IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Aita Darjee, et al.,

Plaintiffs,

v.

Thomas Betlach,

Defendant.

No. CV-16-00489-TUC-RM (DTF)

REPORT AND RECOMMENDATION

Before the Court are Defendant's Motion for Summary Judgment (Doc. 228) and Plaintiffs' Motion for Partial Summary Judgment (Doc. 238). The Court heard oral argument on February 4, 2019 at took the motions under advisement. (Docs. 260, 261.) For the reasons set forth below, the Court recommends that the District Court **grant** Defendant's motion and **deny** Plaintiffs' motion.

Background

The following is taken from the District Court's Order denying Plaintiffs' renewed motion for class certification:

> Plaintiff Aita Darjee is an immigrant from Nepal who came with her family to the United States as a refugee in 2011 and, based on her status as a refugee, is eligible for Full Medical Assistance ("Full MA") with the Arizona Health Care Cost Containment System ("AHCCCS"). (Doc. 1 at 13.) Plaintiff Darjee's benefit eligibility was twice improperly reduced, once in 2015 and once in 2016, to Federal Emergency Service ("FES"), a medical plan with significantly less coverage. (*Id*.) After both reductions, Full MA was restored, but Plaintiff Darjee and her family worry that their benefits will again be improperly reduced, preventing them from obtaining much-needed

> medical care. (*Id*. at 14-15.)
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> Plaintiff Alma Sanchez Haro came to the United States in 2003 as an immigrant and has, since that time, been eligible for Full MA based on her status as a victim of domestic violence under the Violence Against Women Act ("VAWA"). (Doc. 1 at 15.) In 2015, Plaintiff Sanchez Haro became a legal permanent resident ("LPR"); LPRs generally have to wait five years for Full MA, but Plaintiff Sanchez Haro is exempt from the waiting period because of her VAWA status. (*Id*. at 15-16.) After obtaining status as an LPR, Plaintiff Sanchez Haro's benefits were improperly reduced to FES on three separate occasions, but Full MA was later restored each time. (*Id*.at 16; Doc. 119 at 4-5; Doc. 185 at 2.) Plaintiff Sanchez Haro suffers from medical conditions, including mental illness, and worries that her reduced status will prevent her from receiving the medications and medical care she relies on. (Doc. 1 at 17.)
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> AHCCCS benefits are determined by the Department of Economic Security ("DES"), which process applications for benefits using the Health-e-Arizona Plus computer system ("HEAPlus"). (*See, e.g.*, Doc. 117-1 (exhibit explaining the means by which the computer program processes applicant information as well as suggested modifications to the system).) Immigration information relating to eligibility for benefits is stored at an application level; that is, immigration information will not transfer within the system when a cse worker begins a new application, like a renewal. (*Id*. at 6.) The system prompts a caseworker with a series of questions regarding the applicant, including immigration information affecting benefit eligibility, and will then automatically generate a benefit eligibility response. (*See id*.) However, any application which, based on the information input by the caseworker, would result in an eligibility change from Full MA to FES cannot happen automatically because it requires approval by DES supervisory staff. (Doc. 119 at 5-6.)
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> Plaintiffs filed this putative class action claiming that Defendant, in his official capacity, violated the Medicaid Act, 42 U.S.C. § 1396a(a)(8) by failing to furnish them Medicaid benefits with "reasonable promptness." (*See* Doc. 1 at 17-18.) Plaintiffs additionally claim that the written eligibility notices Defendant sent to Plaintiffs were deficient and in violation of the Due Process Clause of the Fourteenth Amendment in addition to the Medicaid Act, 42 U.S.C. § 1396a(a)(3). (Doc. 1 at 18.)

(Doc. 256 at pp. 2-3.) (Footnote omitted.) Earlier in the litigation, the District Court dismissed Plaintiff Darjee's claim under Count 2 concluding that she lacked standing to

assert that Defendant's notice violates due process or the Medicaid Act because she never received a notice concerning a reduction in AHCCCS benefits. (Doc. 85 at p. 20; Doc. 87 at 20-23.)

Objections

Both parties have lodged objections to submissions by the other party. (Docs. 249, 254.) Pursuant to L.R.Civ. 7.2(m), Defendant objects to approximately 302 separate statements of fact submitted by Plaintiffs in their statement of facts. (Doc. 249.) Defendant argues that Plaintiffs' submission of a statement of facts that contains 341 separate statements and 32 pages of *additional* material in response to his separate statement of fact does not comply with Rule 56.1(a) of the Local Rules of Civil Procedure. *Id*. at p. 2. Since Plaintiffs moved for partial summary judgment on Count 2 of the Complaint, Defendant argues the approximately 302 statements of fact that do not relate to Count 2 are not in compliance with the Local Rules of Civil Procedure. *See Id*. at pp. 2-3 (identifying statements of fact numbers 1-8, 12-190, and 218-341 as not related to Count 2).

Plaintiffs, also pursuant to L.R.Civ. 7.2(m), object to evidence that Defendant submitted in his response to their statement of facts. (Doc. 254.) Plaintiffs argue that Defendant improperly included material for the first time in his reply in violation of L.R.Civ. 56.1(b). *Id*. at pp. 2-3.

