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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN DOE,

No. C 09-00980 MHP

Plaintiff,

MEMORANDUM & ORDER

v.

Re: Defendant’s Motion to Dismiss

MICHAEL J. ASTRUE, Commissioner of the
Social Security Administration,

Defendant.

Plaintiff John Doe brings this action against defendant Michael J. Astrue, in his capacity as the Commissioner of the Social Security Administration (“Commissioner” or “defendant”), for allegedly engaging in a practice of discrimination against plaintiff and other persons with mental and/or developmental disabilities. Plaintiff seeks injunctive and declaratory relief for violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, and the Due Process Clause of the Fifth Amendment of the United States Constitution. Now before the court is defendant’s motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim, under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), respectively. Having considered the parties’ arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

1 BACKGROUND¹

2 Plaintiff John Doe is a developmentally-disabled resident of San Francisco who has been
3 diagnosed with autism, generalized anxiety disorder, and a number of other mental and cognitive
4 impairments. See Complaint, Docket No. 3 (“Compl.”), ¶¶ 5-6. Defendant heads the Social
5 Security Administration, an agency of the federal government that provides, among others, benefits
6 based on disability and economic status.

7 In 1995, Doe was deemed eligible for two types of benefits under the Social Security Act:
8 Social Security Disability Income (“SSDI” or “Title II benefits”), which are benefits tethered to the
9 recipient’s disability status, and Supplemental Security Income (“SSI” or “Title XVI benefits”),
10 which supplement SSDI if the recipient’s monthly income falls below a certain threshold. Id. ¶¶ 8-9.
11 In addition to a primary diagnosis, which in Doe’s case was “mental retardation,” an individual can
12 receive additional disability codings, reflecting other impairments. A 1999 neuropsychological
13 evaluation of Doe, conducted by one of defendant’s examiners, established that plaintiff also
14 suffered from epilepsy, Jacksonian seizures, psychotic disorder not otherwise specified, depressive
15 disorder not otherwise specified, and borderline intellectual function. Id. ¶¶ 10-11. These additional
16 diagnoses were not reflected in Doe’s disability coding, however, due to defendant’s finding of
17 “insufficient evidence.” Id.

18 Doe’s disabilities affect his everyday life. He suffers from severe anxiety episodes arising
19 from normal daily interactions, he experiences auditory and visual hallucinations, and he has both
20 contemplated and attempted suicide. Id. ¶13. As a result of his cognitive deficits, Doe needs more
21 time to understand basic instructions and he often misinterprets events and situations, which leads to
22 unfounded fears and panic attacks that require medical intervention and occasionally incapacitate
23 him. Id. ¶¶ 14, 66.

24 Soon after becoming eligible for Social Security benefits, Doe expressed a wish to live and
25 work independently, despite his disability. Since 1996, Doe has been working, with variable
26 intensity, at a number of “sheltered” work entities. Id. ¶¶ 15-20. This type of work, and the
27 remuneration Doe would earn as a result, is separate from his SSI/SSDI benefits and is meant to
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1 provide an incentive for Social Security beneficiaries to try to live independently. Id. Amounts
2 earned in a “sheltered” job, do not count towards the threshold that triggers a reduction in benefits.
3 To guide him towards work autonomy, Doe retained a job coach, whom he paid from his SSI
4 benefits, as well as the services of several nonprofit organizations seeking to help individuals like
5 Doe live independently. Id. ¶¶ 17-18. By 2003, Doe was making good progress and, as a result, his
6 mother ceased to be his representative payee, enabling Doe to take charge of his own finances. Id. ¶
7 20. However, now Doe also began to receive defendant’s notices, which were previously mailed to
8 his mother.

9 To determine the continued eligibility of Social Security beneficiaries, from time to time,
10 defendant conducts reviews of a beneficiary’s monthly income. Id. ¶¶ 28, 30, 38, 42. From a
11 beneficiary’s monthly earnings, defendant is supposed to deduct impairment-related expenses, such
12 as amounts spent on medication, a job coach, or a therapist. If the monthly income thus computed
13 exceeds a certain threshold, the individual is said to engage in substantial gainful activity (“SGA”)
14 and his SSI benefits are reduced to reflect the increase in income.

15 Defendant has reviewed Doe’s file several times since 2005, and, the complaint alleges, has
16 failed to make the proper inquiries into the impairment-related deductions to which Doe was
17 entitled. Id. ¶ 38. This eventually led to Doe’s SSI benefits being reduced to zero, in August 2007.
18 Id. ¶ 45. At each step in the process, defendant sent Doe notices, according to defendant’s regular
19 practice, informing him of his right to appeal, provide more information, or otherwise participate in
20 the eligibility evaluation process. Id. ¶¶ 51-59. The notices require prompt action usually within ten
21 to fifteen days. Id. ¶ 54. In Doe’s case, the notices, combined with the decrease in his monthly
22 payments, triggered a state of heightened anxiety, delusional attacks, psychotic episodes, and vivid
23 hallucinations that persist to this day. Id. ¶¶ 62-68.

24 As a result, Doe’s ability to function independently and to afford the same level of medical
25 care has been severely diminished. Moreover, because of his mental disability and his elevated state
26 of anxiety, Doe has been unable to comprehend and act on the numerous notices he received. Id. ¶¶
27 68-69.

1 In August 2007, after Doe’s SSI benefits were terminated, Doe retained his current counsel,
 2 who also represents the plaintiff in Davis v. Astrue, Case No. CV 06-6108, (N.D. Cal. 2009) (Patel,
 3 J.). In 2005, Davis filed an action styled “administrative class action” on behalf of himself, another
 4 named representative, and “similarly situated individuals” with defendant’s Office of the General
 5 Counsel, alleging violations of Section 504 of the Rehabilitation Act, 29 U.S.C. section 794
 6 (“Rehabilitation Act”) and the Due Process Clause of the Fifth Amendment. See Docket No. 20,
 7 Bruce Dec., ¶ 2. Defendant issued a final decision with respect to that action on July 27, 2006, and
 8 mailed a copy thereof to each of the named “class representatives.” See Docket No. 20, Exhs. 3A &
 9 3B. Doe alleges that he was one of the unnamed members of the aforementioned “administrative
 10 class” and has, therefore, exhausted his administrative remedies. Compl. ¶ 75.² Even so, in
 11 November 2008, plaintiff brought an administrative appeal of defendant’s decision to reduce his SSI
 12 benefits to zero, and in February 2009, plaintiff filed a civil rights violations complaint with
 13 defendant’s Office of the General Counsel. See Docket No. 11, Stella Dec. & O’Connor Dec.

