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9 UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 JOHN DOE ¹ ,)	CIVIL ACTION No.: 09-cv-980 MHP
)	
12 Plaintiff,)	
)	FIRST AMENDED COMPLAINT FOR
13 v.)	INJUNCTIVE AND DECLARATORY
)	RELIEF PURSUANT TO ORDER
14 MICHAEL J. ASTRUE, Commissioner of the)	
15 Social Security Administration,)	DEMAND FOR JURY TRIAL
)	
16 Defendant)	
)	
)	
)	

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18
19 1. Plaintiff John Doe (hereinafter "Plaintiff") hereby alleges causes of action against
20 Defendant Michael J. Astrue, Commissioner of the Social Security Administration (hereinafter
21 "Defendant" or "SSA") for violations of Section 504 of the Rehabilitation Act of 1973, 29
22 U.S.C. § 794 (hereinafter "Section 504") and the Due Process Clause of the Fifth Amendment
23 (hereinafter the "Due Process Clause"). Defendant is engaging in a continuing pattern and
24 practice of discrimination against Plaintiff and other persons with mental and/or developmental
25 disabilities.

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¹ Plaintiff previously obtained an order to protect his identity in the present action. Doc. No. 2.

I

PROCEDURAL BACKGROUND

2. On December 19, 2007, in the case of *Davis v. Astrue*, Case No. 3:06-CV-6108-MHP, currently before this Court (hereinafter “*Davis*” or the “*Davis* action”), Terrence Davis (hereinafter “*Davis*”) filed a motion for leave to amend his Second Amended Complaint (a putative class action complaint) (hereinafter the “SAC”) to add two (2) additional plaintiffs, one (1) of whom was Plaintiff. *See* Doc. No. 59 (redacted), *Davis*; Order of May 2, 2008, Doc. No. 74, *Davis*. *Davis* concurrently filed a motion for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure (hereinafter “Rule 23”). Doc. No. 55 (redacted), *Davis*.

3. The Court denied *Davis*’s motion for class certification pursuant to Rule 23 and further denied *Davis*’s motion for leave to amend the SAC to add Plaintiff as an additional party in the *Davis* action. On July 27, 2009, the Court ruled that the *Davis* and *Doe* cases will be consolidated for discovery and other common pretrial matters. Doc. Nos. 24 and 28.

4. By Order dated August 18, 2009, this Court denied Defendant’s motion to dismiss in part and allowed Plaintiff *Doe* leave to amend as to his due process claims. Doc. No. 26. Plaintiff hereby files his First Amended Complaint for Injunctive and Declaratory Relief Pursuant to Court Order (hereinafter “FAC”).

II

PRELIMINARY ALLEGATIONS

Plaintiff hereby alleges the following:

A. Plaintiff Is a Qualified Individual with Mental and/or Developmental Disabilities Under the Social Security Act, 42 U.S.C. §§ 301 et seq.

5. Plaintiff is an adult individual diagnosed as developmentally disabled with autism, a generalized anxiety disorder (hereinafter “GAD”), and other disabilities. Plaintiff desires and is attempting to live and work independently.

6. At all times relevant to this action, Plaintiff is and has been a resident of San Francisco, California.

1 7. Defendant Michael J. Astrue is the duly appointed Commissioner of the Social
2 Security Administration (hereinafter “SSA”) and, at all times relevant to this action, was
3 exercising his duties as such.

4 8. Plaintiff has been a Social Security disability beneficiary since 1995, when SSA
5 qualified him as a disabled individual with a primary disability of ‘mental retardation’ pursuant
6 to Listing 12.05C of the Listing of Impairments, 20 C.F.R., Part 404, Subpt. P, App. 1 (Code
7 3180, Listing 12 [per SSA’s internal coding system]) (hereinafter “Listing 12.05C”), for
8 purposes of both Title II of the Social Security Act, 42 U.S.C. §§ 301 *et seq.*, (hereinafter the
9 “the Social Security Act”) which governs and authorizes Social Security Disability Insurance
10 (hereinafter “SSDI”) and Title XVI of the Social Security Act, which governs and authorizes
11 Supplemental Security Income (hereinafter “SSI”). In order for an individual to meet Listing
12 12.05C, SSA must find that the individual has an intelligence quotient of 60-70 and a separate
13 impairment that resulted in an “additional and significant work-related limitation of function.”

14 9. SSI is a poverty-based program, with income and resource limitations; Plaintiff
15 qualifies for SSDI and SSI concurrently because his SSDI benefits, alone, are insufficient to
16 cover his necessities of life, such as food, shelter, and needed medical treatment.

17 10. On information and belief, Plaintiff has also been given other diagnoses ranging
18 from dissociative type symptoms to epilepsy by, among others, his primary treating doctor and a
19 neurologist (evaluation of epilepsy in 1993). A neuropsychological evaluation of Plaintiff by
20 Defendant-contracted examiner, a licensed psychologist, in March 19, 1999, for instance,
21 indicated epilepsy and jacksonian seizures every two (2) days (by history). Plaintiff was
22 described in that evaluation as being depressed and anxious and cooperative at all times. This
23 psychologist further diagnosed Plaintiff with psychotic disorder, not otherwise specified
24 (hereinafter “NOS”); depressive disorder, NOS; and borderline intellectual functioning.

25 11. On information and belief, SSA codes all disabled beneficiaries with their internally-
26 designed primary and secondary disability codes. Despite having records of other diagnoses
27 reflecting Plaintiff’s being mentally disabled (such as psychotic disorder, NOS), Defendant
28 failed to give a secondary disability coding when it determined Plaintiff to be disabled and at

1 each subsequent review for medical improvement. Instead, Defendant found “Insufficient
2 Evidence” and gave a code of “0000,” which apparently means “None established.”

3 12. On information and belief, SSA fails to account for Plaintiff’s other psychiatric and
4 other impairments that are not based on his disability coded simply as “mental retardation” by
5 SSA.

6 13. Plaintiff experiences severe anxiety episodes arising from everyday life and work
7 issues, including from his attempts to live and work independently. At times, he experiences
8 auditory and visual hallucinations and has attempted and contemplated suicide. He has also
9 been on numerous psychotropic medications.

10 14. Due to his mental and developmental disabilities, Plaintiff has cognitive deficits
11 requiring more time to understand basic instructions and verbal and nonverbal cues. He can
12 therefore misinterpret events and situations, resulting in unfounded fears that, more often than
13 for the average nondisabled person, can escalate into a crisis mode that requires medical
14 intervention and support from his support network, including but not limited to his family
15 members and psychotherapist.

16 **B. Plaintiff Seeks Independent Living Through Working.**

17 15. Plaintiff is a Social Security disability beneficiary who seeks to gain independence in
18 life and work, including but not limited to by working with The Arc of San Francisco
19 (hereinafter “The Arc”), a nonprofit organization that serves, supports, and advocates for
20 individuals with developmental disabilities. The Arc has provided a multitude of services to
21 accommodate Plaintiff’s varying needs since before 1996 and through the present. Plaintiff’s
22 current supportive housing situation, which includes access to on-site counselor(s), is one such
23 service. Plaintiff has also employed The Arc’s vocational training services, job placement
24 services, and job retention services. Since before 1996, he worked with a life skills trainer from
25 The Arc or elsewhere, who supports Plaintiff in coping with the vicissitudes of life.

26 16. From about October 1999 through September 2000, Plaintiff ‘worked’ at a sheltered
27 work entity for about nine (9) to ten (10) hours per week through an employment training
28 program designed for individuals who are not able to work in a competitive employment. This

1 entity, located in San Francisco, California, provides services directed toward people with
2 mental and/or developmental disabilities to maintain an independent lifestyle, including but not
3 limited to offering sheltered work.

4 17. In a further effort to become independent, from about February 2001 through April
5 2002, Plaintiff also ‘worked’ about twenty (20) hours per week at Goodwill Industries of San
6 Francisco (hereinafter “Goodwill Industries”). Goodwill Industries is a public nonprofit that
7 provides education and career services for disadvantaged populations. Like his enrollment in
8 the training program described in ¶ 16, *supra*, Plaintiff’s work at Goodwill Industries was in the
9 context of a transitional training program and is considered ‘sheltered’ work as defined by
10 20 C.F.R. §§ 404.1573-1574 and 416.973-974.

11 18. Since about April 2003 and through the present, Plaintiff has been working more
12 independently. His hours varied from about ten (10) to twenty (20) hours per week, about
13 two (2) to three (3) days a week. During some of this time, Plaintiff worked with a job coach
14 through The Arc as part of The Arc’s job retention services. Plaintiff may have future need of a
15 job coach, whether for this job or other future employment.

16 19. The Social Security regulations defines a representative ‘payee’ as an individual or
17 organization qualified to receive payment of benefits on behalf of a disabled beneficiary when a
18 beneficiary is a drug addict or incompetent to manage funds. *See* 42 U.S.C. § 405(j) and
19 Contract with America Advancement Act of 1996, Public Law 104-121, § 105, amending
20 portions of the Social Security Act; *see also* 20 C.F.R. § 404.2010.

