

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Case No. 5:11-cv-273

HENRY PASHBY, ANNIE BAXLEY,)
MARGARET DREW, DEBORAH FORD,)
MELISSA GABIJAN, by her guardian and)
next friend JAMIE GABIJAN, MICHAEL)
HUTTER, LUCRETIA WILLIS, AYLEAH)
PHILLIPS, ALICE SHROPSHIRE,)
SANDY SPLAWN, ROBERT JONES,)
and REBECCA PETTIGREW, on behalf)
of themselves and all others similarly)
situated,)

Plaintiffs,)

v.)

ALDONA WOS, in her official)
capacity as Secretary of the North Carolina)
Department of Health and Human Services,)

Defendant.)
_____)

DEFENDANT'S ANSWER AND
AFFIRMATIVE DEFENSES TO
PLAINTIFFS' SECOND AMENDED
AND SUPPLEMENTAL COMPLAINT

NOW COMES Defendant, Aldona Wos, in her official capacity as Secretary of the North Carolina Department of Health and Human Services ("Department"), by and through Amar Majmundar, Iain Stauffer, Charles Whitehead, Special Deputies Attorney General, and Olga E. Vysotskaya de Brito, Assistant Attorney General, and files her Answer and Affirmative Defenses to the Plaintiffs' second amended and supplemental complaint as follows:

FIRST DEFENSE

Plaintiffs' complaint fails to state claims against Defendant Wos in her official capacity upon which relief can be granted pursuant to N.C.R. Civ. P. 12(b)(6).

SECOND DEFENSE

No action taken or not taken by Defendant Was violated any clearly established constitutional or statutory right of Plaintiffs. No act or failure to act by Defendant Was resulted in discrimination in violation of Title II of the Americans with Disabilities Act of 1990, as amended (the “ADA”), or Section 504 of the Rehabilitation Act of 1973 (“Section 504”), or any other State or Federal Law, and therefore Plaintiffs’ complaint fails to state a claim upon which relief may be granted and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

THIRD DEFENSE

Title II of the ADA and Section 504 do not impose legal obligations on Defendant Was to fundamentally alter the nature of the State’s services and programs or to make the additional modifications sought by Plaintiffs and therefore, Plaintiffs fail to state a claim upon which their requested relief can be granted and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

FOURTH DEFENSE

Plaintiffs have failed to state a cause of action under Title II of the ADA and Section 504, and their action must be dismissed under Fed. R. Civ. P. 12(b)(6). Plaintiffs are not being discriminated against on the basis of a disabling condition. Plaintiffs have failed to allege that they have been denied equal access to a public health care service available to the general population. Neither the ADA nor Section 504 guarantees any particular level of care for disabled persons, nor does it assure that services will continue to be provided in a particular setting.

FIFTH DEFENSE

Plaintiffs’ complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) because Plaintiffs lack standing under Article III, Section 2 of the United States

Constitution to challenge Defendant Vos's acts or omissions. There is no case or controversy between the parties, and Plaintiffs' claims are not ripe for adjudication, because they have suffered no injury in fact. Their injury of being "at risk of institutionalization" is purely conjectural and contingent and may not occur as anticipated or at all.

SIXTH DEFENSE

Plaintiffs' complaint should be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) because they have failed to exhaust their administrative remedies as required by 42 U.S.C. § 200a-3. Plaintiffs have failed to first seek relief from the appropriate State body pursuant to the North Carolina Persons Disabilities Protection Act, N. C. GEN. STAT. §§ 168A-1 through -12 and its implementing regulations, as required by federal law.

SEVENTH DEFENSE

Plaintiffs' complaint should be dismissed for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6) as neither Title II of the ADA nor section 504 requires Defendant Vos to expend substantial State funds to fund Plaintiffs' PCS in light of the resources available to the State and the needs of other person with disabilities.

EIGHTH DEFENSE

Plaintiffs' complaint should be dismissed pursuant Fed. R. Civ. P. 12(b)(1) based on the Eleventh Amendment to the United States Constitution. In addition to declaratory and injunctive relief, Plaintiffs seek from Defendant Vos in her official capacity "such other relief as this Court deems just and equitable." Plaintiffs seek far-ranging remedies from the State, above and beyond simple prospective injunctive relief.

ANSWER

Responding to the allegations in the individually numbered paragraphs of the Complaint, Secretary Wos alleges and says:

1. The first sentence in paragraph one is not an allegation that requires an answer. Defendant admits that personal care services can be provided to elderly or disabled individuals who require assistance with certain tasks of daily living if they meet certain eligibility criteria. Defendant denies the remaining allegations in paragraph one.