14 Doe filed his complaint in the present action on March 6, 2009, and is represented by the
 15 same counsel as the plaintiff in Davis v. Astrue. Davis has since moved to consolidate the two cases
 16 for pre-trial and trial proceedings. See Motion to Consolidate, Case No. CV 06-6108, Docket No.
 17 95.

18 Doe alleges defendant violated the Rehabilitation Act and the Due Process Clause of the
 19 Fifth Amendment by denying him due process and meaningful access to Social Security benefits.
 20 Doe seeks declaratory and injunctive relief establishing that defendant is in violation of the
 21 Rehabilitation Act and the Due Process Clause and ordering defendant to implement regulations and
 22 adjustments in its procedures that would bring the Social Security Administration into compliance
 23 with both the Rehabilitation Act and the Due Process Clause. Compl. at 24-25. Doe also seeks
 24 attorneys’ fees. Id. at 26. Defendant moves to dismiss Doe’s complaint both for lack of subject
 25 matter jurisdiction and for failure to state a claim.

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1 LEGAL STANDARD

2 I. Rule 12(b)(1): Subject Matter Jurisdiction

3 A party may raise a challenge to the court's exercise of jurisdiction over the subject matter of
4 an action under Federal Rule of Civil Procedure 12(b)(1). Dismissal is appropriate under Rule
5 12(b)(1) when the plaintiff has failed to establish federal jurisdiction over the claim. Thornhill
6 Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979). A motion under Rule
7 12(b)(1) is appropriate when the jurisdictional issue is separable from the merits of the case, i.e.,
8 jurisdiction and substantive facts are not intertwined. Roberts v. Corrothers, 812 F.2d 1173, 1177
9 (9th Cir. 1987).

10 A Rule 12(b)(1) jurisdictional attack may be facial or factual. White v. Lee, 227 F.3d 1214,
11 1242 (9th Cir. 2000). "In a facial attack, the challenger asserts that the allegations contained in the
12 complaint are insufficient on their face to invoke federal jurisdiction." Safe Air for Everyone v.
13 Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). "By contrast, in a factual attack, the challenger
14 disputes the truth of the allegations that, by themselves, would otherwise involve federal
15 jurisdiction. . . . In such circumstances, a court may examine extrinsic evidence without converting
16 the motion to one for summary judgment, and there is no presumption of the truthfulness of the
17 [p]laintiff's allegations." Id.; see also Land v. Dollar, 330 U.S. 731, 735 n.4 (1947) ("[W]hen a
18 question of the District Court's jurisdiction is raised . . . the court may inquire by affidavits or
19 otherwise, into the facts as they exist.").

20 A. Standing

21 The maximal constitutional bounds of federal courts' subject matter jurisdiction are defined
22 by Article III of the U.S. Constitution, which extends only to "cases" and "controversies." U.S.
23 Const., art. III, § 2, cl. 1. At a constitutional minimum, Article III standing requires the party
24 invoking federal jurisdiction to show that it has "suffered some actual or threatened injury as a result
25 of the putatively illegal conduct of the defendant, and that the injury can be traced to the challenged
26 action and is likely to be redressed by a favorable decision." Valley Forge Christian Coll. v. Ams.
27 United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (internal citations
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1 omitted). To satisfy the injury-in-fact requirement, the alleged harm must be “an invasion of a
2 legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not
3 conjectural or hypothetical.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal
4 citations omitted). The party invoking federal jurisdiction bears the burden of establishing these
5 elements. Id. at 561.

6 **II. Rule 12(b)(6): Failure to State a Claim**

7 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests the legal
8 sufficiency of a claim.” Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Because Rule
9 12(b)(6) focuses on the “sufficiency” of a claim rather than the claim’s substantive merits, “a court
10 may [ordinarily] look only at the face of the complaint to decide a motion to dismiss.” Van Buskirk
11 v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002).

12 A motion to dismiss should be granted if plaintiff fails to proffer “enough facts to state a
13 claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).
14 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
15 the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility
16 standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a
17 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a
18 defendant's liability, it stops short of the line between possibility and plausibility of entitlement to
19 relief.” Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (internal citations omitted).

20 Allegations of material fact are taken as true and construed in the light most favorable to the
21 nonmoving party, Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996), but courts
22 “are not bound to accept as true a legal conclusion couched as a factual allegation,” Iqbal, 129 S. Ct.
23 at 1949-50.

1 DISCUSSION

2 I. Subject Matter Jurisdiction

3 A. Plaintiff's Claims "Arise Under" the Social Security Act

4 Plaintiff invokes the court's jurisdiction over claims based on the Rehabilitation Act and the
5 Fifth Amendment's Due Process Clause. While it is true that, under 28 U.S.C. section 1331, district
6 courts have "original jurisdiction of all civil actions arising under the Constitution [and] laws of the
7 United States," Congress has specifically excluded claims arising under the Social Security Act from
8 district courts' Section 1331 jurisdiction. See 42 U.S.C. § 405(h). Such claims may be heard in
9 district court only pursuant to the judicial review provisions included in the Social Security Act itself
10 and after the plaintiff has exhausted all available administrative remedies. 42 U.S.C. § 405(g).

11 A constitutional or statutory challenge to the actions of the Social Security Administration
12 may seek to recover two types of remedies, monetary and non-monetary. When plaintiff claims "a
13 monetary benefit from the agency [such as] a disability payment, or payment for some medical
14 procedure," Shalala v. Ill. Council on Long Term Care, 529 U.S. 1, 11 (2000), "it is fruitless" to
15 argue that a claim seeking to recover benefits does not arise under the Social Security Act,
16 Weinberger v. Salfi, 422 U.S. 749, 761 (1975).

