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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Aita Darjee on her own behalf and on behalf of her minor child N. D.; and Alma Sanchez Haro on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Thomas Betlach, Director of the Arizona Health Care Cost Containment System, in his official capacity,

Defendant.

CV-16-00489-TUC-RM (DTF)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Thomas Betlach moves, pursuant to Rule 56, FRCP, for summary judgment against the Plaintiffs because there is no genuine issue of fact and he is entitled to judgment as a matter of law. This Motion is supported by the following Memorandum of Points and Authorities and the separate Statement of Facts in Support of Defendant's Motion for Summary Judgment (SOF), filed herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Summary judgment should be granted for two reasons. First, the Plaintiffs have failed to support their allegations, made mostly on information and belief, that Director

Betlach has a practice and policy of violating federal law in several ways when immigrants renew their Medicaid eligibility. The Plaintiffs are unable to show any unlawful conduct that would support either a declaratory judgment that the Director has violated the law or an injunction regarding the handling of Plaintiffs' AHCCCS renewals. Instead, the evidence is 1) that human error occasionally occurs in the complicated process of renewing immigrant eligibility for Medicaid and 2) that AHCCCS policies and practices are to prevent, reduce, and correct any such errors.

Second, the Plaintiffs lack standing and their claims are moot because neither can show any reasonable expectation of suffering future injury. Their full benefits were restored in 2016 and can only be changed in the future by DES's most experienced eligibility worker, an individual who knows both individuals are eligible for full benefits. She has been handling every action related to their cases without incident for months. None of the errors that occurred in either Plaintiffs' prior eligibility renewals has any reasonable possibility, let alone likelihood, of happening again. [1]

[1] We recognize the Court has not yet ruled on Plaintiffs' Renewed Motion for Class Certification. We submit, however, that Plaintiffs must maintain standing and present claims that are not moot at the time the Court rules on their Renewed Motion. *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). We also recognize there may be an argument for Plaintiffs to represent a properly certified class, even if this Motion be granted, *assuming they meet the other requirements of Rule 23*. *See Gerstein v. Pugh*, 420 U.S. 103, 106-07 (1975). Defendant does not believe the claims in this case are transitory or "capable of evading review," so as to come within the latter ruling, for the reasons stated in Defendant's Motion to Dismiss. *Doc. 35, pp. 11-13.* Moreover, it would make little sense and be inimical to judicial economy if these Plaintiffs who have no current standing, whose claims are moot, ***and*** who have failed to prove a claim in any event, were certified to represent a class simply because they had sufficient standing to survive a motion to dismiss.

STANDARD OF REVIEW

When there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). The Court views the facts and inferences from the facts in the light most favorable to the non-moving party. *Matsushita Elec. Co. v. Zenith Radio Corp*., 475 U.S. 574, 577 (1986). If, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion, summary judgment is appropriate. *Id*. at 586.

I. THE PLAINTIFFS CANNOT SUPPORT THE ALLEGATIONS IN THEIR COMPLAINT.

The Plaintiffs cannot demonstrate any of the theories in their complaint, either generally or as applied to them. They allege four reasons why the Director is violating the law. All are wrong; most do not even to apply to the Plaintiffs' experience.

A. AHCCCS Rules Do Not Violate Federal Law.

First, the Complaint implies at ¶ 46 that AHCCCS A.A.C. R9-22-306.C (Administration or its Designee Responsibilities at Eligibility Renewal) may violate federal law because it is "not as comprehensive as the federal regulation or is not implemented consistent with the federal requirement." On its face, the language of the AHCCCS rule is substantially identical with the federal rules at 42 C.F.R. § 435.916(a)(2) and (3). Plaintiffs have failed even to allege, let alone prove, any way in which the Arizona rule is not as comprehensive as its federal counterpart or any way in which it is not implemented consistently with federal rules. Moreover, the Complaint does not allege this theory has any relevance to the Plaintiffs' cases.

