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.

AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. This case challenges the lack of basic due process protections for Medicaid recipients when their providers' requests for behavioral health and developmental disability services are denied, reduced, or terminated by the North Carolina Department of Health and Human Services (DHHS) or its agent, ValueOptions. ValueOptions is a private company with which DHHS has contracted to administer behavioral health and developmental disability services for North Carolina's Medicaid recipients. Plaintiffs are Medicaid-eligible children who have been diagnosed with behavioral, emotional, and developmental conditions which urgently require

home and community based treatment. Essential treatment services that the Plaintiffs were receiving through the Medicaid program have been reduced or terminated by the Defendant as a result of multiple violations of the Due Process Clause and the federal Medicaid Act. The violations of law and illegal reduction or termination of services suffered by the named plaintiffs are typical of similar violations suffered by thousands of other North Carolina Medicaid recipients, as Defendant and his agents have engaged in a pattern and practice of serious due process violations in the provision of Medicaid behavioral health and developmental disability services. Plaintiffs therefore bring this suit both individually and on behalf of all other affected North Carolina Medicaid recipients.

2. In 2006, DHHS selected and contracted with ValueOptions, Inc. (VO) to be its statewide agent responsible for prior authorization of behavioral health services (including Medicaid funded services for persons with developmental disabilities) under the Medicaid program. The affected services include the range of services that North Carolina Medicaid recipients with behavioral health problems need, such as community support services, intensive in-home services, residential treatment, community based services provided as an alternative to institutionalization, psychologist's services, and inpatient psychiatric care. Since July 2006, VO and DHHS have denied, reduced, and terminated coverage of medically necessary services to thousands of North Carolina Medicaid recipients under practices and procedures in clear violation of federal law. These practices and procedures were either dictated or ratified by DHHS.

3. Defendant's illegal policies and practices are denying the Plaintiffs and the Plaintiff class coverage of behavioral health services as prescribed by their treating providers and as required under federal law. These illegal policies and practices also imminently threaten

Plaintiffs and the Plaintiff class with further illegal denials, reductions, and terminations of coverage in the future. These policies and practices are causing and threaten to cause irreparable harm to the Plaintiffs and the Plaintiff class. For example, Plaintiff McCartney's behavioral problems caused him to be excluded from public school after Defendant illegally terminated coverage of his community support services. Plaintiffs and the class they represent have no adequate remedy at law.

4. Defendant's policies and practices used in reducing and terminating services violate the procedural due process rights of Plaintiffs and Plaintiff class that are guaranteed to them by the U.S. Constitution and also violate their rights under the Medicaid Act. By depriving them coverage of essential health services to which they are entitled without due process or statutory authority, Defendant leaves many of the most vulnerable children and adults in North Carolina without adequate health care services, even though such services are critical to their health, safety, and development.

5. The Plaintiffs seek prospective declaratory and injunctive relief against the Defendant to enjoin the Defendant from continuing to deny, terminate or reduce coverage of behavioral health and developmental disability services and to reinstate services that were illegally reduced or terminated until Defendant has brought his practices and procedures into compliance with Due Process and the Medicaid Act.

II. JURISDICTION AND VENUE

6. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331, which provides for original jurisdiction over all civil suits involving questions of federal law, and 28 U.S.C. §§ 1343(3) and (4), which grant this Court original jurisdiction in all actions authorized by 42 U.S.C. § 1983 to redress the deprivation under color of State law of any rights, privileges, or

immunities guaranteed by the United States Constitution and Acts of Congress.

7. Plaintiff seeks declaratory, injunctive and other appropriate relief, pursuant to 28 U.S.C. §§ 2201 and 2202, Fed. R. Civ. P. 23, 57, and 65, 42 U.S.C. § 1983, and the Fourteenth Amendment to the United States Constitution.

8. Venue for this action lies in this District pursuant to 28 U.S.C. § 1391(b). A substantial part of the events or omissions giving rise to Plaintiffs' claims occurred here and the Defendants may be found here.

III. PARTIES

9. Plaintiff Devon "Tyler" McCartney is a twelve-year-old resident of Robeson County, North Carolina, who is qualified for Medicaid services. He does not have a guardian or other duly-appointed representative and appears in this proceeding through his mother and next friend, Penny McCartney. Tyler has been and remains unable to obtain necessary and appropriate behavioral health services because Defendants illegally terminated coverage of those services. As a result, Tyler has suffered and is suffering damage and serious risk to his health, safety, education, and well-being.

10. Plaintiff Eric Cromartie is a four-year-old resident of Robeson County, North Carolina, who is qualified for Medicaid services. He does not have a guardian or other duly-appointed representative and appears in this proceeding through his mother and next friend, Selena McMillan. Eric has been and remains unable to obtain all of the behavioral health services he needs because Defendants illegally reduced coverage of those services. As a result, Eric has suffered and is suffering damage and serious risk to his health, safety, education, and well-being.

11. Plaintiff Katie Tipton is a nine-year-old resident of Henderson County, North Carolina, who is qualified for Medicaid services by being enrolled in a N.C. Medicaid home and community based program for the mentally retarded and developmentally disabled.. She does not have a guardian or other duly-appointed representative and appears in this proceeding through her father and next friend, Greg Tipton. Katie is imminently threatened with termination of necessary and appropriate in-home services needed for her to safely remain in the community instead of being institutionalized at the expense of the state. As a result, Katie is imminently threatened with damage and serious risk to her health, safety, and quality of life.

12. Defendant Dempsey Benton is the Director of the North Carolina Department of Health and Human Services. He is charged with overall responsibility for the administration of the N.C. Department of Health and Human Services, which administers the Medicaid program in North Carolina and has been designated as the "single state agency" with direct and non-delegable responsibility for administration of the state Medicaid plan. *See* 42 U.S.C. § 1396a(a)(5); N.C. Gen. Stat. § 108A-54 *et seq.* As such, Defendant Benton is charged with implementing the Medicaid program in North Carolina in a manner consistent with the federal Medicaid laws, regulations, and guidelines. He is sued in his official capacity.

IV. CLASS ACTION ALLEGATIONS

13. This action is brought as a statewide class action pursuant to Fed. R. Civ. P. 23(a) and (b)(2) on behalf of all current or future North Carolina Medicaid recipients who have, or will have, their claims for behavioral health or developmental disability services denied, delayed, interrupted, terminated, or reduced by the N.C. Department of Health and Human Services directly or through its agents or assigns.

14. The class is so numerous that joinder of all members is impracticable.

15. There are questions of law and fact as to the permissibility of the Defendant's policies and practices with respect to denying, reducing, and terminating behavioral health services to Medicaid beneficiaries that are common to all members of the class.

16. The claims of the class representative plaintiffs are typical of the claims of the class.

17. The plaintiffs will fairly and adequately represent the interests of all members of the class.

18. Prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members which would establish incompatible standards of conduct for the party opposing the class or could as a practical matter be dispositive of the interests of the other members or substantially impair or impede their ability to protect their interests.

