81 IDELR 166

122 LRP 27025

UNITED STATES OF AMERICA and STATE OF NEW YORK, ex rel. Patrick DONOHUE, Plaintiff, v. Richard CARRANZA, et al., Defendants

U.S. District Court, Eastern District of Virginia

1:22-cv-189 (AJT/IDD)

July 1, 2022

Related Index Numbers

116.40 In General

205.053 Title XIX (Medicaid)

510. TITLE XIX [of the Social Security Act - Medicaid]

116. CORONAVIRUS-RELATED LITIGATION

Judge / Administrative Officer

ANTHONY J. TRENGA

See decisions in related case at 122 LRP 5779 and 123 LRP 2511

Ruling

A civil rights attorney could not show that a Virginia district violated the False Claims Act when it sought reimbursement from Medicaid for IDEA services that it delivered remotely during the COVID-19 pandemic. The U.S. District Court, Eastern District of Virginia granted the district's motion to dismiss the attorney's federal and state law fraud claims.

Meaning

Districts that sought Medicaid reimbursement for IDEA services provided during the extended school closures should not be overly concerned about fraud claims brought by third parties. Still, districts may wish to brush up on when and how they can seek Medicaid reimbursement for services required by students' IEPs. The district in this case pointed out that the only IEP mentioned in the attorney's complaint expressly contemplated in-person or remote delivery of services. That IEP provision undercut the attorney's claim that the district fraudulently billed Medicaid for IDEA related services that "conferred no meaningful benefit" when delivered remotely.

Case Summary

A Virginia district had little trouble convincing a District Court to dismiss fraud claims arising out of its decision to deliver IDEA services remotely during the COVID-19 pandemic. Noting that a New York-based civil rights attorney did not identify any fraudulent statements by the district in its requests for Medicaid reimbursement, the court held that the attorney failed to state a claim for relief under the False Claims Act. To prevail on his claim, the court observed, the attorney needed to show that: 1) the district made an objectively false statement or engaged in a fraudulent course of action; 2) the district intended to present a false claim; 3) the falsehood was material; and 4) the statement or conduct caused the government to pay out money. The court held that the attorney's complaint fell short of that standard. U.S. District Judge Anthony J. Trenga pointed out that federal law allows districts to seek payment from Medicaid for services required by students' IEPs. Although the attorney maintained that the district improperly billed for services delivered using telehealth or other remote means when it should have provided those services in person, the judge disagreed. The judge noted that the section of the False Claims Act referenced in the attorney's complaint did not preclude the district from seeking full payment for services delivered remotely. Furthermore, the attorney failed to identify specific instances of fraudulent billing by the district. Judge Trenga noted that the single IEP referenced in the complaint did not support the attorney's claim that the district could only seek Medicaid funding for in-person services. "[A] review of [that IEP] clearly shows that the IEP services were 'designated for implementation in a school and/or remote location,'" the judge wrote. The court also dismissed the attorney's state law fraud claims against the district.

Full Text

APPEARANCES

For Patrick Donohue, Plaintiff: Ashleigh C Rousseau, LEAD ATTORNEY, PRO HAC VICE, Brain Injury Rights Group, Ltd., New York, NY USA; Rory Jude Bellantoni, LEAD ATTORNEY, PRO HAC VICE, Brain Injury Rights Group, New York, NY USA; Caleb Dyer, LawHQ, P.C., Salt Lake City, UT USA.

For Loudoun County Public School District, Scott A. Ziegler, Defendants: John F. Cafferky, Joshua Ontell, LEAD ATTORNEYS, Blankingship & Keith, Fairfax, VA USA; Michael Kwang-Min Kim, LEAD ATTORNEY, Blankingship & Keith PC (Fairfax), Fairfax, VA USA.

Judges: Anthony J. Trenga, United States District Judge.