B. AHCCCS Policies Do Not Violate Federal Law.

Next, the Complaint alleges at ¶¶ 48 and 51 that AHCCCS policies do not "implement federal law on *ex parte* renewals" because AHCCCS policy "lists some information that does not need to be obtained at each renewal." Even assuming for the sake of argument that eligibility workers ask for alien identification numbers (¶ 48) or about immigration status (¶ 49), the Complaint fails to allege these "unnecessary requests" (¶ 50) violate federal law ***or*** that any such event has affected either Plaintiff.

In fact, alien identification numbers and immigration status may be necessary for any number of reasons. Grants of asylum may be terminated. 8 USC 1158(c)(2). Refugee status may be revoked. 8 USC 1157(c)(4). Lawful permanent residence may be rescinded. 8 USC 1256. Qualified aliens have various eligibility limitations they must meet. 8 USC 1612. Up to half of immigrants have changes during a year that may affect their eligibility. [2] Neither Plaintiff alleges an improper request for an alien identification number or immigration status or a violation of the *ex parte* process.

C. AHCCCS Does Not Violate "Reasonable Promptness."

Nor can the Plaintiffs support their theory that AHCCCS is violating Medicaid's reasonable promptness requirement, 42 U.S.C. § 1396a(a)(8), which requires a

[2] "States are required to terminate eligibility in situations involving erroneous determinations of eligibility based on inaccurate information, as in cases involving fraud. . . . Research has indicated that 33-50 percent of people experience a change in circumstance that may impact their eligibility for coverage. . . . [These people] will need to provide additional information to the State so that their eligibility can be renewed." *Medicaid Program; Eligibility Changes Under the Affordable Care Act of 2010, 77 FR 17144-01.*

Medicaid agency to "provide that all individuals wishing to make application for medical assistance under the [state's] plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." The corollary federal rule at 42 C.F.R. 435.916 requires that, "The [state] agency must (a) furnish Medicaid promptly to beneficiaries without any delay caused by the agency's administrative procedures; [and] (b) continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." Neither clause of the rule applies here. There has been no delay due to the agency's administrative procedures, and AHCCCS continues to furnish Medicaid to both Plaintiffs.

The Plaintiffs believe reasonable promptness "implies" error-free eligibility determinations. The only legal support for this theory is *Romano v. Greenstein,* 2012 WL 1745526 (E.D. La. 2012), *aff'd*, 721 F.3d 373 (5th Cir. 2013). In that case, an individual was granted summary judgment on her claim that the Louisiana Medicaid agency had failed to follow a required federal eligibility process. The court reasoned:

> A Medicaid regulation implementing [the reasonable promptness] statute provides that "[t]he agency must ... continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." 42 C.F.R. § 435.930(b). This provision implies that assistance may not be terminated until an individual is *properly* found ineligible.

2012 WL 1745526, at *8 (footnotes omitted) (emphasis in original). Here, unlike *Romano*, neither Plaintiffs' assistance was terminated. Out of thousands of immigrant eligibility renewals from December 2016 through November 2017, only 5 people may have had their benefits *temporarily* reduced before errors in their cases were corrected.

Neither Plaintiff was among those five.

Even more to the point, the Plaintiffs cannot show that mistakes by an eligibility worker (EW) in processing an immigrant renewal are committed pursuant to an AHCCCS policy or practice. As discussed below, AHCCCS policy and practice is to avoid such errors: AHCCCS and DES have provided training, policy reminders, multi-level reviews of any reduction in benefits, and computer enhancements designed to reduce and prevent worker errors. *SOF 13, 34-38.*

The worker error made in Ms. Darjee's eligibility was corrected even before this case was filed. *Doc. 1, ¶ 59; SOF 20.* She has had no problem since. Ms. Sanchez Haro's eligibility was the subject of an error in 2016 that was promptly corrected once she notified AHCCCS through the Complaint herein. Eligibility workers made two more errors in her renewals in 2017, but both errors were quickly corrected and her eligibility for full benefits continued unaffected.