2. Defendant admits that IHCA Clinical Coverage Policy No.: 3E became effective June 1, 2011. Defendant further admits that Clinical Coverage Policy No.: 3L became effective January 1, 2013 and that Policy 3L applies irrespective of setting. To the extent that the allegations restate or summarize Court orders and legislation, no response is required as the Court orders and legislation speak for themselves. Defendant denies the remaining allegations in paragraph two.

3. Defendant denies the allegations in paragraph three.

4. Defendant admits the allegation in paragraph four that the named plaintiffs received notices informing them that they were no longer going to receive PCS, and did not qualify for IHCA services. To the extent that the allegations restate or summarize a Court order, no response is required as the Court order speaks for itself. Defendant denies the remaining allegations in paragraph four.

5. Defendant denies the allegations in paragraph five.

6. Defendant denies the allegations in paragraph six.

7. The allegations in paragraph seven are not allegations of fact and do not require an answer. To the extent a response is deemed necessary, Defendant denies the allegations in paragraph seven.

8. The allegations in paragraph eight are conclusions of law and therefore require no answer. To the extent an answer is required, the provisions of 28 USC § 1331, 28 USC §§ 1343(3) and (4) speak for themselves.

9. The allegations in paragraph nine are not allegations of fact and do not require an answer.

10. The allegations in paragraph ten are conclusions of law and do not require an answer. To the extent that a response is deemed necessary, Defendant admits that Wake County is within the jurisdiction of the Eastern District Court. Defendant denies that any error or omissions on her part gave rise to any claim on the part of the named or putative plaintiffs.

11. Defendant admits the allegation in paragraph eleven that the named plaintiffs received notices informing them that they were no longer going to receive PCS, and did not qualify for IHCA services. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph eleven and the same are therefore denied.

12. Defendant admits the allegation in paragraph twelve.

13. Defendant admits the allegation in paragraph thirteen.

14. Defendant admits the allegation in paragraph fourteen.

15. The allegation in paragraph fifteen is a conclusion of law that does not require an answer. To the extent that a response is deemed necessary, the allegations of paragraph fifteen of the plaintiffs' second amended complaint are denied.

16. The allegations in paragraph sixteen are not statements of fact that require an answer. To the extent any answer is required, Defendant is without information sufficient to form a belief as to the truth of those matters and the same are therefore denied.

17. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph seventeen and the same are therefore denied.

18. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph eighteen and the same are therefore denied.

19. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph nineteen and the same are therefore denied.

20. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph twenty and the same are therefore denied.

21. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph twenty-one and the same are therefore denied.

22. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph twenty-two and the same are therefore denied.

23. As to the allegations in paragraph twenty-three, they are statements of the contents of various statutes. The statutes speak for themselves.

24. The contents of paragraph twenty-four contain general conclusory statements about the "Medicaid program" and are not specific to Defendant. As written, the allegations in paragraph twenty-four are denied.

25. The contents of paragraph twenty-five contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph twenty-five.

26. The contents of paragraph twenty-six contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits that North Carolina has chosen to participate in the Medicaid program.

27. The contents of paragraph twenty-seven contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph twenty-seven.

28. The contents of paragraph twenty-eight contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph twenty-eight.

29. The contents of paragraph twenty-nine contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph twenty-nine.

30. The contents of paragraph thirty contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph thirty.

31. The contents of paragraph thirty-one contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph thirty-one.

32. The contents of paragraph thirty-two contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph thirty-two.

33. The contents of paragraph thirty-three contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph thirty-three.

34. The contents of paragraph thirty-four contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary,

Defendant admits the allegations in paragraph thirty-four except that 10A NCAC 22O .0120 was transferred to 10A NCAC 25O .0202 effective May 1, 2012.

35. The contents of paragraph thirty-five contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph thirty-five.

36. The contents of paragraph thirty-six contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph thirty-six.

37. The contents of paragraph thirty-seven contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph thirty-seven.

38. The contents of paragraph thirty-eight contain general conclusory statements about the “federal Medicaid statute” and are not specific to Defendant. As written, the allegations in paragraph thirty-eight are denied.

39. The contents of paragraph thirty-nine contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph thirty-nine.

40. The contents of paragraph forty contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph forty.

41. The contents of paragraph forty-one contain conclusions of law or restatements of federal law that do not require an answer.