Opinion by: Anthony J. Trenga

Opinion

Order

This matter is before the Court on a Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure [Doc. No. 101] (the "Motion") filed by Defendants Loudoun County School Board and Dr. Scott Ziegler ("Defendants" or "Loudoun Defendants"). Of the seventeen counts alleged in the Second Amended Complaint, only Counts I-IV and XIV pertain to the Loudoun Defendants, the only remaining Defendants in this action in this Court. In that regard, in Count I, Relator alleges the presentation of a false claim in violation of 31 U.S.C. § 3729(a)(1)(A); in Count II, the making or using of false records or statements material to a false or fraudulent claim in violation of 31 U.S.C. § 3729(a)(1)(B); in Count III, the making or using of false records or statements material to a monetary obligation to the government in violation of 31 U.S.C. § 3729(a)(1)(G) ("Reverse FCA" claim); in Count IV, conspiring to commit the aforementioned violations in violation of 31 U.S.C. § 3729(a)(1)(C); and in Count XIV, the making or using of false records or statements material to a false claim in violation of Va. Code Ann. § 8.01-216.3 et seq.

Upon consideration of the Motion, the memoranda submitted in support thereof and in opposition thereto,[1] the Motion is GRANTED, and the Second Amended Complaint is DISMISSED WITH PREJUDICE as to the Loudoun Defendants.

I. Background

Relator Patrick Donuhue ("Relator"), a civil rights attorney with a focus on special education law, commenced this lawsuit on July 14, 2020, by filing a complaint under seal in the U.S. District Court for the Southern District of New York. *See United States ex rel. Donohue v. Carranza, et al.*, 1:20-cv-05396 (S.D.N.Y.). Relator filed an amended complaint on August 20, 2020. On April 6, 2021, the United States declined to intervene in the lawsuit. [*Id.*, Doc. No. 11.] Relator subsequently amended his complaint, filing his Second Amended Complaint on September 29, 2021, which is the operative complaint (the "SAC"). [*Id.*, Doc. No. 19.][2]

On December 27, 2021, Defendants filed a motion to dismiss pursuant to Rules 12(b)(1), (2), and (6) of the Federal Rules of Civil Procedure. [*Id.*, Doc. No. 68.] On February 14, 2022, the U.S. District Court for the Southern District of New York denied Defendants' motion, severed the claims against the Loudoun Defendants contained in the SAC, and transferred the severed claims to this Court, [*id.*, Doc. No. 86 at 10], which were docketed in this Court on March 15, 2022, [Doc. No. 89].

As Relator explains in the Second Amended Complaint, the Individuals with Disabilities Education Act ("IDEA") requires public schools to offer all children a Free Appropriate Public Education ("FAPE"). [SAC ¶ 78, p. 18.] Schools may receive, and use, IDEA Part B grants to pay the excess costs associated with providing disabled children access to FAPE. [SAC ¶ 74, p. 16.] Additionally, after Congress passed the Medicare Catastrophic Coverage Act of 1988, schools may also submit claims to Medicaid for reimbursement for providing services to

children under IDEA. [SAC ¶¶ 78-81, p. 18-19.] School districts "must follow strict reporting requirements to secure this federal funding." [SAC ¶ 80, p. 19.]

In his Second Amended Complaint, Relator generally alleges that the Loudoun Defendants (along with more than a dozen other school district defendants) violated the Federal False Claims Act, 31 U.S.C. § 3729 et seq. by "conduct[ing] related services for students with disabilities via telehealth and/or via phone contrary to the Medicaid and IDEA/Title I billing requirements," and submitting for reimbursement of those services "by misrepresenting that such services were in compliance with relevant State and federal laws." [SAC ¶¶ 1, 3, p. 4.]