17 In Ill. Council, the Supreme Court refused to "accept a distinction that limits the scope of
18 [Section] 405(h) to claims for monetary benefits." 529 U.S. at 14. Therefore, even claims seeking
19 non-monetary remedies are said to arise under the Social Security Act. Plaintiff's attempt to
20 distinguish Ill. Council because it sought to interpret Section 405(h) as incorporated in the Medicare
21 Act, is unavailing. "Claims for money, claims for other benefits, claims of program eligibility, and
22 claims that contest a sanction or remedy . . . may all similarly dispute agency policy determinations,
23 or may all similarly involve the application, interpretation, or constitutionality of interrelated
24 regulations or statutory provisions. There is no reason to distinguish among them in terms of the
25 language or in terms of the purposes of [Section] 405(h)." Id. Based on this explicit reasoning,
26 there is no reason to believe the analysis would have been different in the context of the Social
27 Security Act. The statutory language and, therefore, the Supreme Court's conclusion, applies
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1 equally to either case. See, e.g., Davis v. Astrue, 513 F. Supp. 2d 1137, 1144 n.1 (N.D. Cal. 2007)
2 (Patel, J.).

3 Plaintiff cites a Ninth Circuit case that found that district courts did have Section 1331
4 jurisdiction over Rehabilitation Act challenges to actions of the Social Security Administration.
5 See J.L. v. Social Sec. Admin., 971 F.2d 260, 263 (9th Cir. 1992). The facts of that case closely
6 parallel those in plaintiff's complaint, as do the legal arguments. Be that as it may, the more recent
7 authority of Ill. Council compels the court to reject plaintiff's position, as it did in Davis, 513 F.
8 Supp. 2d at 1145. Given plaintiff's recent motion to consolidate his case with Davis, the court
9 commends the rulings in that action to plaintiff's attention. The court's reasoning for Davis' claim
10 applies with equal force to Doe. To proceed with these claims in this court Doe must show that he
11 has complied with the exhaustion requirements set forth in Section 405(g).

12 **B. Exhaustion of Administrative Remedies**

13 The Social Security Act permits judicial review only after "a final decision of the
14 Commissioner of Social Security." 42 U.S.C. § 405(g). Plaintiff currently has two separate
15 proceedings pending before the Social Security Administration, one appealing the reduction of his
16 benefits and another alleging discrimination because of his mental disability. Because a final
17 decision has not issued in either proceeding, defendant maintains that the court lacks jurisdiction
18 under Section 405(g).

19 As Ill. Council has made clear, plaintiff must meet the exhaustion requirement with respect
20 to the instant action before the court, i.e. his civil rights case based on the Rehabilitation Act. 529
21 U.S. at 14. However, he need not meet the exhaustion requirement with respect to a claim that is not
22 now before the court, such as his benefits appeal, if that claim is severable from his civil rights case
23 and a final judgment in that collateral claim would in no way influence the merits of his civil rights
24 complaint, as discussed below.

25 **(i) Severability of Plaintiff's Benefits Appeal**

26 Plaintiff does not dispute that his benefits appeal has not been exhausted. See Docket No.
27 10, Stella Dec. ¶ 3 (confirming that plaintiff's benefits appeal is pending before an administrative
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1 law judge). Nor need it have been, since plaintiff does not seek a court decision reinstating his
2 benefits. Therefore, should the court find that his civil rights claim can be separated from his
3 benefits appeal, it is within its power to sever or waive the requirement that he seek a final decision
4 on his benefits claim.

5 Waiver of the exhaustion requirement is proper when the claim to be reviewed is “(1)
6 collateral to a substantive claim of entitlement (collaterality), (2) colorable in its showing that refusal
7 to grant the relief sought will cause an injury which retroactive payments cannot remedy
8 (irreparability), and (3) one whose resolution would not serve the purposes of exhaustion (futility).”
9 Briggs v. Sullivan, 886 F.2d 1132, 1139 (9th Cir. 1989) (internal quotations omitted). Plaintiff must
10 satisfy all three elements in order to qualify for the waiver. See Kaiser v. Blue Cross of Ca., 347
11 F.3d 1107, 1115-16 (9th Cir. 2003) (finding collaterality but denying waiver because irreparability
12 and futility were not met).

13 With regard to the first prong, the Supreme Court has found that a claim that a policy failed
14 to follow applicable regulations is purely collateral to a claim for benefits. City of New York v.
15 Bowen, 476 U.S. 467, 483 (1985). “A plaintiff’s claim is collateral if it is not essentially a claim for
16 benefits.” Johnson v. Shalala, 2 F.3d 918, 921 (9th Cir. 1993). Like the plaintiff in Johnson, Doe
17 does not seek reinstatement of his benefits through the present action, but rather mounts a
18 constitutional and statutory challenge to one of the substantive policies of the Social Security
19 Administration. See id. Plaintiff’s complaint alleges, in some detail, that defendant has
20 implemented policies that place all mentally disabled individuals at a disadvantage by failing to train
21 Social Security Administration personnel, ignoring medical evaluations, using a mechanistic method
22 of determining cessation of eligibility that disregards the particular circumstances of the mentally
23 disabled, and, through its notices, increasing the beneficiaries’ suffering rather than informing them
24 effectively of adverse administrative action. Nowhere in the complaint can a claim for benefits be
25 found.³ This is a facial challenge to defendant’s policies, not to the way they were applied to the
26 plaintiff’s case or to his appeal.

1 With regard to the second prong of irreparability, when “back payments cannot erase either
2 the experience or the entire effect of” the alleged injury, a plaintiff has a colorable claim of
3 irreparable harm. Kildare v. Saenz, 325 F.3d 1078, 1083 (9th Cir. 2003). “A colorable claim of
4 irreparable harm is one that is not wholly insubstantial, immaterial, or frivolous.” Id. (internal
5 quotations omitted). In addition to economic hardship, already identified by the Ninth Circuit as
6 irreparable, see id., defendant’s actions allegedly cause plaintiff severe anxiety, psychotic episodes,
7 and hallucinations that may have permanently impaired his mental stability and cognitive functions.
8 See Compl. ¶¶ 62-66 (vividly describing plaintiff’s hallucinations that the Social Security
9 Administration was “coming to get him” and he would be rendered homeless as a result). Payment
10 of benefits cannot reverse this harm. Plaintiff has easily exceeded the minimal requirement of
11 pleading a colorable claim of irreparable harm.