42. The contents of paragraph forty-two contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph forty-two.

43. The contents of paragraph forty-three contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph forty-three.

44. The contents of paragraph forty-four contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph forty-four.

45. The contents of paragraph forty-five contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph forty-five.

46. The contents of paragraph forty-six contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph forty-six.

47. The contents of paragraph forty-five call for legal conclusions. The holding in the case of *Olmstead v. L.C. ex rel Simring*, 527 U.S. 581 (1999) speaks for itself.

48. The contents of paragraph forty-eight contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant denies that she receives federal funds. Defendant admits that the Department of Health and Human Services receives federal funds.

49. The contents of paragraph forty-nine contain conclusions of law or restatements of federal law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph forty-nine.

50. Upon information and belief, Defendant admits that Henry Pashby is presently authorized by the North Carolina Medicaid program to receive 80 hours of medically necessary PCS per month. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph fifty and the same are therefore denied.

51. Defendant admits that Henry Pashby received a denial notice from the Carolina Centers for Medical Excellence (CCME), and that the contents of the notice speak for themselves. Defendant expressly denies the remaining allegations of paragraph fifty-one. Mr. Pashby filed a timely appeal of the IHCA denial notice and was specifically able to challenge the decision.

52. Defendant admits, upon information and belief, that Henry Pashby resolved his case through mediation as part of DHHS's fair hearing process. Defendant admits that Mr. Pashby was reassessed in October 2011 and authorized to receive 80 hours of medically necessary PCS per month. Upon information and belief, Defendant admits that Mr. Pashby is presently authorized by the North Carolina Medicaid program to receive 80 hours of medically necessary PCS per month.

53. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph fifty-three and the same are therefore denied.

54. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph fifty-four and the same are therefore denied.

55. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph fifty-five and the same are therefore denied.

56. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph fifty-six and the same are therefore denied.

57. Defendant admits that Annie Baxley was previously authorized by the North Carolina Medicaid program to receive up to 60 hours of PCS per month prior to April 2011.

58. Defendant admits that Annie Baxley received a denial notice from the Carolina Centers for Medical Excellence (CCME), and that the contents of the notice speak for themselves. Defendant expressly denies the remaining allegations of paragraph fifty-eight. Ms. Baxley filed a timely appeal of the IHCA denial notice and was specifically able to challenge the decision.

59. Defendant admits, upon information and belief, that Annie Baxley resolved her case through mediation as part of DHHS's fair hearing process. Defendant further admits, upon information and belief, that Ms. Baxley appealed an assessment in 2012 and resolved her case through mediation as part of DHHS's fair hearing process. Defendant admits that independent assessments are required on an annual basis to ensure continuing eligibility for PCS. Defendant denies the remaining allegations in paragraph fifty-nine.

60. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph sixty and the same are therefore denied.

61. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph sixty-one and the same are therefore denied.

62. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph sixty-two and the same are therefore denied.

63. Upon information and belief, Defendant admits that Margaret Drew is presently authorized by the North Carolina Medicaid program to receive 80 hours of medically necessary

PCS per month. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph sixty-three and the same are therefore denied.

64. Defendant admits that Margaret Drew received a denial notice from the Carolina Centers for Medical Excellence (CCME), and that the contents of the notice speak for themselves. Defendant expressly denies the remaining allegations of paragraph sixty-four. Ms. Drew filed a timely appeal of the IHCA denial notice and was specifically able to challenge the decision.

65. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph sixty-five and the same are therefore denied.

66. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph sixty-six and the same are therefore denied.

67. Defendant admits, upon information and belief, that Margaret Drew resolved her case through mediation as part of DHHS's fair hearing process. Defendant expressly denies the remaining allegations of paragraph sixty-seven.

68. Defendant admits that, upon information and belief, Ms. Drew filed an administrative appeal of the denial, resolved her case through mediation as part of DHHS's fair hearing process and is authorized to receive 80 hours per month of medically necessary PCS.

69. Defendant admits that Ms. Drew received an annual assessment in August 2013. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph sixty-nine and the same are therefore denied.

70. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph seventy and the same are therefore denied.

71. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph seventy-one and the same are therefore denied.

72. Defendant admits that Deborah Ford received a denial notice from the Carolina Centers for Medical Excellence (CCME), and that the contents of the notice speak for themselves. Defendant expressly denies the remaining allegations of paragraph seventy-two. Ms. Ford filed a timely appeal of the IHCA denial notice and was specifically able to challenge the decision.

73. Defendant admits that, upon information and belief, Ms. Ford resolved her case through mediation as part of DHHS's fair hearing process. Defendant further admits, upon information and belief, that Ms. Ford was reassessed in June 2012 and was authorized to receive 76 hours of medically necessary PCS per month. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph seventy-three and the same are therefore denied.