According to the Relator, the Loudoun Defendants, aware of the "profound nature of [the students'] disabilities," knew that the students could not "meaningfully participate" in the remote sessions but nonetheless "fraudulently billed" for the remote sessions "through Medicaid at their regular, full rates." [SAC ¶ 2, p. 4.] Relator alleges that he has "first-hand knowledge" that Defendants "knowingly submitted false claims" for services provided to IDEA-eligible students via remote means when Defendants "were acutely aware that such services were contrary to those set forth in each student's last agreed-upon IEP [Individualized Education Plan], which required in-person services." [SAC ¶ 66, p. 24.] Relator also alleges that he has "knowledge" that the Defendants lack adequate or detailed records to support the Medicaid claims made on behalf of students with disabilities for the 2019-2020 and 2020-2021 school years. [SAC ¶ 65, p. 24.] Relator alleges that Defendants "fraudulently created Individualized Education Plans (IEPs) for special education students, knowing they could not implement these IEPs as written, thus knowingly denying students a FAPE." [SAC ¶ 72, p. 25.] After creating these fraudulent IEPs, Relator alleges, Defendants "fraudulently claimed they were providing special education and related services as outlined and described in the students' IEPs and billed and/or were reimbursed or otherwise by the federal government and the States ... for services that were not performed, and for services performed at an over-billed rate or for services (medical, educational, related, and otherwise) that were established fraudulently." [SAC ¶ 73, p. 25.]

In terms of the allegations specific to the Loudoun County School Board and Dr. Ziegler, Relator alleges that the Loudoun Defendants violated the False Claims Act as well as the Virginia Fraud Against Taxpayers Act by, among other things, unlawfully billing for remote services that were recommended to be "in person" and using IDEA funds despite failing to provide students with a FAPE. [SAC ¶¶ 192-93, 200-02.] Relator alleges to have "first-hand knowledge" of the Defendants' fraud. [SAC ¶ 194.]

Relator attaches to the Second Amended Complaint a redacted, unsigned IEP, dated November 4, 2020, for T.A., a student at John Champe High School with multiple disabilities during the 2020-2021 school year. [SAC ¶ 195, Ex. 16.] Relator focuses on language in the IEP that states that "the school division has no obligation to make-up any missed services, on days when the school division does not offer instruction, whether virtually or in-person, for reasons such as inclement weather, pandemics, health emergencies ...." [SAC ¶ 196; Ex. 16 at 19.] The IEP also states that the "services described in this IEP are designated for implementation in a school and/or remote location." [Ex. 16 at 19 (emphasis omitted).] Relator then alleges that the Defendants were required to, but did not, reconvene an IEP with T.A.'s parents to recommend remote-related services in order to properly bill Medicaid. [SAC ¶ 199.] Accordingly, Defendants' billing and/or claims for reimbursement related to T.A. ran afoul of Medicaid billing restrictions and were unlawful. [SAC ¶ 200.] Defendants allegedly "benefitted from their unlawful acts by collecting Medicaid reimbursement payments for services that were not offered in accordance with the IEP as written." [SAC ¶ 203.]

On April 29, 2022, Defendants moved to dismiss the Second Amended Complaint for failure to state a claim pursuant to Rule 12(b)(6).

II. Legal principles

A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) should be granted unless the complaint "state[s] a claim to relief that is plausible on its face." *United States v. Triple Canopy*, 775 F.3d 628, 634 (4th Cir. 2015) (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007). This "requires a plaintiff to demonstrate more than 'a sheer possibility that a defendant has acted unlawfully.'" *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (*quoting Iqbal*, 556 U.S. at 678).

In considering a Rule 12(b)(6) motion, the Court must construe the complaint, read as a whole, in the light most favorable to the plaintiff and take the facts asserted therein as true. *LeSueur- Richmond Slate Corp. v. Fehrer*, 666 F.3d 261, 264 (4th Cir. 2012). In addition to the complaint, the Court may also examine documents "attached to the motion to dismiss, so long as they are integral to the complaint." *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (*citing Blankenship v. Manchin*, 471 F.3d 523, 526 n.1 (4th Cir. 2006)).

