (S.D. Ill. 2006). Even an *affidavit* made on "knowledge and belief" is insufficient to establish jurisdiction. *America's Best Inns, Inc. v. Best Inns of Abilene, L.P.*, 980 F.2d 1072, 1073 (7th Cir. 1992). Plaintiffs' unverified amended complaint, replete as it is with allegations on "information and belief," is at best sketchy in alleging a factual basis for jurisdiction.[1] After discounting the "information and belief" allegations, much of what is left is a claim that ValueOptions makes bad decisions because of the way it evaluates requests for medical assistance, and that it addresses mail to Medicaid recipients, even if they are children. *See* Comp. ¶¶ 59, 85, 116 and 133. Surely in the

[1] Fully 27 paragraphs of the amended complaint must be disregarded on plaintiff's burden to prove an ongoing violation of rights so as to establish subject matter jurisdiction: ¶¶ 39, 52, 53, 54, 55, 56, 58, 79, 80, 81, 84, 86, 95, 101, 102, 103, 107, 110, 111, 112, 113, 114, 115, 118, 119, and both paragraphs 120.

absence of any allegation of systematic lack of receipt of such mail because of an *erroneous* address,[2] the mail issue does not allege an ongoing constitutional deprivation caused by defendant.

Defendant has presented evidence in support of his Rule 12(b)(1) motion to show that for a variety of reasons there is no ongoing violation of plaintiffs' rights, they lack standing and their claims are not ripe for adjudication.

B. THIS ACTION IS BARRED BY THE ELEVENTH AMENDMENT.

Pursuant to *Verizon Maryland v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, 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." *Id*., 535 U.S. at 645 (quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring)). Under this inquiry, it is clear that plaintiffs' amended complaint fails, and the amended complaint is barred by the Eleventh Amendment.

To respect a State official's Eleventh Amendment immunity, federal courts may exercise jurisdiction over claims for injunctive relief against them only if (1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114-50 (1984) ("*Pennhurst II*"); *Green v. Mansour*, 474 U.S. 64, 68 (1985). Plaintiffs have not alleged an ongoing violation of any enforceable statutory right, and defendant Benton is not alleged to be engaging in any actions that currently deny any plaintiff

[2] Plaintiff Cromartie complains that a mailing may have been missed because the household *moved*, not because it was addressed to the plaintiff. *See* Comp. ¶ 71.

due process of law. Thus, plaintiffs have failed to allege facts which support a claim for prospective injunctive relief.

Moreover, plaintiffs do not seek solely prospective relief. They seek payment for services that have not been approved. Accordingly, defendant has Eleventh Amendment immunity from plaintiffs' claims. *See Edelman v. Jordan*, 415 U.S. 651 (1974) (the Court of Appeals erred in holding that the Eleventh Amendment did not constitute a bar to that portion of the decree which ordered retroactive payment of benefits found to have been wrongfully withheld). This Court should dismiss plaintiffs' amended complaint because it is not within the *Ex parte Young* exception to Eleventh Amendment immunity.

1. Plaintiffs Are Not Seeking Exclusively Prospective Relief.

When State officials are sued in their official capacities for *purely* prospective relief to stop an ongoing violation of federal rights, the action is not considered to be against the State and the Eleventh Amendment does not bar the claim. *Republic of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir. 1998) ("the relief sought is only prospective"). *See generally Ex parte Young*, 209 U.S. 123 (1908). This exception does not extend to suits seeking retrospective monetary relief, because to do so would effectively eliminate the constitutional immunity of the States. *Pennhurst II*, 465 U.S. at 105. If the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 277 (1997).

Eleventh Amendment immunity is triggered when a declaration or injunction effectively calls for the payment of state funds as a form of compensation for past breaches of legal duties by

state officials. *Edelman*, 415 U.S. 651*; Pennhurst II*, 465 U.S. 89. In *Edelman*, the Supreme Court explained its disapproval of a purportedly prospective monetary award as follows:

> It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

415 U.S. at 668.

In this case plaintiffs seek to force North Carolina to reinstate or to assure the continuation of the State's payment for medical assistance that has not been approved. (Comp. ¶¶ 49, 78, 109) Therefore, it is an action "in essence" for the payment of money and, as such, is barred by the Eleventh Amendment. Although plaintiffs named only a State official as the defendant, the State of North Carolina is the real party in interest, in that plaintiffs clearly seek State funds. Indeed, the relief requested implicates powers that *only* the State, not the defendant, can possibly exercise. Paying for medical assistance that has never been approved is not ancillary to proper injunctive relief, which would - at best - require the State to provide due process and/or fair hearings in its *future* appellate procedures.