21 20. Plaintiff’s mother served as Plaintiff’s representative payee from about 1995 to
22 2003. However, to further enable Plaintiff be more independent, she ceased to be Plaintiff’s
23 representative payee on or about 2003. This allowed Plaintiff to control and balance his own
24 checkbook.

25 **C. Defendant Reviews Plaintiff’s Eligibility for Benefits.**

26 21. Based on a nonpublic formula, from time to time, SSA conducts reviews of a
27 beneficiary’s eligibility to benefits through work continuing disability reviews (hereinafter
28

1 “work CDRs”) and medical continuing disability reviews (hereinafter “medical CDRs”).

2 Factors considered during a work CDR (hereinafter “work CDR factors”) are discussed *infra*.

3 22. SSA considers different work CDR factors in an SSI work CDR than it does in an
4 SSDI work CDR.

5 23. Under the Title II (SSDI) program, a Trial Work Period (hereinafter “TWP”) is an
6 SSA work incentive for the personal rehabilitation efforts of SSDI beneficiaries who work. The
7 TWP allows SSDI beneficiaries an opportunity to test their ability to work or run a business for
8 at least nine (9) months and receive full SSDI benefits.

9 24. Substantial Gainful Activity (hereinafter “SGA”) is a rebuttable presumptive
10 standard by which SSA evaluates the work activity of an individual claiming or receiving
11 benefits under SSDI and/or claiming benefits because of a disability under SSI. Under both SSI
12 and SSDI programs, SSA uses earnings guidelines to evaluate a beneficiary’s work activity to
13 decide whether the work activity is SGA and whether SSA may consider the beneficiary
14 disabled under the law.

15 25. An Unsuccessful Work Attempt (hereinafter “UWA”) is an effort to do substantial
16 work, in employment or self-employment, that a beneficiary of SSI or SSDI stopped or reduced
17 to below the SGA level after a short time (six [6] months or less) as a result of the beneficiary’s
18 impairment(s), or the removal of special conditions related to the beneficiary’s impairment(s)
19 that was essential to the performance of his or her work.

20 26. On information and belief, SSA policy is to not count an UWA when it makes a
21 decision with respect to whether a beneficiary has engaged in SGA.

22 27. During the thirty-six (36) consecutive months following the TWP, if an individual
23 otherwise qualifies, SSA may restart SSDI benefits without requiring a new application,
24 disability determination, or waiting period. This period of thirty-six (36) months is referred to
25 by SSA as the Extended Period of Eligibility (hereinafter “EPE”) for benefits and is not
26 applicable to qualification for SSI benefits. After the expiration of the EPE, a single month’s
27 earnings over SGA may result in termination of benefits.

1 28. On information and belief, in determining whether a beneficiary of SSI and/or SSDI
2 benefits is engaging in SGA, SSA deducts Impairment-Related Work Expenses (hereinafter
3 “IRWEs”) – that is, the cost of items and services that the beneficiary needs to work because of
4 his or her impairment, irrespective of whether the person needs the same items for normal daily
5 activities. Examples of IRWEs include attendant care services, job coaches, medications and
6 medical devices.

7 29. With respect to SSI and SSDI, an SSA-approved Plan to Achieve Self-Support
8 (hereinafter “PASS”) allows SSI beneficiaries to set aside income and/or resources over a
9 reasonable time period that will enable the beneficiary to become financially self supporting.
10 The beneficiary is allowed to use that income and those resources for purposes such as
11 obtaining occupational training or education, purchasing occupational equipment, and
12 establishing a business. On information and belief, moreover, SSA does not count the income
13 and resources that an SSI beneficiary sets aside under a PASS when deciding SSI eligibility and
14 payment amount.

15 30. SSA work incentive rules for SSI involve subtracting \$1 for every \$2 earned, less a
16 \$65 pass through. This rule is applied after an SGA determination has been made, taking into
17 account IRWEs and subsidies.

18 **D. Defendant Has Reviewed Plaintiff’s Eligibility Multiple Times.**

19 31. On or about April 5, 2005, Plaintiff received a notice stating, “[w]e are writing to
20 you because we need to know more about your work.” SSA enclosed a pamphlet in that notice
21 and asked Plaintiff to return the enclosed form (“Work Activity Report”) within fifteen (15)
22 days and to call SSA if there were any questions.

23 32. Pursuant to a work CDR completed by an SSA Claims Representative (hereinafter
24 “CR”) and other SSA employees, whose identities are not all known at this time, SSA
25 determined that Plaintiff continues to be disabled because he is on an active Ticket to Work (*see*
26 Ticket to Work and Work Incentives Improvement Act of 1999, Public Law 106-170, amending
27 Title XI of the Social Security Act, 42 U.S.C. §§ 1301 *et seq.*, [hereinafter “TWWIIA”]), that
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1 his TWP was completed in July 2000, and that no SGA has been performed since the end of his
2 TWP. SSA further noted that Plaintiff’s EPE would end after July 2003.

3 33. SSA also noted several UWAs by Plaintiff, including UWAs in March 2001, August
4 2001, and January 2002. At those times, Plaintiff was involved in the employment training
5 program at Goodwill Industries, as set forth in ¶ 17, *supra*.

6 34. Since August 2003, based on SSA’s month-by-month determinations of
7 Plaintiff’s countable income, Plaintiff’s monthly SSI cash benefits have been reduced to about
8 zero dollars (\$0) due to SSA’s determination that Plaintiff’s countable income since August
9 2003 exceeded SSA’s income requirements for SSI eligibility for cash benefits.

10 35. Defendant has inadequate or no procedures in place or training for CRs to conduct
11 work CDRs for Social Security beneficiaries who suffer from primarily mental and/or
12 developmental disabilities. In particular, Defendant failed to provide appropriate training to
13 CRs on understanding components of mental and/or developmental disorders, including the
14 effect(s) of antipsychotic medications and other factors, as required in a work CDR. For
15 instance, a CR is not trained in medical, vocational, or legal analyses and therefore does not take
16 into account basic elements of mental and/or developmental disabilities necessary in the
17 adjudication of work CDRs, including but not limited to decompensation(s), the alternating
18 cycles of chronic mental disability, and other basic symptomatology related to work CDR
19 factors (IRWEs – such as the need for job coaches, psychotropic medications, and/or continuous
20 psychotherapy). As a result, even the most experienced CRs do not know what kind of
21 questions to ask at the work CDR of someone with primarily mental and/or developmental
22 disabilities.

23 36. A CR is bound by internal memoranda and an internal SSA manual (referred to by
24 SSA as “POMS”) to apply a mechanical formula without taking into account the mental status
25 or effect of medications on a person’s ability to comprehend or comply with notices, including a
26 ten-day notice of cessation letter, regardless of what the POMS indicates; this stems in part from
27 lack of Section 504 procedures such as CR training in the area of mental and/or developmental
28 disability employment supports.

1 37. Pursuant to Defendant’s methods of administration, the CR making adjudications of
2 termination during a work CDR concerning SSDI or SSI eligibility disregards material factors
3 relating to ‘substantial’ in addition to ‘gainful’ activity.

4 38. The mechanical month-by-month comparison CRs apply during a work CDR
5 concerning SSDI or SSI eligibility should but does not determine a particular dollar amount per
6 month, minus IRWEs (such as payments for medications prescriptions, job coaches, or
7 therapists), as supported by the production of receipts; and evidence of employer subsidies,
8 showing that an individual is being paid more than others for doing the same job (such as in a
9 subsidized or sheltered workshop).

10 39. SSA work incentive rules for SSI, as explained in ¶ 30, *supra*, was incorrectly
11 applied in Plaintiff’s case.

12 40. In or about May 2008, a CR promised to provide PASS information after being
13 requested to do so by Plaintiff. The CR handed a PASS application to Plaintiff but has failed to
14 offer requested additional guidance in completing the multi-page application. *See* ¶ 29, *supra*.

15 41. In Plaintiff’s case, SSA failed to meet its affirmative obligation to proactively inform
16 people of its work incentive plans and to ensure that all beneficiaries have meaningful access to
17 participate in the work incentive program(s), including PASS. *See* TWWIIA, § 121, *Work*
18 *Incentives Outreach Program*; *see also* 45 C.F.R., Part 85 (providing duty to ensure meaningful
19 access).

20 42. Plaintiff made payments to The Arc for independent living support. Those
21 payments, which qualify as IRWEs, should have been deducted from Plaintiff’s earnings during
22 SSA’s work CDR(s). Due in part to Defendant’s inadequate methods of administration and
23 training for CRs, however, SSA failed to request, obtain, or consider information about
24 Plaintiff’s payments to The Arc, as required by 45 C.F.R., Part 85. As a result, Plaintiff’s
25 payments were not deducted from his earnings as required by law. *See* 20 C.F.R. §§ 404.1576
26 and 416.976.