12 Defendant questions this analysis by pointing out that plaintiff has not specified any
13 improper or unnecessary notice and by distinguishing “recalling” past hallucinations from
14 anticipating future such episodes — a semantic difference. Plaintiff does not allege improper or
15 unnecessary notice because that is not the point of his complaint: he is not claiming that defendant
16 sent him notices in violation of defendant’s policies, but that defendant’s policies violate the
17 Constitution, the Rehabilitation Act, and a number of federal regulations. Once more, defendant
18 mistakes a facial challenge for an as-applied claim.

19 Lastly, the court considers the issue of futility. “The exhaustion requirement allows the
20 agency to compile a detailed factual record and apply agency expertise in administering its own
21 regulations”, conserving judicial resources and allowing the agency to correct its own errors.
22 Johnson, 2 F.3d at 922. But “when the agency applies a ‘systemwide policy’ that is ‘inconsistent in
23 critically important ways with established regulations,’ nothing is gained ‘from permitting the
24 compilation of a detailed factual record, or from agency expertise.’” Id., quoting City of New York,
25 476 U.S. at 485. Like the Ninth Circuit in Johnson, this court is able to decide a straightforward
26 statutory challenge without the benefit of the agency’s expertise. See id. Likewise, a more detailed
27 factual record concerning plaintiff’s individual circumstances is likely to do little to cast any
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1 additional light on either the Constitution or on Congress's intent in the Rehabilitation Act.

2 Exhaustion of plaintiff's benefits appeal would be futile to his present claim.

3 Defendant's reliance on Ill. Council is misplaced here. In that case, the Supreme Court was
4 addressing the applicability of the exhaustion requirement to claims seeking non-monetary relief and
5 not when or whether such requirements may be waived. By contrast, here the question is whether
6 the administrative remedies must be exhausted in plaintiff's benefits appeal, which is not even
7 before this court, before plaintiff can bring his civil rights case before this court. The fact remains
8 that even if defendant reversed its earlier decision and reinstated plaintiff's benefits, plaintiff would
9 still have a valid cause of action in federal court, assuming that he has met the exhaustion
10 requirement with respect to his civil rights claims. How defendant's policies were applied in this
11 particular case has no bearing on whether such policies are illegal or not.

12 In sum, plaintiff's Rehabilitation Act and constitutional claims are sufficiently distinct and
13 severable from his underlying benefits appeal. Accordingly, the court hereby waives the requirement
14 that plaintiff have exhausted his administrative remedies in the benefits appeal before he may pursue
15 his civil rights claims.

16 (ii) Plaintiff's Civil Rights Claims

17 The parties have conflicting views about the exhaustion of plaintiff's remedies to his civil
18 rights claims. Again, it is undisputed that the administrative civil rights complaint plaintiff filed on
19 February 24, 2009, is still pending. See Docket No. 11, O'Connor Dec. ¶ 3 (confirming that
20 plaintiff's civil rights complaint has been under review by the Social Security Administration's
21 Office of the General Counsel). Plaintiff nevertheless claims that he has exhausted his
22 administrative remedies as an unnamed plaintiff in a class of individuals that was the subject of a
23 final decision in an administrative class action concluded on July 27, 2006. See Docket No. 20,
24 Bruce Dec. ¶¶ 2-6 (describing the sequence of decisions in administrative class actions filed by
25 named plaintiffs Davis and Gibler).

26 When an individual brings both constitutional and statutory challenges to the policies of the
27 Social Security Administration, the constitutional claims are not subject to an administrative
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1 exhaustion requirement. Salfi, 422 U.S. at 765 (finding that disposing of constitutional claims is “a
2 matter which is beyond [the Commissioner’s] jurisdiction to determine”). Plaintiff’s Due Process
3 claim is, therefore, exempt from the exhaustion requirement, leaving only his Rehabilitation Act
4 claim in question, which the court addresses below.⁴

5 Before an individual may file a claim arising under the Social Security Act in district court,
6 he must obtain a “final decision of the Commissioner of Social Security made after a hearing to
7 which he was a party” and must commence his civil action “within sixty days after the mailing to
8 him of notice of such decision.” 42 U.S.C. § 405(g). The Supreme Court has interpreted the “final
9 decision” requirement to include three elements: (1) a requirement, not waivable by the
10 Commissioner, that a claim be presented; (2) a requirement that the administrative review
11 procedures be exhausted, waivable either by action of the Secretary or through a court-imposed
12 waiver; and (3) that the complaint in district court meet the sixty-day filing deadline. Mathews v.
13 Eldridge, 424 U.S. 319, 328 (1976), Salfi, 422 U.S. at 763-76.

14 The first non-waivable requirement, that plaintiff present his claim to the Commissioner prior
15 to commencing a civil action, “is satisfied once the Secretary has had an opportunity to act and
16 benefits have actually been terminated.” Lopez v. Heckler, 713 F.2d 1432, 1439 (9th Cir. Cal. 1983)
17 (noting that substantial authority supported this view); accord Mathews v. Diaz, 426 U.S. 67, 75
18 (1976) (finding that the plaintiff had satisfied the requirement when he filed an application for
19 benefits after he became a party to the suit), Jones v. Califano, 576 F.2d 12, 18 (2d Cir. N.Y. 1978)
20 (finding that “by filing claims with the SSA, [plaintiffs-appellants] have satisfied the non-waivable
21 requirement”). In the present case, plaintiff has met the non-waivable requirement by filing a civil
22 rights complaint with the Office of the General Counsel for the Social Security Administration on
23 February 27, 2009, and an Assistant Regional Counsel reviewed his claim. See Docket No. 11,
24 O’Connor Dec. ¶¶ 1, 3. He then brought the present action on March 3, 2009, and this motion is
25 being considered more than five months later. His benefits had already been reduced to zero. See
26 Docket No. 20, Exh. 5 at 1 (letter from the Social Security Administration to plaintiff informing him
27 of the reduction of his benefits).

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1 Where the legal challenge to the Social Security Administration’s policies is statutory, rather
2 than constitutional, defendant has the authority to decide it, subject to judicial review, thus forming
3 the basis for the second waivable requirement that administrative remedies be exhausted before
4 bringing a civil action. “The test for exhaustion of a statutory issue in an individual case . . . should
5 be whether the Secretary has taken a final position on that issue.” Liberty Alliance of the Blind v.
6 Califano, 568 F.2d 333, 346 (3d Cir. 1977). Accord Jones v. Califano, 576 F.2d at 19 (2d Cir. 1978)
7 (agreeing with the Third Circuit that a “final position” may amount to “a final decision”). The Ninth
8 Circuit has adopted this test as well. Livermore v. Heckler, 743 F.2d 1396, 1405 (9th Cir. 1984)
9 (following the Third Circuit’s reasoning in holding that in “a question of statutory interpretation in
10 which the [Commissioner] has taken a final position on an issue, . . . further administrative appeals
11 would be futile”).