19. Defendant's actions and omissions have affected and will affect the class generally, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

V. STATUTORY AND REGULATORY FRAMEWORK

20. In 1965, Congress enacted Title XIX of the Social Security Act, 42 U.S.C. § 1396-1396v, establishing Medicaid, a medical assistance program cooperatively funded by the federal and state governments. Medicaid is designed to ensure that low income people receive necessary medical services. States are to administer Medicaid "in the best interests of recipients." *Id.* at § 1396a(a)(19).

21. The Medicaid program typically does not directly provide health care services to eligible individuals, nor does it provide beneficiaries with money to purchase health care directly. Rather, Medicaid is a vendor payment program, wherein Medicaid-participating

providers—including providers of behavioral health and developmental disabilities services—are reimbursed by the program for the services they provide to recipients.

22. The Centers for Medicare & Medicaid Services (CMS) of the United States Department of Health and Human Services is the agency which administers Medicaid at the federal level, including publishing rules and guidelines. These rules and regulations are set forth in 42 C.F.R. Part 430, and in the CMS State Medicaid Manual. These rules and regulations are binding on all states that participate in Medicaid.

23. A state's participation in Medicaid is voluntary. Once a state elects to participate, it must adhere to the federal legal requirements, as provided by the United States Constitution, the Medicaid Act, and the rules promulgated by CMS. North Carolina has elected to participate in the Medicaid program. N.C. Gen. Stat. 108A-54 *et seq.*

24. Federal law permits states to obtain federal financial assistance for certain mandatory and optional services, including reimbursement for appropriate behavioral health services and services for the developmentally disabled. States must follow the minimum requirements of federal law with respect to both mandatory and optional Medicaid services. 42 U.S.C. § 1396a.

25. The state must adopt a plan which is consistent with the requirements of the Medicaid Act. The Medicaid Act provides that the provisions of the state Medicaid plan become mandatory upon and must be in effect in all political subdivisions of the state. 42 U.S.C. § 1396a(a)(1); 42 C.F.R. § 431.50. The state must designate a "single state agency" with responsibility for administration of the state Medicaid plan. 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10.

26. When a state accepts Medicaid funds, federal law mandates that the state must ensure that Medicaid beneficiaries be provided with the opportunity for a fair hearing whenever their

claims for medical assistance are denied or not acted upon with reasonable promptness. 42 U.S.C. § 1396a(a)(3). The regulations which implement this statutory requirement define the process that is due Medicaid recipients pursuant to *Goldberg v. Kelly*, 397 U.S. 254 (1970). *See* 42 C.F.R. § 431.205(d).

27. The Due Process Clause of the Fourteenth Amendment prohibits states from denying, reducing, or terminating Medicaid services without due process of law. The Constitutional right includes the right to meaningful notice prior to the termination of Medicaid benefits, continued benefits pending a pre-termination hearing, and a fair and impartial pre-termination hearing. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Federal Medicaid regulations explicitly implement the due process requirements set forth in *Goldberg*. 42 C.F.R. 431.200, et.seq. As set forth in *Goldberg* and incorporated in the Medicaid regulations, recipients are entitled to receive timely, adequate, and understandable written notices of their hearing rights when an action affects their claim for health services; the hearing must be fair and impartial and held at a meaningful time; coverage of services must be continued at the prior-approved level until a final *de novo* hearing decision if: (a) a Medicaid recipient requests a fair hearing before the date that the services are to be stopped or reduced; (b) the recipient requests the hearing within 10 days of the mailing of the notice; or (c) the requisite notice is not sent. 42 C.F.R. Part 431.

28. In North Carolina, most behavioral health and developmental disability services funded by Medicaid require prior approval by ValueOptions (VO), an agent of DHHS. If a request to begin providing a service is denied by VO or if continuation of a service is reduced or terminated by VO, North Carolina state regulations provide the recipient with the right to appeal. The recipient may request an "informal hearing" prior to the "formal" fair hearing mandated

under *Goldberg*. 10A NCAC 22H. The informal hearing process does not meet due process requirements under *Goldberg* because no cross examination is permitted, no record of the hearing is kept, and the hearing officers are not impartial.

VI. STATEMENT OF FACTS

A. Named Plaintiff Tyler McCartney

29. Devon "Tyler" McCartney is a twelve-year-old child who is eligible to receive Medicaid services. Tyler was diagnosed with Fragile X syndrome in June of 1999, when he was three years old. Soon after receiving that diagnosis, he became a patient at the Fragile X Program of the Child Development Unit at Duke University Medical Center and has continued to be evaluated and treated by doctors at Duke's Fragile X program multiple times per year. At the age of four, Tyler was also diagnosed with autism by the Division for Treatment and Education of Autistic and Related Communication-Handicapped Children (TEACCH) after exhibiting some aggressive behaviors at preschool.

30. In July 2004, at the age of eight, Tyler began having seizures. He was diagnosed with epilepsy and began treatment with Dr. Michael Tennison, a pediatric neurologist in the neurology department of the University of North Carolina School of Medicine. Dr. Tennison prescribed multiple medications for Tyler's seizures and has met with Tyler concerning his seizures as recently as January 14, 2008. On that date, Dr. Tennison recommended: "the child needs help with the following activities of daily living: bathing, using toilet, dressing."

31. Beginning on or about August 25, 2005, when he was nine years old, Tyler began receiving Medicaid community-based services (in the form of a professional case manager and a paraprofessional one-on-one aide in the school to help him meet various therapeutic goals, including learning to control inappropriate behaviors, become more independent, reduce temper

tantrums, interact with peers, follow directions, and remain on task). On August 25, 2005, Defendant authorized between 32.5 and 33.5 hours per week of community- based services for Tyler. Beginning on March 20, 2006, because of a change in Defendant's service definitions, Tyler was transferred to Community Support Services (CSS). At that time, Defendant authorized 34.15 hours per week of CSS, including case management and a one-on-one aide in the school for Tyler.

32. At least since November 2006 (except during the summer and other interruptions of service as detailed below) and continuing until January 2008, when Tyler lost these services due to Defendant's actions, the same CSS worker came to school with Tyler every day and helped him remain in the community and in school by assisting him with controlling and changing behaviors, learning coping skills, following directions, interacting with his peers, and reducing temper tantrums.

33. On May 11, 2007, Tyler's case manager at that time, Nicole Cummings, completed a prior approval request form, requesting that Tyler receive 28 hours per week of community support services for the next 90 days, beginning May 18, 2007 and continuing until August 16, 2007. This form was sent to VO via facsimile transmission on May 11, 2007.

34. On June 28, 2007, after repeated telephone calls to VO inquiring about the status of this request for continuation of CSS services for Tyler, Ms. Locklear received a telephone call from VO informing her that Tyler would be authorized for only 21 hours per week of community support services from June 9, 2007 until July 27, 2007. VO did not issue a written notice to the provider reducing the service to 21 hours per week for the period June 9 through July 27 2007 until July 5, 2007, and no notice was sent to the McCartneys concerning the reduction of hours from 28 per week to 21 per week for that time period.