2. There Is No Ongoing Violation of Substantive Rights to Enjoin.

Section 1396a(a)(3), does not create a right enforceable under § 1983. It provides, in pertinent part, that a state plan for medical assistance must provide "an opportunity for a fair hearing

. . . to any individual whose claim for medical assistance is denied or is not acted upon with reasonable promptness." 42 U.S.C. § 1396a(a)(3) (2008).

Plaintiffs do not claim to be or to have been deprived of any "fair hearing"at this time. Each plaintiff, according to the complaint, has either failed to submit a request for medical assistance, withdrawn a request for medical assistance, withdrawn a request for a hearing, has not appealed a decision on a request for medical assistance, or is in the process of appealing a decision. The denials of medical assistance are all past acts. Consistent with the Eleventh Amendment, this Court can act only to prevent an existing violation of federal rights. Whatever may have happened last year or the month before is truly inconsequential given the jurisdictional limitations posed by the Eleventh Amendment. *See Papasan v. Allain*, 478 U.S. 265, 277-78 (1986) ("*Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past.").

Furthermore, plaintiffs' numerous allegations "on information and belief" do not suffice. "Mere conjecture is insufficient to transform a one-time event into a continuing governmental practice or an ongoing violation." *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999), *cert. denied*, 529 U.S. 1033 (2000). In determining whether a plaintiff alleges a continuing violation under *Ex parte Young*, if the claimed violation was a one-time event, there is no jurisdiction. *See Sonnleitner v. York*, 304 F.3d 704, 718-19 (7th Cir. 2002) (allegations referring to a past violation of federal law, such as a procedurally-deficient demotion, do not fit within the narrow exception of *Ex Parte Young*); *Nelson v. Univ. of Tex.*, 461 F. Supp. 2d 504, 510 (N.D. Tex. 2006) (termination constitutes a one-time event). Following *Sonnleitner*, the court in *Garcia v. Ill. State Police*, 2006 U.S. Dist. LEXIS 52538 (C.D. Ill. July 31, 2006) held the plaintiff could not use his demotion to

establish an ongoing violation of his procedural due process rights, because without an ongoing violation, even a right to a pre-termination or post-termination hearing cannot give rise to a procedural due process claim actionable under *Ex Parte Young*.

Two plaintiffs ask the Court to require the State to pay for medical assistance *now* because they dispute discretionary decisions not to pay for such services for periods now past.[3] In addition to requiring State expenditures for unapproved services, this does not constitute relief for an *ongoing* violation of law:

> In reality, the Community is asking this Court to declare an official act taken in the past to be a violation of federal law and to reverse the consequences of that act. There is no ongoing violation of federal law respecting the prior assessments and offsets; they have already occurred and are not continuing.

Keweenaw Bay Indian Cmty. v. Kleine, 2008 U.S. Dist. LEXIS 24994, at *14 (W.D. Mich. Mar. 27, 2008).

a. § 1396a(a)(3) does not create an enforceable substantive right.

When a statute does not create an enforceable right, the *Ex parte Young* exception to Eleventh Amendment immunity does not apply. *Bio-Med. Applications of N.C. v. Elec. Data Sys. Corp*., 412 F. Supp. 2d 549, 553 (E.D.N.C. 2006) (finding as a matter of law that in enacting 42 U.S.C. §§ 1396a(4)(a), 1396a(8), 1396a(37)(A), and 1396a(30)(A) Congress did not create rights enforceable under § 1983). Under Judge Flanagan's *Bio-Med* analysis, Congress did not create a new right in § 1396a(a)(3), and therefore the *Ex parte Young* exception is inapplicable because plaintiffs have failed to allege a violation of a federal right.

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[3] When such plaintiffs have received the requested services pending appeal, their claims are moot. Plaintiff Tipton, having the longer period of authorization (12 months instead of 90 days), simply has not been deprived of anything at this point. *See* ¶ 12 of Exhibit 2 to Motion to Dismiss.

To determine whether a particular statutory provision gives rise to a federal right enforceable under § 1983, the initial step in the analysis requires a determination of Congressional intent to create a federal right. *Bio-Med*, 412 F.Supp. 2d at 555. The second consideration is whether the "right" claimed is not so "vague and amorphous" that its enforcement would strain judicial competence. *Blessing*, 520 U.S. at 340-41. The third consideration is whether the statute unambiguously imposes a binding obligation on the States. At a minimum, the statutory provision giving rise to the asserted right must be couched in mandatory terms. *Blessing*, 520 U.S. at 340.