12 Plaintiff contends that the administrative remedies available for his civil rights claim were
13 exhausted when defendant reached a decision in a purported administrative class action (“ACA”) to
14 which Doe was an unnamed plaintiff. The purported ACA was styled as “Davis, Gibler, and
15 Similarly Situated Individuals v. Social Security Administration” and took the form of a letter from
16 plaintiffs counsel to defendant’s Office of the General Counsel dated September 21, 2005. See
17 Docket No. 20, Bruce Dec., ¶ 2. Defendant’s Office of the General Counsel issued final decisions
18 in this dispute on July 27, 2006. Id. at ¶ 5.

19 “There is no provision for class relief in the administrative process under SSI-Title XVI.”
20 Jones v. Califano, 576 F.2d at 19. The parties do not cite references to, and the court is not aware of,
21 a class action administrative remedy in the context of Social Security claims. Its notice requirements
22 are unknown; its preclusive effects unclear. The court does not need to address here whether the
23 purported ACA made Doe a party to Davis’s complaint. Under Livermore v. Heckler, the
24 requirement is met because defendant’s decision with respect to Davis’s claim was a final position
25 on the merits of the civil rights complaint both Davis and Doe share.

26 While Livermore v. Heckler applied the “final position” test to multi-party actions, where
27 one plaintiff had exhausted his remedies and obtained a final decision and other co-plaintiffs were
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1 only at the early stages of administrative review, the court sees no reason why the same test would
2 be inapplicable to the present case. Davis's and Doe's civil actions are contemporaneous and
3 subject to a motion to consolidate, the parties are represented by the same counsel in both suits, and
4 defendant had due notice that its final decisions in Davis's and Gibler's complaints would apply to a
5 larger group of individuals.

6 Moreover, any claim that defendant's final decisions depended on Davis's or Gibler's
7 individual circumstances would be fanciful. The two letters share exactly the same content, with the
8 exception of three additional paragraphs that defendant's Office of the General Counsel devotes to
9 explaining why it believed Gibler's complaint was not timely. See Docket No. 20, Exh. 3A & 3B.
10 In what must have been an attempt to put substance over form, defendant's letter to Gibler further
11 indicates that the Office of the General Counsel considered Gibler's substantive argument, and then
12 proceeds to reiterate, to the letter, the second half of the Davis decision. See Docket No. 20, Exh.
13 3B, at 2. Defendant's identical treatment of the two claims makes no mention of the significantly
14 different personal circumstances of the two petitioners that defendant's own inquiry had earlier
15 revealed. Compare Docket No. 20, Exh. 2A (Davis "findings of fact") with Docket No. 20, Exh. 2B
16 (Gibler "findings of fact"). If anything, defendant's own actions have demonstrated that defendant
17 does not rely on determinations of fact in reaching its final decisions in civil rights claims of the type
18 Davis and Gibler filed. Since Doe's challenge is nearly identical, there is no reason to believe that
19 defendant would reach a different final decision.

20 There is also a strong indication that despite its current protestations about plaintiff's failure
21 to exhaust all administrative remedies, defendant has more or less acknowledged that a third review
22 of the same civil rights claims would not yield in Doe's case a result any different from the ones that
23 it did with respect to Davis's and Gibler's complaints. See Diaz, 426 U.S. at 76 (finding that the
24 Social Security Administration had waived the exhaustion requirement, despite its later insistence
25 that plaintiff had not exhausted his administrative remedies, when it conceded at oral argument that
26 the case was probably ripe for summary judgment). When the plaintiff in Davis, formerly a class
27 action now also before this court, attempted to include Doe as a named plaintiff, defendant made no
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1 mention about Doe's purported failure to exhaust his administrative remedies. See Federal
2 Defendant's Opposition to Motion for Leave to Amend Second Amended Complaint (Jan. 18, 2008),
3 Docket No. 66, Case No. CV 06-6108.

4 Finally, the sixty-day filing requirement is inapplicable here, since Doe received no notice of
5 defendant's decision in Davis's and Gibler's cases. "Where the purpose of the sixty day rule is to
6 forestall the filing of belated or stale claims, it is not so compelling in [an] action like this one based
7 on a challenge to a policy of the Secretary which applies in the same manner to all litigants."
8 Kennedy v. Harris, 87 F.R.D. 372, 377 (S.D. Cal. 1980) (noting a similar practice is Title VII
9 employment discrimination cases). See also Owens v. Heckler, 1984 WL 62779, *5 (C.D. Cal. Aug.
10 28, 1984) (finding "section 405(g) action, in which a plaintiff is required to initially resort to
11 administrative remedies, [to be] analogous to actions brought under Title VII, which has a similar
12 procedural scheme).

13 The court concludes that because (1) plaintiff has already filed an administrative action
14 alleging civil rights violations, (2) defendant has already issued a final position on the same
15 substantive claim, and (3) the sixty-day filing deadline does not apply to individuals in plaintiff's
16 situation, plaintiff has satisfied the requirement present in Section 405(g) that he proceed with a civil
17 action only after a final decision of the Commissioner.

18 To summarize, plaintiff's present civil rights action is separable from his benefits appeal and
19 does not require him to have exhausted all administrative remedies in that separate case. Plaintiff's
20 civil rights claim does require exhaustion but plaintiff has already met this condition. Finally,
21 plaintiff's constitutional claim does not require administrative exhaustion, since defendant's
22 jurisdiction does not extend over constitutional challenges to its policies. Accordingly, the court has
23 subject matter jurisdiction in this action pursuant to 42 U.S.C. section 405(g).

24 C. Mandamus Jurisdiction Under 28 U.S.C. Section 1361

25 Like the plaintiff in Davis, plaintiff also asserts that this court has subject matter jurisdiction
26 pursuant to 28 U.S.C. section 1361, which provides that "district courts shall have original
27 jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United
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1 States or any agency thereof to perform a duty owed to the plaintiff.” Mandamus is an
2 “extraordinary remedy,” and is only available where “(1) the individual’s claim is clear and certain;
3 (2) the official’s duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from
4 doubt, and (3) no other adequate remedy is available.” Kildare v. Saenz, 325 F.3d 1078, 1084 (9th
5 Cir. 2003) (internal quotations omitted).