35. On June 28, 2007, the same day verbal reauthorization was given for only 21 hours services per week, VO received Tyler's most current Person-Centered Plan, which was signed on June 20, 2007, and which requested 32.5 hours per week of community support services.

36. On August 13, 2007, Value Options sent a notice to Devon T. McCartney and to Primary Health Choice, the provider with whom his case manager is employed, stating that Medicaid, as of July 28, 2007, had denied 28 hours per week of CSS for Tyler. The notice claimed that 21 hours per week were more appropriate for Tyler, and that only 21 hours per week would be approved from July 28, 2007 until September 21, 2007.

37. The notice sent on August 13, 2007 incorrectly stated that 28 hours per week of CSS had been requested on July 25, 2007, when, in fact, continuation of this service had been requested two and one-half months earlier, on May 11, 2007. On information and belief, neither this notice nor any other notice gave any indication of VO's decision as to the period May 11 through July 24, 2007. The notice dated August 13, 2007 also was late. Tyler's mother should have been notified of the proposed reduction of services and of her right to appeal before the reduction began, i.e. at least ten days before June 9, 2007, when the reduction took effect. VO's actions thus denied Tyler the opportunity to appeal before his services were reduced. The August 21 notice also failed to provide a meaningful explanation for the decision to reduce services. The notice is from VO but does not indicate that VO is the agent of DHHS. The notice does not indicate who the respondent should be if the recipient wishes to file a formal appeal. The notice contains no information about Tyler's right to continued services at the prior level if the decision is appealed.

38. Ms. McCartney timely filed on August 21, 2007 an informal appeal of the August 13 notice reducing Tyler's services from 28 hours per week to 21 hours per week. Pursuant to

instructions from VO and Defendant, Tyler's case manager did not send to VO any requests for reauthorization of services for Tyler while the appeal was pending. No action was taken by Defendant on Tyler's appeal for the next three and one-half months.

39. On information and belief, Defendant, through its agent VO, waited weeks after the August 21 appeal was filed before providing authorization to Tyler's provider to continue providing the prior level of services to him pending the outcome of the appeal, thus interrupting his right to continued services pending appeal.

40. No hearing was ever held by Defendant on Tyler's appeal. Instead, Ms. McCartney and her case manager at that time, Nicole Cummings, participated on December 7, 2007 in a telephone conference with a hearing officer for the Respondent, Ms. Jane Plaskie. Ms. Plaskie stated that, if a hearing were to occur, the only issue would be whether Medicaid had made the correct decision in reducing Tyler's hours from 28 to 21 per week during the weeks between July 28 and September 21, 2007. Ms. Plaskie emphasized that the hearing would not address Tyler's current or future needs for this service**.** Based on this information, Ms. McCartney agreed to a dismissal of the appeal. A letter sent by Ms. Plaskie to Ms. McCartney on December 7, 2007 confirmed this conversation.

41. Ms. Plaskie's statements to Ms. McCartney on December 7 were improper in several respects. First, her statements reflected Defendant's practice of improperly denying a *de novo* hearing to address Tyler's current need for the service, rendering Tyler's appeal meaningless. Second, the fact that the authorization period for which services were originally requested (July 28, 2007 until September 21, 2007 according to VO) had expired was solely due to Defendant's unreasonable delays both in acting on the provider's request and in scheduling the hearing. Third, no request for reauthorization of services was submitted by Tyler's provider for the period

beginning September 22, 2007 solely because Defendant had instructed the provider not to submit any request for reauthorization of the same service while an appeal was pending. Fourth, despite Ms. Plaskie's assurance that authorization for services after the dismissal would continue without interruption if a new request for services was made within 15 days, no such authorization was given to Tyler's provider and VO later informed the provider that no authorization for any hours of the service existed because of the dismissal of the appeal.

42. On December 21, 2007, Tyler's case manager submitted to VO a new request for Community Support Services, along with a supporting letter from Tyler's doctors. To this date VO has issued no written decision on the December 21 request for services.

43. On or about January 23, 2008, Tyler's new case manager, Marcella Clement, telephoned VO to check on the status of Tyler's services. Ms. Clement was informed by the VO representative that the appeal had been dismissed on December 28, 2007 and that there was no authorization in the system for Tyler to receive any services. Ms. Clement then notified Ms. McCartney that community support services for Tyler would have to be terminated immediately. Since that date Tyler has not received any service from a one-on-one aide covered by Medicaid.

44. Ms. Clement was also told by VO that the December 21 request was being denied, that no more hours of community support services (CSS) would be authorized for Tyler, and that she needed to withdraw the December 21 request in order to obtain VO approval for another service--1.25 hours per week of case management for Tyler. Based on this information from VO, the new case manager Marcella Clement withdrew the December 21 request on February 28, 2008.

45. After Tyler lost his one-to-one CSS worker, his behavior worsened considerably, which his treating clinicians say is to be expected from an autistic child who is unable to cope

with such a major change. He began having multiple tantrums per day at school and his mother was on many occasions telephoned by the school and told to pick him up.

46. On February 4, 2008, Tyler was put into handcuffs by a police officer at the school because the teachers in the classroom did not know how to calm him.

47. One of Tyler's tantrums, on March 5, 2008, led school authorities to immediately exclude Tyler from attending school.

48. On March 13, 2008, after Tyler had been out of school for six days, the school decided that Tyler would not be allowed to come back unless he was accompanied by his CSS worker or by his mother. Tyler's mother is the sole breadwinner for her family, is employed full-time, and cannot attend school every day with her son.

49. As a result of an ongoing legal dispute between the McCartneys and the school about Tyler's right to attend school, Tyler is now attending school again but has had additional incidents in which he has been removed from the school because of his behavior. The school is currently providing a one-on-one aide for Tyler, but that aide is not trained or supervised in the same manner as the CSS worker to provide medical services and behavioral interventions, and does not have the long-term experience and relationship of trust in working with Tyler that the CSS worker had. Without injunctive relief from this Court to reinstate his prior services, Tyler is experiencing and will continue to experience irreparable harm.

50. After being informed of the school incidents, Ms. Clement submitted a new request for 21 hours per week of community support services for Tyler on March 6, 2008. In response, a VO representative telephoned her on or about April 1, 2008, informing her that the March 6 request would be denied. Ms. Clement was told Tyler would be approved for five hours per week of the service for a short period of time in order to make appointments for Tyler for evaluations,

even though the case manager explained that Tyler had already had the recommended evaluations. VO informed Ms. Clement that no hours of an aide in the school would be approved.

51. Approximately two and one-half weeks later, on April 16, 2008, VO issued a written notice to permit an appeal of its decision**.** The notice contains numerous defects and errors. The notice incorrectly states that services were requested to begin on April 2, 2008, when in fact the request was for services to begin March 6, 2008. The notice does not make clear whether it is a denial of an initial request for services or a reduction of services, to which a right to continued services pending appeal would apply. The notice is addressed to a minor child, is confusing and overly complex, and fails to cite relevant legal authority. The notice relies on a standard checklist of "alternative services" as a basis for denial. The listed "alternative services" are: (1) services that VO was informed are clearly inappropriate for or unavailable to Tyler, or (2) are not alternative services at all but rather are evaluations that VO was informed have already been performed or that VO failed to request before denying the request for CSS, or (3) are simply referrals to services that VO was informed are not currently or actually available to Tyler, do not exist in the local community, and that VO has not determined to be medically necessary and thus are not actually currently available as an alternative service.

