

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

K.C., a minor child, by his mother and next friend Africa H.; ALLISON TAYLOR JOHNS; L.S., a minor child, by his father and next friend Ron S.; and D.C., a minor child, by his mother and next friend Penny C.,

Plaintiffs,

vs.

LANIER CANSLER, in his official capacity as Secretary of the Department of Health and Human Services; PAMELA L. SHIPMAN, in her official capacity as Chief Executive Officer of PBH; and PBH,

Defendants.

Civil Action No. 5:11-cv-354-FL

**ANSWER AND AFFIRMATIVE
DEFENSES OF DEFENDANTS
PAMELA L. SHIPMAN AND PBH**

Defendants Pamela L. Shipman (“Shipman”) and PBH (together, the “PBH Defendants”), by and through their undersigned attorneys, answers Plaintiffs Complaint [D.E. 6] (“Complaint”) as follows:

FIRST DEFENSE

The allegations of the Plaintiffs’ Complaint fail to state a claim upon which relief can be granted, and the Complaint should be dismissed.

SECOND DEFENSE

Specifically responding to the enumerated paragraphs of Plaintiffs’ Complaint, the P BH Defendants answer as follows:

RESPONSE TO “INTRODUCTION”

1. The PBH Defendants admit that the Plaintiffs are all Medicaid consumers who purport to seek certain declaratory and injunctive relief, but deny that there is any basis in fact or law for Plaintiffs to receive the relief they purport to seek. The PBH Defendants further admit that Plaintiffs purport to bring this action as a class action, but deny that there is any basis in fact or law for the same. Except as otherwise admitted, the PBH Defendants deny the allegations contained in paragraph 1 of the Complaint.

2. Based on confirmation received from counsel for the Plaintiffs on July 26, 2011 as to the identity of the minor Plaintiffs, the PBH Defendants admit that the named Plaintiffs are Medicaid consumers who have been receiving Medicaid services through North Carolina’s 1915(b)/(c) Medicaid Waiver, specifically the 1915(c) Waiver, known as the “Innovations Waiver.” The PBH Defendants admit that Defendant PBH operates the Innovations Waiver and that Defendant Shipman is the Chief Executive Officer of PBH, but aver that the name of the entity is “PBH”, not “Piedmont Behavioral Healthcare Area Mental Health, Developmental Disabilities and Substance Abuse Authority.” The PBH Defendants deny that there is any basis in fact or law for Plaintiffs’ action to be certified as a class action. Except as otherwise admitted or averred, the PBH Defendants deny the allegations contained in paragraph 2 of the Complaint.

3. The PBH Defendants admit that prior to July 1, 2011, PBH had approved the use of Medicaid funds through the Innovations Waiver to reimburse providers for providing certain Medicaid services for each of the Plaintiffs in specific quantities and for specific, limited periods of time. The PBH Defendants admit that specially trained personnel conducted evaluations of each of the named Plaintiffs using an analytical tool known as the Supports Intensity Scale

(“SIS”). Except as expressly admitted and averred, the PBH Defendants deny the allegations contained in paragraph 3 of the Complaint.

4. The PBH Defendants deny the allegations contained in paragraph 4 of the Complaint.

5. The PBH Defendants admit that PBH is a “local management entity” (“LME”) as defined in N.C. Gen. Stat. § 122C-3(20b). The PBH Defendants further admit that by agreement between PBH and the North Carolina Department of Health and Human Services (the “Department”), with the approval of the Centers for Medicare and Medicaid Services (“CMS”), PBH operates as a Pre-Paid Inpatient Health Plan (“PIHP”) pursuant to 42 C.F.R. § 438.2. PIHPs are one of three types of Managed Care Organizations (“MCOs”) authorized to operate Medicaid managed care programs pursuant to Medicaid waivers in accordance with Sections 1915(b) and 1915(c) of the Social Security Act (42 U.S.C. §§ 1396n(b) and (c)). Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 5 of the Complaint.

6. The PBH Defendants admit the allegations contained in paragraph 6 of the Complaint.

7. The PBH Defendants admit that pursuant to Sections 1915(b) and 1915(c) of the Social Security Act (42 U.S.C. §§ 1396n(b) and (c)), the North Carolina Department of Health and Human Services has waived portions of North Carolina’s traditional “fee-for-service” Medicaid program and replaced them with a managed care program (the “1915(b)/(c) Waiver”). The PBH Defendants further admit that PBH operates the 1915(b)/(c) Waiver. The PBH Defendants aver that the 1915(b) Waiver, known as the “Cardinal Health Plan”, is a Medicaid-funded, managed care health plan for qualified consumers who require mental health and

substance abuse healthcare services. The 1915(c) Waiver, known as “Innovations”, is a Medicaid-funded, managed care health plan for qualified consumers who require healthcare services for intellectual and developmental disabilities. The 1915(c) Waiver operates concurrently with the 1915(b) Waiver, which means that the operational requirements contained in the 1915(b) Waiver also apply to the 1915(c) Waiver. Except as expressly admitted and averred, the PBH Defendants deny the allegations contained in paragraph 7 of the Complaint.

8. The PBH Defendants deny the allegations contained in paragraph 8 of the Complaint.

9. The PBH Defendants deny the allegations contained in paragraph 9 of the Complaint.

10. The PBH Defendants acknowledge that the Plaintiffs purport to seek declaratory and injunctive relief, but deny that there is any basis in fact or law for the same, and deny the allegations contained in paragraph 10 of the Complaint.

11. The PBH Defendants acknowledge that the Plaintiffs purport to seek class certification, but deny that there is any basis in fact or law for the same, and deny the allegations contained in paragraph 11 of the Complaint.