6 In ruling that mandamus is sometimes appropriate in Social Security cases, the Supreme
7 Court indicated that “[t]he common-law writ of mandamus, as codified in 28 U.S.C. [section] 1361,
8 is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and
9 only if the defendant owes him a clear nondiscretionary duty.” Heckler v. Ringer, 466 U.S. 602, 616
10 (1989).

11 Plaintiff requests an order, presumably a writ of mandamus, requiring defendant to comply
12 with the Rehabilitation Act and the United States Constitution. Plaintiff’s request is clearly beyond
13 the scope of mandamus jurisdiction. It is by no means self-evident that plaintiff’s claims are clear
14 and certain; in fact, if the range of issues encompassed by this decision is any indication, plaintiff’s
15 claims are complex and likely to require careful and sustained litigation. Further, defendant’s duty
16 does not appear to be so free from doubt and so plainly ministerial as to compel the issuance of a
17 writ of mandamus. Lastly, plaintiff’s remedies, which include injunctive and declaratory relief, are
18 far from inadequate vehicles for accomplishing plaintiff’s purpose should he prevail. Accordingly,
19 plaintiff may not proceed with his Rehabilitation Act and constitutional claims based on mandamus
20 jurisdiction. See Davis, 513 F. Supp. 2d at 1147; see also Laurie Q. v. Callahan, 973 F. Supp. 925,
21 933 (N.D. Cal. 1997) (Patel, J).

22 D. Standing

23 To establish Article III standing, a plaintiff must show that

24 (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b)
25 actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to
26 the challenged action of the defendant; and (3) it is likely, as opposed to merely
speculative, that the injury will be redressed by a favorable decision.

27 Friends of the Earth, Inc. v. Laidlaw Envntl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000).

1 Plaintiff is currently awaiting an administrative appeal of defendant's decision to reduce his
2 SSI benefits to zero. Should the outcome of that appeal prove favorable to plaintiff, there would be
3 no "injury in fact" of a monetary nature. Plaintiff's monetary injury is concrete and particularized,
4 but is also hypothetical.

5 Plaintiff, however, goes on to further allege that he was subject to intense stress and anxiety,
6 which, given his precarious mental condition, is both actual and imminent. As a result, plaintiff's
7 health has allegedly deteriorated and his ability to live independently seriously compromised. These
8 psychological problems constitute an "injury-in-fact" for the purposes of Article III standing. See
9 Situ v. Leavitt, 2006 WL 3734373, *4 (N.D. Cal. Dec. 18, 2006) (Henderson, J.) (holding that
10 "evidence regarding [p]laintiffs' actual anxiety and distress" distinguished that case from those
11 involving "hypothetical, speculative or other possible future injuries [that] do not count in the
12 standing calculus") (internal quotations omitted). Plaintiff alleges there is no reason to expect
13 defendant would desist from its procedures, which defendant indirectly acknowledges by stating its
14 belief that the notices were both necessary and proper. Thus, plaintiff's alleged injuries were
15 directly traceable to defendant's conduct. A decision of this court, granting plaintiff's prayer for
16 declaratory and injunctive relief, would prevent Social Security beneficiaries, including plaintiff,
17 from experiencing this form of injury in the future.

18 Accordingly, plaintiff has satisfied the conditions for standing in this action.

19 II. Failure to State a Claim

20 A. Pleading Standard

21 Federal Rule of Civil Procedure 8(a) instructs that a pleading contain "a short and plain
22 statement of the claim showing that the pleader is entitled to relief." While the rule does not require
23 "detailed factual allegations," Twombly, 550 U.S. at 555, "it demands more than an unadorned,
24 the-defendant-unlawfully-harmed-me accusation," Iqbal, 129 S. Ct. at 1949. A complaint that rests
25 on labels, conclusions, and "formulaic recitation[s] of the elements of a cause of action" fails this
26 pleading standard. Twombly, 550 U.S. at 555.

1 The Supreme Court has suggested a two-step approach to evaluating a complaint. First, the
2 court must “identify pleadings that, because they are no more than conclusions, are not entitled to
3 the assumption of truth.” Iqbal, 129 S. Ct. at 1950. “Threadbare recitals of the elements of a cause
4 of action, supported by mere conclusory statements, do not suffice.” Id. Second, while the
5 remaining “well-pleaded factual allegations” are assumed to be true, the reviewing court must still
6 “determine whether they plausibly give rise to an entitlement to relief.” Id. If the well-pleaded facts
7 support a more persuasive, and likely benign, “obvious alternative explanation” for the defendant’s
8 actions, a claim is not plausible. Twombly, 550 U.S. at 567. If, in fact, the court may only infer the
9 “mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader
10 is entitled to relief.” Iqbal, 129 S. Ct. at 1950 (internal quotations omitted). This determination is “a
11 context-specific task that requires the reviewing court to draw on its judicial experience and
12 common sense.” Id. (internal quotations omitted).

13 B. Statute of Limitations

14 At the outset, the court considers defendant’s threshold allegation that the statute of
15 limitations prevents plaintiff from bringing his Rehabilitation Act claim.

16 Section 504 of the Rehabilitation Act does not contain a statute of limitations, but the
17 Supreme Court has instructed district courts to borrow the statute of limitations from an analogous
18 cause of action under state law. Bd. of Regents v. Tomanio, 446 U.S. 478, 484 (1980) (noting that
19 Congress clearly instructed district courts to look to state law for a statute of limitations applicable
20 to actions brought under 42 U.S.C. section 1983). The Ninth Circuit has analogized Section 504
21 actions to personal injury claims. Alexopoulos v. San Francisco Unified School Dist., 817 F.2d 551,
22 554 (9th Cir. 1987). The California statute of limitations for personal injury claims is now two
23 years. See Cal. Code Civ. Pro. § 335.1. That statute of limitations is tolled if the plaintiff is under
24 the age of majority or mentally disabled, for the duration of the disability. See Cal. Code Civ. Pro. §
25 332. Absent tolling, the statute of limitations begins to run “when a plaintiff knows or has reason to
26 know of the injury that is the basis of the action.” Alexopoulos, 817 F.2d at 555. “The time period
27 for filing a complaint of discrimination begins to run when the facts that would support a charge of
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1 discrimination would have been apparent to a similarly situated person with a reasonably prudent
2 regard for his rights.” Boyd v. United States Postal Service, 752 F.2d 410, 414 (9th Cir. 1985).