52. On information and belief, VO representatives have repeatedly discouraged Tyler's case managers from requesting, or encouraged them to withdraw requests for, the services which the case managers believed to be necessary in his case. This discouragement was improper and rested upon misinformation such as statements that Tyler had already received CSS for longer than the state agency would permit, that the request exceeded the limits on the number of hours

permitted, or that the number of hours requested would not be permitted under ongoing provider audits of CSS.

53. On information and belief, VO's decisions to reduce and terminate services to Tyler were made without requesting sufficient information from Tyler's treating clinicians, without giving any material weight to the opinions of those treating clinicians, without making any finding that Tyler's condition had medically improved or explaining the basis for the change from its prior decision to approve such services. Moreover, VO made its decisions in Tyler's case without first requesting evaluations and other information that VO itself stated were needed in order to determine the appropriate services for Tyler.

54. On information and belief, VO's repeated decisions to reduce, terminate and deny services to Tyler were made based upon unpromulgated, illegal guidelines about how many hours are permitted for the requested service and how long the service may continue.

55. On information and belief, VO repeatedly failed to make decisions on authorization of services for Tyler with reasonable promptness, and repeatedly delayed sending written notice of its decisions to Tyler's mother after VO made its decisions.

56. On information and belief, Defendant, through its employees and its agent VO, repeatedly failed to timely and consistently provide authorization for Tyler's provider to continue to provide services to Tyler until ten days after a written decision was issued by VO on whether to reduce or terminate services, even though the provider timely and properly requested reauthorization to continue services.

58. On information and belief, Defendant, through its agent VO, mailed written notices to Tyler's mother after the effective date of the termination or reduction of services, thus denying Tyler his right to continued services until after a notice of reduction or termination was mailed.

59. Defendant, through its agent VO, has engaged in a practice of repeatedly addressing and mailing notices to Tyler, a minor child, instead of to his parent.

60. Defendant, through its agent VO, has engaged in a practice of failing to provide an adequate explanation of the reasons for its decisions in the written notices sent to Tyler.

B. Named Plaintiff Eric Cromartie

61. Eric Cromartie is a four-year-old child who is eligible to receive Medicaid services. Eric was tentatively diagnosed at age two with autism and since then has undergone extensive testing and evaluation which confirmed that diagnosis. Eric lives with his mother, Selena McMillan, and attends a pre-school for children with disabilities where he receives speech therapy and special education.

62. In addition to being autistic, Eric suffers from post-traumatic stress disorder. When Eric was two-years-old, he was physically abused by a daycare worker, including being struck, shook, and dragged across the ground by his feet. Eric was hospitalized for his injuries and suffered long-term emotional damage. After this incident, Eric's behavioral problems dramatically worsened, including not sleeping, being verbally noncommunicative, impulsive outbursts, screaming, and being physically and verbally aggressive. . Eric receives regular therapy and sees a psychiatrist.

63. In August 2007, Eric began receiving Community Support Services, to provide case management and a one-on-one aide to help him control his behaviors and learn skills while at his pre-school and while attending therapy sessions. VO approved continuation of this service at 25 hours per week beginning September 2007. This service was successful in allowing Eric to attend school regularly, to begin to control his disruptive behaviors, and to improve his coping and verbalization skills.

64. On December 7, 2007, Eric's case manager at the time, Travis Brown, timely requested that VO reauthorize CSS for Eric for the period December 17, 2007 through March 18, 2008. However, Mr. Brown requested only 15 hours per week of the service for Eric.

65. The reduction in hours from 25 to 15 per week in the December request by Mr. Brown was not based on a change in the medical necessity for Eric to receive this service. Indeed, Mr. Brown was concerned that the reduction would cause Eric to regress. Mr. Brown only requested 15 hours because VO informed him that 15 hours was the maximum number of hours of CSS VO would authorize, and that, if he requested more than 15 hours, there was a good chance that Eric would not be approved for any hours of the service. This misinformation, discouragement, and intimidation by VO representatives to Mr. Brown and other case managers at his agency was contrary to the State's August 17, 2007 policy instructions, which state that a Medicaid recipient under age 21 can receive as many hours of CSS and other services as are medically necessary.

66. VO approved 15 hours per week of CSS for Eric beginning December 17, 2007. Eric's mother, Selena McMillan, never received any written notice of the reduction in hours which provided her with any opportunity to appeal this decision.

67. After Eric's CSS hours were reduced, his behavior worsened. Much of the progress he had made in the Fall of 2007 with the CSS worker could not be sustained. He began acting out more at school and Ms. McMillan began receiving telephone calls from his teachers about difficulty controlling his behaviors when the one-on-one aide was not present. The school day is from 8:30 to 2:30 five days a week, so it was no longer possible for the aide to be with Eric for much of the school day. Eric's uncontrolled behaviors typically started as soon as the CSS worker left the school.

68. On February 21, 2008, Eric's new case manager, Erica Striblin, timely requested reauthorization of Eric's CSS for the period March 19 through June 17, 2008. She also requested an increase in his hours to 21 hours per week because Eric's behavior had worsened. Despite her belief that 25 hours of service were needed, she did not request this amount because of discouraging communications from VO.

69. In response to the February 21, 2008 request, VO called Ms. Striblin on March 7, 2008 to inform her that Eric's services would be reduced again, to only 3.5 hours per week, mostly for case management, with almost no hours for one-on-one services. Ms. Striblin immediately telephoned Ms. McMillan to inform her of the VO decision.

70. On March 11, 2008, Ms. McMillan telephoned VO to ask why she had not received written notice of the decision. The VO representative told her that the letter was mailed to her on March 7. She called again on March 13 and was told that another copy of the letter would be mailed on that day.

71. Ms. McMillan moved her residence on March 18, 2008. She told VO about her upcoming move on March 11. She also asked the Post Office to hold her mail. She informed VO on March 28 that she still had not received the March 7 notice and that she had obtained a post office box. She asked VO to mail the March 7 notice to that post office box. Ms. McMillan continued to check with the post office almost daily and telephoned VO frequently but did not receive the VO notice dated March 7 until April 14.

72. Although neither Ms. McMillan nor Ms. Striblin had received the March 7 notice, they nonetheless filed an informal appeal of the VO decision on March 18, 2008 because Ms. Striblin was aware she needed to initiate an appeal quickly in order to continue Eric's services. Ms. Striblin used a "dummy copy" of Defendant's informal appeal form that she found in her

office and filled in the pertinent information, including Eric's name and Medicaid ID number. The form was signed by Ms. McMillan and faxed on March 18 to the DHHS hearing office. Ms. Striblin received a telephone call a few days later from the hearing office informing her that the appeal could not be accepted because it was not filed on the appeal form which had been mailed to Ms. McMillan, i.e. the information concerning Eric on the form was not pre-printed by VO and did not include on the form the VO logo.