RESPONSE TO “JURISDICTION AND VENUE”

12. The allegations contained in paragraph 12 of the Complaint are legal conclusions to which no response is required. To the extent a response is required, the PBH Defendants deny the allegations contained in said paragraph.

13. The allegations contained in paragraph 13 of the Complaint are legal conclusions to which no response is required. To the extent a response is required, the PBH Defendants deny the allegations contained in said paragraph.

14. The allegations contained in paragraph 14 of the Complaint are legal conclusions to which no response is required. To the extent a response is required, the PBH Defendants deny the allegations contained in said paragraph, except admits that Defendant Cansler's main office is located in this District.

RESPONSE TO "PARTIES"

15. The PBH Defendants admit the allegations contained in the first and second sentences of paragraph 15 of the Complaint upon information and belief. The PBH Defendants deny the allegations contained in the third and fourth sentences of said paragraph.

16. The PBH Defendants admit the allegations contained in the first sentence of paragraph 16 of the Complaint upon information and belief. The PBH Defendants deny the allegations contained in the second sentence of said paragraph. The PBH Defendants admit the allegations contained in the third sentence of said paragraph upon information and belief. The PBH Defendants deny the allegations contained in the fourth and fifth sentences of said paragraph.

17. The PBH Defendants admit the allegations contained in the first and second sentences of paragraph 17 of the Complaint upon information and belief. The PBH Defendants deny the allegations contained in the third and fourth sentences of said paragraph.

18. The PBH Defendants admit the allegations contained in the first and second sentences of paragraph 18 upon information and belief. The PBH Defendants deny the allegations contained in the third and fourth sentences of said paragraph.

19. The allegations contained in paragraph 19 of the Complaint are not directed at the PBH Defendants, and therefore no response is required. To the extent a response is required, the

PBH Defendants lack knowledge as to the truthfulness of the allegations contained in said paragraph.

20. The allegations contained in paragraph 20 of the Complaint are not directed at the PBH Defendants, and therefore no response is required. To the extent a response is required, the PBH Defendants lack knowledge as to the truthfulness of the allegations contained in said paragraph.

21. The PBH Defendants admit the allegations contained in paragraph 21 of the Complaint.

22. The PBH Defendants admit that Defendant Shipman is the Chief Executive Officer of PBH.

23. The PBH Defendants admit that PBH's contract with the North Carolina Department of Health and Human Services requires compliance with the Medicaid managed care regulations contained in 42 C.F.R. Part 438. The PBH Defendants deny that PBH is required to comply with any Medicaid fee-for-service regulations contained in 42 C.F.R. Part 431, as PBH exclusively operates Medicaid managed care waivers. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 23 of the Complaint.

RESPONSE TO "CLASS ACTION ALLEGATIONS"

24. The PBH Defendants acknowledge that the Plaintiffs purport to bring this action as a class action, but deny that there is any basis in fact or law for the same, and deny the allegations contained in paragraph 24 of the Complaint.

25. The PBH Defendants deny that there is any basis in fact or law for this action being made a class action, and therefore deny the allegations contained in the first sentence of paragraph 25 of the Complaint. The PBH Defendants admit that 675 Medicaid consumers

receive services under the Innovations Waiver, and that PBH has reviewed and authorized Medicaid reimbursement for services pursuant to the policies and operational processes of the Support Needs Matrix (“SNM”). The PBH Defendants specifically deny that any of the 675 Medicaid consumers under the Innovations Waiver “receive” services from PBH; rather, the PBH defendants aver that PBH reviews and authorizes the use of Medicaid funds to pay for approved Medicaid services, which are provided to consumers by a network of healthcare providers coordinated and maintained by PBH.

26. The PBH Defendants deny the allegations contained in paragraph 26 of the Complaint.

27. The PBH Defendants deny the allegations contained in paragraph 27 of the Complaint.

28. The PBH Defendants deny the allegations contained in paragraph 28 of the Complaint.

29. The PBH Defendants deny the allegations contained in paragraph 29 of the Complaint.

30. The PBH Defendants deny the allegations contained in paragraph 30 of the Complaint.

31. The PBH Defendants deny the allegations contained in paragraph 31 of the Complaint.

RESPONSE TO “FACTUAL BACKGROUND”

RESPONSE TO “A. PBH / the N.C. Innovations Waiver”

32. The allegations contained in paragraph 32 of the Complaint are not directed at the PBH Defendants, and therefore no response is required. Should a response be deemed required,

the PBH Defendants admit that Title XIX of the Social Security Act, which Plaintiffs refer to as the “Medicaid Act”, establishes a medical assistance program funded by the federal and state governments, and respectfully refers the Court to Title XIX of the Social Security Act for its full text. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 32 of the Complaint.

33. The allegations contained in paragraph 33 of the Complaint are not directed at the PBH Defendants, and therefore no response is required. Should a response be deemed required, the PBH Defendants admit the allegations contained in said paragraph upon information and belief and respectfully refers the Court to Title XIX of the Social Security Act and N.C. Gen. Stat. § 108A-54 for their full text.

34. The allegations contained in paragraph 34 of the Complaint are not directed at the PBH Defendants, and therefore no response is required. Should a response be deemed required, the PBH Defendants admit that Title XIX of the Social Security Act, at 42 U.S.C. § 1396a(a)(3), requires that a State Medicaid Plan “provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness,” and respectfully refer the Court to Title XIX of the Social Security Act for its full text. The PBH Defendants aver that Plaintiffs’ citation of “42 C.F.R. part 410.200” does not correspond with any regulation promulgated by the United States Department of Health and Human Services as of the most recent publication of the Code of Federal Regulations. Except as expressly admitted and averred, the PBH Defendants deny the allegations contained in paragraph 34 of the Complaint.