27 43. Plaintiff relied on a job coach to enable him to engage in SGA.
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1 44. During work CDRs, Defendant should have deducted the value of the job coach
2 alleged in ¶ 43, *supra*, from Plaintiff's earnings as a 'subsidy'. Due to its inadequate and
3 discriminatory methods of administration and insufficient training for CRs, however, SSA failed
4 to request, obtain, or consider information about Plaintiff's job coach subsidy by The Arc, or
5 any other possible subsidy he might have received, as required by 45 C.F.R., Part 85. As a
6 result, neither the job coach subsidy nor any other potentially qualifying subsidy was deducted
7 from Plaintiff's earnings in these work CDR(s), as required by law. *See* 20 C.F.R. §§ 404.1573-
8 1574 and 416.973-974.

9 45. At the time of Defendant's termination of Plaintiff's SSI cash benefits, Plaintiff's
10 SSI cash benefits were at approximately three hundred dollars (\$300) per month. Plaintiff was
11 relying on the SSI cash payment to pay The Arc. *See* ¶¶ 15, 18, and 42-44, *supra*.

12 **E. Defendant Constantly Sends Plaintiff Numerous Notices.**

13 46. On information and belief, from 1996 (when Defendant first found Plaintiff to be
14 disabled under the meaning of the Social Security Act) and ongoing, to assess Plaintiff's
15 continuing eligibility for SSI, Defendant sends multiple notices on a frequent basis to Plaintiff,
16 his representative payee, and/or his legal representative. The notices include the following:
17 Notices asking for information (such as filling out multi-page forms or sending in bank
18 statements); notices requesting an appointment (such as for medical consultations or for work
19 CDR interviews); notices of planned action (hereinafter "NOPAs"), which give 'due process' by
20 allowing about ten (10) days for Plaintiff to respond; notices of change in payment and/or
21 notices of important information (hereinafter collectively "NCIPs"); notices of overpayment
22 (hereinafter "NOPs"); notices to employer(s) requesting information; notices to treating
23 source(s) requesting information; and/or other notices currently unknown to Plaintiff.

24 47. During the multiple times when Plaintiff's eligibility to SSI was under review,
25 Defendant sent notices requesting information, followed by notices of appointment(s) needed
26 and/or NOPAs. In addition, Defendant sent notices to Plaintiff's employers and/or treating
27 sources, who, in turn, notified Plaintiff of these notices.
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1 48. Plaintiff receives an NOPA if SSA determines that Plaintiff failed to have
2 satisfactorily followed up with SSA's noticed requirements. Subsequently, decisions with
3 respect to his eligibility are made, resulting in further NCIP(s) and NOP(s). For definitions, *see*
4 ¶ 46, *supra*.

5 49. Because month-by-month calculations are made by SSA in calculating correct SSI
6 cash benefit amounts, monthly fluctuations in wages (such as is the case for Plaintiff's part-time
7 employment) often result in multiple and/or successive NOP(s) that are for amounts as little as
8 thirty dollars (\$30) each time Defendant becomes aware of changes in Plaintiff's earned
9 income.

10 50. On information and belief, medical CDRs evaluate work activity before evaluating
11 medical factors. When medical CDRs were conducted (each time Plaintiff is reviewed for
12 medical improvement), SSA sent notices that were substantially similar to those sent for work
13 CDRs, which are followed by additional notices specific for medical CDRs.

14 51. The notices set forth in ¶¶ 46-50, *supra*, are hereinafter collectively referred to as the
15 "SSI-Related Notices."

16 52. On information and belief, from 1996 and ongoing, to assess Plaintiff's continuing
17 eligibility for SSDI, Defendant sends multiple notices on a frequent basis, including but not
18 limited to the types of notices described in ¶¶ 46-51, *supra*, (hereinafter the "SSDI-Related
19 Notices").

20 53. On information and belief, even though Plaintiff's earnings and work activity were
21 reviewed on or about April 2005, another review of Plaintiff's SSI and/or SSDI eligibility was
22 initiated by Defendant on or about December 2005. Because of the numerous reviews (work or
23 medical CDRs) that occurred over the years and the seemingly overlapping time periods under
24 review, Plaintiff has been deluged with paper that require his prompt attention and action in
25 order to maintain his monthly SSI checks.

26 54. The SSI-Related Notices and SSDI-Related Notices alleged in ¶¶ 46-52, *supra*, will
27 hereinafter be referred to as the "Collective Notices."
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1 55. Pursuant to this Court's August 18, 2009 Order, exhibits of sample notices are
2 attached and incorporated into this FAC. Doc. No. 26. All exhibits have been redacted
3 pursuant to the protective Order of March 4, 2009. Doc. No. 2.

4 56. Exhibit A is a decision on reconsideration dated August 27, 2008, which purported
5 to explain SSA's decision regarding Plaintiff's contested work CDR determination from August
6 3, 2007, which was previously submitted by Plaintiff as Exhibit 4 in support of his opposition to
7 Defendant's motion to dismiss. Doc. No. 20-1, pp. 22-25.

8 57. Exhibit B is an NOPA dated July 20, 2007, which purported to explain SSA's
9 decision to immediately cease Plaintiff's SSI payments due to a previously returned SSI check
10 and Plaintiff's work CDR.

11 58. Exhibit C is an NCIP dated April 30, 2008, which purported to explain SSA's work
12 CDR decision dated August 3, 2007.

13 59. Exhibit D is an NCIP dated August 3, 2007, which stated and purported to explain an
14 adverse decision pursuant to Plaintiff's work CDR, and which was previously submitted by
15 Plaintiff as Exhibit 5 in support of his opposition to Defendant's Motion to Dismiss. Doc. No.
16 20-1, pp. 26-29.

17 60. Exhibit E is an NCIP dated July 13, 2007, which purported to explain SSA's pending
18 adverse decision on Plaintiff's SSI eligibility due to a work CDR, and which also purported to
19 explain that Plaintiff was entitled to about \$16.07 for September 2007.

20 61. Exhibit F is an NCIP dated June 26, 2007, which purported to explain SSA's
21 pending adverse decision regarding Plaintiff's SSI eligibility based on a work CDR, and which
22 also purported to explain that Plaintiff was entitled to about \$16.07 for September 2007.

23 **F. Defendant's Inadequate and Discriminatory Procedures and Practices Directly**
24 **Harmed Plaintiff and May Cause Further Harm in the Future.**

25 62. Not understanding the purpose(s) of the Collective Notices and confused by their
26 proliferation, Plaintiff experienced heightened anxiety and delusional attack(s) as a result of
27 receiving the Collective Notices from SSA.
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1 63. Plaintiff's increased anxiety and fears due to the Collective Notices resulted in
2 devoting a substantial amount of his psychotherapy sessions in reviewing how to cope with the
3 situation and to decrease anxiety and fear. Plaintiff, in particular, was fearful of becoming
4 homeless due to loss of SSI checks.

5 64. On or about February 2002, after receiving an overpayment notice, Plaintiff vividly
6 recalls having hallucinations relating to Social Security coming to get him. These
7 hallucinations have persisted to this day, despite ongoing psychotropic drug therapy and
8 psychotherapy.

9 65. The Collective Notices Plaintiff received or learned about through his representative
10 payee, treating sources, and/or employers drove Plaintiff into a delusional psychotic episode(s)
11 that Social Security was coming to get him at his home. In certain instances, as a result of his
12 persisting delusions and anxiety, Plaintiff has had to stay indoors, impairing his activities of
13 daily living.

14 66. As someone with GAD and who is thus especially prone to not only experiencing
15 anxiety but also to having slower than average recovery from an experience of anxiety attack, as
16 a result of receiving the Collective Notices, Plaintiff's condition has deteriorated, impairing his
17 ability to work and live independently.

18 67. To this day, Plaintiff continues to believe that his hallucinations, as described in ¶¶
19 64-65, *supra*, were real and that SSA was and continues to be after him.

20 68. In applying its methods of administration, Defendant failed to provide Plaintiff with
21 a meaningful opportunity to comprehend, as well as psychologically and logistically respond to,
22 the Collective Notices, given Plaintiff's GAD and cognitive impairments. To maintain his
23 ability and composure to deal with the Collective Notices, Plaintiff required, at minimum,
24 access to his support framework, such as his psychotherapists; however, Defendant failed to
25 provide adequate program modifications and/or accommodations, including but not limited to
26 using simpler language in their notices so that Plaintiff could understand any or all of the
27 Collective Notices and/or allowing Plaintiff more time to access his support network so that he
28 could meaningfully and timely respond to any or all of the Collective Notices.

1 69. Defendant's failure to provide program modifications and/or accommodations to
2 Social Security beneficiaries with primarily mental and/or developmental disabilities, such as
3 Plaintiff, results in disproportionate harm to persons with mental and/or developmental
4 disabilities, including by creating a substantially increased likelihood that qualified persons with
5 mental and/or developmental disabilities will be improperly terminated from Social Security
6 benefits, as well as a substantially increased likelihood of further deterioration of the qualified
7 person's mental and/or developmental disability.

8 70. Plaintiff faces a substantially increased risk of decompensation resulting from any
9 modification to or loss of his support network, such as by no longer being able to afford his
10 independent living skills trainer.

11 71. As a current recipient of SSDI, Plaintiff is subject to future work CDRs, and Plaintiff
12 may have additional relevant employment factors in future work CDRs, such as a PASS. ¶ 29,
13 *supra*.