73. After finally receiving the March 7 notice on April 14, Ms. McMillan requested an informal appeal once again on April 14 by signing and faxing the enclosed appeal form to the DHHS hearing office. However, on April 18, Ms. McMillan received a certified letter from the hearing office dated April 15 informing her that her appeal had been dismissed because it was not filed within eleven days of March 7.

74. The March 7 notice contains numerous legal defects and errors. The notice does not make clear that it is both a denial of a request for an increase in services and a reduction of existing services, and does not indicate the number of hours of service to which a right to continued services pending appeal would apply. The notice is addressed to a minor disabled child, is confusing and overly complex, and fails to cite the specific, relevant legal authority, including no citation to the law or policy which should have governed VO's decision. The notice relies on a standard checklist of "alternative services" as a basis for denial. The listed "alternative services" are services that VO was informed that Eric already receives, or are not alternative treatment services but, rather, evaluations that VO failed to request before reducing the hours of CSS.

75. Upon receiving the dismissal of her informal appeal, Ms. McMillan requested a formal appeal in the N.C. Office of Administrative Hearings on April 18. That appeal is currently

pending. However, Ms. McMillan does not have an attorney representing her in that appeal and is concerned she will not be able to meet all of the technical requirements of the formal appeal process, particularly because DHHS is represented by an attorney in that proceeding. On information and belief, Defendant's attorneys have sought dismissal of many other formal appeals filed by *pro se* Medicaid recipients based on technical requirements. On information and belief, one of the technical defenses Defendant's attorneys are likely to raise in her formal appeal is that the only period of time at issue in the appeal is the period March 19 through June 17, 2008, a period which is very likely to expire before Eric's formal appeal is decided. If Ms. McMillan had been granted the informal hearing she requested, she would not have been faced with many of these technical requirements. In addition, the formal appeal will concern only whether Eric can receive 21 hours, not 25 hours of CSS per week, which is the amount his clinicians state is medically necessary.

76. Authorization from Defendant for Eric's provider to provide more than 3.5 hours per week of CSS ended on March 18. Because of a lack of authorization to do so, Eric's CSS provider stopped providing a one-on-one aide to him on April 11, 2008. No authorization to provide maintenance of services (MOS) pending appeal was given to the provider by VO until May 6, 2007. Services were reinstated by the provider on May 7. Thus, because of the delays by Defendant and its agent VO before sending a written notice to Ms. McMillan to the correct address, before accepting the last of Ms. McMillan's three different appeals, and then before authorizing MOS upon acceptance of the appeal, Eric went without medically necessary services to which he was legally entitled under due process for almost four weeks. This delay was despite numerous complaints by Ms. McMillan and Ms. Striblin about the illegal interruption in services to Eric.

77. Because of the interruption in services, Eric's behavior worsened considerably. Until some needed services began again, Eric was able to attend school only intermittently due to his behavior. Ms. McMillan received almost daily calls from the school informing her that the school could not handle Eric and she would need to pick him up early.

78. Since May 7, 2008, Eric has begun receiving some CSS again pending the outcome of the formal appeal. However, he is only authorized by VO for 17 hours per week, not the 25 hours his treating clinicians say is medically necessary. Eric continues to have behavior problems as a result, including throwing severe tantrums, spitting, hitting, and not following directions. Without injunctive relief from this Court to reinstate his prior level of service, Eric will continue to suffer irreparable harm.

79. On information and belief, VO representatives have improperly discouraged Eric's case managers from requesting the services which the treatment team believes to be necessary. VO thus effectively denied or reduced services to Eric without providing written notice or appeal rights.

80. On information and belief, VO's decisions to reduce and terminate services to Eric were made without requesting sufficient information from Eric's treating clinicians, without giving any material weight to the opinions of those treating clinicians, without making any finding that Eric's condition had medically improved or explaining the basis for the change from its prior decision to approve such services, and without first requesting evaluations and other information that VO itself stated were needed to determine the appropriate services for Eric.

81. On information and belief, VO's decisions to reduce services to Eric were made not based upon the complete, individual facts of his case and controlling law but rather based

upon unpromulgated, internal, illegal guidelines about how many hours are permitted for the requested service and how long the service may continue.

82. Defendant, through its agent VO, failed to provide authorization to Eric's providers to continue to provide services to Eric until ten days after a written decision was properly issued by VO on whether to reduce or terminate services, even though the provider timely and properly requested reauthorization.

83. Defendant, through its agent VO, failed to promptly provide authorization to Eric's providers to continue to provide the prior level of services to Eric after the filing of Eric's appeal.

84. On information and belief, Defendant, through its agent VO, waited weeks after the date on its written notice before mailing that notice to Eric's most recent known address, thus denying Eric his right to continued services until after a notice of reduction or termination is properly mailed.

85. Defendant, through its agent VO, has engaged in a practice of addressing and mailing notice to Eric, a minor child, instead of to his parent.

86. On information and belief, Defendant, through its agent VO and employees, has engaged in a practice of failing to properly mail adverse notice to Eric on the same date the notice is dated and then computing Eric's appeal deadline based on the date of the notice regardless of the date the notice was properly mailed or received, thus denying him the right to an informal hearing.

87. Defendant, through its agent VO and employees, has engaged in a practice of failing to accept an informal appeal for Eric because it was filed on a form that had not been pre-

printed by VO, even though Defendant knew there was good cause for failure to use the pre-printed form and even though there is no legal basis for requiring the use of a pre-printed form.

88. Defendant, through its agent VO, has engaged in a practice of failing to accept an informal appeal filed within 10 days of actual receipt of the VO notice, despite repeated communications from Eric's mother to Defendant's hearing office and agent VO demonstrating her failure to receive that written notice in a timely manner.

C. Named Plaintiff Katie Tipton

89. Katie Tipton is a nine-year-old Medicaid recipient enrolled in a home and community based program, the Community Alternatives Program for the Mentally Retarded/Developmentally Disabled (CAP-MR/DD). Katie is totally and permanently disabled due to cerebral palsy, hydrocephalus, developmental delays, neurogenic bladder, probable Turrette's syndrome, and asthma. Katie requires daily skilled medical monitoring and interventions, total assistance with her activities of daily life and self-care, and ongoing training to learn and reinforce skills and behaviors. But for the services provided to her under the CAP-MR/DD program, Katie would require institutionalization, which would be significantly more expensive to the state and federal governments.

90. Katie has received Medicaid services and has been enrolled in the CAP-MR/DD program since age three. Since April 2006, Katie's services through the CAP MR/DD waiver program have included Enhanced Personal Care (EPC), Home and Community Support (HCS), and Enhanced Respite (ER) services. Since April 2006, highly trained staff have come to Katie's home to monitor her health, provide nursing services, assist her with activities of daily living, personal care, safety, and skill-building, and provide much-needed relief to her parents.

91. Effective April 1, 2007 through March 31, 2008, Defendant authorized through VO 104 hours per month of EPC services, 129 hours per month of HCS services, and 576 hours per year of ER care for Katie.