Local Rule of Civil Procedure 56.1(a) and (b) provides:

> Any party filing a motion for summary judgment must file a statement, separate from the motion and memorandum of law, setting forth each material fact on which the party relies in support of the motion. The separate statement should include only those facts that the Court needs to decide the motion. Other undisputed facts (such as those providing background about the action or the parties) may be included in the memorandum of law, but should not be included in the separate statement of facts.
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> Any party opposing a motion for summary judgment must file a statement, separate from that party's memorandum of law, setting forth: (1) for each paragraph of the moving party's separate statement of facts, a correspondingly numbered paragraph indicating whether the party disputes the statement of fact set forth in that paragraph and reference to the specific

> admissible portion of the record supporting that party's position if the fact is disputed; and (2) any additional facts that establish a genuine issue of material fact or otherwise preclude judgment in favor of the moving party.[…] No reply statement of facts may be filed.

See L.R.Civ. 56.1(a) and (b). "[T]he rule against introducing new facts on reply is not a new one in this district or in the Ninth Circuit." *Sunburst Minerals, LLC v. Emerald Copper Corp*., 300 F.Supp.3d 1056, 1060 (D. Ariz. 2018). (Citations omitted.) "The rule exists to guard against unfairness and surprise." *Id*. "It would be unfair, and reversible error, for a district court to consider new evidence offer in reply without affording the non-moving party an opportunity to respond." *Id*. (Citation omitted.) While Rule 56(c) allows the moving party to object in reply to the non-moving party's evidence, "the rule does not authorize that party to rely on new evidence in so doing." *Id*.

It is true, as argued by Defendant, that Plaintiffs submitted a voluminous number of "facts" many of which are not statements of material fact. For example, Plaintiffs recite statutory provisions, federal regulations and state administrative code sections as facts. *See, e.g*., Doc. 239 at ¶¶ 1-5, 9-16. Plaintiffs also reference statements that do not apply to their claims but apply to other AHCCCS recipients. This Court acknowledges that the pending motions were filed before the District Court entered its order denying Plaintiffs' renewed motion for class certification and that Plaintiffs' opposition was prepared with class certification in mind. *See, e.g*., Doc. 254 at p. 5 (referring to putative class members). However, since class certification was denied the statements of fact that Plaintiffs rely upon for their arguments regarding other AHCCCS beneficiaries are not relevant. This Court will analyze the merits of the motions with respect to the two Plaintiffs disregarding irrelevant statements of fact.

It is also true, as argued by Plaintiffs, that Defendant submitted additional facts in his reply that were not presented until his reply. For example, Defendant states for the first time in reply that System Request (SR) 392 went into effect. SR 392 is an "enhancement" to the HEAPlus system that will reduce or prevent immigrant recertification errors. (Doc. 239 at p. 50, ¶¶ 323-324.) While both parties discussed SR 392 in their briefs and separate

statements of fact, s*ee, e.g*., Doc. 239 at pp. 50-53, ¶¶ 323-341, the fact that SR 392 went into effect was not raised until Defendant's reply. Defendant's motion was filed prior to the date that SR 392 went into effect and the implementation of SR 392 could not have been mentioned.

Because both parties discussed SR 392 this Court will consider the fact that SR 392 has gone into effect in issuing is recommendation to the District Court. Plaintiffs have advocated for SR 392's implementation throughout this litigation. As such, this Court determines that they are not unfairly surprised by Defendant's mention of its implementation of SR 392 in his reply brief.

Legal Standards

Summary judgment is appropriate "when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact." *Zetwick v. County of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017). *See also* Fed. R. Civ. P. 56. A disputed fact is material if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The inquiry is whether there exists a material fact that requires the trier of cact to resolve the differing versions of the truth at trial. *Id*. at 248-49. This means that "where evidence is genuinely disputed on a particular issue - such as by conflicting testimony – that issue is inappropriate for resolution on summary judgment." *Zetwisk*, 850 F.3d at 441. (Citation omitted.)

Plaintiffs seek only declaratory and injunctive relief. (Doc. 1 at pp. 18-19, ¶¶ B1, B2, C1, C2.) The United States Supreme Court held:

> The purpose of an injunction is to prevent future violations, […] and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger or recurrent violation, something more than the mere possibility which serves to keep the case alive. The [court's] decision is based on all the circumstances; [its] discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the discontinuance and, in some cases, the character of past violations.

United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953). The District Court previously

recognized:

> 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.' *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). If the same personal interest required for standing does not continue throughout the action, the case is moot. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000) (citing *Arizonans for Official English*, 520 U.S. at 68 n.22).

(Doc. 85 at p. 11.)

The Motions

Count 1: Plaintiffs allege that Defendant's transfer of Arizona immigrants from Full MA benefits to FES benefits at recertification is a violation of 42 U.S.C. § 1396a(a)(8). (Doc. 1 at pp. 17-18, ¶ 2.) Section 1396a(a)(8), Title 42, United States Code, provides:

> [A]l individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals[.]

See 42 U.S.C. § 1396a(a)(8). Defendant moves for summary judgment based on the merits of Count 1 and mootness. The Court begins with the merits.