14 72. Plaintiff also suffered harm as a result of Defendant's failure to continue benefits
15 payments to Plaintiff during the time of Plaintiff's appeal, in violation of clear due process
16 standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and Defendant's own rules. *See*
17 POMS SI 02301.300 ("Due Process Protections-General"), available at [https://s044a90.ssa.gov/
18 apps10/poms.nsf/lnx/0502301300!opendocument](https://s044a90.ssa.gov/apps10/poms.nsf/lnx/0502301300!opendocument).

19 73. On information and belief, in light of Plaintiff's current efforts to work, SSA may
20 deem him ineligible for continuing SSDI (Title II) benefits. If SSA's inadequate and
21 discriminatory methods of administration are not remedied, SSA's notice, in-person
22 communications (including interviews), and other work CDR procedures are therefore more
23 likely than not to result in further irreparable injury to Plaintiff. The psychological harm that
24 Plaintiff faces, which may render Plaintiff unable to effectively work at all in the future, coupled
25 with SSA's denial of SSI and/or SSDI benefits, would render Plaintiff, who is a qualified
26 disabled person under the Social Security Act and Section 504, without the ability to work, to
27 live independently in the community, or to receive the Social Security benefits to which he is
28 entitled.

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III

JURISDICTION AND VENUE

74. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1361².

75. Venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391(b). Plaintiff resides within this District, a substantial part of the events giving rise to Plaintiff's claims occurred in this District, and Defendant maintains several offices and operates in this District.

IV

EXHAUSTION OF ADMINISTRATIVE REMEDIES

76. Plaintiff has exhausted administrative remedies as to all claims raised in this complaint.

77. There are no adequate administrative remedies for the claims alleged herein.

V

NON-COMPLIANCE WITH SECTION 504 OF THE REHABILITATION ACT OF 1973

78. Paragraphs 1 through 77 are each re-alleged and incorporated as if fully set forth herein.

79. Section 504, as amended, provides that:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or activity conducted by any Executive agency[.]

29 U.S.C. § 794 (as amended).

80. Defendant is a federal agency, and, as such, is governed by Section 504.

81. As set forth more specifically in Section II, *supra*, and Sections V and VI, *infra*, Defendant has failed to comply with the letter and spirit of Section 504, including its implementing regulations.

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² The Court, on August 18, 2009, ruled it did not have mandamus jurisdiction. Doc. No. 26.

1 **A. Defendant Does Not Have Its Own Section 504 Regulations.**

2 82. On information and belief, SSA was constituted as its own agency, distinct from
3 Department of Health and Human Services (hereinafter “DHHS”) in 1995.

4 83. Defendant fails to comply with Section 504 insofar as, since 1995, Defendant has
5 neglected to promulgate its own regulations as required by Section 504 but, rather, applies the
6 regulations as promulgated by DHHS. *See* 45 C.F.R., Part 85.

7 **B. Defendant Does Not Follow Its Operative Section 504 Regulations.**

8 ***i. Defendant Fails to Evaluate Its Own Compliance with Section 504, as Required by 45***
9 ***C.F.R. § 85.11, Self-Evaluation.***

10 84. Defendant fails to comply with Section 504 insofar as Defendant has never
11 conducted the self-evaluation with respect to mental and/or developmental disabilities that is
12 required by 45 C.F.R. § 85.11.

13 ***ii. Defendant’s Methods of Administration Are Discriminatory, in Violation of Section***
14 ***504 and Its Implementing Regulations, 45 C.F.R. § 85.21, General Prohibitions Against***
15 ***Discrimination.***

16 85. Defendant fails to comply with Section 504 insofar as its methods of administration,
17 set forth in greater detail in Section II, Subsections C-F, *supra*, fail to account for the needs and
18 limitations of individuals like Plaintiff with mental and/or developmental disabilities.

19 86. As set forth in greater detail in Section II, Subsections C-F, *supra*, Defendant fails to
20 comply with Section 504 insofar as it has inadequate or no procedures in place and no training
21 for its CRs to conduct work CDRs specifically for Social Security beneficiaries who suffer from
22 primarily mental and/or developmental disabilities.

23 87. As set forth in greater detail in Section II, Subsections C-D and F, *supra*, Defendant
24 fails to comply with Section 504 insofar as the CR making the initial adjudication of termination
25 during a work CDR disregards material factors relating to ‘substantial’ in addition to ‘gainful’
26 activity.

27 88. On information and belief, since on or about 2004, Defendant has changed its POMS
28 so that Defendant’s CRs, who work at local (neighborhood) Social Security field offices, are
now instructed to ignore available medical and/or other evidence required by law and

1 regulations in their termination assessment(s). Prior thereto, CRs were instructed not to ignore
2 medical evidence by their internal operations manual (POMS DI 13010.015). This change in
3 SSA's methods of administration violates Section 504 regulations.

4 89. Defendant fails to comply with Section 504 insofar as it discriminates against
5 Plaintiff and other persons with mental and/or developmental disabilities by systematically,
6 through its methods of administration, failing to apply factors equivalent to those for persons
7 with nonmental disabilities in making work CDR determinations.

8 90. By applying its methods of administration to Plaintiff without considering the impact
9 of his mental and/or developmental disabilities on his ability to understand and respond to SSA
10 administration notices and procedures, SSA is denying Plaintiff and persons with primarily
11 mental and/or developmental disabilities, such as Plaintiff, with meaningful access to Social
12 Security benefits, in violation of the letter and spirit of Section 504 and its implementing
13 regulations.

14 ***iii. Defendant Fails to Identify Existing Barriers to Meaningful Access to Its Programs,***
15 ***Violating 45 C.F.R. § 85.42, Program Accessibility: Existing Facilities.***

16 91. Defendant further fails to comply with Section 504 insofar as it fails to identify
17 significant barriers for people with mental and/or developmental disabilities, especially where
18 the process of termination often exacerbates the individual's disability by causing severe
19 anxiety attacks and other psychotic-like symptomatology, and precludes meaningful and equal
20 participation in the work CDR process, in violation of Section 504 and, in particular, 45 C.F.R.
21 § 85.42.

22 ***iv. Defendant Violated Section 504's Requirement to Effectively Communicate via Its***
23 ***Notices and Its Verbal Communications, Pursuant to 45 C.F.R. § 85.51, Effective***
24 ***Communication.***

25 92. The Collective Notices violate Section 504 and, in particular, 45 C.F.R. § 85.51,
26 which requires Defendant to engage in "effective communication[s]" with qualified individuals
27 with disabilities.

28 93. Due to the lack of sufficient training for CRs to apply the work CDR factors required
by SSA, including but not limited to those set forth in POMS, at DI 13010.000 *et seq.* ("Work

Activity”), available at <https://s044a90.ssa.gov/apps10/poms.nsf/lrx/0413010000!opendocument>; DI 13050.000 *et seq.* (“Expedited Reinstatements”), available at <https://s044a90.ssa.gov/apps10/poms.nsf/lrx/0413030000!opendocument>; DI 10500.000 *et seq.* (“Substantial Gainful Activity”), available at <https://s044a90.ssa.gov/apps10/poms.nsf/lrx/0410500000!opendocument>; DI 24000.000 *et seq.* (“Work Issues - Initial/Reconsideration Cases”), available at <https://s044a90.ssa.gov/apps10/poms.nsf/lrx/0424000000!opendocument>; SI 00820.000 *et seq.* (“Earned Income”), available at <https://s044a90.ssa.gov/apps10/poms.nsf/lrx/0500820000!opendocument>; SI 00870.000 *et seq.* (“Plans to Achieve Self-Support for Blind or Disabled People”), available at <https://s044a90.ssa.gov/apps10/poms.nsf/lrx/0500870000!opendocument>; and SI 02305.000 *et seq.* (“Redeterminations of Eligibility and/or Payment Amount”), available at <https://s044a90.ssa.gov/apps10/poms.nsf/lrx/0502305000!opendocument>, Defendant has not fulfilled its obligation to ensure effective communication with beneficiaries with mental and/or developmental disabilities, as required by 45 C.F.R. § 85.51.

v. Defendant Refers Its Discrimination Complaints to the Office of General Counsel, in Violation of 45 C.F.R. § 85.61, Compliance Procedures.

94. Defendant fails to comply with Section 504 insofar as Defendant has failed to maintain its own Office for Civil Rights (hereinafter “OCR”) after Congress separated it from DHHS in 1995, as required by Public Law 103-296 106(b), *Transition Rules*, which required the now distinct SSA to follow DHHS rules, and as provided for by 45 C.F.R. § 85.61 (authorizing OCR, not the Office of General Counsel [hereinafter “OGC”], to take jurisdiction over administrative adjudication of discrimination complaints).

95. Defendant fails to comply with Section 504 insofar as, in further violation of 45 C.F.R. § 85.61, Defendant refers all discrimination complaints to OGC.