The general pleading standard requires that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief ... [and that] give[s] the defendant fair notice of what the claim is and the grounds upon which it rests." *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 (4th Cir. 2007) (internal quotations omitted); see also Fed. R. Civ. P. 8(a)(2). Twombly established that the "plain statement" must "possess enough heft"--that is, "factual matter"--to set forth grounds for the plaintiff's entitlement to relief "that is plausible on its face." 550 U.S. at 557, 570. The complaint must contain sufficient factual allegations that, taken as true, "raise a right to relief above the speculative level" and "across the line from conceivable to plausible." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (internal citations and quotations omitted). Put another way, the facial plausibility standard requires pleading of "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Robertson v. Sea Pines Real Estate Co.*, 679 F.3d 278, 287 (4th Cir. 2012) (internal quotations omitted). "A pleading that offers labels and conclusions[,] a formulaic recitation of the elements of a cause of action ... [or] naked assertions devoid of further factual enhancement" will not suffice. *Iqbal*, 556 U.S. at 678.

Thus, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Walker v. Prince George's Cty., Md.*, 575 F.3d 426, 431 (4th Cir. 2009) (citations omitted); *see also Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). Accordingly, in order to survive a Rule 12(b)(6) motion to dismiss, the complaint must present sufficient non- conclusory factual allegations to support reasonable inferences of the plaintiff's entitlement to relief and the defendant's liability for the unlawful act or omission alleged. *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 391 (4th Cir. 2011) (citations omitted).

Furthermore, "suits brought under the False Claims Act sound in fraud, and thus are 'subject to' Fed. R. Civ. P. 9(b)." *United States ex rel. Sheldon v. Forest Labs, LLC*, 499 F. Supp. 3d 184, 201-02 (D. Md. 2020) (*quoting Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir. 1999)). Under Rule 9(b), a relator "must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *United States ex rel. Nathan v. Takeda Pharms. N.A., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013) (citation omitted). Accordingly, Rule 9(b) requires a relator to plead, with specificity, the "who, what, when, where, and how of the alleged fraud." *United States ex. rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008).

III. Analysis

Relator's claims against the Defendants boil down to his theory that Defendants violated the False Claims Act and Virginia Fraud Against Taxpayers Act by submitting claims to Medicaid for school-based services offered to students with disabilities via telehealth that "conferred no meaningful benefit, or in the alternative, were billed at the normal rate even though the full 'service' was not offered," in contravention of the students' IEP. [Doc. No. 104 at 2.] Relator claims that providing services such as Physical Therapy and Occupational Therapy via telehealth or other remote means was "simply inappropriate for severely disabled students who exhibit extensive management needs;" and, therefore, those services "were rendered inappropriately" and "inappropriately billed [to] Medicaid." [Doc. No. 104 at 5.]

Relator claims in Counts I and II that Defendants submitted false claims to Medicaid when it certified that it complied with the IDEA/Medicaid billing requirements. Those claims are based on the allegations that Defendants unlawfully sought and obtained reimbursement for services that were improperly provided or administered through remote means. Count XIV, the Virginia Fraud Against Taxpayers Act, largely tracks Counts I and II, and Count IV generally alleges Defendants conspired to commit the various alleged FCA violations.

Relator's Count III claim, however, is not quite as readily decipherable. For Count III, Relator offers the formulaic allegation that Defendants submitted false claims to evade or reduce a payment obligation to the federal government but offers no specifics regarding the supposed obligation.[3]

Defendants argue that the claims should be dismissed for a multitude of reasons, all of which may generally be summarized as follows: (1) providing telehealth services during the COVID-19 pandemic did not violate the Medicare Catastrophic Act or Medicaid billing guidelines; (2) the FCA claims as well as the Virginia state law fraud claim are not plead with particularity as required by Rule 9(b) or even in accordance with Rule 8(a)'s requirements; and (3) Relator's Virginia state law claim is barred by sovereign immunity. [Doc. No. 102 at 6-22.]

a. Counts I and II: Presentment Claims

Section 3729(a)(1)(A) of the FCA prohibits any person from "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval." Section 3729(a)(1)(B) of the FCA prohibits any person from "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim." To state a claim under these provisions, a relator must allege "(1) that the defendant made a false statement or engaged in a fraudulent course of conduct; (2) such statement or conduct was made or carried out with the requisite scienter; (3) the statement or conduct was material; and (4) the statement or conduct caused the government to pay out money or to forfeit money due." *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913 (4th Cir. 2003) (citation omitted).

