IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

JACQUELYN A. DEARMORE,)
)
Plaintiff)
v.)
)
CINDY GILLESPIE, Director, Arkansas)
Department of Human Services, in)
her official and individual capacity)
)
RICHARD ROSEN, Managing Attorney,)
Office of Chief Counsel, Arkansas)
Department of Human Services,)
in his official and individual capacity,)
)
DAVID STERLING, Chief Counsel,)
Arkansas Department of Human Services,)
in his official and individual capacity,)
)
MARK WHITE, Chief of Staff to)
Gillespie and Chief Legislative and)
Intergovernmental Affairs Officer,)
Arkansas Department of Human)
Services, in his official and individual)
capacity,)
)
JOHN DOE, in their official and)
Individual capacity,)
)
Defendants)

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
FEB 24 2020
JAMES W. McCORMACK, CLERK
By: DEP CLERK

Case No. 4:20CV188-LPR

This case assigned to District Judge Rudofsky
and to Magistrate Judge Kearney

COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, and DAMAGES

Plaintiff Jacquelyn Dearmore states the following in support of her complaint for declaratory judgment, injunctive relief, and damages against Cindy Gillespie, Richard Rosen, David W. Sterling, Mark White, and John Doe in their official and individual capacities:

I. PRELIMINARY STATEMENT

1. Jacquelyn Dearmore is a 71 year-old woman with multiple disabilities whose continued residence in the community rather than in an institution depends on services provided under the ARChoices Medicaid program. Through ARChoices, individuals who are over 65 or have disabilities receive in-home care, access to the full range of state plan Medicaid benefits, and financial support to pay Medicare premiums. Although Ms. Dearmore has been on the program for about eight years and has experienced no medical improvement, the Arkansas Department of Human Services (ADHS) cut the amount of care she receives by nearly 30%.

2. Clearly established constitutional due process principles require that a Medicaid beneficiary receive adequate written notice of the reasons for any adverse action and have the opportunity for an evidentiary hearing before services are reduced. Such requirements are similarly enshrined in the Medicaid Act and accompanying federal and state regulations that specify the requirements of written notice and allow a beneficiary to continue services at pre-reduction levels pending the outcome of an administrative hearing. Providing beneficiaries the full process due to them is a fundamental obligation and function of ADHS.

3. ADHS did not send Ms. Dearmore a written notice that identified that a reduction in services was taking place or explained the reasons for the reduction. Moreover, although Ms. Dearmore requested an administrative hearing and requested that her services be maintained pending the outcome, ADHS nevertheless reduced her services. As a result, she did not receive the in-home care she needed, forcing her to skip meals, sit in urine-soaked clothing, forego bathing, miss medical appointments, and experience increased depression.

4. For over four years, ADHS and the named defendants have perpetuated the agency's systematic failure to provide proper written notice and continue the benefits of people

who timely appeal and have refused to take corrective action that would have prevented the present harm to Ms. Dearmore. Accordingly, Ms. Dearmore asks that the Court order Defendant Gillespie in her official capacity to remedy the illegal practices and seeks monetary damages from all named defendants in their individual capacities.

II. JURISDICTION AND VENUE

5. This action arises under 42 U.S.C. § 1983 and the Due Process Clause of Amend. XIV of the United States Constitution. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3) and (4).

6. This Court has jurisdiction to issue declaratory relief and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. Pro. 65.

7. The venue of this action is appropriately in this judicial district and division pursuant to 28 U.S.C. § 1391(b), as ADHS and the named defendants in their official capacities are headquartered in Little Rock and, on information and belief, the named defendants in their individual capacities reside in Little Rock.

III. PARTIES

8. Ms. Dearmore is a resident of Marion County, Arkansas. For about eight years, she has been eligible for the ARChoices Medicaid program. Through ARChoices, she receives in-home care provided by a care aide, mental health services, coverage of her monthly Medicare premium, and other services. She resides and receives mail at 508 W. 6th St. #8, Yellville, Arkansas, 72687.