Merits

Defendant argues that he does not have a policy or practice of processing immigrant AHCCCS renewal applications that violates federal law. (Doc. 228 at p. 2.) He argues there is no evidence that any mistakes made by Department of Economic Security (DES) eligibility workers (EWs) in the eligibility process are committed pursuant to a policy or practice. *Id*. at p. 6. He contends that HEAPlus is not defective and that only EWs can reduce a recipient's benefits. *Id*. at pp. 6-7. Defendant lays out that he has taken several steps to prevent EW errors during recertifiction, including a fix to the HEAPlus system in November 2015, additional training for EWs and a triple-level review of eligibility determinations. *Id*. at pp. 7-8.

Plaintiffs argue the HEAPlus computer system causes, directly or indirectly,

eligibility errors. Plaintiffs argue that "auto-job" and "AAA" cases establish that Defendant's argument that the HEAPlus computer cannot automatically reduce a recipient's benefits is not true. (Doc. 246 at p. 22.) They argue HEAPlus is causing errors because it requests immigration status on each renewal from the federal "hub" computers (Systematic Alien Verification for Entitlements ("SAVE") and Verify Lawful Presence ("VLP")) in violation of AHCCCS policy. *Id*. at p. 23. They argue the HEAPlus system is faulty because it does not ask an EW about exemptions to the 5-year bar, does not lock down an immigration status and is not programmed to analyze whether a recipient has multiple qualifying statuses. *Id*. at pp. 25-28.

Policy or Practice of Denying Medical Services with Reasonable Promptness: Plaintiffs cite their statement of fact numbers ¶¶ 129-190 and 294-297 in support of their argument that they have had their benefits reduced on multiple occasions and have been unable to obtain medical services. *Id*. at p. 18. The relevant portions provide:

In April 2016, Plaintiff Sanchez Haro received notice that her medical assistance eligibility was going to change from Full MA to FES effective May 18, 2016. *Id*. at ¶ 134 and Ex. 27. Plaintiff Sanchez Haro states that "[a]fter her benefits were cut off, [she] was not able to pay for her medications…," she was not able to get her medications for "over 2 weeks" and she "stopped going to her doctor's appointments [] from April 2016 through July 2016[.]" *Id*. at ¶¶ 139, 140 and Ex. 28 at ¶ 19. In August 2016, Plaintiff Sanchez Haro's benefits were restored to Full MA. *Id*. at ¶ 149.

On March 28, 2017, AHCCCS sent Plaintiff Sanchez Haro notice that her Full MA benefits were going to be reduced to FES effective May 3, 2017. *Id*. at ¶ 153. On April 20, 2017, her benefits were restored to Full MA. (Doc. 242-4 at p. 164.) In a declaration, Plaintiff Sanchez Haro states, "[d]uring May my pharmacy would not fill my prescriptions." Doc. 239 at ¶ 160. Specifically, on May 9, 2017, when Plaintiffs' counsel learned that Plaintiff Sanchez Haro could not get a prescription filled counsel sent an email to Defendant's counsel. *Id*. at ¶ 161. Approximately two (2) hours after receiving that email, Defendant's counsel sent an email to Plaintiffs' counsel stating the "problem" was

fixed. (Doc. 239 at ¶ 161.)

The parties agree the last error regarding Plaintiff Sanchez Haro's benefits occurred in October 2017. (Doc. 229 at ¶ 27; Doc. 239 at p. 75, ¶ 27.) On this occasion, Plaintiff Sanchez Haro received a notice dated October 12, 2017 advising her that she was approved for FES starting on November 1, 2017. (Doc. 424-4 at p. 43.) There is no evidence in the record that Plaintiff Sanchez Haro failed to receive any medical services because of this October 2017 forthcoming benefit reduction.

With respect to Plaintiff Darjee, her benefits were reduced from Full MA to FES in June 2015 and subsequently restored. On June 8, 2016, Plaintiff Darjee's benefits were reduced again. (Doc. 239 at ¶ 295.) Plaintiff Darjee's eligibility was restored to Full MA on July 19, 2016, before this lawsuit was filed. (Doc. 229 at ¶ 20.)

From above sequence of events Plaintiffs argue that:

> It is more than reasonable to infer that, absent the intervention of Plaintiffs' counsel the benefits would have been cut off for even longer. Thus, it is genuinely in disputed that: 'neither Plaintiffs' assistance was terminated,' […]; '[t]heir benefits have not been reduced since,' 2016; […] and that errors in Sanchez Haro's cases 'were quickly corrected and her eligibility for full benefits continued unaffected[.]'

(Doc. 246 at p. 18.) In its order denying Plaintiffs' renewed motion for class certification the District Court stated:

> Although the Court declines to make a final determination of what constitutes 'reasonable promptness' at the class certification stage, it stretches the bounds of common sense for Plaintiffs to claim that notification of an erroneous benefit determination that in some cases was later corrected, without more, necessarily constitutes failure to furnish benefits with reasonable promptness.