VI

DISPARATE IMPACT UNDER SECTION 504

96. Paragraphs 1 through 95 are each re-alleged and incorporated as if fully set forth herein.

1 97. The methods of administration routinely used by Defendant in work CDRs for both
2 SSI and SSDI, as set forth in greater detail in Section II, Subsections C-F, *supra*, have a
3 disparate impact on Social Security beneficiaries with primarily mental and/or developmental
4 disabilities who are subject to work CDRs than Social Security beneficiaries with primarily
5 physical disabilities who are subject to work CDRs, in violation of the letter and spirit of
6 Section 504.

7 98. Defendant's failure to provide appropriate training to CRs on understanding
8 components of mental and/or developmental disorders, as set forth in greater detail in Section II,
9 Subsections C-D and F, *supra*, results in the disparate termination of benefits for individuals
10 with mental and/or developmental disabilities, in violation of 45 C.F.R., Part 85, as compared to
11 the termination of benefits for individuals with primarily nonmental disabilities.

12 99. As set forth in greater detail in Section II, Subsections C-D and F, *supra*, the CR
13 making the initial adjudication of termination during a work CDR, for both SSI and SSDI,
14 disregards material factors relating to 'substantial' in addition to 'gainful' activity, resulting in
15 the disparate termination of benefits for individuals with mental and/or developmental
16 disabilities, in violation of 45 C.F.R., Part 85, as compared to the termination of benefits for
17 individuals with primarily nonmental disabilities.

18 100. As set forth in greater detail in Section II, Subsections C and E, *supra*, SSA's notices
19 and notice procedures for Social Security beneficiaries have a disparate impact on Plaintiff's
20 ability and the ability of people like him with primarily mental and/or developmental disabilities
21 to remain in the Social Security programs (SSI or SSDI). SSI and SSDI-related work CDR
22 notices are of sufficient similarity and such vagueness that Plaintiff and other beneficiaries with
23 mental and/or developmental disabilities are unable to distinguish program differences, which
24 lead to disproportionate terminations from the program(s).

25 101. The strict application of the regulatory analysis, including the inclusion of
26 vocational, legal, and/or medical input, will not be overly burdensome because it will not
27 require great modifications of the program. On balance, the benefits to people with mental
28 and/or developmental disabilities will outweigh costs, if any, to SSA.

1 102. Defendant has published statistical evidence showing a disparate access to its
2 disability programs. Specifically, on information and belief, approximately 28.3% of all
3 disabled beneficiaries (excluding widows and adult children) are primarily disabled mentally
4 and/or developmentally, whereas, on information and belief, about 45% of those terminated
5 from SSA's disability programs are primarily disabled mentally and/or developmentally.

6 103. Defendant has failed to equalize the psychiatric nature of a disability as opposed to a
7 physical disability by authorizing 'low level' CRs to cease Social Security benefits without
8 available professional input including, but not limited to, medical, legal, and/or vocational input.

9 104. Plaintiff and others with primarily mental and/or developmental disabilities are
10 denied meaningful access to Social Security benefits under SSA's present scheme. For SSDI,
11 CRs, who are not trained in understanding work CDR factors medically or legally, have
12 mechanically applied a month-by-month look-back formula to assess if an individual in a work
13 CDR earned a gross income over approximately five hundred dollars (\$500) per month – an
14 amount which varies annually based on a cost of living adjustment and is estimated to currently
15 be about nine hundred dollars (\$900) per month. This mechanical assessment denies people
16 with severe mental and/or developmental disabilities meaningful and equal access to the
17 program in that the formula does not take into account other required factors in order to find
18 'substantial' and 'gainful' work activity.

19 105. SSA's own statistics demonstrate the disparate treatment of Social Security
20 beneficiaries who have primarily mental and/or developmental or 'invisible' disabilities as
21 compared to those who have primarily physical disabilities. On information and belief, from
22 1998 through 2005, the percentage of ceased beneficiaries with primarily mental and/or
23 developmental disabilities is much higher (about 45%) than would be expected, given the
24 representation of mentally- and/or developmentally-disabled beneficiaries in the entire
25 population of disabled beneficiaries (about 28%).

26 ///

27 ///

VII

INTENTIONAL DISCRIMINATION (SECTION 504)

106. Paragraphs 1 through 105 are each re-alleged and incorporated as if fully set forth herein.

107. According to DHHS regulations, agencies may not utilize criteria or methods of administration the purpose or effect of which would subject qualified individuals with disabilities to discrimination. 45 C.F.R. § 85.21(b)(3)(i). There are approximately six (6) million people receiving SSA benefits, and approximately 28.3% of those recipients, like Plaintiff, have a primarily mental and/or developmental component to their disability.

108. On information and belief, approximately 45% of all disabled beneficiaries who are terminated from benefits have a primarily mental and/or developmental disability.

109. Knowing this statistical discrepancy *over time* and continuing to target the same population, including Plaintiff, amounts to intentional discrimination on the part of SSA.

110. In the present case and as a matter of internal policy, SSA, intentionally and in bad faith, ignores a Congressional mandate, Public Law 98-460 (also known as the Social Security Reform Act of 1984), and its own internal policies (DI 11065.050³), which do not permit a CR to terminate an individual who has a mental and/or developmental disability without a medical evaluation:

DI 11065.050 Return to Work Cases

A. Exception to Field Office (FO) SGA Denial

Some individuals may have returned to work since our last denial and within one year of the alleged onset; however, the law requires us to rereview these mental impairment claims regardless of whether or not the individual is engaging in SGA. (Note that these mental impairment claims are exceptions to the requirement that the FO complete an SGA initial denial (DI 11010.050, DI 11020.050, and DI 11010.250). Undertake any necessary work development (e.g., completing an SSA-821-F4, or SSA-820-F4, and other appropriate forms). Do not prepare an SGA denial. If the work is or was SGA, make a recommendation to the DDS as to whether or not the period of work may be considered an unsuccessful work attempt (UWA) per DI 11010.205. Since these mental impairment claims require a medical

³ On information and belief, this POMS policy, while now either removed or rendered nonpublic, was in effect at least through December 20, 2007.

1 decision under the statute, the final responsibility for how the SGA
2 affects the decision lies with the DDS.

3 **B. Prior Cessations -- Work Activity Involved**

4 Automatic review cessation cases (those where an appeal was pending
5 on June 7, 1983, or later) require a review under the new mental
6 impairment criteria as well as under the new medical improvement
7 standard. Therefore, regardless of work activity since the cessation
8 decision, the claim must be forwarded to the DDS for a medical
9 decision. If the DDS reverses the prior cessation to a continuance,
10 undertake all the necessary work activity development. See DI
11 13010.015.

12 POMS DI 11065.050, as published December 20, 2007, on SSA's policy website, which was
13 available at <https://s044a90.ssa.gov/apps10/poms.nsf/lnx/0411065050!opendocument>.

14 111. As set forth in greater detail in Section II, Subsections C-D and F, *supra*, Plaintiff
15 was directly and proximately injured, both financially and in his health, as a result of Plaintiff's
16 intentional discriminatory conduct.

17 **VIII**

18 **VIOLATIONS OF DUE PROCESS CLAUSE OF FIFTH AMENDMENT**

19 112. Paragraphs 1 through 111 are each re-alleged and incorporated as if fully set forth
20 herein.

21 113. The Fifth Amendment states, in relevant part: "No person shall be . . . deprived of
22 life, liberty, or property, without due process of law"

23 **A. Defendant's Methods of Administrations Do Not Reach the Threshold of Minimum
24 Due Process Requirements.**

25 114. Due process would require that, at minimum, Defendant's Collective Notices and
26 verbal communication include understandable reasons for its decisions and a notification of
27 Plaintiff's right of appeal.

28 115. Due process would further require that, at minimum, Defendant not place the burden
of ascertaining reasons for its decisions regarding benefits on Plaintiff and others with mental
and/or developmental disabilities.

116. Due process would further require that, at minimum, Defendant's Collective Notices
and verbal communication convey distressing information regarding a mentally and/or

1 developmentally disabled recipient's benefits such that they cause the least angst and in clear,
2 understandable language.

3 117. Due process would further require that, at minimum, Defendant's Collective Notices
4 and verbal communication to mentally and/or developmentally disabled recipients include a full
5 and easily understandable explanation so as to equalize the comprehension as compared to an
6 individual who only has a physical disability.

7 118. Due process further requires that, at minimum, Defendant's methods of
8 administration have its automated notices provide for Plaintiff to be able to request or otherwise
9 have an automatic extension to obtain assistance (*see* ¶ 139, *infra*) with responding to the ten-
10 day or other short term deadline for recipients with mental and/or developmental disabilities.

11 119. Due process would further require that, at minimum, notice and communication,
12 pursuant to 45 C.F.R. §§ 85.12 and 85.51, be modified so that those with mental and/or
13 developmental disabilities, in addition to blind, deaf, *etc.*, to enable such individuals a
14 meaningful opportunity to comprehend and respond to Defendant's Collective Notices.

15 120. Due process would further require that, at minimum, Defendant train its employees
16 who are interviewing Plaintiff and Social Security beneficiaries with mental and/or
17 developmental disabilities such as Plaintiff so that the effects of and other issues relating to their
18 disabilities can be factored into the information requested and obtained by Defendant for the
19 purpose of conducting its work CDR(s).