35. The allegations contained in paragraph 35 of the Complaint are not directed at the PBH Defendants, and therefore no response is required. Should a response be deemed required,

the PBH Defendants admit that the Fourteenth Amendment to the United States Constitution provides, *inter alia*, that “nor shall any State deprive any person of life, liberty, or property, without due process of law,” and respectfully refers the Court to the Fourteenth Amendment for its full text. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 35 of the Complaint.

36. The allegations contained in paragraph 36 of the Complaint are not directed at the PBH Defendants, and therefore no response is required. Should a response be deemed required, the PBH Defendants admit the allegations contained in said paragraph upon information and belief.

37. The PBH Defendants admit that PBH operates, with respect to all issues pertinent to this litigation, pursuant to a contract with the North Carolina Department of Health and Human Services, Division of Medical Assistance (“DMA”) under which PBH operates the North Carolina 1915(b)/(c) Waiver in a five-county catchment area (*i.e.*, Cabarrus, Davidson, Rowan, Stanly, and Union Counties), and respectfully refers the Court to the contract between DMA and PBH for its full text. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 37 of the Complaint.

38. The PBH Defendants admit that pursuant to the North Carolina 1915(b)/(c) Waiver, and the contract between DMA and PBH, PBH operates as a Prepaid Inpatient Health Plan (“PIHP”), which is defined at 42 C.F.R. § 438.2. The PBH Defendants further admit that pursuant to the contract between DMA and PBH, the North Carolina 1915(b)/(c) Waiver, and 42 C.F.R. § 438.240, PBH is responsible for conducting utilization management. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 38 of the Complaint.

39. The PBH Defendants admit that Title XIX of the Social Security Act and the Centers for Medicare and Medicaid Services (“CMS”) regulations promulgated thereunder require State Medicaid Plans to provide for an opportunity for Medicaid consumers to “appeal” “actions”, as those terms are defined at 42 C.F.R. § 438.400(b). The PBH Defendants aver that 42 C.F.R. § 438.404(b), which is cited by the Plaintiffs in paragraph 39 of the Complaint, sets out the required contents of a “Notice of action”, as the term “action” is defined in 42 C.F.R. § 438.400(b), and respectfully refers the Court to these provisions for their full text. Except as expressly admitted and averred, the PBH Defendants deny the allegations contained in paragraph 39 of the Complaint.

40. The PBH Defendants admit the allegations contained in paragraph 40 of the Complaint.

41. The PBH Defendants admit the allegations contained in paragraph 41 of the Complaint.

42. The PBH Defendants admit the allegations contained in paragraph 42 of the Complaint.

43. The PBH Defendants admit that the N.C. Innovations waiver (the “Innovations Waiver”) is a home and community-based services waiver in North Carolina, and aver that PBH operates the Innovations Waiver pursuant to a contract between the North Carolina Department of Health and Human Services, Division of Medical Assistance (“DMA”) and PBH. The PBH Defendants aver that in order to be eligible to participate in the Innovations Waiver, one must be a Medicaid-eligible consumer residing in PBH’s catchment area (currently consisting of Cabarrus, Davidson, Rowan, Stanly, and Union Counties), and also meet the eligibility requirements set forth in the Innovations Waiver. The PBH Defendants aver that as of the date

of this Verified Answer, there are 675 PBH consumers who are eligible to receive services through the Innovations Waiver. Except as expressly admitted or averred, the PBH Defendants deny the allegations contained in paragraph 43 of the Complaint.

44. The PBH Defendants admit that each PBH consumer enrolled in the Innovations Waiver is encouraged to meet at least once each year with his or her planning team and a PBH Care Coordinator to discuss the services available and their annual budget. The PBH Defendants aver that the purpose of these meetings is to develop and design an Individual Service Plan (“ISP”) for each consumer, as required for continued enrollment in the Innovations Waiver. The PBH Defendants further aver that a PBH Care Coordinator facilitates and assists the PBH consumer and his/her planning team to design and submit a plan meeting the consumer’s goals and needs, but it is the *consumer’s* plan and must be signed by the consumer or his/her legally responsible person. The PBH Defendants further aver that the PBH Care Coordinator does not approve or deny plans, but rather submits a proposed plan or plan update to the PBH Utilization Management department with a Treatment Authorization Request (“TAR”) for approval or denial. The PBH Defendants further aver that the PBH Utilization Management department, under eligibility and utilization management criteria, approves or denies the plan and corresponding TAR. The PBH Defendants admit an approved plan is generally effective for a year, starting the first day *after* the consumer’s month of birth. Except as expressly admitted or averred, the PBH Defendants deny the allegations contained in paragraph 44 of the Complaint.

Response to “B. Supports Needs Matrix”

45. The PBH Defendants admit that in March 2011, PBH mailed a Waiver Alert to all PBH consumers receiving services through the Innovations Waiver entitled “Transition from the Individual Budget System to the Support Needs Matrix”, and the PBH Defendants

respectfully refer to the Court to that document for its full text. The PBH Defendants admit that on April 4, 2011, PBH mailed letters to each of the four named Plaintiffs informing each Plaintiff of his or her Category and Matrix of the Support Needs Matrix based in part on his or her Supports Intensity Scale (SIS) score. The PBH Defendants further admit that the April 4, 2011 letters also informed each of the Plaintiffs of his or her assigned annual budget under the Support Needs Matrix, based on his or her Category and Matrix, and whether there were any “step-downs” from their previous base annual budget. Except as expressly admitted or averred, the PBH Defendants deny the allegations contained in paragraph 45 of the Complaint.