(Doc. 256 at p. 17.) "The law does not require that a state Medicaid agency implement a flawless program." *Unan v. Lyon*, 853 F.3d 279, 288 (6th Cir. 2017) (citing *Frazier v. Gilbert*, 300 F.3d 530, 544 (5th Cir. 2002) ("Perfect compliance with such a complex set of requirements is practically impossible, and we will not infer congressional intent that a state achieve the impossible"), *rev'd on other grounds*, *Frew v. Hawkins*, 540 U.S. 431,

436 (2004)). As laid out below, this Court determines that Plaintiffs have not put forth evidence that creates a genuine issue of material fact on the issue of whether they were denied medical services with reasonable promptness based upon a policy or practice of Defendant.

There is no evidence that Plaintiff Sanchez Haro did not receive any medical services after her receipt of the October 12, 2017 notice of forthcoming benefit reduction. It is undisputed that the April 2017 benefit reduction decision was corrected before its effective date of May 3, 2017. Plaintiff Sanchez Haro states that "during May my pharmacy would not fill my prescriptions." Defendant has presented evidence that Plaintiff Sanchez Haro's had one issue at pharmacy during May 2017. The issue was resolved in approximately one or two hours. Plaintiff Sanchez Haro does not rebut this sequence of events but argues that it is for a jury to decide whether a one or two hour wait to receive a prescription is a denial of reasonably prompt medical services. Plaintiffs have not cited any case, and this Court is not aware of any case, which holds that a one or two hour wait at a pharmacy is a denial of reasonably prompt medical services. This Court determines that there is no genuine dispute of material fact concerning Plaintiff Sanchez Haro's April 2017 benefit decision.

The facts concerning Plaintiff Darjee's receipt of medical services is the same as it was at the time the Complaint was filed. The evidence is that Plaintiff Darjee's benefits were reduced to FES once in 2015 and once in 2016 and promptly restored. The first instance regarding Plaintiff Sanchez Haro's benefits also occurred in 2016 prior to the filing of the Complaint. Due to the nature of relief sought by Plaintiffs, these past instances are insufficient to create a genuine issue of fact for trial. *See American Cargo Transport, Inc. v. U.S.*, 625 F.3d 1179, 1179-80 (9th Cir. 2010) (injunctive relief as to the past cannot be granted). Plaintiffs have failed to establish that there is a genuine issue of material fact regarding the two occasions in 2017 on which Plaintiff Sanchez Haro received a notice of forthcoming benefit reduction. Plaintiff Darjee has neither received a notice of forthcoming benefit reduction nor experienced a benefit reduction since 2016.

This Court rejects the argument that harm occurs immediately upon receipt of notice of a forthcoming benefit reduction. Plaintiffs state:

> Ms. Sanchez Haro, for instance, immediately stopped attending doctors' appointments following the receipt of her April 2016 letter, even though her benefits were not scheduled to end until May 1. It is a more than reasonable inference that many of the hundreds of immigrants who have received an inaccurate notice have likewise delayed seeking care and medications or skipped appointments – even if their benefits were eventually corrected.

(Doc. 246 at p. 10 (citing SOF ¶ 140).) First, the action precluded by the reasonable promptness statute is not the sending of a notice of a forthcoming benefit reduction that is superseded. *See* Doc. 256 at p. 17 ("it stretches the bounds of common sense for Plaintiffs to claim that notification of an erroneous benefit determination that in some cases was later corrected, without more, necessarily constitutes failure to furnish benefits with reasonable promptness"). *See also*, *Bushie v. Stenocord Corp*., 460 F.2d 116, 119 (9th Cir. 1972) ("The showing of a 'genuine issue for trial' is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law.")

Second, Plaintiffs have failed to establish the relevancy of the behavior of other immigrants to the Plaintiffs' claims. Nor have they produced any factual basis for their statement that "[i]t is a more than reasonable inference" that immigrants who received an inaccurate notice delayed seeking care because of an incorrect, although timely corrected, notice of proposed benefit reduction. "Inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn." *Ameripride Services, Inc. v. Valley Industrial Services, Inc.*, 2016 WL 3753267, at *4 (E.D. Cal. 2016) (citing *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd* 810 F.2d 898 (9th Cir. 1987).)

Plaintiffs argue that 42 C.F.R. 435.930 requires Defendant to "(a) furnish Medicaid promptly to all 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." 42 C.F.R. 435.930. Plaintiffs rely upon *Lewis v. New Mexico Dep't of Health*, 94 F.Supp.2d 1217, 1235 (D.N.M. 2000) and *Crawley v. Ahmed*, 2009 WL 1384147 (E.D. Mich. 2009). (Doc. 246 at p. 17.) Defendant argues that this regulation is not violated by erroneous eligibility determinations that are timely corrected. (Doc. 250 at p. 4.) This Court agrees with Defendant and is not persuaded by the two cases relied upon by Plaintiffs.

In *Lewis*, the District Court for the District of New Mexico held that the plaintiff stated a claim under the reasonable promptness statute explaining, "though it may be difficult to determine exactly what is meant by 'reasonable promptness' in the provision of Medicaid services, the facts alleged in this case – remaining on a waiting list for two to seven years – are egregious enough that the reasonableness requirement does not strain judicial competence." 94 F.Supp.2d at 1235. *Lewis* referred to 42 C.F.R. 435.930(a) in the context of other regulations in the Medicaid scheme and recognized that reasonableness is a range. *Id*. In this case, there is no evidence of Plaintiffs being placed on a waiting list or that medical services were not provided for years.