As the Fourth Circuit has explained, to "satisfy this first element of an FCA claim, the statement or conduct alleged must represent an objective falsehood." *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376-77 (4th Cir. 2008) (emphasis omitted) (citations omitted). "[I]mprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false under the FCA." *Id.* (emphasis omitted) (*quoting United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999)). Moreover, "Rule 9(b) requires that 'some indicia of reliability' must be provided in the complaint to support the allegation that an actual false claim was presented to the government." *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013) ("Indeed, without such plausible allegations of presentment, a relator not only fails to meet the particularity requirement of Rule 9(b), but also does not satisfy the general plausibility standard of Iqbal.").

Here, the Second Amended Complaint fails to

satisfy this basic requirement. Relator alleges that Section 411(k)(13) of the Medicare Catastrophic Coverage Act of 1988 lists "six conditions that must be met for Medicaid to reimburse for IDEA-related services," including that the " services must be listed in the child's individualized education program (IEP)." [SAC ¶ 81, p. 19 (emphasis in original).] Section 411(k)(13), according to Relator, mandates that "billing for related services must mirror (at maximum) the services recommended in each student's IEP." [SAC ¶ 200.] Relator claims that Defendants failed to "provide services as mandated" by the students' IEP, which necessarily led to the "false submission of reimbursement claims to Medicaid." [SAC ¶ 194.] Defendants, Relator alleges, inappropriately billed for services provided to disabled students via telehealth or other remote means when those services "were recommended to be in person as opposed to remote." [SAC ¶ 200 (emphasis in original).] Relator further alleges that Defendants "formulat[ed] IEPs with recommended related services to be offered to students with disabilities at physical site locations" and then subsequently failed to "provide the recommended related services as written." [SAC ¶ 202.]

Relator's claims regarding Section 411(k)(13) requirements are not reflected in the law's text. Section 411(k)(13), which amends Section 1903 of the Social Security Act, states as follows:

Nothing in this title shall be construed as prohibiting or restricting, or authorizing the Secretary to prohibit or restrict, payment under subsection (a) for medical assistance for covered services furnished to a handicapped child because such services are included in the child's individualized education program established pursuant to part B of the Education of the Handicapped Act or furnished to a handicapped infant or toddler because such services are included in the child's individualized family service plan adopted pursuant to part H of such Act.

Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683 (codified as amended at 42 U.S.C. § 1396b(c)). The section does not specify billing requirements. The section also does not speak to Relator's other claims that Defendants were required to bill at reduced rates for remote services or were forbidden from seeking reimbursement at all for services rendered to severely disabled student via remote means. Therefore, Section 411(k)(13) does not provide a plausible basis for the Court to infer that Defendants committed an "objective falsehood" by submitting reimbursement claims to Medicaid for IEP-related services provided via remote means. *See Forest Labs, LLC*, 499 F. Supp. 3d at 212 ("Relator's interpretation of the Rebate Statute is not the only plausible reading of the text, and the allegations do not suggest that defendant's interpretation is objectively unreasonable. It follows that claims based on [defendant's] interpretation cannot qualify as objective falsehoods or constitute false statements under the FCA."); *see also United States ex rel. Hixson v. Health Mgmt. Sys., Inc.*, 613 F.3d 1186, 1191 (8th Cir. 2010) ("Because there is a reasonable interpretation of the law that does not obligate the defendants to seek reimbursement, we hold that the relators have not stated a claim under the FCA."). Relator cites to a number of guidelines and statements issued by federal and Virginia agencies in his opposition, but upon examination, those references do not support Plaintiff's claim that Defendants' reimbursement claims qualify as objective falsehoods or constitute false statements. [Doc. No. 104 at 3-6.][4]