46. The PBH Defendants admit that under the Support Needs Matrix, there are four (4) separate matrices, or groupings, and aver that these matrices ensure that the correct amount of funding is available to meet the needs of the individuals assigned to that matrix. The PBH Defendants further admit that the four (4) matrices under the Support Needs Matrix are:

- Children Living at Home (a/k/a “Non-Residential”)
- Children Living in Residential (e.g., licensed group homes, licensed Alternative Family Living (“AFL”) placements)
- Adults Living at Home (a/k/a “Non-Residential”)
- Adults Living in Residential (e.g., licensed group homes, licensed and unlicensed AFL placements)

Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 46 of the Complaint.

47. The PBH Defendants admit that under the Support Needs Matrix, each of the matrices described in Response to Paragraph 46, above, has seven (7) categories of consumers who have similar support and funding needs, named categories A, B, C, D, E, F, and G. The PBH Defendants further aver that categories A and G each have subcategories to address the

needs of individuals assigned to that category that are different from others in that category. The PBH Defendants admit that each category and subcategory has a specific dollar amount tied to it, known as a Base Budget, which reflects the total amount available to fund the typical types of services used by individual consumers in these categories (“Base Budget Services”). The PBH Defendants aver that each consumer’s Base Budget is the maximum amount of funding available to pay for Base Budget Services, which include community networking, day supports, in-home intensive supports, in-home skill building, personal care services, residential supports, respite, and supported employment. The PBH Defendants also aver that there are other services which are Non-Base Budget Services, that are preventative, crisis, and/or equipment and supplies, and which do not affect the Base Budget. Except as expressly admitted or averred, the PBH Defendants deny the allegations contained in paragraph 47 of the Complaint.

48. The PBH Defendants admit that the Base Budget assigned to each category increases in ascending order (*i.e.*, Category A contains the lowest budget; Category G contains the highest budget). The PBH Defendants aver that PBH consumers who receive services through the Innovations waiver are assigned to one of the categories based on each consumer’s assessed support needs, which includes the SIS assessment and an assessment of Community Safety Risk, their age, and their living arrangement. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 48 of the Complaint.

49. The PBH Defendants admit that the SIS was developed by the American Association on Intellectual and Developmental Disabilities as an assessment tool to “evaluate the practical support requirements of a person with an intellectual disability through a positive and thorough interview process.” Upon information and belief, the PBH Defendants aver that the North Carolina Developmental Disabilities Consortium opposes the use of the SIS, but aver that

the SIS is being used presently in at least sixteen (16) other States to evaluate the needs of Medicaid consumers with developmental disabilities and to allocate resources to consumers based on those needs. Except as expressly admitted or averred, the PBH Defendant deny the allegations contained in paragraph 49 of the Complaint.

50. The PBH Defendants admit that the SIS evaluations used to determine the Category and Matrix for each of the Plaintiffs, as shown in the April 4, 2011 letters to each of the Plaintiffs, were conducted in 2009, 2010, and 2011. Except as expressly admitted, the allegations contained in paragraph 50 of the Complaint are denied.

51. The PBH Defendants admit that at the time that the SIS assessments were conducted for each of the Plaintiffs in 2009, 2010, and 2011, PBH mailed a copy of their SIS score and a summary of the assessment to each of the Plaintiffs. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 51 of the Complaint.

52. The PBH Defendants admit that the Plaintiffs were notified that their respective PBH Care Coordinator would contact them to assist in the creation of an appropriate ISP update. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 52 of the Complaint.

53. The PBH Defendants admit that consumers whose planning teams believe that they have unique behavioral, safety, health, and welfare needs that make them outliers as compared with others in their Support Needs Matrix Category and which cannot be met in their assigned Support Needs Matrix Category may request consideration of individual needs that require additional funding through the Intensive Review Committee at PBH. The PBH Defendants admit that the March and April 2011 letters did not specifically discuss the Intensive Review process, although the PBH Defendants aver that the Intensive Review process is

discussed in the 2011 Support Needs Matrix Guide which PBH sent to all PBH consumers who receive services through the Innovations Waivers. The PBH Defendants further aver that the request for an Intensive Review is prepared by a consumer's PBH Care Coordinator with input from the consumer and his/her care team. Except as expressly admitted or averred, the PBH Defendants deny the allegations contained in paragraph 53 of the Complaint.

54. The PBH Defendants admit that the 2011 Support Needs Matrix Guide states that “[i]n the NC Innovations Waiver, up to seven percent (7%) of the participants may receive increased funding based on identification as an outlier” Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 54 of the Complaint.

55. The PBH Defendants deny the allegations contained in paragraph 55 of the Complaint.

56. The PBH Defendants admit that the Intensive Review Committee makes its determinations based on the records submitted to it, and that the Intensive Review Committee does not hold hearings where live testimony is permitted. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 56 of the Complaint.

57. The PBH Defendants admit that the Instructions on the Intensive Review Request Cover Sheet state, in pertinent part, that “You may only request review under one type of issue: Medical, Behavioral, or Beyond Academics.” The PBH Defendants further admit that under the Innovations Waiver, consumers may only request an Intensive Review for one type of issue, and not for a combination of issues. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 57 of the Complaint.