Plaintiffs' eligibility determinations have been prompt. Nor can they can any legitimate fear that they will not be furnished Medicaid "until they are found to be ineligible." As discussed below, their eligibility is settled and their renewals can only be processed by DES's best EW who is fully aware both are entitled to full benefits.

D. The AHCCCS Computer Is Not Defective.

The Plaintiffs have sought to show that the AHCCCS computer was responsible for the incorrect eligibility determinations in their cases and that AHCCCS policy and practice is to foster or condone such errors. This is an absurd theory. First, the computer ***cannot*** reduce an immigrant's benefits without human intervention. *SOF 7.*

There is no evidence that the computer works improperly, much less that it has ever caused the Plaintiffs' benefits to be improperly reduced. The evidence is that in 2015 AHCCCS fixed the one computer programming error that was ever found. *SOF 10*. No computer malfunction has been found since by anyone at AHCCCS, DES, the computer vendor (SIS), *or the Plaintiffs*. Human error was the cause of each erroneous determination in the Plaintiffs' cases. *SOF 20-28.* [3]

E. AHCCCS's Actual Policy and Practice are to Prevent Worker Errors.

Plaintiffs would have the Court believe that they and hundreds or thousands of other individual immigrants are suffering from incorrect eligibility determinations and that AHCCCS condones these errors as a matter of policy and practice. This is untrue.

The AHCCCS/DES computer, "HEAplus," went into service in October 2013. *SOF 2.* When AHCCCS learned of a programming error in October 2015, it fixed the error within a month. *SOF 10.* AHCCCS then went back through every single case of an immigrant whose benefits had been reduced since January 2014. It found approximately 3,500 errors of various sorts and immediately restored each person to full benefits and offered to pay any out of pocket expenses they had incurred. *SOF 11-12.* Many of these errors had been caused by eligibility worker mistakes, so AHCCCS and DES gave workers additional training and periodic policy reminders focused on

[3] This is not surprising. Immigrant eligibility determinations are complicated, and some amount of human error in the process is inevitable. The federal government does not expect perfection; it allows states a 3% margin of error in eligibility determinations. *81 FR 40596-01, 2016 WL 3402966(F.R.)* Even the Complaint acknowledges that the federal *ex parte* system is designed to reduce, not eliminate, error. *Doc. 1, ¶ 32*.

immigrant renewals. *SOF 14.* AHCCCS and DES continued to track reductions in benefits for immigrants to catch and correct errors. *SOF 13.*

DES instituted a triple-level review of any eligibility determination or "disposition" that would reduce a person from full AHCCCS benefits to federal emergency services (FES) only benefits. *SOF 7.* Thus, when the HEAplus computer compares the information input into it against the information it receives from other federal and state computer databases and the comparison seems to predict FES is the appropriate eligibility category, the eligibility worker is required to review the person's entire file to be sure FES is the correct status. If the EW decides FES is the appropriate status, he or she has to take the case to a supervisor for a second review. If the supervisor also agrees that FES is correct, they are required to take the case to office management for a third review before the case can be dispositioned as FES. *Id.*

When another error in Ms. Sanchez Haro's case in October 2017, DES created a specialized unit of EWs to review all FES determinations. As yet another level of review, DES's most experienced EW, Deborah Bailey, now reviews all FES determinations, including those by the specialized unit, before any case can be finally dispositioned as FES. *SOF 30-32.*

Notices to customers go out the day the case is dispositioned. Since not all DES's layers of review can always be completed the same day as an erroneous disposition, if an erroneous first notice has been sent, a corrected notice is sometimes necessary to notify the person of their full benefits. *SOF 12.* During December 2016 - November

2017, 766 errors were caught. *SOF 17, 19.* Of these, only 5 people did not get a corrected notice before an erroneous reduction in their benefits took effect. *SOF 18-19.*

II. THE PLAINTIFFS NO LONGER HAVE STANDING AND THEIR CLAIMS UNDER COUNT 1 ARE MOOT, SINCE THERE CAN BE "NO REASONABLE EXPECTATION THAT THE ALLEGED VIOLATION WILL RECUR."