74. Defendant admits that independent assessments are required on an annual basis to ensure continuing eligibility for PCS. Defendant expressly denies the remaining allegations of paragraph seventy-four.

75. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph seventy-five and the same are therefore denied.

76. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph seventy-six and the same are therefore denied.

77. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph seventy-seven and the same are therefore denied.

78. Defendant admits that, upon information and belief, Melissa Gabijan is presently authorized by the North Carolina Medicaid program to receive 66 hours of medically necessary PCS per month. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph seventy-eight and the same are therefore denied.

79. Defendant admits that Melissa Gabijan received a denial notice from the Carolina Centers for Medical Excellence (CCME), and that the contents of the notice speak for themselves. Defendant expressly denies the remaining allegations of paragraph seventy-nine. Ms. Gabijan filed a timely appeal of the IHCA denial notice and was specifically able to challenge the decision.

80. Upon information and belief, Ms. Gabijan was authorized to receive 24 hours of medically necessary PCS per month prior to June 2011 and that Ms. Gabijan received a notice denying transition to IHCA. Defendant admits that, upon information and belief, Ms. Gabijan filed an administrative appeal and resolved her case through mediation as part of DHHS's fair hearing process. Defendant further admits, upon information and belief, that Ms. Gabijan was reassessed in June 2012 and was authorized to receive 59 hours of medically necessary PCS per month. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph eighty and the same are therefore denied.

81. Defendant admits that Ms. Gabijan that following an annual independent assessment in August 2012, Ms. Gabijan was authorized to received 66 hours of medically necessary PCS per month. Defendant admits that independent assessments are required on an annual basis to ensure continuing eligibility for PCS. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph eighty-one and the same are therefore denied.

82. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph eighty-two and the same are therefore denied.

83. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph eighty-three and the same are therefore denied.

84. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph eighty-four and the same are therefore denied

85. Defendant admits that, upon information and belief, Micheal Hutter is authorized by the North Carolina Medicaid program to receive 50 hours of medically necessary PCS per month. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph eighty-five and the same are therefore denied.

86. Defendant admits that Micheal Hutter received a denial notice from the Carolina Centers for Medical Excellence (CCME), and that the contents of the notice speak for themselves. Defendant expressly denies the remaining allegations of paragraph eighty-six. Mr. Hutter filed a timely appeal of the IHCA denial notice and was specifically able to challenge the decision.

87. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph eighty-seven and the same are therefore denied.

88. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph eighty-eight and the same are therefore denied.

89. Defendant admits, upon information and belief, that Micheal Hutter resolved his case through mediation as part of DHHS's fair hearing process. Defendant admits that Mr. Hutter received an independent assessment in July 2012 and that a notice was issued to Mr. Hutter informing him of a reduction in his approved medically necessary PCS hours from 50 to 39 hours per month. Defendant admits, upon information and belief, that Mr. Hutter filed an administrative appeal which remains pending. Defendant expressly denies the remaining allegations of paragraph eighty-nine.

90. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph ninety and the same are therefore denied.

91. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph ninety-one and the same are therefore denied.

92. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph ninety-two and the same are therefore denied

93. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph ninety-three and the same are therefore denied.

94. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph ninety-four and the same are therefore denied.

95. Defendant admits that Lucretia Willis received a denial notice from the Carolina Centers for Medical Excellence (CCME), and that the contents of the notice speak for themselves. Defendant expressly denies the remaining allegations of paragraph ninety-five. Ms. Willis filed a timely appeal of the IHCA denial notice and was specifically able to challenge the decision.

96. Upon information and belief, Defendant admits that Ms. Willis filed an administrative appeal and resolved her case through mediation as part of DHHS's fair hearing process and was authorized to receive 58 hours per month of medically necessary PCS. Upon information and belief, Ms. Willis is presently authorized to receive PCS.

97. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph ninety-seven and the same are therefore denied.

98. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph ninety-eight and the same are therefore denied.

99. Defendant admits that independent assessments are required on an annual basis to ensure continuing eligibility for PCS. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph ninety-nine and the same are therefore denied.

100. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 100 and the same are therefore denied.

101. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 101 and the same are therefore denied.

102. Defendant admits that Mr. Moore is deceased.

103. Defendant admits that James Moore received a denial notice from the Carolina Centers for Medical Excellence (CCME), and that the contents of the notice speak for themselves. Defendant expressly denies the remaining allegations of paragraph 103. Mr. Moore filed a timely appeal of the IHCA denial notice and was specifically able to challenge the decision.

104. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 104 and the same are therefore denied.

105. Defendant admits that Mr. Moore was previously authorized to receive up to 28 hours of medically necessary PCS per month and that Mr. Moore filed a previous appeal. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 105 and the same are therefore denied.

106. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 106 and the same are therefore denied.

107. Defendant admits that Ayleah Phillips was previously authorized by the North Carolina Medicaid program to receive up to 29 hours of medically necessary PCS per month. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 107 and the same are therefore denied.

108. Defendant admits that Ayleah Phillips received a denial notice from the Carolina Centers for Medical Excellence (CCME), and that the contents of the notice speak for themselves.

Defendant expressly denies the remaining allegations of paragraph 108. Ms. Phillips filed a timely appeal of the IHCA denial notice and was specifically able to challenge the decision.

109. Defendant admits that Ms. Phillips filed an appeal of her IHCA denial. Defendant further admits that Ms. Phillips received an annual independent assessment in March 2012 and was authorized to receive 59 hours of medically necessary PCS per month. Defendant admits that independent assessments are required on an annual basis to ensure continuing eligibility for PCS. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 109 and the same are therefore denied.

110. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph one 110 and the same are therefore denied.

111. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 111 and the same are therefore denied.

112. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 112 and the same are therefore denied.

113. Defendant admits that Alice Shropshire was previously authorized by the North Carolina Medicaid program to receive 28 hours of medically necessary PCS per month. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 113 and the same are therefore denied.

114. Defendant admits that Alice Shropshire received a denial notice from the Carolina Centers for Medical Excellence (CCME), and that the contents of the notice speak for themselves. Defendant expressly denies the remaining allegations of paragraph 114. Ms. Shropshire filed a timely appeal of the IHCA denial notice and was specifically able to challenge the decision.

115. Defendant admits, upon information and belief, that Alice Shropshire resolved her case through mediation as part of DHHS's fair hearing process and was authorized to receive 45 hours of medically necessary PCS per month. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 115 and the same are therefore denied.

116. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 116 and the same are therefore denied.

117. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 117 and the same are therefore denied.

118. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 118 and the same are therefore denied.

119. Defendant admits that Sandy Splawn received a denial notice from the Carolina Centers for Medical Excellence (CCME), and that the contents of the notice speak for themselves. Defendant expressly denies the remaining allegations of paragraph 119.

120. Defendant admits, upon information and belief, that Sandy Splawn filed an administrative appeal of the denial and resolved her case through mediation as part of DHHS's fair hearing process. Defendant further admits that Ms. Splawn received an independent assessment in June 2012 and was authorized to receive 71 hours of medically necessary PCS per month. Defendant admits that independent assessments are required on an annual basis to ensure continuing eligibility for PCS. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 120 and the same are therefore denied.

121. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 121 and the same are therefore denied.

122. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 122 and the same are therefore denied.

123. Defendant admits that Robert Jones was previously authorized by the North Carolina Medicaid program to receive up to 27 hours of medically necessary PCS per month, and that Mr. Jones was authorized to receive up to 48 hours of PCS per month prior to November 2010. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 123 and the same are therefore denied.

124. Defendant admits that Robert Jones received a denial notice from the Carolina Centers for Medical Excellence (CCME), and that the contents of the notice speak for themselves. Defendant expressly denies the remaining allegations of paragraph 124.

125. Defendant admits that Robert Jones filed a timely appeal of the IHCA denial notice and that his PCS was reinstated in accordance with federal and state law pending the outcome of the appeal. To the extent the allegations of this paragraph imply or contend that Department representatives provided misinformation during the mediation of Mr. Jones' appeal, such allegations are expressly denied. Defendant admits that Mr. Jones voluntarily dismissed his appeal. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 125 and the same are therefore denied.

126. Defendant admits that Mr. Jones' PCS was authorized pursuant to the December 8, 2011 Order of the Federal District Court for the Eastern District of North Carolina.

127. Defendant admits that Mr. Jones received an annual assessment on April 3, 2013. Defendant further admits that following the assessment, Mr. Jones filed an administrative appeal of his PCS termination. Upon information and belief, Defendant admits that Mr. Jones resolved

his case through mediation as part of DHHS's fair hearing process and was authorized for 36 hours per month of medically necessary PCS.

128. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 128 and the same are therefore denied.

129. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 129 and the same are therefore denied.

130. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 130 and the same are therefore denied.

131. Defendant admits that its contractor CCME erroneously sent an IHCA approval notice to Rebecca Pettigrew in May 2011. The contents of the notice speak for themselves.