92. On or about March 6, 2008, Katie's case manager, Donna Jean Drafteseth, timely and properly submitted via facsimile transmission to VO a plan of care, requesting prior approval that Katie continue to receive the same level of services for the period beginning April 1, 2008 and continuing through March 31, 2009.

93. In response, Ms. Drafteseth received a phone call from a VO representative informing her that VO planned to deny the March 6 prior approval request for continuation of EPC and ER for the next year. No mention was made in the telephone call of the VO decision to eliminate HCS services. The VO representative pressured Ms. Drafteseth to convince the parents to accept the VO decision. No medical records or clinician opinions or evaluations were asked for by VO in this or any other communication with the case manager.

94. After consulting with Katie's parents, Ms. Drafteseth informed VO that Katie's treatment team and parents disagreed with VO's decision not to continue the current level of services. The VO representative then informed Ms. Drafteseth that, only because Katie's parents disagreed with VO's decision, a VO physician would review the request and make a final determination. Again, VO did not ask for additional information.

95. On information and belief, the initial telephone communication from VO to the case manager was pursuant to a standard VO practice of verbally announcing decisions to deny, terminate, or reduce CAP services and then pressuring the case manager and family to accept this decision, without issuing a written notice, without providing appeal rights, without first obtaining

sufficient information from treating clinicians, and without involving any VO physician in the decision-making process.

96. On April 21, 2008, Ms. Drafteseth submitted via facsimile transmission to VO additional information in support of the services request by the treatment team.

99. On or about May 5, 2008, Ms. Drafteseth was informed by a VO representative via telephone that VO's doctor agreed with the prior verbal VO notice of termination of services and that a written decision would be issued.

100. On or about May 8, 2008, Katie's parents received from VO via certified mail a written notice dated May 6, 2008 terminating all three services requested in the March 6, 2008 continuation request. In lieu of the existing services, VO approved 104 hours per month of regular (not enhanced) personal care and 576 hours per year of regular (not enhanced) respite. The 129 hours per month of HCS was not replaced by VO with any service. The effect of VO's decision was to significantly reduce both the number of hours of service to Katie and the intensity and skill level of the services provided.

101. On information and belief, VO made no finding of medical improvement or other change in circumstances justifying a change from its April 2007 decision to approve EPC, ER and HCS, in making its May 2008 decision to terminate all three of those services. No medical improvement or other relevant change in circumstance has occurred according to Katie's clinicians.

102. On information and belief, VO did not request any information from Katie's treating clinicians or any medical records prior to making its decision to terminate Katie's services.

103. On information and belief, VO applied unpromulgated guidelines and internal practices rather than the applicable law and facts in making its decision to reduce Katie's services.

104. The VO notice to Katie contains several legal defects and errors on its face. The notice was dated May 6, 2008—36 days after the effective date of the decision, April 1, 2008. The notice provides no authorization for continuation of the prior level of service until 10 days after the date of the notice as required by due process. The notice is self-contradictory as to whether it is a denial of an initial request for services or a reduction of services, to which a right to continued services pending appeal applies. The notice is addressed to a minor disabled child, is confusing and overly complex, and fails to cite the relevant legal authority. The notice relies on a standard checklist of "alternative services" as a basis for denial. The listed "alternative services" are not alternative treatment services at all, but rather evaluations and planning that VO failed to request before making its decision to terminate the existing services.

105. Authorization by Defendant to continue the prior level of services to Katie expired on March 31, 2008. On May 9, VO finally notified via email Katie's service provider, Team Daniel, of the authorization that was effective April 1, 2008. However, that authorization was only for the services approved by VO in the May 6 notice. VO thus retroactively implemented its May 6 decision to terminate services, instead of making the decision effective 10 days after written notice was issued as required by due process.

106. Mr. and Mrs. Tipton properly and timely submitted a request for informal appeal on May 13, 2008. To date, no authorization for maintenance of service (MOS) pending appeal has been provided by VO,, despite several telephone calls and emails by Team Daniel to VO requesting this authorization. On information and belief, a delay of two to four weeks is common

in VO cases before authorization to provide MOS is given after an appeal has been filed. This is in addition to the delay of 36 days in this case between the April 1 effective date of the termination of services and the May 6 issuance of a written, appealable notice.

107. On information and belief, the DHHS hearing office and VO have informed providers in other cases that even after an appeal of a reduction or termination of services has been filed, the issues of whether MOS will be authorized, the number of hours that will be authorized under MOS, and the effective date of the MOS authorization are all a matter of VO discretion. Some providers have been advised by VO not to provide services until the written MOS authorization is entered, as there is no assurance they will be paid for those services.

108. As a result of their uncertainty about MOS authorization in this case and other cases, Team Daniel has informed the Tiptons that unless MOS authorization is entered promptly by VO, the provider intends to stop providing the three terminated services to Katie as soon as the plan of care is modified by the case manager to conform to the VO authorization. As a result, Katie is imminently threatened with no longer receiving any Home and Community Support services, enhanced personal care, or enhanced respite care.

109. Katie's health and safety will be at risk if her services stop a result of the above illegal interruption of services by Defendant through its agent VO. Katie requires 24/7 trained supervision due to her behaviors and medical problems. Without constant supervision, she is at risk of respiratory complications, anaphylactic shock, falls and other accidents, and is more likely to engage in potentially dangerous behaviors. Without injunctive relief from this Court to assure continuation of her prior level of services, Katie is at risk of irreparable harm.

110. On information and belief, VO's decision to terminate services to Katie was made without requesting sufficient information from Katie's treating clinicians, without seeking the

opinions of those treating clinicians, without making any finding that Katie's condition had medically improved or explaining the basis for the change from its prior decision to approve such services, and without first requesting evaluations and other information that VO itself stated were needed to determine the appropriate services for Katie.

111. On information and belief, VO's decision to terminate services to Katie was made not based upon the complete, individual facts of her case and controlling law but rather based upon unpromulgated guidelines.

112. On information and belief, VO failed to make its decision on reauthorization of services for Katie with reasonable promptness.

113. On information and belief, VO representatives have engaged in a practice of improperly discouraging Katie's case manager from requesting, or encouraged her to convince Katie's parents to withdraw requests for, the services which the treatment team believes to be necessary in her case, thus attempting to circumvent Katie's rights to written notice and to appeal.

114. On information and belief, Defendant, through its agent VO, has engaged in a practice of failing to provide authorization to Katie's provider to continue to provide services to Katie until ten days after a written decision was issued by VO on whether to reduce or terminate services, even though the provider timely and properly requested reauthorization.

115. On information and belief, Defendant, through its agent VO, mailed written notice to Katie's family weeks after the effective date of the termination of her services, thus denying Katie her right to continued services until after a notice of reduction or termination is mailed.

116. Defendant, through its agent VO, has engaged in a practice of repeatedly addressing and mailing notices to Katie, a minor child, instead of to her parents.