In *Crawley v. Ahmed*, 2009 WL 1384147, at *20 (E.D. Mich. 2009), the district court determined that §§ 1396a(a)(8) and 1396a(a)(10), Title 42, U.S.C., provided for a private right of action. That is not at issue in this case. *Crawley* concluded that 42 C.F.R. 435.930 "supplement[ed] the broad mandate of 1396a(a)(8)" by defining the duration and scope of the promised medical assistance "by requiring continued aid and pretermination reviews." *Id*. That court did not hold that reasonable promptness provision of Medicaid is violated by erroneous eligibility determinations that are promptly corrected.

None of Plaintiffs' other arguments convince this Court that there is a genuine issue of material fact for trial on Count 1.

"Auto-job" and "AAA" cases: Plaintiffs argue that "AAA" and "auto-job" designations reflected on a DES log that shows a recipient's eligibility to have changed from Full MA to FES establish that the HEAPlus computer can automatically reduce eligibility. Defendant points out that Dareth Cox, the program manager at AHCCCS,

testified that these entries are for persons who were give 90-days of conditional full eligibility to provide evidence pursuant to 42 U.S.C. § 1320b-7(d)(4)(A). (Doc. 250 at p. 8.) Plaintiffs are not among these AHCCCS recipients.

Multiple Immigration Statuses: Plaintiffs argue that AHCCCS has failed to develop policies and practices that address individuals who have held multiple immigration statuses like Plaintiff Sanchez Haro. (Doc. 246 at p. 28.) They argue that this failure "compounds" the issue with HEAPlus. *Id*. Defendant argues it is the rare person with more than one qualifying status and is an example of why no reductions are made except by an EW after review of a recipient's file. (Doc. 250 at p. 11.) This Court determines that AHCCCS policies, or lack thereof, concerning individuals who have multiple immigration statuses does not create a genuine issue of material fact for trial on Plaintiffs' reasonable promptness claim. Despite the admitted errors in processing Plaintiff Sanchez Haro's renewal applications there is no genuine issue of material fact on Count 1.

Requesting Immigration Status from Federal Hubs: Plaintiffs argue that a fact-finder could conclude that HEAPlus is causing errors because it requests immigration status on each renewal from federal SAVE and VLP hub computers. Plaintiffs argue that requesting immigration status on each renewal from the SAVE and VLP hubs is a violation of AHCCCS policy. Defendant argues that it is not a violation of AHCCCS policy for HEAPlus to request information from the federal hubs.

The plain language of the AHCCCS policy does not prohibit HEAPlus from requesting information from the SAVE and VLP hubs. (Doc. 242-3 at pp. 7-9.) Moreover, it is undisputed that the ultimate decision to reduce a recipient's benefits lies with an EW after review of the recipient's entire file regardless of the information obtained from a hub check. This Court determines that the way HEAPlus functions with respect to federal hub checks does not create a genuine issue for trial on Count 1.

Questioning Immigration Status: Plaintiffs argue that questioning an AHCCCS recipient on his or her immigration status is sometimes unnecessary and presents an opportunity for an EW to make a wrong eligibility determination. The record does not

support an inference that Plaintiffs were questioned by an EW in the processing of their renewal applications. This argument is irrelevant to Plaintiffs' claim in Count 1.

Lock Down of Immigration Information: Plaintiffs argue that HEAPlus is faulty because it is not programmed to lock down immigration status once it has been determined. (Doc. 246 at pp. 25-26.) Defendant argues that because HEAPlus is programmed to force an EW to determine a recipient's eligibility status does not make the HEAPLus system faulty. (Doc. 250 at p. 10.) Plaintiffs arguments concerning what it believes the HEAPlus computer system should do does not create a genuine issue of material fact on Count 1.

In sum, Plaintiffs have failed to put forth evidence that creates a genuine issue of material fact for trial on the claim Defendant has a policy or practice that violates the reasonable promptness provision of Medicaid. This Court **recommends** that the District Court **grant** Defendant's motion for summary judgment on Count 1.

Mootness

Defendant also argues he is entitled to summary judgment on Count 1 because Plaintiffs' claims are moot. He argues the risk of future reductions caused by innocent mistake no longer exists because of measures that are currently in place along with the formal enactment of SR 392. As part of the 2015 fix, the HEAPlus computer was reprogrammed so that only an EW can reduce a person's benefits when the EW "dispositions" the case. (Doc. 250 at p. 13.) Defendant states that EWs have received additional training; DES created a triple-review process for every case in which an AHCCCS recipient may be reduced from Full MA to FES; and DES's most experienced EW, Deborah Bailey, reviews all reductions to FES. *Id*. Defendant argues Plaintiffs have not explained how they might be erroneously reduced in the future nor have they provided evidence that Ms. Bailey is not handling their files or that she does not know that they are both eligible for Full MA. *Id*. at p. 14. Defendant states:

> [i]t is inconceivable that the special unit and Ms. Bailey would uphold a reduction. Thus, there is no 'reasonable chance of the dispute arising again between the government and the same plaintiff.'