At the pleading stage, the Court found Plaintiffs had standing under Count 1, and their claims were not moot at that time. *Id. at 9-12.* The Court reasoned that the Plaintiffs remain "subject to the same risk of future reductions caused by the same [renewal] policies and practices. Accordingly, a live controversy exists." The Court felt both Plaintiffs had "*alleged* a sufficient threat of impending injury." *Doc. 85, p. 10 (emphasis added).*

The Court noted however that, "Plaintiffs who seek injunctive relief must allege a future injury that is 'certainly impending'; allegations of a 'possible' injury are insufficient. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)." Further,

> To qualify as a case fit for federal-court adjudication, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." If the same personal interest required for standing does not continue throughout the action, the case is moot.

Doc. 85, p. 11 (citations omitted).

We can now see that Plaintiffs' allegations of unlawful conduct have no merit, and the efforts of AHCCCS and DES to prevent and, when necessary, promptly correct any errors in Plaintiffs' cases have made it impossible for them to maintain that any future injury is "impending." Even the risk of future reductions caused by innocent mistake no longer exists. Plaintiffs' claims are indeed moot and there is no controversy.

AHCCCS restored full benefits to both Plaintiffs in 2016. Their benefits have not been reduced since. They cannot show that the past errors were the product of an unlawful policy or practice of the Director rather than simple mistakes. They are in no danger of future errors. They no longer run even the *de minimus* risk of receiving another mistaken reduction that is not corrected before it might take effect.[4] This is because their immigration status is now settled, their files plainly indicate they are entitled to full Medicaid benefits, and DES has "locked" their files so that whenever their benefits may be affected in the future, their cases may be reviewed by only one person, Deborah Bailey. *SOF 30, 32.* Ms. Bailey is thoroughly familiar with the Plaintiffs' cases, knows they are both eligible for full benefits, and has been processing their cases without incident since last October. *Id.* No other EW has an opportunity to make an error in renewing their benefits.

"The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." *Pinnacle Armor, Inc. v. United States,* 648 F.3d 708, 715 (9th Cir. 2011). If effective relief is unavailable, the Court can only render an advisory opinion, which is prohibited by Article III of the Constitution. *Coal. for a Healthy Cal. v. F.C.C.,* 87 F.3d 383, 386 (9th Cir. 1996). .

The errors over which the Plaintiffs sued in 2016 were corrected, and injunctive relief as to the past cannot be granted. *Am. Cargo Transp., Inc. v. United States,* 625

[4] The risk is approximately 5/61,000, i.e. 5 persons for whom an error was not corrected before their benefits were reduced out of 61,000 immigrant renewals annually. *SOF 15-19*.

F.3d 1176, 1179–80 (9th Cir. 2010). Going forward, AHCCCS meets the "heavy" burden of being able to show that any danger to Plaintiffs has ended. Though there never was any unlawful conduct for the Court to enjoin, AHCCCS and DES have taken steps to prevent even future human error in Plaintiffs' cases. There is no more effective relief to ensure against further error than the review process AHCCCS and DES have already put in place, and this process will continue unless computer enhancements serve to end the problem. *SOF 31, 38*. [5]

Where "interim relief or events have completely and irrevocably eradicated the effects of ***the alleged violation***," the case is moot. *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979) (internal quotation marks omitted) (emphasis added). In this case, the alleged violation proved nonexistent. There is indeed "no reasonable ... expectation that ***the alleged violation*** will recur." *Id.* (emphasis added). Plaintiffs' files show that in terms of immigration status both have been found permanently eligible for full benefits. They are reduced to seeking a guarantee against human error. Even if that were a justiciable claim, there is no way an injunction can preclude all human error. The lack of any plausibly likely future injury deprives Plaintiffs of standing as to Count 1 and makes their request for injunctive relief moot.