20 **B. Defendant's Collective Notices Are Facially Constitutionally Inadequate.**

21 121. The Collective Notices are facially constitutionally deficient for numerous reasons:
22 They do not state reasons for reductions and/or termination of benefits, they impermissibly
23 place the burden on Plaintiff without factoring in his mental and/or developmental impairments
24 to ascertain the reasons for such reductions or termination, and they often fail to notify Plaintiff
25 of his right to appeal an adverse decision.

26 ///

27 ///

1 ***i. The Collective Notices Are Facially Violative of the Due Process Clause, in Part,***
2 ***Because They Do Not Always State the Reasons for SSA's Adverse Actions, Proposed or***
3 ***Otherwise, Requiring that the Burden Be on Plaintiff, whose Disability Is Not Factored in, to***
4 ***Independently Ascertain SSA's Reasons for Those Adverse Actions.***

5 122. For example, Defendant's Decision on Reconsideration dated August 27, 2008
6 (Exhibit A), does not list the calculation used, the specific evidence relied upon, or otherwise
7 explain the reasons for Defendant's decision to affirm the reduction of Plaintiff's SSI benefits to
8 approximately \$0.00 per month. This Notice merely provides a single out-of-context
9 justification for its decision: "We have applied the Impairment Related Work Expenses
10 effective 01/2006, based on the evidence that was submitted for medications, training and
11 employment services."

12 123. In addition to requiring Plaintiff to research and determine what evidence was
13 submitted for medications, training, and employment services (*see* ¶¶ 125-126, *infra*) – a task
14 that Plaintiff clearly cannot complete, given his mental disabilities – this 'explanation' neither
15 says which of the evidence submitted was dispositive to Defendant's decision nor why.

16 124. As a further example, Defendant's NOPA dated July 20, 2007 (Exhibit B), notifies
17 Plaintiff that his SSI payments are stopping, yet provides no cognizable reasons for this sudden
18 stoppage. Defendant's NOPA merely says that Plaintiff's check "was returned to the U.S.
19 Treasury Department." It is entirely unclear from this NOPA why the check was returned or
20 whether this fact was the determining factor in Defendant's decision to suddenly cease
21 Plaintiff's SSI monthly payments.

22 125. Because SSA's Collective Notices do not adequately explain its reasoning, Plaintiff
23 had to and the collective notices continue to require him to ask for clarification of the received
24 notices from SSA and/or from other sources within Plaintiff's support network (framework).

25 126. For example, in Defendant's NOPA (Exhibit B), Defendant notifies Plaintiff that his
26 SSI payments are stopping, provides no cognizable reason for the sudden stoppage, and declares
27 that "[w]e will not send you any more checks until you contact your local Social Security
28 Office." They do not state that Plaintiff has a right of nondiscrimination based on mental and/or
developmental disability, nor do they inform Plaintiff of auxiliary aids and/or program

1 modifications which would provide for assistance and equal and meaningful program access by
2 SSA.

3 ***ii. The Collective Notices Are Facially Violative of the Due Process Clause, in Part,***
4 ***Because They Often Fail to Advise the Collective Notice's Recipient of His or Her Right to***
5 ***Appeal the Adverse Action, Proposed or Otherwise.***

6 127. Furthermore, some of the Collective Notices do not explain Plaintiff's right to appeal
7 an adverse decision, as mandated by the Due Process Clause.

8 128. For example, in Defendant's notice dated April 30, 2008 (Exhibit C), Defendant
9 responds to Plaintiff's request to comply with procedural due process requirements by providing
10 an explanation for Plaintiff's reduction in SSI benefits. Defendant offers a brief explanation but
11 does not notify Plaintiff of his right to appeal the decision within sixty (60) days, in violation of
12 the Due Process Clause, offering only that, "[i]f you have any questions, you should call, write
13 or visit any Social Security Office."

14 129. Therefore, in these Collective Notices, Plaintiff did not have adequate and
15 meaningful opportunity to respond to Defendant's requests for information, impairing his right
16 to adequate notice and opportunity to be heard.

17 130. Further, Defendant's conduct, set forth in greater detail in Section II, Subsections C-
18 F, *supra*, which improperly deprived Plaintiff of his SSI cash benefits, amount to an on-going
19 violation of the Due Process Clause.

20 131. Accordingly, Defendant's form of notice in its Collective Notices improperly fails to
21 provide reasons for its decisions to reduce and/or terminate benefits, improperly places the
22 burden on Plaintiff to ascertain such reasons, and improperly fails to notify Plaintiff of his right
23 to appeal its decisions, all in violation of the Due Process Clause.

24 **C. Defendant's Notices Are Not "Reasonably Calculated, Under All the Circumstances,"**
25 **to Provide Notice, in Violation of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.**
26 **306 (1950).**

27 132. In addition to the facial constitutional inadequacies of the Collective Notices,
28 Defendant also fails to provide Collective Notices that are "reasonably calculated" to provide
29 'genuine notice' to Plaintiff, given Plaintiff's mental and/or developmental disabilities and
30 Defendant's knowledge thereof. *Mullane*, 339 U.S. at 314. Given the circumstances of

1 Plaintiff's particular disabilities, the Collective Notices amount to nothing more than a "mere
2 gesture." *Id.* at 315.

3 ***i. The Collective Notices Unreasonably Begin with Distressing Information in Harsh***
4 ***Language, Making It Impossible for Plaintiff and Others Similarly Situated to Meaningfully***
5 ***Comprehend the Collective Notices.***

6 133. As Defendant has long been aware, Plaintiff suffers from severe GAD that causes
7 Plaintiff debilitating anxiety when placed in a situation that would cause only mild anxiety in an
8 individual without GAD. On information and belief, Plaintiff's anxiety attacks are both long-
9 lasting and severe in nature, which could lead to visual and/or auditory hallucinations and/or
10 paranoia. It would not be uncommon for Plaintiff to take hours or days to recover from such
11 severe anxiety episodes. Plaintiff also suffers from cognitive deficits as often seen in autism
12 spectrum disorders, which severely restrict his ability to comprehend and coherently respond to
13 information in a timely manner.

14 134. Due to these mental and/or developmental disabilities, Plaintiff requires more time to
15 meaningfully comprehend and respond to the Collective Notices he receives. This inability to
16 quickly respond to his Collective Notices stems, in part, on the fact that Plaintiff receives both
17 SSI-Related Notices and SSDI-Related Notices, which are quite similar on their face and all
18 come from SSA, but are governed by different rules and administered by different SSA
19 personnel. Deciphering which of the Collective Notices govern which benefit is a
20 disproportionately confusing task for mentally and/or developmentally disabled persons such as
21 Plaintiff.

22 135. The Collective Notices demonstrate Defendant's failure to appreciate and account
23 for reasonably prudent persons with mental and/or developmental disabilities such as Plaintiff.
24 The Collective Notices routinely and unnecessarily begin with distressing news (often a
25 reduction or termination of benefits) that is communicated in unnecessarily harsh, anxiety-
26 producing language. *See* ¶¶ 122, 124, and 126, *supra*.

27 ///

28 ///

1 136. For example, Defendant's NCIP dated August 3, 2007 (Exhibit D), begins with a
2 small introduction. Immediately following the introduction is the heading, in bold font, "Your
3 Payments Will Be as Follows," followed by the amount of payment due: "\$0.00."

4 137. Given Plaintiff's severe GAD and cognitive deficits based on his developmental
5 disability, it is entirely foreseeable that Plaintiff would react to this information by developing
6 into a lengthy anxiety attack or other incapacitating episodes. In such a state, Plaintiff cannot be
7 expected to read through and meaningfully comprehend the entire NCIP. Exhibit D.

8 138. This inability for a reasonably prudent mentally and/or developmentally disabled
9 person to meaningfully comprehend the entire notice fails constitutional muster. *See id.* at 314-
10 15. In Exhibit D, Defendant includes over three (3) more pages (pp. 2-4) of vital required
11 information that is vital to Plaintiff's case including a purported explanation for the reduction in
12 Plaintiff's benefits, a purported explanation of Plaintiff's right to review information in his case,
13 and Plaintiff's right to appeal. Accordingly, Plaintiff could not, nor could he have been
14 reasonably expected to, meaningfully comprehend this information on the Collective Notices.

15 139. Presenting the distressing information without advising on available auxiliary aids
16 and/or program modifications such as therapy; supportive assistance, provided by Plaintiff or
17 Defendant (taking into account Plaintiff's choice), in responding to a Collective Notice;
18 automatic time extensions to the short deadlines for example to obtain assistance; and other
19 disability-related auxiliary aids and/or program modifications on the NCIP weakens the
20 probability of meaningful comprehension.