Furthermore, Relator's specific allegations, supposedly showing "first-hand knowledge" of Defendants' fraud, do not state facts that make his claims plausible. As an initial observation, they appear contradictory or, at the very least, vague and ambiguous. In that regard, Relator alleges that Defendants committed fraud in seeking reimbursement for IEP-related services provided remotely to T.A., a student at John Champe High School. [SAC ¶¶ 195-99, Ex. 16.] Relator claims that the Loudoun Defendants failed to "reconvene[] an IEP meeting" with T.A.'s parents as required by law in order to properly bill Medicaid for the remote

services. [SAC ¶ 199.] But Relator cites to no authority for this proposition; and a review of the IEP for T.A. clearly shows that the IEP services were "designated for implementation in a school and/or remote location." [SAC, Ex. 16 at p. 19 (emphasis omitted).] In short, the relied upon IEP appears to explicitly authorize Defendants to provide T.A. with IEP-related services through remote means, or, at a minimum, does not suggest any fraudulent conduct on behalf of the Defendants. The T.A. allegations also fail to provide any facts that would suggest the Defendants fraudulently formulated IEPs, such as by purposely including in-person services in IEPs with no intention of providing those services. Relator, moreover, provides no factual allegations that T.A. did not meaningfully participate or receive the IEP services or that T.A.'s IEP was somehow otherwise fraudulent. The Court is accordingly unable to draw any reasonable inferences from Relator's T.A allegations that make plausible that Defendants submitted false claims or statements to Medicaid in connection with reimbursement for IEP-related services.

Additionally, the Second Amended Complaint fails to plausibly allege other key elements of an FCA claim such as scienter. To state a claim for an FCA violation a plaintiff must establish that there was intent on the part of the defendant to present a false claim. 31 U.S.C. § 3729(a)(1); *United states. ex rel. Owens v. First Kuwaiti Gen. Trading & Contracting Co.*, 728 (4th Cir. 2010). A plaintiff need not show "specific intent to defraud," but at a minimum, must establish that a defendant acted with "reckless disregard of the truth or falsity of the information." *Id.* (quoting 31 U.S.C. § 3729(b)). Relator only alleges that Defendants "knowingly presented, or caused to be presented, false or fraudulent claims for payment or approval" and "knowingly made, used, or caused to be made or use, a false record or statement material to a false or fraudulent claim." [SAC ¶ 192.] Such conclusory allegations and "formulaic recitation of the elements" of an FCA claim are insufficient to satisfy Rule 8's pleading requirements, let alone Rule 9(b)'s heightened pleading standard. *Twombly*, 550 U.S. at 555.[5]

b. Count III: Reverse FCA Claim

Section 3729(a)(1)(G) imposes liability on anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(G). "To prove a claim under subsection (a)(1)(G), a plaintiff must show: (1) proof that the defendant made a false record or statement, (2) at a time that the defendant had a presently-existing obligation to the government--a duty to pay money or property." *United States ex rel. Sanders v. USAA Fed. Savings Bank*, 2021 WL 3513663 (W.D. Va Aug. 10, 2021) (citation omitted). "At its essence, a 'reverse' false claim action involves 'a false statement made to knowingly avoid having to pay the government when payment is otherwise due.'" *Id.* (citation omitted).