Id. at p. 15. (Citation omitted.) Plaintiffs' argument that they will continue to be screened

for FES benefits is, according to Defendant, without merit because screening is merely a prediction. (Doc. 250 at p. 15.) He also argues no exception to the mootness doctrine applies. *Id*. at pp. 16-19.

Plaintiffs argue that their case is not moot for three reasons. First, they argue Defendant's remedial efforts have been unsuccessful claiming that they have had their benefits reduced "long after [Defendant's] purported fixes." (Doc. 246 at p. 4.) Second, they argue Defendant's voluntary efforts do not moot their case. *Id*. at p. 11-12. Finally, they argue Defendant's conduct amounts to "picking off" to evade judicial review, a recognized exception to mootness. *Id*. at pp. 12-15.

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). Generally, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e*., does not make a case moot." *Id*. (quoting *W. T. Grant Co*., 345 U.S. at 632). "But jurisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that 'there is no reasonable expectation…' that the alleged violation will recur […] and, (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id*. (Citations omitted.) "When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact or law." *Id*.

"The burden of demonstrating mootness 'is a heavy one.' *Id*. (quoting *W. T. Grant Co.*, 345 U.S. at 632-33). The party asserting mootness "must show that it is 'absolutely clear' that the allegedly wrongful behavior will not recur if the lawsuit is dismissed.'" *Rosemere Neighborhood Ass'n v. United States Environmental Protection Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009) (Citation omitted.) "The government's change of policy presents a special circumstance in the world of mootness…[courts] presume the government is acting in good faith." *American Cargo Transport, Inc.*, 625 F.3d at 1180.

Reasonable Expectation of Recurrence: Defendant points out that since AHCCCS restored Full MA to both Plaintiffs in 2016 their benefits have not been reduced since. Defendant represents, and Plaintiffs do not dispute, that Deborah Bailey reviews Plaintiffs' files monthly to be sure that Plaintiffs maintain their Full MA. (Doc. 229 at p. 11, ¶ 33; Doc. 239, p. 79, ¶ 33.) Defendant also argues that because SR 392 became effective on June 28, 2018 if an EW is about to reduce a recipient's benefits, the EW receives a pop-up warning on his or her computer screen. If the EW continues to believe that FES is the appropriate disposition, the computer transfers the file automatically to a special DES unit of eligibility experts that is "backed up" by Ms. Bailey. On one hand, Plaintiffs appear to concede that the changes implemented by SR 392 likely moot their claims. Plaintiffs' state, "[u]ntil the [] Defendants (*sic*) have finished the process of financing and implementing SR 392, and the changes are in effect and actually resulting in correct renewal decisions, Defendant cannot meet [his burden of establishing mootness]." (Doc. 246 at p. 12.) However, Plaintiffs also contend that "there is no guarantee that SR 392 will solve the problem." (Doc. 239 at p. 51, ¶ 334.)

Defendant's implementation of SR 392 and its formation of a specialized team of EWs that review potential FES determinations that is overseen by Ms. Bailey persuade this Court to conclude that Defendant has met its burden of establishing that there is no reasonable expectation of recurrence considering Defendant's remedial efforts. Plaintiffs argue that Defendant will continue to make incorrect decisions claiming that HEAPlus will continue to screen Plaintiffs as eligible for FES. *Id.* at p. 52, ¶ 334. Plaintiffs' argument misses the point. Screening an applicant as eligible for FES benefits does not itself cause a benefit reduction. It is an EW that decides to reduce an AHCCCS recipient's benefits.

Considering Defendant's implementation of SR 392 and a specialized unit of EWs overseen by Ms. Bailey this Court determines that neither Plaintiff has a reasonable expectation of suffering the same allegedly unlawful conduct again. In fact, the evidence is that Plaintiff Darjee has not experienced any proposed benefit reduction since prior to the filing of the Complaint in 2016 and that Plaintiff Sanchez Haro has not experienced a

proposed benefit reduction since October 12, 2017.

The cases cited by Plaintiffs fail to convince this Court otherwise. For instance, in *Am. Civil Liberties Union of Nevada v. Lomax*, the court declined to conclude the case was moot because "[t]throughout th[e] litigation, the Secretary has expressed a clear desire to enforce the 13 Countries Rule insisting that the rule passes constitutional muster and furthers the interest of Nevada." 471 F.3d 1010, 1018 (9th Cir. 2006). Here, while maintaining that he does not have a policy of unlawfully reducing benefits to eligible recipients, Defendant has engaged in efforts to prevent EW errors in renewal applications by instituting additional training for EWs, creating a specialized unit of EWs headed by Ms. Bailey, and formally implementing SR 392 - a change that Plaintiffs have advocated for in this litigation. Plaintiffs admit that "[t]he changes identified in SR 392 could reduce or prevent emergency only benefit errors." *See* Doc. 239 at p. 51, ¶ 328.

In *Barry v. Lyon*, 834 F.3d 706 (6th Cir. 2016), the United States Court of Appeals for the Sixth Circuit affirmed the district court's determination the case was not moot based on the past termination of plaintiff's Supplemental Nutritional Assistance Program benefits. There, unlike in this case, there was no evidence of remedial efforts by the defendant state agency. *Id*. at 715. On the other hand, in *Los Angeles County v. Davis*, *supra*, the Court concluded the case was mooted during litigation where "there [was] no reasonable expectation that petitioner will use an unvalidated civil service examination for the purposes contemplated in 1972." 440 U.S. at 631-632. The Supreme Court determined the conditions that gave rise to the action, "are no longer present, and unlikely to recur because, since the commencement of […] litigation, petitioners have succeeded in instituting an efficient and nonrandom method of screening job applicants and increasing minority representation in the Fire Department." *Id*. at 632.