. D. Class allegations

117. Defendant, through its agent VO, has engaged in numerous practices that violate the Medicaid Act and the Due Process Clause of the U.S. Constitution. VO and Defendant have denied, terminated, and reduced services to thousands of Medicaid recipients under practices and procedures in clear violation of the law.

118. On information and belief, Defendant, through its agent VO, has a practice of instructing Medicaid-participating providers of behavioral health services to apply arbitrary and improper limits on how many hours of a service may be requested. For example, where the recipient is appealing the denial or termination of a service, VO has informed providers in some cases that the provider may not request more in services than were previously approved by VO. Thus, Medicaid services are being denied, reduced, or terminated verbally by Defendant's agent without providing written notice or hearing rights to the recipient.

119. On information and belief, DHHS, through its staff and agents, has engaged in a practice of discouraging requests for services and discouraging appeals of its decisions to reduce or terminate services by improperly threatening providers with unfair audits and repayment requests. Defendant's audit procedures have sought repayment for services required to be provided pending the outcome of an appeal, have use medical necessity standards that do not comply with the state's own Medicaid policy, and have permitted auditors to routinely find after the fact that a service was not medically necessary even though VO previously authorized the service as medically necessary or the service was determined to be medically necessary on appeal.

120. On information and belief, DHHS, through its staff and agent VO, has engaged in a practice of discouraging requests for services and discouraging appeals of its decisions to

reduce or terminate services by (1) improperly informing legal guardians of adult recipients that the guardian will have to repay the state if an appeal is filed and lost, (2) improperly informing case managers that unless the recipient consents to modify the request for services, other services also will be affected, and (3) discouraging providers from acting as the recipient's representative in filing an appeal and dismissing appeals on that basis.

120. On information and belief, DHHS, through its agent VO, has engaged in a practice of telephoning behavioral health care providers to insist or strongly encourage that the provider and/or recipient withdraw or modify requests for services. Defendant thus has engaged in a practice of verbally denying, reducing, and terminating services without issuing a written notice and without permitting any appeal of the decision.

121.. Defendant, through its agent VO, informal hearing officers, legal representatives, and final agency decision-makers, has engaged in a practice of failing to seek information from or give appropriate weight to the opinion of the treating clinician in determining medical necessity for the service, thus failing to provide a fair and unbiased decision-making process as required by law.

122. Defendant, through its agent VO, has engaged in a practice of failing to consistently ask for, and even in some cases instructing providers not to send, the information needed to determine medical necessity for the requested service prior to making its decision, and then denying those requests for failure to provide that information. For example, Defendant's prior approval forms and instructions fail to request the information required under Defendant's own August 17, 2007 policy in order to determine medical necessity of services requested for recipients under the age of twenty-one.

123. Defendant, through its agent VO, has engaged in a practice of reducing or terminating a service despite the absence of any material change in circumstances or medical improvement, without giving any explanation for the change in its decision.

124.. Defendant, through its agent VO and through its informal hearing officers, has engaged in a practice of failing to consider evidence of necessity for the requested service unless the evidence was provided to VO by using a particular form.

125. Defendant, through its agent VO and informal hearing officers, has engaged in a practice of failing to make medical necessity decisions based on the individual facts of the case and controlling law but rather based upon unpromulgated guidelines about how many hours are permitted for the requested service or what requirements must be met to qualify for the service.

126. Defendant, through its agent VO, has engaged in a practice of failing to make medical necessity decisions based on the individual facts of the case and controlling law but rather routinely justifies its reduction or termination of services based upon a standard checklist of "alternative services" that the recipient should seek instead of continuing to receive the current Medicaid service. This list routinely includes medical, psychological, and educational evaluations and assessments, but VO generally makes no effort to obtain these evaluations or assessments nor determine if the evaluations or assessments have already been performed prior to making its decision. This list of "alternative services" also routinely includes services that VO has been informed are not actually currently available to the recipient or are clearly inappropriate. This list of "alternative services" also routinely includes a "referral" to another Medicaid service with no assurance that the alternative service will be approved by VO or for how many hours.

127. Defendant, through its agent VO, has engaged in a practice of failing to make decisions on requests for services and requests for reauthorization of services with reasonable promptness.

128. Defendant, through its employees and its agents, has engaged in a practice of failing to timely and consistently provide authorization for providers to continue to provide services to recipients until ten days after a written decision is issued by VO on whether to reduce or terminate services, even though the provider has timely and properly requested reauthorization.

129. Defendant, through its agent VO, has engaged in a practice of failure to issue timely and adequate written notices when requests for services are denied, reduced or terminated.

130. Defendant, through its agent VO, has engaged in a practice of mailing notices to recipients after the effective date of the termination or reduction of services, thus denying them their right to continued services until after a notice of reduction or termination is mailed.

131. Defendant, through its agent VO, has engaged in a practice of mailing notices days or weeks after the date appearing on the notice, but computing appeal deadlines based on the date appearing on the notice. Defendant has dismissed appeals based on an appeal deadline that expired before the date the notice was properly mailed to the recipient.

132. Defendant, through its agent VO, has engaged in a practice of failing to mail written notice to the legal guardian where VO knows that an adult recipient has a legal guardian and VO knows the address of that guardian.

133. Defendant, through its agent VO, has engaged in a practice of addressing and mailing notices to minor recipients instead of to the parent or legal guardian of the minor recipient.

134. Defendant, through its agent VO, has engaged in a practice of failing to mail written notice to the most recent known address of the recipient listed on the request for prior approval of services or otherwise provided to VO.

135. Defendant, through its agent VO, has engaged in a practice of issuing written notices that fail to identify what services are being denied, reduced, or terminated, and the extent to which coverage of a service has been approved.

136. Defendant, through its agent VO, has engaged in a practice of issuing notices that fail to cite the relevant legal authority, policy or regulations supporting its decision.

137. Defendant, through its agent VO, has engaged in a practice of failing to provide an adequate explanation of the reasons for its decision in the written notice to the recipient.

138. Defendant, through its agent VO, has engaged in a practice of issuing confusing, contradictory notices that this class of mentally ill and developmentally disabled individuals cannot understand.

139. Defendant, through its agent VO, has engaged in a practice of issuing notices that fail to identify whether services are being initially denied or terminated and that do not indicate whether the recipient has a right to continued services pending appeal in that case.

140. Defendant, through its agent VO, has engaged in a practice of issuing notices that misstate the period of time for which services were requested, thus failing to inform the recipient and provider of any decision as to part of the period of time at issue.

141. Defendant, through its agent VO, has engaged in a practice of using VO's letterhead on its notices but failing to identify on its notices that VO is the agent of DHHS or who the proper respondent should be if the recipient wishes to file a formal appeal.

142. Defendant has engaged in a practice of improperly dismissing appeals as untimely and terminating or reducing services despite its failure to provide proper written notice to the recipient.

143. After a recipient has appealed a decision by VO to reduce or terminate services, Defendant, through its employees and agents, has engaged in a practice of failing to provide authorization, with reasonable promptness and for the entire period at issue, for the provider to continue to provide services to recipients pending the outcome of the appeal.