In applying this test, courts are required to identify with particularity the rights claimed to arise under a specific statutory provision. *See Blessing*, 520 U.S. at 342-43. "Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria . . . for determining whether a federal statute creates rights." *Id.* at 342. The statute must create new rights in "clear and unambiguous terms -- no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action." *Gonzaga*, 536 U.S. at 290. At best, plaintiffs might claim a right to a "fair hearing," but they do not. The closest they come is to allege a violation of the Medicaid Act. (Comp. ¶ 163)

It has been noted that "fair hearing" is but an unbounded generality. In *Rosie D. v. Swift*, 310 F.3d 230 (1st Cir. 2002), the First Circuit explained that:

> [S]ection 1396a(a)(3) merely guarantees a fair hearing to Medicaid beneficiaries. It neither offers any detail as to how states must conduct such hearings nor erects any ancillary remedial structures.... the Medicaid fair hearing reference is a *standardless generality*, open to interpretation by the states.

Id. at 236-37 (emphasis added). A standardless generality is hardly the stuff of which enforceable rights are made.

Moreover, similar language is found in 42 U.S.C. § 8624(b)(13): "provide an opportunity for a fair administrative hearing to individuals whose claims for assistance under the plan described in subsection (c) are denied or are not acted upon with reasonable promptness." That statute does not create a private substantive right. *Hunt v. Robeson County Dep't of Soc. Servs.*, 816 F.2d 150 (4th Cir. 1987); *Boyland*, 487 F. Supp. 2d 161 (2007). The Fourth Circuit emphasized that "plaintiffs have not pointed to any *substantive* provision of [the statute] that gives them a tangible right, privilege or immunity." *Hunt*, 816 F.2d at 152 (emphasis added). *See also Cabinet for Human Res., Com. Ky. v. Northern Ky. Welfare Rights Ass'n*, 954 F.2d 1179, 1184 (6th Cir. 1992) (statute must create *substantive* rights to provide a § 1983 cause of action). A right to a fair hearing is merely procedural, not substantive, and it is not enforceable under § 1983.

Regulations promulgated under § 1396a(a)(3) do not create rights. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Supreme Court had this to say about the force of federal regulations:

> Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. . . . it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Sandoval, 532 U.S. at 291 (citations omitted). Plaintiffs appear to propose to have this Court enforce various federal regulations pertaining to Medicaid appeals and appeal procedures. However, in this circuit regulations do not create enforceable § 1983 rights not "already implicit in the enforcing statute." *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987). Therefore, if § 1396a(a)(3) itself does not create a particular substantive right enforceable under § 1983, its regulations cannot do so. *See Peters v. Jenney*, 327 F.3d 307, 316 n. 9 (4th Cir. 2003); *Brinkley v. Hill*, 981 F. Supp. 423 (S.D. W. Va. 1997); *Kissimmee River Valley Sportsman Ass'n v. City of Lakeland*, 250 F.3d 1324, 1327

(11th Cir.) (regulations which impose obligations not found in the statute are not enforceable via § 1983), *cert. denied*, 534 U.S. 1040 (2001); *Harris v. James*, 127 F.3d 993, 1009-1010 (11th Cir. 1997) (transportation to medical care set forth in regulation not a right).

Accordingly, the regulations referenced by plaintiffs cannot and do not create any enforceable right not implicit in that standardless generality, § 1396a(a)(3), itself. *See Prestera Ctr. for Mental Health Servs. v. Lawton*, 111 F. Supp. 2d 768 (S.D. W. Va. 2000) (holding that regulations promulgated pursuant to the Medicaid Act are not enforceable via § 1983). As in *Prestera,* plaintiffs' claims herein stand or fall on the statute itself, and plaintiffs have no claims enforceable through § 1983 under any of the regulations they cite.

In particular, plaintiffs' suggestion that regulations provide them with a right to the full panoply of due process considerations embodied in *Goldberg v. Kelly*, 397 U.S. 254 (1970), *and more*, is absurd. First, *Goldberg* itself does not apply to *applicants* for a benefit subject to an agency's subjective discretion, as are the plaintiffs here. Second, in enacting § 1396a(a)(3) Congress did not provide that "no person who pursues an appeal will receive less than all the procedural protections of *Goldberg*," much less something more. Instead, Congress simply called for an opportunity for a "fair" hearing. Third, there is nothing *implicit* in the concept of a "fair" hearing that requires it be conducted in person, by telephone, on a *de novo* basis, on the record, with a right to cross examine, with or without the assistance of counsel, within a certain period of time, and so forth.