9. Cindy Gillespie is the director of ADHS, the "single State agency" designated to administer or supervise the administration of the Medicaid program, as established in Arkansas through the State Plan submitted to and approved by the federal Centers for Medicare and

Medicaid Services. Ms. Gillespie is being sued in her official and individual capacities. Her office is located at Donaghey Plaza, 7th and Main Streets, Little Rock, Arkansas, 72201. Her mailing address in her official capacity is P.O. Box 1437, S201, Little Rock, Arkansas, 72203. On information and belief, she is a resident of Pulaski County, Arkansas.

10. Richard Rosen is the managing attorney of the General Counsel Section of ADHS's Office of Chief Counsel. His office is located at Donaghey Plaza, 7th and Main Streets, Little Rock, Arkansas, 72201. His mailing address in his official capacity is P.O. Box 1437, S201, Little Rock, Arkansas, 72203. On information and belief, he is a resident of Pulaski County, Arkansas.

11. David Sterling is ADHS's Chief Counsel and director of ADHS's Office of Chief Counsel. His office is located at Donaghey Plaza, 7th and Main Streets, Little Rock, Arkansas, 72201. His mailing address in his official capacity is P.O. Box 1437, S201, Little Rock, Arkansas, 72203. On information and belief, he is a resident of Pulaski County, Arkansas.

12. Mark White is currently Chief of Staff to Gillespie and ADHS's Chief Legislative and Intergovernmental Affairs officer. Between February 2018 until October 2019, he was the deputy director of ADHS's Division of Aging, Adult, and Behavioral Health Services. His office is located at Donaghey Plaza, 7th and Main Streets, Little Rock, Arkansas, 72201. His mailing address in his official capacity is P.O. Box 1437, S201, Little Rock, Arkansas, 72203. On information and belief, he is a resident of Pulaski County, Arkansas.

IV. BACKGROUND ON THE ARCHOICES MEDICAID PROGRAM

13. Medicaid is a medical assistance program for individuals with limited economic resources created pursuant to federal statute and subject to federal oversight. *See generally* 42 U.S.C. § 1396. The federal Center for Medicaid and Medicare Services (CMS) is an agency

within the United States Department of Health and Human Services (HHS) charged with administration of the Medicaid program at the federal level.

14. States have the option to participate in Medicaid. Once a state elects to participate in Medicaid, it must adhere to the federal legal requirements provided by the Medicaid Act, rules promulgated by CMS, and the United States Constitution. Arkansas has elected to participate in Medicaid. *See* Ark. Code Ann. § 20-77-107. Arkansas has designated ADHS to be the "single State agency" to administer or supervise the administration of the state's Medicaid program. *See* 42 U.S.C. § 1396a(a)(5).

15. The Medicaid Act sets forth mandatory services that participating states must include in their Medicaid programs and optional services that participating states may include in their Medicaid programs. *See* 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a). States express the types and amounts of covered services, conditions for eligibility, and other related information in a "state plan."

16. The Medicaid Act allows states to deviate from provisions that apply to state plan services in certain situations prescribed by statute. Pursuant to specific statutes, a state requests that CMS waive provisions that the Medicaid Act deems to be waivable. Medicaid programs operated pursuant to such a waiver are called "waiver programs."

17. One type of "waiver" program allows states to operate Home and Community Based Services (HCBS) programs. *See* 42 U.S.C. § 1396n(c) (also known as Section 1915(c) of the Social Security Act). Such HCBS waiver programs are designed to provide community-based alternatives for individuals who would otherwise require institutionalization in a setting such as a nursing facility. *See id.* A state operating an HCBS waiver program must comply with all provisions of the Medicaid Act that were not waived and all other applicable constitutional

provisions, statutes, and regulations. The waived provisions of the Medicaid Act are not at issue in this lawsuit.

18. ADHS currently operates an HCBS waiver program under Section 1915(c) called ARChoices.[1] ARChoices allows the state to save money by providing community-based care to individuals who would otherwise be institutionalized. On average, the cost of providing community-based care to a waiver-qualified individual is less than the cost of providing comparable care in an institutional setting such as a nursing facility.

19. ARChoices provides an array of services for program beneficiaries, including, but not limited to, attendant care services, home-delivered meals, and a personal emergency response system. These are considered "waiver services."