132. Defendant admits that Rebecca Pettigrew received a denial notice from CCME in June 2011 and that the contents of the notice speak for themselves. Defendant expressly denies the remaining allegations of paragraph 132.

133. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 133 and the same are therefore denied.

134. Upon information and belief, Defendant admits the allegations in paragraph 134.

135. Upon information and belief, Defendant admits that Ms. Pettigrew's PCS was reinstated February 29, 2012 and that Ms. Pettigrew was authorized to receive 22 hours of medically necessary PCS per month. Upon information and belief, Defendant admits that Ms. Pettigrew filed an administrative appeal, received an independent assessment in April 2012, and was authorized to receive 80 hours of medically necessary PCS per month. Defendant expressly denies the remaining allegations of paragraph 135.

136. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 136 and the same are therefore denied.

137. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 137 and the same are therefore denied.

138. The contents of paragraph 138 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph 138.

139. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 139 and the same are therefore denied.

140. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 140 and the same are therefore denied.

141. Defendant expressly denies the allegations of paragraph 141.

142. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 142 and the same are therefore denied.

143. Defendant admits that Adult Care Homes are permitted to have locked units. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 143 and the same are therefore denied.

144. Defendant expressly denies the allegations of paragraph 144.

145. Defendant expressly denies that Adult Care Home residents' autonomy is limited. Defendant admits that residents may be subject to 24-hour supervision.

146. Defendant expressly denies the allegations of paragraph 146.

147. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 147 and the same are therefore denied.

148. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 148 and the same are therefore denied.

149. The contents of paragraph 149 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits that an ACH may impose restrictions on visitation.

150. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 150 and the same are therefore denied.

151. The contents of paragraph 151 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant denies the allegations in paragraph 151 as written.

152. The contents of paragraph 152 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph 152.

153. The contents of paragraph 153 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph 153.

154. The contents of paragraph 154 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits that an adult care home is permitted to apply the recipient's federal benefits directly to the facility charges.

155. Defendant admits the allegations of paragraph 155.

156. The contents of paragraph 156 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph 156.

157. The contents of paragraph 157 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph 157.

158. Defendant expressly denies the allegations of paragraph 158.

159. The contents of paragraph 159 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph 159.

160. The contents of paragraph 160 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 160 and the same are therefore denied.

161. Defendant admits that Adult Care Home residents may be eligible for Special Assistance. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 161 and the same are therefore denied.

162. The contents of paragraph 162 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations of paragraph 162.

163. The contents of paragraph 163 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations of paragraph 163.

164. Defendant admits the allegations of paragraph 164.
165. Defendant admits the allegations of paragraph 165.
166. Defendant expressly denies the allegations of paragraph 166.
167. Defendant admits that in Session Law 2010-31 the North Carolina General Assembly directed the Department to eliminate the Personal Care Services program and replace it with the In-Home Care Services program. The remaining allegations of paragraph 167 are denied.
168. The contents of paragraph 168 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant denies the allegations in paragraph 168 as written.
169. Defendant admits the allegations of paragraph 169.
170. Defendant admits the allegations of paragraph 170.
171. Defendant admits the allegations of paragraph 171.
172. The allegations of paragraph 172 are denied.
173. The allegations of paragraph 173 are denied.
174. The allegations of paragraph 174 are denied.
175. The contents of the second sentence of paragraph 175 restate the contents of the CMS approval notice for SPA 10-031 and do not require an answer. The contents of the CMS letter speak for themselves. The remaining allegations of paragraph 175 are denied.
176. Defendant admits that the Department properly and legally promulgated new clinical coverage policies for IHCA and IHCC in accordance with N.C.G.S. § 108A-54.2. The contents of IHCA Clinical Coverage Policy No. 3E speaks for itself.

177. The allegations of paragraph 177 restate various provisions of IHCA Clinical Coverage Policy No.: 3E. The contents of IHCA Clinical Coverage Policy No.: 3E speaks for itself. To the extent that a response is deemed necessary, Defendant denies the allegations of paragraph 177.

178. The allegations of paragraph 178 restate various provisions of IHCA Clinical Coverage Policy No.: 3E. The contents of IHCA Clinical Coverage Policy No.: 3E speaks for itself. To the extent that a response is deemed necessary, Defendant admits the allegations of paragraph 178.

179. The allegations of paragraph 179 restate various provisions of IHCA Clinical Coverage Policy No.: 3E. The contents of IHCA Clinical Coverage Policy No.: 3E speaks for itself. To the extent that a response is deemed necessary, Defendant admits the allegations of paragraph 179.