Here, Relator fails to allege any obligation owed by the Defendants to the government, only alleging the formulaic recitation of the elements of the claim. [SAC ¶ 192.] Assuming Relator attempts to plead a Reverse FCA claim based on alleged Medicaid overpayments that is insufficient because the government's ability to pursue reimbursement for overpayments or fraudulently induced payments does not constitute an obligation. *See United States ex rel. Fadlalla v. DynCorp. Int'l LLC*, 402 F. Supp. 3d 162, 191 (D. Md. 2019) ("[A]s a matter of law 'the Government's ability to pursue reimbursement for overpayments or fraudulently induced payments does not constitute an 'obligation.'" (citation omitted)); *see also Chesbrough v. VPA, P.C.*, 655 F.3d 461, 473 (6th Cir. 2011) (merely alleging that the defendant was "obligated to repay all payments it received from the government" did not state a Reverse FCA claim). Accordingly, Relator's Count III fails.

c. Count IV: Conspiracy FCA Claim

Relator only alleges that Defendants "conspired to commit the above acts, all in violation of 31 U.S.C. § 3729(a)(1)(A), (B), (C) & (G)." [SCA ¶ 192.] "To prove an FCA conspiracy, a relator must show (1) the existence of an unlawful agreement between defendants to get a false or fraudulent claim reimbursed by the Government and (2) at least one overt act performed in furtherance of that agreement." *Phipps v. Agape Counseling & Therapeutic Servs., Inc*., 2015 WL 2452448 (E.D. Va. May 21, 2015) (citation omitted). Relator fails to plead basic requirements of a conspiracy, such as the "specific time, place, or person involved in the alleged" conspiracy. *Twombly*, 550 U.S. at 564 n.10; *cf. United States ex rel. DeCesare v. Americare In Home Nursing*, 757 F. Supp. 2d 573, 586 (E.D. Va. 2010) (finding relator plausibly alleged an FCA conspiracy where he alleged, in part, that he attended a meeting where plans to submit false claims were discussed and those plans were later implemented). Accordingly, Relator's Count IV fails for failure to state a claim.

d. Count XIV: Virginia Fraud Against Taxpayers Act

Defendants argue that they enjoy sovereign immunity and therefore are not subject to suits brought under the Virginia Fraud Against Taxpayers Act ("VFATA"). [Doc. No. 102 at 21-22.] "As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action." *Afzall v. Commonwealth*, 639 S.E.2d 279, 282 (Va. 2007) (*quoting Alliance to Save the Mattaponi v. Commonwealth*, 621 S.E.2d 78, 96 (Va. 2005)). That immunity extends to school boards and school superintendents. *Linhart v. Lawson*, 540 S.E.2d 875, 878 (Va. 2001) (school boards); *Banks v. Sellers*, 294 S.E.2d 862, 865 (Va. 1982) (school superintendents). "[I]f sovereign immunity applies, the court is without subject matter jurisdiction to adjudicate the claim." *Afzall*, 639 S.E.2d at 281; *see also Drew v. Va. Commonwealth Univ.*, 2018 WL 1508593 (E.D. Va. Mar. 27, 2018) ("Sovereign immunity is a jurisdictional issue." (*citing Research Triangle Inst. v. Bd. of Governors of the Fed. Reserve Sys*., 132 F.3d 985, 987, 990 (4th Cir. 1997))).

Here, Defendants claim Virginia's general sovereign immunity, not immunity under the Eleventh Amendment, bars Plaintiff's VFATA claims. *See McCants v. Nat'l Collegiate Athletic Ass'n*, 251 F. Supp. 3d 952, 954-55 (M.D.N.C. 2017) ("[T]he Supreme Court has long observed that states possess a broader form of immunity that transcends the literal meaning of the Eleventh Amendment." (citations omitted)). "To determine whether a state has waived its sovereign immunity, the court must look to state law, including decisions from the state's highest court." *Id.* (*citing Alden v. Maine*, 527 U.S. 706, 757-58 (1999)). The Virginia Supreme Court, on at least two occasions, has declined to find that the VFATA contains a waiver of sovereign immunity. *See Ligon v. Cty. of Goochland*, 689 S.E.2d 666, 670 (Va. 2010) (concluding that the "VFATA does not contain an explicit and express waiver of the Commonwealth's sovereign immunity"); *Cuccinelli v. Rector & Visitors of the Univ. of Va*., 722 S.E.2d 626, 632-33 (Va. 2012) (declining to include Commonwealth agencies as "persons" under the VFATA definition of "person" and noting that "there is no waiver of sovereign immunity subjecting the Commonwealth to the false claims provision" of the VFATA). Accordingly, the Court finds that sovereign immunity bars Plaintiff's VFATA claim. Count XIV will be dismissed for lack of subject matter jurisdiction.[6]