3 Plaintiff received his latest SSI notice from defendant in August 2007. See Docket No. 20,
4 Exh. 4 (letter informing Doe that his benefits had been reduced to zero). While plaintiff had
5 received similar notices prior to this time, the August 2007 notice clearly constitutes an adequate
6 basis for plaintiff’s action, within the two-year time limit. Moreover, plaintiff’s abilities to
7 comprehend the nature of notices and respond promptly to them was greatly reduced at the time,
8 which is, after all, one of his main causes of complaint against defendant. Since defendant’s own
9 examiner diagnosed Doe as suffering from “mental retardation,” it is strange indeed that defendant
10 would now claim that plaintiff’s claim is time-barred based on the same statute of limitations
11 applicable to non-disabled individuals. Lastly, it is entirely conceivable that a reasonably prudent
12 individual, with a mental disability, would not connect his diminishing benefits to a legal cause of
13 action until they ceased completely, and even then only after having consulted with counsel.

14 The court finds that plaintiff’s claim under the Rehabilitation Act was timely filed. The court
15 now turns to defendant’s objections to plaintiff’s claims on jurisdictional and pleading grounds.

16 C. Rehabilitation Act Claim

17 The Rehabilitation Act clearly lists the elements necessary to assert a claim of
18 discrimination: The plaintiff must be disabled and otherwise qualified to receive benefits, and must
19 have been “excluded from the participation in, be denied the benefits of, or be subjected to
20 discrimination” under any program or activity receiving federal financial assistance. 29 U.S.C. §
21 794. Further, the Ninth Circuit has held that the Rehabilitation Act requires programs or agencies
22 receiving federal financial assistance to “consider the particular needs of disabled” individuals and
23 provide them with “meaningful access” to the benefits to which they are entitled. Armstrong v.
24 Davis, 275 F.3d 849, 862 (9th Cir. Cal. 2001) (rejecting policies that failed to “address the needs of
25 prisoners or parolees who have problems understanding complex information or communicating
26 through the spoken or written word”).

1 Plaintiff has properly stated the facts necessary to support his claim, which are entitled to a
2 presumption of truth at this stage of the proceedings. Plaintiff has alleged he is disabled, within the
3 meaning of the Social Security Act, as evidenced by defendant's own evaluations. Compl. ¶ 8.
4 Plaintiff has also alleged he is otherwise qualified to receive benefits, a factual assertion which is
5 beyond the scope of a motion to dismiss. *Id.* ¶¶ 37-38. If defendant was correct, and this assertion
6 would not be entitled to a presumption of truth, no claim could ever be brought by a wronged
7 beneficiary of a government program unless the government agreed not to raise the issue of
8 eligibility in a motion to dismiss. This is plainly not the proper function of Rule 12(b)(6). Further,
9 plaintiff has correctly alleged that he was denied the benefits to which he was entitled and
10 discriminated against in the course of his participation in SSI. *Id.* ¶¶ 34-35. Lastly, plaintiff has
11 alleged, and defendant does not dispute, that defendant is one of the programs or agencies that fall
12 under the scope of the Rehabilitation Act.

13 As a result, under the first prong of the *Iqbal* procedure, plaintiff has pleaded enough facts to
14 have a cognizable claim under the Rehabilitation Act. The court now considers the plausibility of
15 that claim under the current Supreme Court standard.

16 Plaintiff's principal claim is one that defendant appears intent to conveniently ignore or
17 misconstrue: This is not a claim for reinstatement of benefits, nor is it a claim that discrimination
18 occurs because the rate at which mentally disabled beneficiaries are being terminated is considerably
19 higher than their share of the population of generically disabled beneficiaries. Thus the objections
20 raised in *Alexander v. Choate*, 469 U.S. 287 (1985), are inapposite to plaintiff's instant claims,
21 because plaintiff does not seek equal results, but merely equal treatment as implied by the right to
22 "meaningful access."

23 Instead, plaintiff alleges that he was wrongfully denied benefits and has suffered additional
24 injuries due to defendant's failure to adequately evaluate the needs of mentally disabled persons,
25 both at the notice stage, but also during periodic eligibility reviews. Defendant offers the alternative
26 explanation that plaintiff's earnings simply disqualified him from receiving further SSI benefits.
27 Given defendant's aversion to considering the possibility that its own rules deny the mentally
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1 disabled proper consideration during the review process and noting defendant's predilection for
2 circuitous arguments in its final decisions in civil rights administrative complaints, the alternative
3 explanation advanced by defendant is hardly obvious, not to mention plausible.⁵

4 Plaintiff alleges that expenses related to his disability, such as job coaches and payments to
5 assistance providers, are never reflected in the review process, due to defendant's poor training of its
6 employees, who are unaware of the specific needs of mentally disabled beneficiaries. See Compl. ¶¶
7 42, 28, 35. Furthermore, plaintiff alleges that defendant's notices are incomprehensible to the
8 mentally disabled and are accompanied by onerous deadlines. Id. ¶ 26. Since defendant is aware of
9 plaintiff's mental disability, it would be possible to tailor the notice procedures to meet plaintiff's
10 needs. Id. ¶¶ 119-120. Plaintiff's theory, despite being pleaded in a less than satisfactory manner,
11 is entirely plausible. Defendant's motion to dismiss the Rehabilitation Act claim is denied.

12 D. Due Process Claim

13 Plaintiff alleges that defendant has violated his due process rights by denying him a
14 "meaningful opportunity to comprehend and respond to [d]efendant's notices." Compl. ¶ 119.
15 Defendant is quick to point out the Supreme Court's holding that Social Security beneficiaries are
16 not constitutionally entitled to a hearing prior to the termination of their benefits. Mathews v.
17 Eldridge, 424 U.S. 319, 339-340 (1976). Defendant then goes on to misread the Supreme Court's
18 decision in Schweiker v. Chilicky, 487 U.S. 412 (1988), as barring a due process claim even if
19 benefits were erroneously terminated. If defendant's interpretation were true, one would be
20 prompted to wonder what exactly forms the substance of a constitutional right to due process, if a
21 property right can be wrongly terminated with unqualified impunity. Fortunately for civil liberties,
22 defendant is incorrect, as Chilicky merely prevented a plaintiff from recovering monetary damages
23 from the government official who improperly terminated his benefits. Id. at 429. Plaintiff requests
24 no monetary damages here. Nor does plaintiff ask for a hearing before his benefits are terminated,
25 so Eldridge is also inapposite.