In sum, the Court determines that Plaintiffs do not have a reasonable expectation of being subjected to conduct that they contend violates the reasonable promptness provision of Medicaid when they renew their AHCCCS benefits.

The "Picking Off" Exception: The 'picking off' exception was developed to prevent

defendants from strategically avoiding litigation by settling or buying off individual named plaintiffs in way that would be contrary to sound judicial administration. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Plaintiffs argue that Defendant's remedial efforts amount to impermissible picking off to evade judicial review. (Doc. 246 at pp. 12-15.) Plaintiffs argue that while "Defendant claims to have implemented a systemic fix … the relief granted to the individual named plaintiffs was granted on an *ad hoc* basis." *Id*. at p. 14 (citing *Unan*, 853 F.3d at 286 n.4.) Plaintiffs argue that they and one putative class member received special attention because their files were placed in a "locked" area and this special attention was not available to other AHCCCS recipients. *Id*. at p. 13. Defendant argues the picking off exception to mootness does not apply because Plaintiffs' claims were not mooted on the eve of class certification. (Doc. 250 at p. 18.) He also states that since 2015 he has been correcting and reducing errors in eligibility determinations. *Id*.

Plaintiffs' request for class certification has been denied twice. Defendant has formally implemented SR 392 and other measures. System Request 392 is not an *ad hoc* review process. Rather, System Request 392 represents formal changes to HEAPlus that Defendant has been working to implement since 2016. *See, e.g.*, Doc. 239 at ¶¶ 323-324, 341. This Court determines that the picking off exception does not apply.

This Court **recommends** that the District Court **grant** summary judgment in Defendant's favor on Count 1 on mootness grounds.

Count 2 – Notice

Plaintiff Sanchez Haro alleges the notices AHCCCS sent advising her a forthcoming benefit reduction failed to adequately inform her of the reason for the determination of FES eligibility and failed to explain what FES services are in violation of the due process clause and the Medicaid Act. (Doc. 1 at ¶¶ 53-54.) In its Order denying Plaintiffs' request for a preliminary injunction the District Court held:

> Plaintiffs claim their benefit reductions are attributable to Defendant's unlawful policies and the programming of the HEAPlus computer system. Since they have not shown a likelihood of succeeding on either of those theories, they have not shown it is likely their benefits will be reduced.

> Receipt of the notices is inextricably tied to the reduction of benefits; therefore, Plaintiffs also have not shown they are likely to receive the reduction notices again.

(Doc. 86 at p. 18.) As discussed above, this Court determines that Plaintiffs' claim Count 1 is moot. As the District Court determined, because receipt of notice is inextricably tied to the reduction of benefits, this Court determines that Plaintiff Sanchez Haro's claim in Count 2 is moot. Plaintiff Darjee's claim in Count 2 was dismissed by the District Court earlier in this litigation. *Id*. at p. 20.

Plaintiff Sanchez Haro argues her case is analogous to *Barry v. Lyon*, *supra*, and that since benefit reductions remain likely her claim in Count 2 is not moot. (Doc. 254 at p. 5.) This Court has determined that *Barry v. Lyon* is distinguishable and disagrees with Plaintiff Sanchez Haro that benefit reductions are likely to recur. Consequently, any issue over the content of the notice is also moot.

This Court **recommends** that the District Court **grant** summary judgment in Defendant's favor on Count 2 on mootness grounds.

Merits

Both parties argue they are entitled to judgment in their favor on the merits of Count 2. Defendant argues that he is entitled to summary judgment because the notice AHCCCS sends out (the notice attached as Exhibit P to his statement of facts) complies with due process and the Medicaid Act. (Doc. 228 at pp. 12-13; Doc. 229-16.) Plaintiff Sanchez Haro argues Defendant has failed to produce evidence that she was sent the notice that he attached at Exhibit P. (Doc. 246 at p. 31.) She argues that she was sent the notices that are attached as Exhibits 27, 31 and 36 to Plaintiffs' statement of facts. *Id*. She argues this factual dispute defeats Defendant's request for summary judgment. She argues is entitled to summary judgment because the notices that she did receive fail to comply with due process. *Id*. at pp. 32-35.

There is no evidence that Plaintiff Sanchez Haro received the notice that Defendant attached as Exhibit P to his statement of facts. This Court declines to make a recommendation to the District Court on whether this notice complies with due process

and the Medicaid statutes as a matter of law. It is undisputed that Plaintiff Sanchez Haro received the notices attached as Exhibits 27, 31 and 36 to Plaintiffs' statement of facts. (Doc. 242-3 at pp. 43, 84; Doc. 242-4 at p. 43.) The notices are substantially similar. *Id*. The last notice sent to Plaintiff Sanchez Haro is dated October 12, 2017 and states: "We will STOP full medical services and START Federal Emergency Services on 11/01/2017[.] We took this action because your immigration status does not let you get full medical services." (Doc. 242-4 at p. 4.)