Arguably, however, implicit in the concept of a fair hearing is an impartial decision-maker. This does not avail plaintiffs, because such adjudicators are presumed to act in good faith, and with integrity. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). To overcome this presumption, a plaintiff must

come forward with allegations of actual or potential bias, such as evidence of a pecuniary interest in the proceeding, personal animosity toward the plaintiff, or actual prejudgment of the plaintiff's case. *Id*. Evidence of prior familiarity with the plaintiff or his situation, or even of involvement in the particular matter under consideration, is not enough to overcome the presumption. *Head v. Chicago Sch. Reform Bd. of Trustees*, 225 F.3d 794, 804 (7th Cir. Ill. 2000). *See also, Simpson v. Macon County*, 132 F. Supp. 2d 407 (W.D.N.C. 2001). In *City of Oakland v. Abend*, 2007 U.S. Dist. LEXIS 53186 (N.D. Cal. July 12, 2007), the court dismissed a claim of bias against the Office of the City Administrator when the plaintiff did not allege specific facts suggestive of actual bias.

Given that it is not yet certain who will decide plaintiffs' pending appeals, except that it will not be defendant Benton, and in the absence of any *particular* allegations of bias, plaintiffs have not sufficiently alleged the lack of an opportunity for a fair hearing, even if that constituted an enforceable substantive right.

b. Plaintiffs have no enforceable constitutional right.

To establish a claim for violation of constitutional procedural due process, a plaintiff must show (1) that a protected property interest was taken, and (2) that the procedural safeguards surrounding the deprivation were inadequate. *See Board of Regents v. Roth*, 408 U.S. 564, 568-69 (1972). The deprivation of a property interest is only unconstitutional if it is effected without due process of law. *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990). Therefore, to determine whether defendant violated plaintiffs' due process rights, the Court must determine what pre-deprivation and post-deprivation process was provided and whether it was constitutionally adequate. *Id.*; *see also Fields v. Durham*, 909 F.2d 94, 97 (4th Cir. 1990) (to determine whether a procedural due process violation has occurred, a court must consult the entire panoply of process provided). Here, even if

plaintiffs *had* a property right in future benefits, they have failed to perfect or have abandoned any procedures associated with their quest for future services, and thus fail to show any "deprivation." As an example, if an employee resigns of his own free will "even though prompted to do so by events set in motion by his employer" he gives up his property interest voluntarily, and cannot demonstrate that "the state 'deprived' him of it within the meaning of the due process clause." *Stone v. Univ. of Md. Med. Sys. Corp.,* 855 F.2d 167, 173 (4th Cir.1988).

i. Plaintiffs have no property right.

The first inquiry is whether the plaintiffs have been deprived of a protected interest in "property." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Only if there has been the deprivation of a protected property interest does the court examine whether the State's procedures comport with due process. *Id*., 424 U.S. at 332. "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person *has already acquired in specific benefits*." *Roth*, 408 U.S. at 576 (emphasis added).

In this case, one of plaintiffs' insurmountable problems is that they have no property right to *future* medical assistance. Absent an absolute entitlement, there is no property right. *Guilford County Cmty. Action Program, Inc. v. Wilson*, 348 F. Supp. 2d 548 (M.D.N.C. 2004). In *Roth,* when employment was to terminate on a fixed date, with no provision for contract renewal, the terms of the appointment secured no interest in re-employment. The employee had but an abstract concern in being rehired, and did not have a *property* interest sufficient to require the authorities to give him a hearing when they declined to renew his contract. *Roth*, 408 U.S. at 578 (emphasis in original).

Generally speaking, once a destitute individual is a recipient of direct Medicaid benefits, such benefits are a property interest that cannot be withdrawn without giving the recipient notice and

an opportunity to be heard. *See O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980); *see also Goldberg*, 397 U.S. at 262. However, persons who are merely Medicaid *applicants* who have been denied benefits, rather than Medicaid recipients whose benefits have been terminated, are not entitled to the due process rights afforded those already receiving benefits. *Johnson v. Guhl*, 166 F. Supp. 2d 42, 46, *aff'd*, 357 F.3d 403, 410 (3d Cir. 2004).