III. COUNT 2 REGARDING AHCCCS'S NOTICES FAILS FOR SIMILAR REASONS.

A. Plaintiff Sanchez Haro's Claims are Moot.

[5] As in *Am. Cargo*, "there is no basis to suggest [Defendant's effort] is a transitory litigation posture." 625 F.3d at 1180.

Only Plaintiff Sanchez Haro has a claim under Count 2; the Court has already ruled Plaintiff Darjee has no standing to raise that issue. *Doc. 85, p. 12*. The Court did not dismiss Sanchez Haro on grounds of mootness and lack of standing in 2017 because, "At this point, it is reasonable to infer from the Complaint that Sanchez Haro, who is allegedly at risk of losing her benefits, is also at risk of receiving the notice again. Accordingly, Sanchez Haro's claim under Count 2 is not moot." *Id*. Since there is now no further danger that her benefits will be improperly reduced, any issue over the content of a future notice of such a reduction is also moot.

B. The Director Complies with Due Process and 42 U.S.C. § 1396a(a)(3).

There is nothing unlawful about the AHCCCS notices in any event. 42 U.S.C. § 1396a(a)(3) requires state plans to "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." Medicaid regulations explicitly adopt the standards of *Goldberg v. Kelly*, 397 U.S. 254 (1970). *42 C.F.R. § 431.205(d)*. *Goldberg* requires timely and adequate notice of a right to a hearing before benefits are terminated. 397 U.S. at 267-68. Medicaid rules give specific content to the general principles enunciated in *Goldberg*. The rules prescribe that notice of an adverse benefit determination by the Medicaid agency must include:

> (a) A statement of what action the agency, skilled nursing facility, or nursing facility intends to take and the effective date of such action;
> (b) A clear statement of the specific reasons supporting the intended action;
> (c) The specific regulations that support, or the change in Federal or State law that requires, the action;
> (d) An explanation of—

> (1) The individual's right to request a local evidentiary hearing if one is available, or a State agency hearing; or
> (2) In cases of an action based on a change in law, the circumstances under which a hearing will be granted; and
> (e) An explanation of the circumstances under which Medicaid is continued if a hearing is requested.

42 C.F.R. § 431.210. AHCCCS has promulgated a parallel rule at A.A.C. R9-22-307. AHCCCS notices comply with these rules. *See Exhibit A to SOF*.

Plaintiffs' Complaint (¶¶ 53-54) alleges that notices do not adequately inform the customer of the reason for a determination of emergency services eligibility and do not explain what emergency services are, thus leaving the customer unable to understand the import of their changed status. At ¶ 55, the Complaint also alleges the notices say a customer can only copy "portions of the case file necessary for proper presentation of your case." These allegations are incorrect. AHCCCS notices inform the customer of the reason for the change, explain what emergency services are, and state that the customer may obtain a copy of "the case record necessary for proper presentation of your case." *Id; Lockner 36:8-37:8*.

The Complaint alleges that recipients generally do not understand the AHCCCS notices, but Plaintiffs have no evidence to support such a claim. The AHCCCS notices meet the requirements of 42 C.F.R. § 431.210 and are certainly as meaningful as the notices in the case they frequently cite, *Unan v. Lyon*, 853 F.3d 279, 292 (6th Cir. 2017) (granting defendant's motion for summary judgment on plaintiffs' claims that notices violated due process).

CONCLUSION

The past mistakes in Plaintiffs' eligibility renewals were the product of human error, not a policy or practice of the Director of AHCCCS that violates Medicaid law or due process. The Plaintiffs are receiving full AHCCCS benefits, and there is no further risk that they will be erroneously reduced to emergency services. The Director is entitled to summary judgment because Plaintiffs' claims have no merit and because the claims are moot and Plaintiffs lack standing.

RESPECTFULLY SUBMITTED this 1st day of June, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 1, 2018, he transmitted the attached document to the following CM/ECF registrants:

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