> The notice states:
>
> Federal Emergency Services for:
> …
> An emergency is:
>
> 1. a sudden medical problem; AND
> 2. may cause death or serious injury if you are not treated right away.

Id. at p. 45. (Emphasis in original.) The notice continues:

> You have the right to ask for a Fair Hearing if you do not agree with our decision. When you ask for a Fair Hearing you have the right to:
> …
> - Review, obtain, or a copy of the case record necessary for proper presentation of your case.

Id. at p. 51. The notice explains, "[i]f your benefits are stopping or your medical premium is increasing and you want to continue benefits or pay the lower premium, then your request must be received by 11/01/2017." *Id*. (Emphasis in original.)

Earlier in the litigation, the District Court recognized that the language of the notice:

> supports an inference that 'your immigration statues does not let you get full medical services' is not a 'clear statement of the specific reason' for reducing Sanchez Haro's benefits. 42 C.F.R § 431.210(b). As Plaintiffs point out, the proffered reason could have a number of meanings, e.g., Sanchez Haro's immigration status changed unbeknownst to her, or Defendant changed which immigration statuses are eligible for full benefits.

(Doc. 85 at p. 19.) Plaintiff Sanchez Haro argues the notice fails to comply with due process and the Medicaid Act because the notice failed to identify the immigration status AHCCCS

relied on to evaluate her eligibility for benefits. (Doc. 246 at pp. 32-33.) She argues the notice fails to provide sufficient information for a recipient to test the accuracy of the decision to reduce benefits and, as such, she is unable to determine if AHCCCS made a mistake. Defendant does little to argue that the notices Plaintiff Sanchez Haro received comply with due process and the Medicaid Act and focuses his argument on the revised notice (Exhibit P) which Plaintiff Sanchez Haro did not receive.

"In the context of the denial of public benefits, due process requires that the individual receive 'timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.'" *Unan v. Lyon*, 853 F.3d 279, 291 (6th Cir. 2017) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 267-69, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)). "Due process, however, 'is flexible and calls for such procedural protections as the particular situation demands.'" *Id*. (quoting *Rosen v. Goetz*, 410 F.3d 919, 928 (6th Cir. 2005) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

"When due process considerations are at stake, 'the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.'" *Rodriguez By and Through Corella v. Chen*, 985 F. Supp. 1189, 1194 (quoting *Matthews*, 424 U.S. at 335, 96 S.Ct. at 893). "The purpose of notice is to 'clarify what the charges are in a manner adequate to apprise the individual of the basis for the government's proposed action.'" *Id*. (quoting *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S.Ct. 2963, 2978, 41 L.Ed.2d 935 (1974)). *See also, Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992) ("Due process requires notice that gives an agency's reason for its action in sufficient detail that the affected party can prepare a responsive defense.") The district court in *Rodriguez, supra*, recognized:

At stake are health benefits. *Goldberg* recognized that the State has an

> interest in seeing that benefits "not be erroneously terminated" or to correct "honest error or irritable misjudgment." *Goldberg*, 397 U.S. at 266, 90 S.Ct. at 1019. Thus, the State of Arizona has an interest in making correct eligibility determinations.

985 F.Supp. at 1195. The regulation at 42 C.F.R. 431.210 provides that notice of an adverse benefit determination by AHCCCS 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.

This Court determines the notices Plaintiff Sanchez Haro received do not comply with due process and the Medicaid Act. The one-line statement that "your immigration statues does not let you get full medical services" does not provide sufficient detail so that an affected party can prepare a responsive position. As pointed out by Plaintiff, AHCCCS represented in a September 9, 2016, declaration that "it is continually working to make its notices more helpful to customers." (Doc. 242-5 at p. 5.) Defendant represented that it will change language on the "hearings page to clarify that customers can ask for a copy of their entire file, removing language about appellants understating their rights before the signature section on the hearing request form" and "adding to the explanations of the reason or denial of full services and approval of FES, and updating the hearings page so information about premiums is excluded when not applicable." *Id*. at pp. 5-6. However, none of these changes were incorporated into the October 12, 2017 notice that Plaintiff Sanchez Haro received.

If the District Court does not accept this Court's recommendation that Plaintiff Sanchez Haro's claim in Count 2 is moot, this Court recommends that the District Court

grant summary judgment in favor of Plaintiff Sanchez Haro on Count 2 based upon the notices that she did receive.

Recommendation

This Court recommends that the District Count **grant** summary judgment in favor of Defendant on Count 1 and 2 and **deny** Plaintiff Sanchez Haro's request for summary judgment on Count 2.

Pursuant to Federal Rule of Civil Procedure 72(b)(2), any party may serve and file written objections within 14 days of being served with a copy of the Report and Recommendation. A party may respond to the other party's objections within fourteen days. No reply brief shall be filed on objections unless leave is granted by the district court. If objections are not timely filed, they may be deemed waived. If objections are filed, the parties should use the following case number: **16-CV-00489-RM**.

Dated this 7th day of February, 2019.

Honorable D. Thomas Ferraro
United States Magistrate Judge