58. The PBH Defendants admit that there is no direct appeal from the determination of the Intensive Review Committee that a particular consumer is not an outlier from his or her

Support Needs Matrix Category, but aver that a determination of the Intensive Review Committee is not a “decision” or an “action” that may be appealed pursuant to 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 438.400, *et seq.* Except as expressly admitted and averred, the PBH Defendants deny the allegations contained in paragraph 58 of the Complaint.

59. The PBH Defendants aver that the 2011 Support Needs Matrix Guide is the best evidence of its contents, and respectfully refer the Court to the 2011 Support Needs Matrix Guide for its actual language and full text. Except as expressly averred, the PBH Defendants deny the allegations contained in paragraph 59 of the Complaint.

60. The PBH Defendants deny the allegations contained in paragraph 60, including subparagraphs (a) through (e).

61. The PBH Defendants deny the allegations contained in paragraph 61 of the Complaint.

62. The PBH Defendants deny the allegations contained in paragraph 62 of the Complaint.

Response to “C. Plaintiffs”

63. Upon information and belief, the PBH Defendants admit the allegations contained in paragraph 63 of the Complaint.

64. The PBH Defendants admit that in August 2010, K.C. submitted an Individual Support Plan (“ISP”) which included a base budget of \$47,936.40 for the period October 2010 through September 2011. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 64 of the Complaint.

65. The PBH Defendants admit that in March 2011, PBH provided K.C. with notice (though his mother, Africa H., who serves as K.C.’s guardian) that K.C.’s Matrix and Category

under the Support Needs Matrix was Matrix “Child Non-Resident” and Category “B”, and that his Base Budget for the period from July 2011 through June 2012 would be \$25,476.40. The PBH Defendants respectfully refer the Court to the March 2011 the April 4, 2011 letters for their actual language and full text. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 65 of the Complaint.

66. The PBH Defendants aver that K.C.’s mother, Africa H., and K.C.’s care team requested that K.C. be re-evaluated using the Supports Intensity Scale due to a significant change in support needs since his original SIS, and further aver that PBH granted this request. Except as expressly averred, the PBH Defendants deny the allegations contained in paragraph 66 of the Complaint.

67. The PBH Defendants admit that the Supports Intensity Scale re-evaluation of K.C. included an interview between the SIS examiner and K.C.’s mother, Africa H., and further admit that K.C.’s PBH’s care coordinator was present during the interview. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 67 of the Complaint.

68. The PBH Defendants admit that based on his new SIS score, K.C. was assigned to the “Child Non-Resident” Matrix and the “D” Category in the Support Needs Matrix. Except as expressly admitted, the allegations contained in paragraph 68 of the Complaint are denied.

69. The PBH Defendants admit that the Base Budgets for the “B” and “D” Categories in the “Child Non-Resident” Matrix in the Support Needs Matrix are \$25,476.40 and \$36,360.40, respectively. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 69 of the Complaint.

70. The PBH Defendants admit that K.C.’s Individual Service Plan for the period of July 2011 through December 2011 is based on an annualized budget of \$45,755.50, representing

the first “step-down” from his previous annual budget. The PBH Defendants further admit that K.C.’s Individual Service Plan for the period January 2012 through June 2012 will be based on an annualized budget of \$36,604.40, representing the second “step-down” from his previous annual budget. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 70 of the Complaint.

71. The PBH Defendants deny the allegations contained in paragraph 71 of the Complaint.

72. The PBH Defendants deny the allegations contained in the first sentence of paragraph 72 of the Complaint. With respect to the second sentence of said paragraph., the PBH Defendants admit that K.C. purports to seek the right to challenge his Support Needs Matrix Category (“Child Non-Resident D”) through the fair hearing process, and aver that if a Treatment Authorization Request (“TAR”) for services for K.C. is submitted in excess of the Base Budget for his “Child Non-Resident” Matrix and “D” Category and PBH Utilization Management denies the TAR in whole or in part, K.C. may challenge his Support Needs Matrix and Category in the fair hearing process pursuant to 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 438.400, *et seq.* The PBH Defendants aver that the SIS is only one factor used in the Support Needs Matrix, and further aver that there exist mechanisms to request a new or revised SIS assessment, where appropriate. Except as expressly admitted or averred, the PBH Defendants deny the allegations contained in the second sentence of said paragraph.

73. The PBH Defendants deny the allegations contained in paragraph 73 of the Complaint, and aver that as of the date of this Answer, PBH Utilization Management has not denied any Treatment Authorization Request submitted by or on behalf of K.C. that would

trigger the fair hearing process pursuant to 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 438.400, *et seq.* wherein K.C. could challenge his SIS score or Support Needs Matrix Category.

74. Upon information and belief, the PBH Defendants admit the allegations contained in paragraph 74 of the Complaint.

75. The PBH Defendants admit that in October 2010, L.S. submitted an Individual Support Plan (“ISP”) which included a base budget of \$55,297.92 for the period December 2010 through November 2011. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 75 of the Complaint.

76. The PBH Defendants admit that in March 2011, PBH provided L.S. with notice (though his father, Ron S., who serves as L.S.’s guardian) that L.S.’s Matrix and Category under the Support Needs Matrix was Matrix “Child Non-Resident” and Category “D”, and that his Base Budget for the period from July 2011 through June 2012 would be \$36,604.40. The PBH Defendants respectfully refer the Court to the March 2011 and the April 4, 2011 letters for their actual language and full text. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 76 of the Complaint.

77. The PBH Defendants admit that L.S.’s parents met with L.S.’s PBH Care Coordinator and discussed L.S.’s new budget. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 77 of the Complaint.