There is generally no property right in the continuation of benefits beyond their expiration date or period. *See Shvartsman v. Apfel,* 138 F.3d 1196, 1200 (7th Cir. 1998) (plaintiffs correctly conceded that there is no property right in continuing Food Stamp benefits, which were cut off on a set date unless plaintiffs became citizens prior to that date); *Kaplan v. Chertoff*, 481 F. Supp. 2d 370 (E.D. Pa. 2007) (no right to SSI benefits beyond period provided by Congress, regardless of governmental delays). When an entitlement is time-limited, as is the medical assistance provided to plaintiffs herein,[4] there is no property right beyond the particular time period approved.

Plaintiffs' situation is analogous to Food Stamp recipients, who are authorized benefits for a fixed period of time with no assurance of continued receipt of benefits in subsequent periods. Food Stamp entitlements are time-limited, in that benefits terminate automatically at the end of the certification period, but recipients may engage in a recertification process to establish continuing eligibility for Food Stamps. The Fourth Circuit agreed with the Sixth Circuit that recipients had no property interest, but mere unilateral expectations, in new certifications:

> In *Banks v. Block*, 700 F.2d 292 (6thCir. 1983), the Sixth Circuit conducted a thorough and detailed analysis of the property interests embodied in the Food Stamp Program as amended by Congress in 1977. Citing both the statutory language and the legislative history of the certification amendments, the Sixth Circuit concluded

[4] There is a 90-day limit for CSS (plaintiffs McCartney and Cromartie) and 12 months for CAP (plaintiff Tipton). *See* ¶¶ 4, 11, 12 to Exhibit 2 to Motion to Dismiss.

> that "household has no protectable property interest in the continuous entitlement to food stamps beyond the expiration of its certification period." *Banks*, 700 F.2d at 297. Although the *Banks* court recognized the recipient's right to reapply for new certification periods, it characterized the anticipated receipt of benefits beyond the certification period as "an unprotected unilateral expectation." *Id*. at 296. The court thereby effectively distinguished the due process rights of food stamp recipients from those individuals in cases such as *Goldberg, supra*, who received welfare benefits unlimited by any statutory duration period.

Holman v. Block, 823 F.2d 56, 59 (4th Cir. 1987).

ii. There is no property right in procedures.

Most of plaintiffs' amended complaint sets forth alleged deficiencies in notices and various Medicaid procedures. But procedural rights in themselves do not create substantive property rights protected by the Fourteenth Amendment. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("Property cannot be defined by the procedures provided for its deprivation any more than can life or liberty"); *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983) (holding that a state may require procedures for reasons other than the protection of substantive rights, and in so doing does not create any independent substantive right); *Jackson v. Long*, 102 F.3d 722 (4th Cir. 1996). A procedure required by statute or regulation does not create a constitutionally protected right, nor does violation of a statute or regulation - by itself - constitute a violation of due process. *Fenje v. Feld*, 301 F. Supp. 2d 781, 802 (N.D. Ill. 2003), *aff'd*, 398 F.3d 620 (7th Cir. 2005); *Kaplan*, 481 F. Supp. 2d at 390-91 (courts have not countenanced claims to a property interest in processes). If one defined access to a set of procedures as a protectable property interest, it would eliminate the distinction between property and the procedures that are constitutionally required to protect property. *Shvartsman*, 138 F.3d at 1197-98.

iii. Plaintiffs have no claim to an ongoing violation because they have not been *deprived* of anything without due process.

Among the fatal problems with plaintiffs' amended complaint is that no plaintiff has lost anything (whether "property" or not) after having completed the appeal process available to them under North Carolina law. This means that even if they have a property right in this action, there has yet to be any deprivation without due process.

> The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

Zinermon, 494 U.S. at 126. Where existing procedures are adequate, there is no ongoing violation to warrant injunctive relief. *Boyland*, 487 F. Supp. 2d at 180. In addition, even when a major component of due procedures is arguably deficient, unless a plaintiff shows resulting *prejudice*, he has no claim. *See Mundell v. Bd. of County Comm'rs*, 2007 U.S. Dist. LEXIS 2635 (D. Colo. Jan. 12, 2007) (defective notice does not result in a violation of due process without a showing of prejudice). Nearly twenty years ago these principles were well-understood by the Fourth Circuit. In *Riccio v. County of Fairfax*, 907 F.2d 1459, 1468-69 (4th Cir. 1990), the court said:

> [T]he mere fact that a state enacts an entitlement to a procedure does not mean that the procedure so created inevitably reduces the likelihood of an erroneous deprivation to a point warranting constitutional recognition . . . . Because the allegedly violated procedures here at issue would not have affected the likelihood of a proper resolution of Riccio's case to any appreciable extent, violation of those procedures is of no constitutional moment.