e. Rule 9(b)'s Particularity Requirement

For the above reasons, the Second Amended Complaint also necessarily fails to meet Rule 9(b)'s well-established heightened pleading requirements. In addition to failing to allege that Defendants committed an objective falsehood or acted with the requisite scienter, Relator also fails to allege the "who, what, when, where and how of the alleged fraud." *United States ex rel. Garzione v. PAE Gov't Servs., Inc.*, 164 F. Supp. 3d 806, 816 (E.D. Va. 2016) (citations omitted). "Rule 9(b)'s heightened pleading standard applies to state law fraud claims asserted in

federal court." *Forest Labs. LLC*, 499 F. Supp. 3d at 202 (*quoting N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 567 F.3d 8, 13 (1st Cir. 2009)). Counts I-III, XIV accordingly fail on this independent ground as well.

IV. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Defendants' Motion to Dismiss [Doc. No. 101] is GRANTED and Plaintiff's Second Amended Complaint is DISMISSED WITH PREJUDICE.

The Clerk is directed to forward copies of this Order to all counsel of record and close this case.

Alexandria, Virginia

/s/ Anthony J. Trenga

Anthony J. Trenga

United States District Judge

[1]The Court held a hearing on the Motion on June 10, 2022. [Doc. No. 106.] Counsel for Plaintiff, however, failed to make an appearance and the Court took the Motion under advisement without hearing argument from counsel.

[2]Relator originally filed his Second Amended Complaint on September 24, 2021. [*Id.*, Doc. No. 18.] He then filed another amended complaint the operative complaint five days later, on September 29, 2021. Despite the amendment, Relator characterizes the operative complaint as his Second Amended Complaint.

[3]Although Relator purports to put forth a reverse FCA claim, the allegations in Count III do not align with such a claim. However, reviewing the SAC as a whole, and in considering Relator's recitation of the elements in the allegations specific to the Loudoun Defendants, the Court will treat Count III as a reverse FCA claim.

[4]In assessing Relator's references, the Court has also considered those federal and Virginia agencies' guidelines and statements cited to by the Defendants. See [Doc. No. 102 at 8-11]; *see also Philips*, 572 F.3d at 180 (noting court is entitled to take judicial notice of those matters of public record when considering a 12(b)(6) motion).

[5]The Court reaches this same conclusion as to the materiality element. *See Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 194 (2016) ("The materiality standard is demanding.... A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial." (citations omitted)). Relator fails to plead any specific allegations that would allow for the Court to draw a reasonable inference that any alleged misrepresentation or fraudulent conduct was in fact material.

[6]Additionally, even if the Defendants did not enjoy sovereign immunity, the Court finds that VFATA claim should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim. The VFATA is practically identical to the False Claims Act. As such, "courts look to decisions interpreting the FCA in considering actions brought under the VFATA." *See Phipps*, 2015 WL 2452448 (collecting cases). Because the VFATA and FCA are analogous and Relator has incorporated his FCA arguments into both causes of action, [Doc. No. 104 at 17 n.6], the Relator's VFATA claims "will be dismissed for the very same reasons that his FCA claims fail." *United States ex rel. Rector v. Bon Secours Richmond Health Corp*., 2014 WL 1493568 (E.D. Va. Apr. 14, 2014).