20. In addition to the ARChoices-specific services, an ARChoices beneficiary receives the full range of state plan Medicaid services, including personal care services and coverage for mental health services, diagnostic tests, medical and incontinence supplies, and prescription medications. These are considered "non-waiver services."

21. In addition to the ARChoices-specific services and the full range of state plan Medicaid services, an ARChoices beneficiary who is simultaneously eligible for Medicare Part B receives full payment of Medicare Part B premiums, deductibles, and co-payments.[2] *See*

[1] Prior to 2016, ADHS operated two home- and community-based services programs for beneficiaries who had disabilities or were elderly: Alternatives for Adults with Physical Disabilities (AAPD) for people under 65 and Elder Choices for people 65 and older. Starting January 1, 2016, these programs were combined into ARChoices.

[2] An ARChoices beneficiary may be simultaneously eligible for Medicare Part B if they are age 65 or over or receive Social Security Disability Insurance benefits. Medicare Part B covers different services than Medicaid and has different terms of coverage. For example, Medicare Part B excludes attendant care and imposes deductibles and co-payments not found in Medicaid. An individual eligible for Medicare must pay premiums to receive Medicare Part B coverage unless she is eligible for premium assistance through ARChoices or other applicable programs.

generally 42 U.S.C. § 1395v(a); 42 C.F.R. § 431.625; Social Security Administration, Program Operation Manual System § HI 01001.205;[3] Arkansas Medicaid State Plan Attachment 3.2 (effective 1/1/89).

22. Attendant care involves assistance with activities of daily living, including eating, bathing, dressing, personal hygiene (grooming, shampooing, shaving, skin care, oral care, etc.), toileting, mobility/ambulating, including mastering the use of adaptive aids and equipment, meal planning and preparation, laundry, shopping, housekeeping, assistance with medication (in certain circumstances), and traveling for purposes of medical appointments or community activities. ARChoices Provider Manual § 213.210.[4]

23. Personal care involves assistances related to activities of daily living, including bathing, bladder and bowel requirements, dressing, eating, housekeeping, laundry, personal hygiene, shopping for personal maintenance items, medication assistance under certain circumstances, mobility, and ambulation. Personal Care Provider Manual § 213.210.[5]

24. Attendant and personal care can be provided in two ways. The first way is that an ARChoices beneficiary can receive services through a caregiving agency of their own choosing. The caregiving agency provides care aides at appointed times and manages billing and payment with ADHS. The second way is that a beneficiary can hire (and fire) a caregiver of their own choosing, in which case the beneficiary signs time sheets submitted to PALCO, an ADHS vendor that pays the hired caregiver with funds provided and authorized by ADHS. A beneficiary may choose to have attendant or personal care provided by both methods, with a caregiving agency

[3] *Available at* https://secure.ssa.gov/poms.nsf/lnx/0601001205

[4] *Available at* https://medicaid.mmis.arkansas.gov/Provider/Docs/archoices.aspx

[5] *Available at* https://medicaid.mmis.arkansas.gov/Provider/Docs/perscare.aspx

providing care at appointed times and a hired attendant at others. The caregiving agency or PALCO also provides a case manager to monitor the beneficiary's status every month and report significant changes to ADHS as appropriate.

25. To be eligible for ARChoices, an individual must meet financial and functional eligibility criteria. The financial eligibility criteria is not at issue in this lawsuit. To meet the functional eligibility criteria, a person between the ages of 21 and 64 must have a physical disability as defined by the Social Security Administration and require an intermediate level of care in a nursing facility. An individual over 65 must only require an intermediate level of care in a nursing facility. ARChoices Provider Manual § 212.000. Pursuant to promulgated regulations, an individual requires an intermediate level of care only in the following three situations:

(a) The individual must be unable to perform either (1) at least 1 of the 3 activities of daily living (ADLs) of transferring/locomotion, eating or toileting without extensive assistance from, or total dependence upon another person; or (2) at least 2 of the 3 ADLs of transferring/locomotion, eating, or toileting without limited assistance from another person;

(b) The individual has a primary or secondary diagnosis of Alzheimer's disease or related dementia and is cognitively impaired so as to require substantial supervision from another individual because he or she engages in inappropriate behaviors which pose serious health or safety hazards to themselves or others; or

(c) The individual has a diagnosed medical condition which requires monitoring or assessment at least once a day by a licensed medical professional and the condition, if untreated, would be life-threatening.