3. The Secretary Is Not Liable under § 1983 for the Acts of ValueOptions.

Vicarious liability, including *respondeat superior*, does not apply in § 1983 actions. *Goebert v. Lee County*, 510 F.3d 1312, 1331 (11th Cir. 2007). In *Goebert* the court noted that in order for a

defendant to commit a constitutional violation in his official and supervisory capacities, it must be shown that he instituted a custom or policy resulting in deliberate indifference to constitutional rights, or directed his subordinates to act unlawfully, or knew that the subordinates would act unlawfully and failed to stop them from doing so.

Because a § 1983 claim cannot succeed under the doctrine of *respondeat superior*, a plaintiff suing a state official must allege that the State is responsible because the official was acting pursuant to an "officially adopted" policy. The Second Circuit has determined recently that: "[A] state official may be sued in his or her official capacity for injunctive or other prospective relief, but only when the state itself is the moving force behind the deprivation." *Reynolds v. Giuliani*, 506 F.3d 183, 191 (2d Cir. 2007). Thus, a state official may be sued in his or her official capacity for injunctive or other prospective relief, but only when the State is the moving force behind the deprivation. To establish *personal* liability of a State official in a § 1983 action, it is enough that the official caused the deprivation of a federal right. *See, e.g., Monroe v. Pape*, 365 U.S. 167 (1961). However, more is required in an official-capacity action, because a governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation or the injury. *Polk County v. Dodson*, 454 U.S. 312, 326 (1981). Therefore, official liability is based on a *governmental* act and not simply on the independent act of a State official. When a final decision by a State official implements State policy, then liability in his official capacity may follow. But if a final decision does not implement State policy, or is contrary to it, then it is not imputable to the State. *See Greensboro Professional Fire Fighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962 (4th Cir. 1995).

4. Defendant Benton has not and will not take unconstitutional action against plaintiffs.

Secretary Benton's general duties do not satisfy *Ex parte Young's* requirement that the State official bear a "special relation" to the statute under challenge. *See Lytle v. Griffith*, 240 F.3d 404, 412 (4th Cir. 2001) (Wilkinson, dissenting); *Young*, 209 U.S. at 157. The State official responsible for final agency decisions on Medicaid appeals is the Director of DMA. *See* ¶ 15 of Exhibit 2 to Motion to Dismiss. That being the case, not only has defendant not caused any deprivation in the past (assuming, *arguendo*, there has been one), he does not threaten a future violation to plaintiffs' right to a fair hearing or to due process, whatever they might be. In *Pennington Seed, Inc. v. Produce Exch. No. 299*, 457 F.3d 1334 (Fed. Cir. 2006), a case seeking to enjoin prospective patent infringements, the court affirmed the dismissal of claims against Arkansas officials who had general, state-law obligations to oversee the University of Arkansas' patent policy. In holding that the claims did not fit within *Ex parte Young*, the court emphasized that mere ability because of one's office to stop an ongoing violation of law by others is insufficient to overcome the officers' Eleventh Amendment immunity. "A nexus between the violation of federal law and the individual accused of violating that law requires more than simply a broad general obligation to prevent a violation; it requires an actual violation of federal law by that individual." *Id.,* 457 F.3d at 1342-43. *See also Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. Cal. 1992) (Eleventh Amendment bars federal court jurisdiction absent a real likelihood that particular State official will employ supervisory powers against plaintiffs' interests).

For the foregoing reasons this Court lacks subject matter jurisdiction over plaintiffs' amended complaint because of defendant's Eleventh Amendment immunity. Therefore, it should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

C. PLAINTIFFS LACK STANDING.

The court also lacks subject matter jurisdiction because for a plaintiff to have standing, the relief requested must be capable of redressing the plaintiff's injury. Here, nothing this court can do will provide services to the plaintiffs for the 90-day periods of time now long past. Even assuming, *arguendo*, they could prove their entitlement to such services at a fair hearing, that does not mean they need the services today, or tomorrow.

Plaintiffs have not demonstrated that they have standing to pursue injunctive relief. "To have Article III standing to seek prospective relief, plaintiffs must show they are likely to suffer future injury that will be remedied by the relief sought." *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006). They have made no such showing. There is no allegation that if they apply for medical assistance in the future, defendant Benton (or any other official) will deprive them of their request without affording them a fair hearing and due process.

D. PLAINTIFFS' CLAIMS ARE NOT RIPE.

Defendant Benton will not repeat herein his prior argument showing that plaintiffs have either not pursued their appeal rights, or have not learned what the final agency action will be subsequent to their appeals, but that argument is incorporated herein by reference. It shows that plaintiffs' claims are not ripe for adjudication, and - there being no present case or controversy for this Court to resolve - plaintiffs' claims should be dismissed for lack of subject matter jurisdiction.