144. Defendant, through its employees and its agents, has engaged in a practice of failing to provide authorization for providers to continue to provide services to recipients pending an appeal of a decision by VO to reduce or terminate services, where the provider requested reauthorization of the service even one day after the end of the prior authorization period. This practice exists even though Defendant has informed providers, recipients, and VO in writing and at trainings that providers have a thirty day grace period to submit a request for reauthorization and that recipients are entitled to continued services pending appeal in those cases.

145. Defendant, through its agent VO, has engaged in a practice of refusing or failing to permit access by the recipient to all records and internal policies used in making the decision prior to an informal or formal hearing.

146. Defendant, through its informal hearing officers, has engaged in a practice of failing to assist unrepresented, indigent, poorly educated, and mentally disabled recipients in fully developing the factual record concerning their appeal, and has in some cases misled recipients during the appeal process. For example, the telephone number for the hearing office on letters sent to some recipients is disconnected.

147. Defendant has engaged in a practice of failing to decide appeals in a reasonably timely manner.

148. Defendant, through its informal hearing officers, legal representatives, and final agency decision-makers, has engaged in a practice of failing to permit a *de novo* fair hearing at either the informal or formal hearing, by refusing to consider on appeal facts which occur and evidence which is provided after the date of the initial VO decision.

149. Defendant through its informal hearing officers, legal representatives, and final agency decision-makers, has engaged in a practice of failing to permit a *de novo* fair hearing by refusing to consider any period of time at the hearing other than the period of time covered by the initial request for services. Because of Defendant's substantial hearing backlog, recipients are likely to wait several months for a formal hearing that meets *Goldberg* requirements. Nonetheless, Defendant's position is that the formal hearing can only consider whether the recipient was entitled to the service for a *past* period of time, i.e. the period for which the service was initially requested, which is limited by Defendant to no more than three months for many behavioral health services. Defendant thus by denying recipients a *de novo* hearing renders an appeal almost inherently meaningless. Defendant has persisted in this position despite informing providers not to submit new requests for the same service while an appeal is pending.

150. Defendant through its agent VO, employees, informal hearing officers, legal representatives, and final agency decision-makers, has engaged in a practice of failing to provide authorization for providers to continue to providing services to recipients after a decision is made on an appeal of a decision to reduce or terminate services. Because the appeal concerns only a past period, and because the provider is not permitted to request reauthorization for a future period while the appeal is pending, and because continued services pending appeal end as soon

as the appeal decision is made, defendant's practices result in an illegal termination of services without notice as soon as the appeal is completed, even where the decision on appeal is that the recipient is entitled to some or all of the services requested.

151. Defendant has engaged in a practice of improperly dismissing appeals as moot because of Defendant's failure to provide a *de novo* fair hearing and because of Defendant's failure to decide appeals within a reasonable time.

152. Defendant's practice of failing to permit a *de novo* hearing is particularly harmful to recipients whose initial request for Medicaid services is denied by VO. Because Medicaid recipients are indigent, they generally cannot afford to advance the cost of the service pending appeal. Because it is a denial of an initial request for services, the service is not provided by Defendant pending the outcome of the appeal. Even if the recipient wins the appeal, Defendant's failure to allow a *de novo* hearing means the decision can only entitle the recipient to services for a period that has already ended. Such a recipient could win a dozen appeals on the same service and never actually obtain the service.

153. Defendants' practices of improperly denying initial requests for community mental health services and then long delays in deciding the appeals of those decisions have caused some recipients to be hospitalized or to require residential treatment because they are not receiving services pending the outcome of the appeal. Defendant's position is that these consequences of its initial denial and delay are not relevant or admissible on appeal.

154. Defendant has engaged in a practice of terminating coverage of services before the end of a prior-approved period, without any written notice, simply because the recipient changes from one Medicaid-participating provider to another Medicaid provider of the same service.

155. Defendant has engaged in a practice of improperly denying the right to continued services pending appeal if the recipient switches providers during a period for which a service has been authorized, the new provider requests continuation of the same service before the end of the authorization period, that request is denied by VO, and that denial is appealed.

156. Defendant has engaged in a practice of denying continued services pending appeal where the recipient changes providers after VO sends notice reducing or terminating the service and the recipient appeals that notice.

157. Defendant has engaged in a practice through its informal hearing officers of failing to notify the recipient in the informal hearing decision of the right to continued services pending the formal appeal when the informal hearing decision upholds the reduction or termination of services.

158. Defendant has for each allegation numbered 117 through 157 specifically directed this practice or repeatedly failed, after being informed of the illegal practices complained of herein, to timely and effectively take corrective action.

VII. CAUSES OF ACTION

First Cause of Action: Constitutional Due Process

159. Plaintiffs incorporate and re-allege paragraphs 1 through 158, as if fully set forth herein.

160. Defendant's practices and procedures alleged herein violate the Due Process clause of the Fourteenth Amendment to the U.S. Constitution by, among other things, denying the Plaintiffs and Plaintiff class a fair and non-arbitrary decision-making process, meaningful notice, meaningful opportunity for a fair hearing; and advance notice and the opportunity for a fair hearing prior to suspension or termination of services previously authorized by the state.

161. These violations, which have been repeated and knowing, entitle the Plaintiff and plaintiff class to relief under 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution.

Second Cause of Action: Violations of the Medicaid Act

162. Plaintiffs incorporate and re-allege paragraphs 1 through 161, as if fully set forth herein.

163. Defendant's practices and procedures alleged herein violate the Medicaid Act, by failing to provide for granting an opportunity for a fair hearing before the state agency to any individual whose claim for medical assistance is denied or not acted upon with reasonable promptness.

164. These violations, which have been repeated and knowing, entitle the Plaintiff and plaintiff class to relief under 42 U.S.C. § 1983 and 42 U.S.C. § 1396a(a)(3) of the Medicaid Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Certify this action as a class action pursuant to Fed. R. Civ. P. 23;

2. Issue a declaratory judgment pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 that Defendant's failure to provide behavioral health and developmental disability services under Medicaid due to the practices and procedures alleged herein violates the named Plaintiffs' and the Plaintiff class's rights under the Due Process Clause of the Fourteenth Amendment and the Social Security Act, 42 U.S.C. § 1396a(a)(3),.

3. Grant a preliminary and permanent injunction requiring the Defendant, his agents, successors, and employees to:

(a) continue to provide behavioral health and developmental disability services to all persons who have been receiving them, until Defendant corrects the practices and procedures alleged herein;

(b) prospectively reinstate behavioral health and developmental disability services previously provided to the named Plaintiffs and members of the Plaintiff class that were improperly reduced or terminated under the illegal practices and procedures alleged herein;

(c) comply with the Due Process Clause of the U.S. Constitution and the Medicaid Act;

4. Retain jurisdiction over this action to insure Defendant's compliance with the mandates of the Court's Orders;

5. Award to the Plaintiff costs and reasonable attorney fees pursuant to 42 U.S.C. § 1988; and

6. Order such other relief as this Court deems just and equitable.

Dated: May 16, 2008

Respectfully submitted,

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