78. The PBH Defendants deny the allegations contained in paragraph 78 of the Complaint.

79. The PBH Defendants deny the allegations contained in paragraph 79 of the Complaint.

80. The PBH Defendants deny the allegations contained in the first sentence of paragraph 80 of the Complaint. With respect to the second sentence of said paragraph, the PBH Defendants admit that L.S. purports to seek the right to challenge his Support Needs Matrix Category “D” and Matrix “Child Non-Resident” through the fair hearing process, and aver that if a Treatment Authorization Request (“TAR”) for services for L.S. is submitted in excess of the Base Budget for his Support Needs Matrix Category and Matrix, and PBH Utilization Management denies the TAR in whole or in part, that L.S. may challenge his Support Needs Matrix Category and Matrix in the fair hearing process pursuant to 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 438.400, *et seq.* The PBH Defendants aver that the SIS is only one factor used in the Support Needs Matrix, and further aver that there exist mechanisms to request a new or revised SIS assessment, where appropriate. Except as expressly admitted and averred, the PBH Defendants deny the allegations contained in the second sentence of said paragraph.

81. The PBH Defendants deny the allegations contained in paragraph 81 of the Complaint, and aver that as of the date of this Answer, PBH Utilization Management has not denied any Treatment Authorization Request submitted by or on behalf of L.S. that would trigger the fair hearing process pursuant to 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 438.400, *et seq.* wherein L.S. could challenge his SIS score or Support Needs Matrix Category.

82. Upon information and belief, the PBH Defendants admit the allegations contained in paragraph 82 of the Complaint.

83. The PBH Defendants admit that in September 2010, Allison Taylor Johns submitted an Individual Support Plan (“ISP”) which included a base budget of \$45,543.84 for the period November 2010 through October 2011. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 83 of the Complaint.

84. The PBH Defendants admit that in March 2011, PBH provided Allison Taylor Johns with notice that her Matrix and Category under the Support Needs Matrix was Matrix “Child Non-Resident” and Category “B”, and that her Base Budget for the period from July 2011 through June 2012 would be \$25,476.40. The PBH Defendants respectfully refer the Court to the March 2011 and the April 4, 2011 letters for their actual language and full text. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 84 of the Complaint.

85. The PBH Defendants admit that Linda Johns, Allison Taylor Johns’ mother, spoke with her PBH Care Coordinator about an Intensive Review of Taylor’s needs. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 85 of the Complaint.

86. The PBH Defendants admit that Linda Johns, Allison Taylor Johns’ mother, met with Taylor’s PBH Care Coordinator on or about May 26, 2011. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 86 of the Complaint.

87. The PBH Defendants admit that Linda Johns, Allison Taylor Johns’ mother, met with Taylor’s PBH Care Coordinator on or about May 26, 2011. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 87 of the Complaint.

88. The PBH Defendants admit that Linda Johns, Allison Taylor Johns’ mother, and Taylor’s PBH Care Coordinator discussed the Intensive Review. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 88 of the Complaint.

89. The PBH Defendants admit that on June 23, 2011, Allison Taylor Johns signed a written request for an Intensive Review. The PBH Defendants aver that on June 30, 2011, the Intensive Review Committee met to consider Allison Taylor Johns’ request for Intensive

Review, and concluded that the Committee would not recommend that Taylor's plan be submitted under the Intensive Review Category. Except as expressly admitted and averred, the PBH Defendants deny the allegations contained in paragraph 89 of the Complaint.

90. The PBH Defendants deny the allegations contained in paragraph 90 of the Complaint.

91. The PBH Defendants deny the allegations contained in the first sentence of paragraph 91 of the Complaint. With respect to the second sentence of said paragraph., the PBH Defendants admit that Allison Taylor Johns purports to seek the right to challenge her Support Needs Matrix Category "B" and Matrix "Child Non-Resident" through the fair hearing process, and aver that if a Treatment Authorization Request ("TAR") for services for Taylor is submitted in excess of the Base Budget for her Support Needs Matrix Category and PBH Utilization Management denies the TAR in whole or in part, that Taylor may challenge her Support Needs Matrix Category and Matrix in the fair hearing process pursuant to 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 438.400, *et seq.* The PBH Defendants aver that the SIS is only one factor used in the Support Needs Matrix, and further aver that there exist mechanisms to request a new or revised SIS assessment, where appropriate. Except as expressly admitted and averred, the PBH Defendants deny the allegations contained in the second sentence of said paragraph.

92. The PBH Defendants deny the allegations contained in paragraph 92 of the Complaint, and aver that as of the date of this Answer, PBH Utilization Management has not denied any Treatment Authorization Request submitted by or on behalf of Allison Taylor Johns that would trigger the fair hearing process pursuant to 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 438.400, *et seq.* wherein Allison Taylor Johns could challenge her SIS score or Support Needs Matrix Category.

93. Upon information and belief, the PBH Defendants admit the allegations contained in paragraph 93 of the Complaint.

94. The PBH Defendants admit that in April 2011, D.C. submitted an Individual Support Plan (“ISP”) which included a base budget of \$43,579.52 for the period May 2011 through April 2012. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 83 of the Complaint.

95. The PBH Defendants admit that in March 2011, PBH provided D.C. with notice (though his mother, Penny C., who serves as D.C.’s guardian) that D.C.’s Matrix and Category under the Support Needs Matrix was Matrix “Child Non-Resident” and Category “A”, and that his Base Budget for the period from July 2011 through June 2012 would be \$18,799.60. The PBH Defendants respectfully refer the Court to the March 2011 and the April 4, 2011 letters for their actual language and full text. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 95 of the Complaint.