E. ABSTENTION IS APPROPRIATE.

The Court should abstain from deciding plaintiffs' claims under the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971), because this federal action attempts to interfere with ongoing state appeals. *Younger* dictates that a federal district court abstain from exercising jurisdiction when (1) a state criminal, civil or administrative proceeding is ongoing; (2) the state court provides an adequate forum to hear the claims raised in the federal complaint; and (3) the state proceedings involve important state interests. *Browning-Ferris, Inc. v. Baltimore County*, 774 F.2d 77 (4th Cir. 1985); *Amanatullah v. Colorado Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999). Absent extraordinary circumstances, abstention is mandatory when these elements are satisfied.

Younger abstention goes to the exercise of equity jurisdiction, not to a court's jurisdiction to hear the case. *Younger* abstention "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced." *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 626 (1986). *Younger* abstention applies to federal claims for declaratory relief and injunctive relief. The motivating force behind *Younger* abstention is the promotion of comity between state and federal judicial bodies. *Aaron v. Target Corp*., 357 F.3d 768, 774 (8th Cir. 2004). Under *Younger,* federal courts should abstain from exercising jurisdiction in cases where equitable relief would interfere with pending state proceedings in a way that offends principles of comity and federalism. *Aaron*, 357 F.3d at 774. Therefore, abstention is appropriate in circumstances such as those presented by plaintiffs herein where: (1) there are ongoing state proceedings; (2) those state proceedings implicate important state interests; (3) the federal litigation will interfere with the state proceedings; and (4) the state proceedings provided the federal plaintiff

with an adequate opportunity to raise the federal claims. *Norwood v. Dickey*, 409 F.3d 901, 903 (8th Cir. 2005).

F. THE AMENDED COMPLAINT FAILS TO STATE CLAIM UNDER RULE 12(b)(6).

In the event the Court decides that (1) it has jurisdiction over the amended complaint and that (2) it will not abstain from exercising that jurisdiction, the Court should nonetheless dismiss because the amended complaint presents claims for which relief cannot be granted. The pleading standard recently articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) emphasized that the allegation of the complaint must state more than a possible claim; it must state a plausible one. *See id.,* 127 S. Ct. at 1965-66 (noting that "[f]actual allegations must be enough to raise a right to relief above the speculative level" and that there must be "plausible grounds" for a claim for relief). Under this standard, the amended complaint fails.

1. Plaintiffs' Statutory Claim Is Defective.

Defendant Benton will not repeat herein his prior argument showing that § 1396a(a)(3) does not create enforceable rights, but that argument shows that plaintiffs have not stated a statutory claim upon which relief can be granted, and it is incorporated herein by reference. It is clear, however, that when a § 1983 plaintiff wants enforcement of federal regulatory provisions, the claim can be dismissed under Rule 12(b)(6). Plaintiffs make much of their on-again, off-again receipt or non-receipt of medical assistance pending their appeals of denials of those very services. However, as clearly held in *Mundell v. Bd. of County Comm'rs*, 2005 U.S. Dist. LEXIS 19815 (D. Colo. Sept. 2, 2005), plaintiffs have no *right* to continued benefits:

> [T]here is still a logical disconnect between the statutory requirement of reasonable promptness and plaintiff's allegation that he has a right to the continuation of benefits pending the outcome of his appeal of the agency's unfavorable decision. That

> alleged right derives not from the text of the statute but from federal regulations interpreting the Medicaid Act, which provide, in relevant part, that when benefits are to be terminated and "the recipient requests a hearing before the date of action, the agency may not terminate or reduce services until a declaration is rendered after the hearing[.]" 42 C.F.R. § 431.230(a). In light of *Gonzaga*, with its focus on congressional intent, it appears clear that a federal regulation itself is not sufficient to create an enforceable federal right. The ultimate question is whether *Congress* intended to create such a right. If the agency's regulations interpret or enforce a congressionally created right, they maybe considered in determining its scope and nature. On the other hand, when a regulation is untethered from a foundational statutory right, or if the link between the two is remote and tenuous, the regulation alone cannot create any enforceable rights. *See Harris v. James*, 127 F.3d 993, 1005-11 (11th Cir. 1997); *see also Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987). The question, therefore, is whether the regulation requiring continuation of benefits pending a determination fleshes out or is, alternatively, discrete from the statutory right to a reasonably prompt determination.
>
> I find that the statutory right and the regulation are insufficiently linked to create an enforceable right to continuation of benefits. The reasonable promptness directive speaks to the temporal aspect of the benefits determination, that is, whether the determination was made in a timely fashion. Plaintiff, however, is not claiming that defendants unduly delayed the determination of his continuing eligibility status. Rather, the gravamen of his complaint is that defendants erroneously terminated his benefits prior to the determination of his appeal. Stated differently, plaintiff is not complaining about the timeliness of defendants' actions, but rather about their substantive consequences. The right to reasonable promptness is not sufficiently expansive to encompass a right to a continuation of benefits pending the outcome of the agency's hearing decision. For this reason, plaintiff's second cause of action should be dismissed for failure to state a cognizable claim.