180. The allegations of paragraph 180 restate various provisions of IHCA Clinical Coverage Policy No.: 3E. The contents of IHCA Clinical Coverage Policy No.: 3E speaks for itself. To the extent that a response is deemed necessary, Defendant admits the allegations of paragraph 180.

181. The allegations of paragraph 181 restate various provisions of IHCA Clinical Coverage Policy No.: 3E. The contents of IHCA Clinical Coverage Policy No.: 3E speaks for itself. To the extent that a response is deemed necessary, Defendant admits the allegations of paragraph 181.

182. The allegations of paragraph 182 restate various provisions of IHCA Clinical Coverage Policy No.: 3E. The contents of IHCA Clinical Coverage Policy No.: 3E speaks for itself. To the extent that a response is deemed necessary, Defendant admits the allegations of paragraph 182.

183. Defendant admits that notices advising individuals that they did not qualify for IHCA were mailed to Medicaid recipients in May 2011. Defendant denies the remaining allegations in paragraph 183.

184. The allegations of paragraph 184 restate the Order issued by the Federal District Court for the Eastern District of North Carolina in this matter and its contents speak for itself. Defendant admits that in February 2012 it approved PCS for class members.

185. Defendant admits the allegations in paragraph 185.

186. Defendant admits the allegations in paragraph 186.

187. Defendant admits that after issuance of the March 2012 Stay from the Fourth Circuit Court of Appeals, it continued to implement Clinical Coverage Policy No.: 3E. Upon information and belief, Defendant denies the remaining allegations in paragraph 187.

188. Defendant admits that Clinical Coverage Policy No.: 3E was in effect through December 31, 2012. Upon information and belief, Defendant denies the remaining allegations in paragraph 188.

189. Defendant admits that the Fourth Circuit Court of Appeals issued its judgment on March 5, 2013. The content of the judgment speaks for itself. Defendant further admits that the Fourth Circuit Court of Appeals issued its mandate on April 10, 2013. The remaining allegations of paragraph 189 are expressly denied.

190. Defendant admits that, prior to January 1, 2013, the criteria for qualifying for personal care services delivered in an Adult Care Home were different than the criteria for qualifying for In-Home Care Services for Adults. The remaining allegations of paragraph 190 are denied.

191. The contents of paragraph 191 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph 191.

192. The contents of paragraph 192 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant admits the allegations in paragraph 192.

193. Upon information and belief, Defendant admits that prior to January 1, 2013 there was no requirement for prior approval by the Department for authorization of PCS for a resident of an Adult Care Home.

194. The contents of paragraph 194 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant denies the allegations in paragraph 194.

195. Defendant denies that it did not promulgate or announce any Clinical Coverage Policy that set forth eligibility criteria for PCS in ACHs prior to January 1, 2013. Defendant admits that Clinical Coverage Policy No.: 3L was promulgated and announced prior to January 1, 2013. Upon information and belief, Defendant denies the remaining allegations in paragraph 195.

196. To the extent that the allegations of paragraph 196 restate various provisions of IHCA Clinical Coverage Policy No.: 3E, the contents of the policy speaks for itself. To the extent that a response is deemed necessary, Defendant admits that Clinical Coverage Policy No.: 3L was effective January 1, 2013 and is applicable to PCS recipients irrespective of setting. Upon information and belief, the remaining allegations of paragraph 196 are denied.

197. Upon information and belief, Defendant admits the allegations of paragraph 197 prior to January 1, 2013.

198. The contents of paragraph 198 simply restate the contents of SPA 10-031 and do not require an answer. The contents of SPA 10-031 speak for themselves. To the extent that a response is required, Defendant denies the allegations in paragraph 198.

199. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 199 and the same are therefore denied.

200. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 200 and the same are therefore denied.

201. The contents of paragraph 201 restate various provisions of state law, N.C. Session Law 2012-142 § 10.9F.(c). The contents of 2012-142 § 10.9F.(c) speaks for itself.

202. Defendant admits that SPA NC12-013 was submitted to CMS on July 22, 2012 and that a response to a Request for Additional Information for SPA NC12-013 was submitted to CMS on October 22, 2012. Defendant further admits that CMS approved SPA NC12-013 by letter dated November 30, 2012. The contents of the second sentence of paragraph 202 restate the contents of the CMS approval letter for SPA NC12-013 and do not require an answer. The contents of the CMS letter speak for themselves. Defendant denies the remaining allegations of paragraph 202.

203. The contents of paragraph 203 restate various provisions of Clinical Coverage Policy No.: 3L and do not require an answer. The contents of Clinical Coverage Policy No.: 3L speak for itself. To the extent that a response is deemed necessary, Defendant admits that Clinical Coverage Policy No.: 3L was implemented effective January 1, 2013 and makes eligibility requirements for PCS uniform across eligible settings. Defendant denies the remaining allegations in paragraph 203.