96. The PBH Defendants admit that D.C.’s Individual Service Plan for the period of July 2011 through December 2011 is based on an annualized budget of \$28,199.40, representing the first “step-down” from his previous annual budget. The PBH Defendants further admit that D.C.’s Individual Service Plan for the period January 2012 through June 2012 will be based on an annualized budget of \$23,499.50, representing the second “step-down” from his previous annual budget. The PBH Defendants further admit that effective July 1, 2012, D.C.’s budget will be the Base Budget amount for his category, or presently \$18,799.60. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 96 of the Complaint.

97. The PBH Defendants admit that D.C.’s Support Needs Matrix Category and Matrix is based, in part, on an evaluation of D.C. using the SIS performed in March 2010.

Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 97 of the Complaint.

98. The PBH Defendants admit that D.C.'s mother, Penny C., met with D.C.'s PBH Care Coordinator in April 2011 and submitted an ISP for the period of May 1, 2011 through April 30, 2012, which included a base budget of \$43,579.52, and that on April 21, 2011, PBH issued a "Notice of Decision on Initial Request for Medicaid Services." Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 98 of the Complaint.

99. The PBH Defendants deny the allegations contained in paragraph 99 of the Complaint.

100. The PBH Defendants admit that in May 2011, D.C.'s mother, Penny C., discussed the SIS with D.C.'s PBH Care Coordinator and requested Intensive Review. The PBH Defendants aver that on or about May 25, 2011, an Intensive Review request from D.C.'s mother was submitted. Except as expressly admitted or averred, the PBH Defendants deny the allegations contained in paragraph 100 of the Complaint.

101. The PBH Defendants admit that on or about June 7, 2011, PBH faxed a copy of the Intensive Review Committee Response Form regarding D.C.'s request for an Intensive Review to Penny C. The PBH Defendants aver that the Intensive Review Committee Response Form is the best evidence of its contents, and respectfully refer the Court to that document for its actual language and full text. Except as expressly admitted and averred, the PBH Defendants deny the allegations contained in paragraph 101 of the Complaint.

102. The PBH Defendants admit that on June 10, 2011, D.C.'s mother, Penny C., met with D.C.'s PBH Care Coordinator. The PBH Defendants further admit that on or about June 15,

2011, D.C.'s mother, Penny C., submitted to PBH an ISP for D.C. Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 102 of the Complaint.

103. The PBH Defendants admit that on or about June 22, 2011, PBH Utilization Management issued a Notice of Decision on Initial Request for Medicaid Services. The PBH Defendants aver that the Notice of Decision on Initial Request for Medicaid Services is the best evidence of its contents, and respectfully refer the Court to said document for its actual language and full text. Except as expressly admitted or averred, the PBH Defendants deny the allegations contained in paragraph 103 of the Complaint.

104. The PBH Defendants admit that on or about June 30, 2011, D.C.'s mother, Penny C., and D.C.'s PBH Care Coordinator communicated and that PBH received an ISP update for D.C. signed by Penny C. dated June 30, 2011, with language indicating it was "signed under protest because ISP Plan does not meet [D.C.]'s needs and care coord. has advised services will end after today if not signed --." Except as expressly admitted, the PBH Defendants deny the allegations contained in paragraph 104 of the Complaint.

105. The PBH Defendants deny the allegations contained in paragraph 105 of the Complaint.

106. The PBH Defendants deny the allegations contained in the first sentence of paragraph 106 of the Complaint. With respect to the second sentence of said paragraph., the PBH Defendants admit that D.C. purports to seek the right to challenge his Support Needs Matrix Category "A" and Matrix "Child Non-Resident" through the fair hearing process, and aver that on June 22, 2011, PBH Utilization Management denied a TAR submitted by D.C. and provided him with notice of appeal rights where he could challenge, *inter alia*, his Support Needs Matrix Category and Matrix in the fair hearing process pursuant to 42 U.S.C. §

1396a(a)(3) and 42 C.F.R. § 438.400, *et seq.* The PBH Defendants aver that the SIS is only one factor used in the Support Needs Matrix, and further aver that there exist mechanisms to request a new or revised SIS assessment, where appropriate. Except as expressly admitted and averred, the PBH Defendants deny the allegations contained in the second sentence of said paragraph.

107. The PBH Defendants deny the allegations contained in paragraph 107 of the Complaint, and aver that on June 22, 2011, PBH Utilization Management denied a TAR submitted by D.C. and provided him with notice of appeal rights where he could challenge, *inter alia*, his Support Needs Matrix Category and Matrix in the fair hearing process pursuant to 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 438.400, *et seq.*

RESPONSE TO “CLASSWIDE ALLEGATIONS”

108. The PBH Defendants deny the allegations contained in paragraph 108 of the Complaint, and specifically deny that there is any basis in law or fact for this Court to certify a class.

109. The PBH Defendants deny the allegations contained in paragraph 109 of the Complaint, and specifically deny that there is any basis in law or fact for this Court to certify a class.

110. The allegations contained in paragraph 110 of the Complaint are not directed at PBH, and therefore no response is required. To the extent a response is deemed required, the PBH Defendants deny the allegations contained in said paragraph 110.