Id at * 11-13.

In enacting § 1983 Congress did not intend to override well-established principles under the common law. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989). As the Supreme Court has explained, federal legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) ("*Pennhurst I*"). Among the common law principles at the time of the enactment of the federal civil rights laws of the 1870's

was that third party beneficiaries to a contract, with but few exceptions, were not entitled to enforce the contract. Against this background, a Congress that understood "rights" to be enforceable entitlements could not have intended § 1983 to authorize actions on the part of third party beneficiaries of federal spending programs. Therefore, the *Gonzaga/Blessing* test should rarely identify "rights" under "a mere federal-state funding statute." *Pennhurst I*, 451 U.S. at 18.

This case presents a clear example of plaintiffs claiming alleged "rights" under a federal spending program as to which, as mere third party beneficiaries, they had no such "rights" at the time § 1983 was enacted. Therefore, the statutory claim fails to state a claim covered by § 1983, and it should be dismissed.[5]

2. Plaintiffs' Have Not Stated a Claim under the Due Process Clause.

Defendant Benton will not repeat herein his prior argument that plaintiffs have failed to allege a violation of due process for a number of reasons, but that argument shows that plaintiffs have not stated a constitutional claim upon which relief can be granted, and it is incorporated herein by reference. In addition, however, plaintiffs have failed to allege the deficiency of their available post-deprivation remedies, and have therefore failed to state a claim. By any standard, the appeal procedures available to plaintiffs pass constitutional muster. *See* Exhibit 1 to Motion to Dismiss, and N.C.G.S. § 150B-23 (2008).

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[5] Defendant readily concedes that this Court previously has found this particular argument to be without merit. *See Antrican v. Buell*, 158 F. Supp. 2d 663, 669 n.5 (E.D.N.C. 2001), *aff'd on other grounds sub. nom. Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002), *cert. denied*, 537 U.S. 973 (2002).

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It is well established that random and unauthorized acts of government employees do not constitute procedural due process violations where adequate post-deprivation remedies exist under state law. *Palmer v. Unified Gov't of Wyandotte County/Kansas City, Kan.*, 72 F. Supp. 2d 1237, 1252 (D. Kan. 1999) (citing *Zinermon*, 494 U.S. 113); *see also Parratt v. Taylor*, 451 U.S. 527, 538 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (normal pre-deprivation notice and opportunity to be heard pretermitted where State provides adequate post-deprivation remedy). To state a procedural due process claim under § 1983 where a defendant does not act in conformity with official policy, procedure or custom, the plaintiff must plead the inadequacy or unavailability of post-deprivation remedies. *Montana v. Hargett*, 84 Fed. Appx. 15, 17 (10th Cir. 2003) (citing *Durre v. Dempsey*, 869 F.2d 543, 548 (10th Cir. 1989)). This plaintiffs have failed to do, and their due process claim fails to state a claim upon which relief can be granted.

III. CONCLUSION

Because the *Ex parte Young* exception to Eleventh Amendment immunity does not apply, this Court lacks subject matter jurisdiction over plaintiffs' amended complaint. Were the Court to find the Eleventh Amendment to be no bar to plaintiffs' claims, nonetheless plaintiffs lack standing. and their claims are not ripe for adjudication. Therefore, the amended complaint should be dismissed for lack of subject matter jurisdiction. In the alternative, the Court should abstain from exercising its jurisdiction and should dismiss the amended complaint. Were the Court to find it has jurisdiction, and not abstain, plaintiffs' amended complaint fails to state any claim upon which relief can be granted, and it should be dismissed for that reason.

Respectfully submitted, this the 2nd day of July, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, 2 July 2008, I electronically filed the forgoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** 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.

/s/ Ronald M. Marquette
Ronald M. Marquette
Special Deputy Attorney General