21 140. As a further example, Defendant's NOPA (Exhibit B) begins with the same small
22 introduction as Exhibit D (*see* ¶ 136, *supra*), followed by an even more direct and anxiety-
23 producing bold font heading: "Why Your Payments Are Stopping." This statement alone, set
24 apart in bold on the first page of this NOPA, would likely immediately produce anxiety.
25 Moreover, as the two (2) notices (Exhibits B and D) are sent a mere fourteen (14) days apart,
26 given Plaintiff's mental and/or developmental disabilities, he would be prone to believe that
27 SSA has imposed successive deadlines in order for him to keep his entitled benefits, leading to
28 further debilitating anxiety. For Plaintiff and similarly situated reasonably prudent mentally

1 and/or developmentally disabled persons, a reasonable reaction likely would include undergoing
2 a debilitating anxiety attack or other symptomatology that may lead to a psychotic episode.
3 This, in addition, to his cognitive deficits and/or other symptomatology, prevents Plaintiff and
4 others like him from appreciating the other three (3) pages of the Notice. Exhibit B. Without
5 any auxiliary aids and/or program modifications to mitigate barriers like this, Plaintiff and
6 others like him do not receive effective communication.

7 141. As a threshold matter, notices that unnecessarily begin with distressing, anxiety-
8 producing information unconstitutionally prevent reasonably prudent mentally and/or
9 developmentally disabled persons from meaningfully comprehending and responding to the
10 entirety of their Collective Notices without notice of assistance in effective communications,
11 such as available auxiliary aids and/or program modifications. The “means employed [are not]
12 desirous of actually informing” Plaintiff and are “substantially less likely to bring home notice
13 than other . . . feasible . . . substitutes.” *Id.* at 315.

14 142. Defendant’s inclusion of distressing and anxiety-producing information at the
15 beginning of notices (and often in bold) is also arbitrary and capricious, as it has the foreseeable
16 effect of producing severe anxiety in Plaintiff and other mentally and/or developmentally
17 disabled recipients without conveying important information any more effectively than if it
18 were included at the middle or end of notices, not in bold, and/or with auxiliary aids and/or
19 program modifications.

20 ***ii. The Collective Notices Provide Unreasonably Incomplete and Complex Explanations***
21 ***for Its Decisions, Requiring Plaintiff and Others Similarly Situated to Independently***
22 ***Investigate SSA Rules to Contextualize Defendant’s Explanations.***

23 143. The Collective Notices fail to account for the reasonably prudent mentally and/or
24 developmentally disabled person in another important way. Many of the explanations for
25 reductions or termination of benefits, particularly those involving mathematical computations,
26 are unnecessarily complex and could be explained in far simpler terms.

27 144. The numerous calculations made in its NCIP (Exhibit C) state that Defendant does
28 not count “one-half of what is left after we have subtracted the \$65.00. The remaining income
is countable income. (\$950.00 minus \$65.00 equals \$885.00) (Half of \$885.00 is \$442.50).” In

1 the next paragraph, the NCIP continues, “Your total countable unearned income and earned
2 income of \$1126.50 (\$684 plus \$442.50) exceed the SSI payment limit of \$870.00.”

3 145. Defendant’s inclusions of these various calculations throughout the NCIP (Exhibit
4 C) create confusion, require recipients to repeatedly refer back to earlier rules and calculations
5 from previous paragraphs, and are far too complex for a reasonably prudent mentally and/or
6 developmentally disabled person such as Plaintiff.

7 146. Additionally, many of the Collective Notices contained a purported explanation that
8 simply lists work CDR factors in Defendant’s decision without explaining the significance of
9 any of these factors. These ‘explanations’ are tantamount to no explanation at all, particularly
10 for a reasonably prudent mentally and/or developmentally disabled person such as Plaintiff.

11 147. In Defendant’s NCIP dated July 13, 2007 (Exhibit E), Defendant purports to explain
12 its decision to reduce Plaintiff’s reduction in benefits to \$0.00 in a section titled “Your SSI Is
13 Based on These Facts.” Defendant then simply lists, in bullet format:

14 [M]onthly income which must be considered in figuring your
15 eligibility:

- 16 • Your Social Security benefits – before deductions for Medicare
17 premiums, if any – of \$688.00 for June 2007 and \$688.00 for
18 August 2007 on.
- 19 • Your wages of \$826.71 for June 2007.
- 20 • Your estimated wages of \$950.00 for August 2007 on . . .

21 Exhibit E.

22 148. This mere listing of significant numbers is tantamount to no explanation at all
23 because it does not explain how these figures were used to arrive at the benefit amount, what
24 SSI rules or calculations are being used, or how the figures relate to each other. At best, this
25 ‘explanation’ requires recipients to attempt to put these numbers into context by themselves,
26 reviewing SSA rules not included in the NCIP notice. Such an arduous task cannot reasonably
27 be expected of a reasonably prudent mentally and/or developmentally disabled person such as
28 Plaintiff.

1 149. Thus, as a threshold matter, Collective Notices requiring recipients such as Plaintiff
2 to investigate in order to understand or contextualize purported explanations because the
3 explanations do not provide the dispositive rules affecting Defendant's decision, proposed or
4 otherwise, nor the full context for Defendant's calculations are unconstitutionally complex and
5 vague for reasonably prudent mentally and/or developmentally disabled persons. The "means
6 employed [are not] desirous of actually informing" Plaintiff and are "substantially less likely to
7 bring home notice than other . . . feasible . . . substitutes." *Mullane*, 339 U.S. at 315.

8 150. Plaintiff did not understand the Collective Notices; nor could other Social Security
9 beneficiaries with primarily mental and/or developmental disabilities such as Plaintiff
10 understand the Collective Notices. Therefore, they do not have a meaningful opportunity to
11 respond to and be heard on the matters that were the subjects of SSA's Collective Notices.

12 ***iii. The Collective Notices Imposed Unreasonable and Vague Ten-Day or Other Short***
13 ***Timeframe Deadlines for Presenting Arguments and Evidence to Rebut Defendant's***
14 ***Proposed Actions.***

15 151. Defendant's NOPAs do not afford Plaintiff "timely and adequate notice detailing the
16 reasons for a proposed termination, and an effective opportunity to . . . present his own
17 arguments and evidence." *Goldberg*, 397 U.S. at 267-68. Defendant generates automated
18 notices imposing ten-day deadlines to present evidence rebutting proposed actions without
19 regard to the mental or developmental disability of the recipient, thus failing to provide notice
20 that is "reasonably calculated, under all the circumstances." *Mullane*, 339 U.S. at 314.

21 152. Defendant's own rules, the POMS, explain the procedures designed to guarantee the
22 protections of procedural due process outlined in *Goldberg*. In POMS § SI 02301.300,
23 subsection E.3 ("Notice Forms"), Defendant's rules state that "[t]he SSI Notice of Planned
24 Action is the form used to provide advance notice. The system issues an automated . . . notice."
25 In subsection E.5 ("Providing the 10-Day Advance Notice"), Defendant's rules state that "the
26 individual has a full 10 days after the date on the notice to appeal and qualify for benefit
27 continuation." The right to appeal is not in some notices (*see, e.g.*, Exhibit C), and on other
28 notices (*see, e.g.*, Exhibits B, D, E, and F), this right to appeal is placed near the middle or end
or in a place not reasonably calculated to be meaningful to persons with mental and/or

1 developmental disabilities; moreover, only Exhibit B (*see* Exhibits A-F) contains notice of
2 Plaintiff's right to receive benefits pending appeal. All these notices (Exhibits B and D-F)
3 spanning the time period of about one (1) month and containing slightly differing pieces of
4 information that sometimes advise him of some of his rights have served to cause further
5 degenerations in his mental and/or developmental disabilities. *See* ¶¶ 64-65 and 67, *supra*.

6 153. This system of automated notices providing only ten (10) days or other short
7 timeframe to rebut a proposed action is inherently discriminatory to recipients with mental
8 and/or developmental disabilities such as Plaintiff. Given the severity and duration of the
9 anxiety attacks which Defendant's Collective Notices typically produce, Plaintiff reasonably
10 needs several days simply to comprehend a Collective Notice, much less gather "arguments and
11 evidence" to "present objections" to a proposed action. *Goldberg*, 397 U.S. at 267; *Mullane*,
12 339 U.S. at 314; *see* ¶¶ 5, 13-14, *supra*.

13 154. Additionally, on information and belief, Plaintiff receives numerous seemingly
14 identical notices as a result of his status as both an SSI and SSDI beneficiary. While the rules
15 governing these two (2) programs differ, they are administered by the same agency, and the
16 notices look very similar in style, form, and content. These similarities between the voluminous
17 Collective Notices regarding two (2) separate benefits programs create additional
18 disproportionate confusion for Plaintiff and other similarly situated persons with mental and/or
19 developmental disabilities.

20 155. At all times during the relevant period, Defendant has been aware of Plaintiff's
21 status as a recipient of both SSI and SSDI benefits. Defendant's unwillingness to alter its
22 automated system to provide more than a meager ten (10) days notice to recipients with known
23 severe mental and/or development disabilities is unconstitutional, as it fails to produce notice
24 that is "reasonably calculated, under all the circumstances." *Mullane*, 339 U.S. at 315.