111. The PBH Defendants deny the allegations contained in paragraph 111 of the Complaint.

112. The PBH Defendants deny the allegations contained in paragraph 112 of the Complaint.

113. The PBH Defendants deny the allegations contained in paragraph 113 of the Complaint.

114. The PBH Defendants deny the allegations contained in paragraph 114 of the Complaint.

115. The PBH Defendants deny the allegations contained in paragraph 115 of the Complaint.

116. The PBH Defendants deny the allegations contained in paragraph 116 of the Complaint.

117. The PBH Defendants deny the allegations contained in paragraph 117 of the Complaint.

118. The PBH Defendants deny the allegations contained in paragraph 118 of the Complaint.

119. The PBH Defendants deny the allegations contained in paragraph 119 of the Complaint.

120. The PBH Defendants deny the allegations contained in paragraph 120 of the Complaint.

121. The PBH Defendants deny the allegations contained in paragraph 121 of the Complaint.

122. The PBH Defendants deny the allegations contained in paragraph 122 of the Complaint.

**RESPONSE TO “FIRST CLAIM FOR RELIEF
(Due Process: Lack of Ascertainable Non-Arbitrary Standards)”**

123. The PBH Defendants incorporate each admission, denial, and averment set forth in their Responses to paragraphs 1 through 122 of the Complaint, as if fully set forth herein.

124. The allegations contained in paragraph 124 of the Complaint are a legal conclusion as to which no response is required.

125. The PBH Defendants deny the allegations contained in paragraph 125 of the Complaint.

**RESPONSE TO “SECOND CLAIM FOR RELIEF
(Medicaid Notice and Hearing Requirements)”**

126. The PBH Defendants incorporate each admission, denial, and averment set forth in their Responses to paragraphs 1 through 125 of the Complaint, as if fully set forth herein.

127. The allegations contained in paragraph 127 of the Complaint are legal conclusions as to which no response is required. The PBH Defendants respectfully refer the Court to 42 U.S.C. § 1396a(a)(3) for its actual language and full text.

128. The PBH Defendants deny the allegations contained in paragraph 128 of the Complaint.

129. The PBH Defendants deny the allegations contained in paragraph 129 of the Complaint.

**RESPONSE TO “THIRD CLAIM FOR RELIEF
(Fourteenth Amendment of the U.S. Constitution)”**

130. The PBH Defendants incorporate each admission, denial, and averment set forth in their Responses to paragraphs 1 through 129 of the Complaint, as if fully set forth herein.

131. The allegations contained in paragraph 131 of the Complaint are legal conclusions as to which no response is required. The PBH Defendants respectfully refer the Court to the U.S. Supreme Court’s decision in *Goldberg v. Kelly*, 397 U.S. 253 (1970) and to 42 C.F.R. § 431.205(d) for their actual language and full text.

132. The PBH Defendants deny the allegations contained in paragraph 132 of the Complaint.

133. The PBH Defendants deny the allegations contained in paragraph 133 of the Complaint.

134. The PBH Defendants deny the allegations contained in paragraph 134 of the Complaint.

RESPONSE TO “RELIEF REQUESTED”

The un-numbered paragraph following paragraph 134 of the Complaint, including subparts (1) through (7), is not an allegation and therefore no responsive pleading is required. Should a response be deemed required, the PBH Defendants deny each and every allegation contained in said paragraph, except admit that Plaintiffs purport to demand judgment and certain forms of relief, but deny that there is any legal or factual basis for awarding the same.

THIRD DEFENSE

No action taken by Defendants Shipman and/or PBH violated any clearly established constitutional or statutory right of the Plaintiffs, and therefore Plaintiffs' Complaint fails to state a claim upon which relief may be granted. Therefore, Plaintiffs' Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

FOURTH DEFENSE

Plaintiffs' Complaint must 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 the acts or omissions of Defendants PBH and Shipman. 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.

FIFTH DEFENSE

Plaintiffs' Complaint must be dismissed pursuant to 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 Shipman in her official capacity and from Defendant PBH "[a]ll such other and further relief as the Court deems to be just and equitable." Plaintiffs seek far-ranging remedies from this Court as to Defendants Shipman and PBH above and beyond simple prospective injunctive relief.

SIXTH DEFENSE

Plaintiffs' Second Claim for Relief must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to exhaust administrative remedies.

SEVENTH DEFENSE

Plaintiffs' Complaint should be dismissed pursuant to Fed. R. Civ. P. 19(a) for failure to join necessary parties, *i.e.*, the approximately 546 PBH consumers enrolled in the Innovations Waiver whose Base Budget under the Support Needs Matrix has remained the same or increased with the implementation of the Support Needs Matrix effective July 1, 2011. The funding available to PBH for the Innovations Waiver is finite and fixed, and the allocation of funds through Innovations is zero sum. To the extent any of the Plaintiffs were to receive the injunctive relief they seek, the impact would necessarily be to reduce the Base Budgets of other consumers enrolled in the Innovations Waiver, including funding for services which have already been authorized for those consumers.

Inasmuch as the Complaint does not describe the alleged underlying claims with sufficient particularity to enable the PBH Defendants to determine all of their legal, contractual, and equitable rights, the PBH Defendants reserve the right to amend and/or supplement the averments of their Answer to assert any and all pertinent liability defenses ascertained through further investigation and discovery of this action.

The PBH Defendants incorporate any applicable affirmative defenses of the defense asserted by any other defendants to this action. The PBH Defendants will rely on all defenses that may become available during the discovery period.

WHEREFORE, the PBH Defendants respectfully demand judgment dismissing the Plaintiffs' Complaint with prejudice and awarding the PBH Defendants their reasonable costs and disbursements, together with such other and further relief that the Court may deem just and proper.

Respectfully submitted, this the 29th day of August, 2011.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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CERTIFICATE OF SERVICE

I, the undersigned attorney of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants Shipman and PBH do hereby certify that on August 29, 2011, I electronically filed the foregoing ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS PAMELA L. SHIPMAN AND PBH with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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