26 What plaintiff seems to be alleging is a constitutional right to receiving comprehensible
27 notices. In support of his claim, plaintiff quotes Mullane v. Cent. Hanover Bank & Trust Co., 339
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1 U.S. 306, (1950), as requiring “notice reasonably calculated, under all the circumstances, to apprise
 2 interested parties of the pendency of the action and afford them an opportunity to present their
 3 objections.” Id. at 314. The right to notice is not always ancillary to the right to be heard; indeed,
 4 its function is to inform an interested party that “the matter is pending [so he] can choose for himself
 5 whether to appear or default, acquiesce or contest.” Id.

6 Unfortunately for plaintiff, his complaint stops short of identifying the legal theory or
 7 documenting the case law that would fully articulate his due process claim. Mullane does more than
 8 just prescribe a right to notice; it also draws the outer bounds of this right. Id. at 315. Plaintiff must
 9 clearly trace out a legal theory that explains why the notices he received were “mere gestures,” id.,
 10 performed perfunctorily, rather than “reasonably calculated” to convey their information to him, id.
 11 at 314. Plaintiff must also identify what in the notices caused him distress and what the threshold
 12 for causing such distress might be. In other words, plaintiff must sketch a cognizable legal theory,
 13 and support it with facts, that defendant’s notices were unreasonable given plaintiff’s disability and
 14 defendant’s awareness thereof. This plaintiff has failed to do. As currently pled, plaintiff’s
 15 constitutional right to receive comprehensible notices is entirely too subjective to be maintained.

16 Accordingly, the court hereby grants defendant’s motion to dismiss plaintiff’s Due Process
 17 claim. However, the claim is dismissed without prejudice, so as to give plaintiff another opportunity
 18 to replead his claim.

19
 20 CONCLUSION

21 For the foregoing reasons, defendant’s motion to dismiss is DENIED with respect to
 22 plaintiff’s Rehabilitation Act claim and is GRANTED with respect to plaintiff’s Due Process claim.
 23 Should plaintiff choose to do so, he must file an amended complaint within thirty (30) days of the
 24 date of this order.

25 IT IS SO ORDERED.

26 Dated: August 18, 2009

27 
 28 _____
 MARILYN HALL PATEL
 United States District Court Judge
 Northern District of California

ENDNOTES

1
2 1. The facts described below are taken from plaintiff's complaint, and assumed to be true. However,
3 mere labels, legal conclusions, and "formulaic recitations of the elements of a cause of action" are not
entitled to a presumption of veracity. Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009).

4 2. Paragraph 75 of plaintiff's complaint perfunctorily states "[p]laintiff has exhausted administrative
5 remedies to all claims raised in this action." The details concerning plaintiff's efforts to comply with
the exhaustion requirement are to be found scattered across subsequent submissions, a practice the court
6 emphatically discourages.

7 3. Defendant's attempts to distinguish Doe's complaint from Davis's complaint fail to persuade. The
8 sections of the complaint that defendant references are all allegations of fact, as required by Federal
Rule of Civil Procedure 8(a), and not claims for remedies. Defendant is equally misguided in reading
9 plaintiff's prayer for declaratory relief as a claim of administrative irregularity related to his own
benefits. See Davis, 513 F. Supp. 2d at 1145 (finding collaterality because Davis was not challenging
10 the individualized procedure used in his case or his own payments under defendant's policies). Like
Davis, Doe does not allege that the Social Security Administration wronged him by misapplying its own
11 policies. Rather, plaintiff has stated, quite clearly in fact, that defendant's policies as a whole are being
challenged. Reading anything else into Davis, such as the extravagant notion that collaterality may not
lie outside of the class action context, ignores the basic requirement that named plaintiffs in class actions
12 must have standing, which in turn compels them to plead facts about their individual circumstances.
If defendant's theory were the law, collaterality would never apply. Indeed, "defendants' construction
of Section 405(g) and Section 405(h) 'would not simply channel review through the agency, but would
13 mean no review at all.'" Am. Council of Blind v. Astrue, 2008 WL 1858928, *6 (N.D. Cal. 2008)
(Alsup, J.), quoting Ill. Council, 529 U.S. at 19.

14 At the July 27, 2009, hearing on this matter, defendant conceded that the benefits question makes
no different to the plaintiff's Rehabilitation Act claim. See Docket No. 25, (Transcript of July 27, 2009,
15 Hearing) at 10:11-13 (recording counsel for defendant agreement that "perhaps exhausting [the
individual benefit analysis] is not going to make a huge difference in the [c]ourt's analysis of the
16 Rehabilitation Act claim").

17 4. The court cannot help but note that in response to a similar complaint filed by Terrence L. Davis and
Timothy J. Gibler with defendant's Office of the General Counsel, alleging violations of the Due
18 Process Clause of the Fifth Amendment and the Rehabilitation Act, defendant's final decision addressed
only the statutory and not the constitutional elements of the complaint. See Docket No. 20, Exh. 1
19 (administrative complaint), Exh. 2A (Davis decision), Exh. 2B (Gibler decision), Exh. 3A (Davis final
decision), Exh. 3B (Gibler final decision).

20 5. In a letter responding to the civil rights violation claim brought by the plaintiff in Davis, defendant's
21 Office of Legal Counsel rejected the view that its own procedures failed to adequately consider the
needs of the disabled at the review stage, in violation of the Rehabilitation Act. In support of its view,
22 defendant's Office of Legal Counsel noted that "it is not discrimination for SSA to apply the provisions
of the Social Security Act, the regulations, and similar materials . . . in the conduct of benefit
23 determinations . . ." See Docket No. 20, Exh. 2A (letter to Terrence Davis) at 3. The essence of the
argument appears to be that when defendant is following the law, it is not breaking it. This argument
24 has failed to work for former United States presidents and vice-presidents and will not be countenanced
by this court.