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1 **D. Defendant's Verbal Communications with Plaintiff Also Violate Due Process, as They**
2 **Are Not Reasonably Calculated to Provide Notice to Mentally and/or Developmentally**
3 **Disabled Persons Such as Plaintiff, in Violation of *Mullane*.**

4 156. Plaintiff often communicates verbally with Defendant about his beneficiary status,
5 either via telephone or in person when Plaintiff goes to a Defendant's field office pursuant to a
6 Collective Notice.

7 157. On information and belief, among other in-person visits, Plaintiff was at Defendant's
8 field offices before his checks were reduced to about zero dollars (\$0) and spoke with the initial
9 decision maker, Ms. Fogarty (a CR), and was there again for a reconsideration conference with
10 Ms. Vigna (another CR). Neither Social Security CR was aware of necessary information to
11 know how to ascertain IRWEs, subsidies, and other relevant facts and/or work CDR factors
12 based on Plaintiff's mental and/or developmental disabilities.

13 158. On information and belief, effective communication is provided, by regulation, only
14 to people with sensory (such as seeing or hearing), manual, and/or speaking impairments but not
15 to people like Plaintiff, who have mental and/or developmental disabilities that may not result in
16 sensory, manual, and/or speaking impairments. *See* 45 C.F.R. § 85.3 (definition of auxiliary
17 aids). However, the Due Process Clause requires that notice – in any form – conveying
18 constitutionally required information, such as an explanation of an adverse decision or the right
19 to appeal, be “reasonably calculated” to provide actual notice. *Id.* at 314-315. Thus, verbal
20 communication is also governed by the Due Process Clause.

21 159. Due process requires Defendant to, at each field office where claimants like Plaintiff
22 can and do walk in as part of the work CDR process, have trained CRs who know how to
23 mitigate anxiety and/or other symptomatology that interfere with effective and/or meaningful
24 communication. 45 C.F.R. § 85.51. However, on information and belief, Defendant maintains
25 field offices with no staff members who have been trained in effective communication
26 techniques with claimants with mental and/or developmental disabilities. *See* Section V,
27 Subsection B, Sub-Subsection iv, *supra*.

28 160. This failure to train staff members in effective verbal communications with mentally
and/or developmentally disabled persons creates a particular hardship for Plaintiff because, on

1 information and belief, Plaintiff only contacts Defendant via telephone or in person after finding
2 himself unable to comprehend Defendant's Collective Notices. Failure to comprehend the
3 Collective Notices itself would already induce heightened and often debilitating anxiety in
4 Plaintiff, and receiving similar or more confusing information via telephone and/or in person
5 only compounds this anxiety.

6 **E. In Summary, Defendant Consistently Fails to Meet Due Process Clause Threshold**
7 **Requirements.**

8 161. Therefore, the inadequacy of SSA's Collective Notices and notice procedures, set
9 forth in greater detail in Subsection C-D, *supra*, amount to repeated due process violations in
10 that the Collective Notices and SSA's verbal communication procedures are not reasonably
11 calculated to afford notice to a reasonably prudent mentally and/or developmentally disabled
12 person.

13 162. Defendant's forms of notice, set forth in greater detail in Subsection C, *supra*, were
14 not reasonably calculated to afford notice to Plaintiff, in violation of the Due Process Clause in
15 numerous ways, including but not limited to: Unnecessarily conveying distressing information
16 in harsh, out of context, and difficult to understand language; offering unnecessarily complex
17 reasons for its decisions to reduce and/or terminate benefits; offering incomplete reasons for
18 such decisions and requiring Plaintiff to investigate Defendant's purported reasons; imposing a
19 ten-day or other short time frame deadline for rebutting proposed actions; and not providing
20 means for effective verbal communications.

21 163. Defendant's methods of administration, including but not limited to its inadequate
22 notices and notice procedures (*see* Subsection C, *supra*), the lack of training of its CRs in
23 relation to persons with mental and/or developmental disabilities (*see* Subsection D, *supra*;
24 Section II, Subsection C-D and F, *supra*), its automatically generated ten-day notice deadlines
25 without regard to a recipient's disabilities (*see* Section II, Subsection E, *supra*), and its failure to
26 effectively convey information verbally (*see* Subsection D, *supra*), deny Plaintiff and other
27 persons with primarily mental and/or developmental disabilities adequate notice and an
28

1 opportunity to be heard before terminating or reducing their Social Security benefits, in
2 violation of the Due Process Clause.

3 **IX**

4 **DEMAND FOR JURY**

5 164. Plaintiff hereby demands a trial by jury, pursuant to Rule 38 of the Federal Rules of
6 Civil Procedure. The issues for which Plaintiff demands a jury trial are as follows:

7 a. Whether Defendant failed to provide Plaintiff with meaningful and equal access to
8 SSA's program benefits;

9 b. Whether Defendant discriminated against Plaintiff based upon the invisible nature
10 of his disabilities, in violation of Section 504, by not affording him meaningful and equal access
11 to the same procedures for challenging cessations as those afforded to beneficiaries with
12 primarily physical disabilities who are subject to work CDRs;

13 c. Whether Defendant is in noncompliance with Section 504 and/or other statutory
14 requirements to avoid discrimination based on disability;

15 d. Whether Defendant was intentionally discriminating Plaintiff and others with
16 mental and/or developmental disabilities by systematically disenrolling them from the programs;

17 e. Whether Defendant violated Plaintiff's rights to procedural due process under the
18 Due Process Clause of the Fifth Amendment.

19 **X**

20 **PRAYER FOR RELIEF**

21 WHEREFORE, Plaintiff prays for judgment as follows:

22 1. A determination that Defendant has violated Section 504 by failing to allow Plaintiff
23 and other persons with mental and/or developmental disabilities meaningful access to the same
24 procedures for challenging cessations as those given to beneficiaries with disabilities that are
25 primarily physical and who are subject to work CDRs, thus depriving Plaintiff and other persons
26 with mental and/or developmental disabilities of meaningful and equal access to Social Security
27 benefits, past, present, and future;

1 2. A determination as to what steps are required of SSA to bring it into compliance
2 under Section 504 so that people with mental and/or developmental disabilities have meaningful
3 and equal access to SSA programs in work CDRs, past, present, and future;

4 3. An Order requiring SSA comply with Section 504 and its implementing regulations
5 *vis-à-vis* the rights of persons with mental and/or developmental disabilities to have meaningful
6 and equal access to SSA programs in the context of work CDRs, past, present, and future,
7 including but not limited to an Order requiring:

8 a. SSA, collaboratively with mental health professionals, organizations serving
9 people with mental and/or developmental disabilities, actual SSA beneficiaries with mental
10 and/or developmental disabilities, and additional interested and qualified parties (hereinafter
11 collectively “Task Force”), conduct a diagnostic review of all work CDR policies, procedures,
12 and practices to:

13 i. Identify any barriers that deny and/or limit meaningful participation by
14 persons with mental and/or developmental disabilities;

15 ii. Identify reasonable modifications, accommodations, and/or auxiliary aids that
16 eliminate any barriers as found in (i), *supra*; and

17 iii. SSA mandate that, during the work CDR process, its staff consult a mental
18 health professional prior to terminating program benefits (SSI and/or SSDI) of a person with a
19 mental and/or developmental disability if the individual is currently not engaged in SGA.

20 b. SSA, collaboratively with the Task Force, design work CDR-related notices in
21 clear and simple language, including but not limited to plain definitions and applications of work
22 CDR factors, which can be easily understood by people with mental and/or developmental
23 disabilities;

24 c. SSA establish a nationwide system to develop, implement, monitor, evaluate, and
25 enforce program accommodations or modifications for individuals with mental and/or
26 developmental disabilities;

27 d. SSA memorialize its policies and procedures in writing and distribute to
28 appropriate SSA staff, SSA beneficiaries, and mental health advocates;

1 e. SSA develop and implement procedures and training for CRs to conduct work
2 CDRs specifically for Social Security beneficiaries who suffer from primarily mental and/or
3 developmental disabilities, including but not limited to training of CRs on understanding
4 components of mental and/or developmental disorders, including the effect(s) of antipsychotic
5 medications and other factors, as required in a work CDR;

6 f. SSA train all CRs and managers in field offices to identify individuals who have
7 mental and/or developmental disabilities and who may need reasonable accommodations or
8 modifications to effectively participate in the work CDR process; and

9 g. Defendant make whole any mentally and/or developmentally disabled beneficiary
10 who was subjected to a work CDR and who received an adverse determination and did not
11 receive appropriate accommodations or assistance as identified by the Task Force.

12 4. A determination that Defendant has violated the Due Process Clause of the Fifth
13 Amendment by failing to give Plaintiff due process procedures before depriving Plaintiff his
14 Social Security benefits, past, present, and/or future;

15 5. A determination as to what steps are required of, and an Order requiring, Defendant
16 to desist from such violations of the Due Process Clause of the Fifth Amendment, with respect to
17 individuals with mental and/or developmental disabilities, past, present, and/or future;

18 6. Costs;

19 7. Reasonable attorney's fees, including, if appropriate, Equal Access to Justice Act
20 fees; and

21 8. Such other relief as the Court deems just and proper.

22
23
24 Date: September 17, 2009

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