204. The allegations of paragraph 204, and all sub-paragraphs are denied.

205. The contents of paragraph 205 contain conclusions of law or restatements of state law that do not require an answer. To the extent that a response is deemed necessary, Defendant denies the allegations in paragraph 205.

206. The allegations of paragraph 206 are denied.

207. The allegations of paragraph 207 are denied.
208. Defendant admits the allegations of paragraph 208.
209. Defendant admits that notices were sent to Medicaid recipients with current PCS assessments informing those recipients whether or not they qualify for IHCA.
210. The contents of paragraph 210 restate the contents of notices issued by the Carolina Centers for Medical Excellence (CCME), and do not require an answer. The contents of the notices speak for themselves.
211. The contents of paragraph 211 restate the contents of notices issued by the Carolina Centers for Medical Excellence (CCME), and do not require an answer. The contents of the notices speak for themselves.
212. The contents of paragraph 212 restate the contents of notices issued by the Carolina Centers for Medical Excellence (CCME), and do not require an answer. The contents of the notices speak for themselves.
213. The allegations of paragraph 213 are denied.
214. The allegations of paragraph 214 are denied.
215. Defendant admits the allegations of paragraph 215.
216. The allegations of paragraph 216 are denied.
217. Upon information and belief, Defendant admits that PCS notices were changed in early 2012. Defendant further admits that it will continue to defend the legality of its notices. Defendant denies the remaining allegations in paragraph 217.
218. The allegations in paragraph 218 restate or summarize the contents of notices issued by CCME and do not require an answer. The contents of the notices speak for themselves. Defendant admits that the Office of Administrative Hearings issues the final agency decision in

Medicaid beneficiary appeals of PCS adverse determinations. Upon information and belief, the remaining allegations of paragraph 218 are denied.

219. Defendant restates her answers and responses to the allegations of paragraphs 1-218, as if fully set forth herein.

220. Defendant admits that she is Secretary of DHHS. The remaining allegations of paragraph 220 contain conclusions of law to which no response is required.

221. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 221 and the same are therefore denied.

222. The allegations of paragraph 222 are expressly denied.

223. The allegations of paragraph 223 are expressly denied.

224. The allegations of paragraph 224 are expressly denied.

225. Defendant restates her answers and responses to the allegations of paragraphs 1-224, as if fully set forth herein.

226. Defendant is without information sufficient to form a belief as to the truth of the allegations in paragraph 226 and the same are therefore denied.

227. Defendant admits that the Department administers the North Carolina Medicaid program. The remaining allegations of paragraph 227 contain conclusions of law to which no response is required.

228. The allegations of paragraph 228 are expressly denied.

229. The allegations of paragraph 229 are expressly denied.

230. Defendant restates her answers and responses to the allegations of paragraphs 1-229, as if fully set forth herein.

231. The allegations of paragraph 231 are expressly denied.

232. The allegations of paragraph 232 are expressly denied.

233. Defendant restates her answers and responses to the allegations of paragraphs 1-232, as if fully set forth herein.

234. The allegations of paragraph 234 are expressly denied.

235. The allegations of paragraph 235 are expressly denied.

236. Defendant restates her answers and responses to the allegations of paragraphs 1-235, as if fully set forth herein.

237. The allegations of paragraph 237 are expressly denied.

238. The allegations of paragraph 238 are expressly denied.

239. The allegations of paragraph 239 are expressly denied.

240. Defendant restates her answers and responses to the allegations of paragraphs 1-239, as if fully set forth herein.

241. The allegations of paragraph 241 are expressly denied.

242. The allegations of paragraph 242 are expressly denied.

WHEREFORE, Defendant respectfully prays:

1. That plaintiffs' second amended and supplemental complaint be dismissed;
2. Plaintiffs have and recover naught on their complaint;
3. That the costs of this action be taxed against the plaintiffs; and
4. For such other and further relief as the Court deems just and equitable.

This 9th day of October, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, 9 October 2013, I electronically filed the forgoing **DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' SECOND AMENDED AND SUPPLMENTAL COMPLAINT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: John R. Rittelmeyer, Douglas S. Sea, Sarah Somers, Jane Perkins, Elizabeth Edwards and Jennifer L. Bills attorneys for Plaintiffs, and I hereby certify that I have mailed the document to the following non CM/ECF participates: none.

/s/ Iain Stauffer
Iain Stauffer
Special Deputy Attorney General