Id.

26. The eligibility criteria listed in Paragraph 25(a) for ARChoices and its predecessor programs has not changed since at least 2005.

27. ADHS conducts a functional eligibility assessment to determine whether an individual is eligible and, if eligible, the amount of services to allocate.

28. Prior to January 1, 2016, ADHS used an assessment tool called ArPath to assess an individual's eligibility. The agency determined the amount of services to allocate under ARChoices' predecessor programs according to the professional discretion of a ADHS registered nurse, who could authorize beneficiaries under the age of 65 up to eight hours per day of care and beneficiaries age 65 or over up to seven hours per day of care.

29. Starting January 1, 2016, while still using the ArPath to assess eligibility, ADHS changed the way it allocated care by switching from the system of nurse discretion to an algorithm-based methodology called RUGs (short for Resource Utilization Groups). Under RUGs, about half of all ARChoices beneficiaries received service reductions. Use of the ArPath and RUGs ended on December 31, 2018.

30. Starting January 1, 2019, ADHS again changed its system for assessing beneficiary eligibility and for allocating services.

31. Starting January 1, 2019, ADHS began using an assessment tool called Arkansas Independent Assessment (ARIA). A nurse employed by a contracted company called Optum visits an applicant or beneficiary in their home, asks the questions provided by the ARIA assessment tool, and marks a response. The responses to the assessment are run through an algorithm to place the beneficiary into a tier used to determine eligibility. People eligible according to the assessment and algorithm are classified as Tier Two. ADHS's Office of Long-Term Care then reviews the results and decides whether an individual is eligible for ARChoices,

sometimes overruling the assessment's tier result. Eligible individuals then move onto the process for developing an "ARChoices Person-Centered Service Plan" and determining the amount of services ADHS will allocate to them.

32. Starting January 1, 2019, ADHS's introduced a multi-step process to determine the amount of services to allocate an eligible individual:

(a) First, ADHS assigns a beneficiary an Individual Service Budget. Generally, ADHS has three Individual Service Budget levels, which allow an ARChoices beneficiary to receive up to $5,000, $20,000, or $30,000 worth of waiver services per year, respectively. ARChoices Provider Manual § 212.200(D). The budget level assigned depends on results from the ARIA assessment tool. An individual who is rated as needing extensive assistance or total dependence in all three activities of daily living of transferring/locomotion, eating, and toileting is placed at the $30,000 level. *Id.* An individual who is rated as needing extensive assistance or total dependence in two of the three activities of daily living of transferring/locomotion, eating, and toileting is placed at the $20,000 level. *Id.* Any other individual is placed at the $5,000 budget level. *Id.* Additionally, there is a fourth possible budget level limited to individuals who received more than $30,000 worth of waiver services during 2018. *See* ARChoices Provider Manual § 212.200(D)(3). For these select beneficiaries, ADHS authorizes a "Transitional Allowance" budget for 2019 and 2020 that is fixed at the total cost of the person's waiver services for 2018, even if that amount exceeds $30,000. *Id.*

(b) Second, an ADHS registered nurse visits the eligible individual in their home to complete a form called the Task and Hour Standards. The Task and Hour Standards lists 11 activities of daily living (ADLs)—eating, bathing, dressing, grooming,

toileting, walking/mobility, transferring/positioning, cleaning, shopping, laundry, and meal preparation. For each ADL, the nurse determines a beneficiary's placement in one of three Needs Intensity levels based on the assistance the person requires and then allots a specific number of minutes from a range authorized for that level. *See* ARChoices Provider Manual § 212.300(D). The nurse then determines the frequency of assistance needed and tabulates the total amount of time to allocate for that ADL. *Id.* After completing this process for all 11 ADLs, the nurse calculates the total monthly amount of medically necessary care hours. *Id.* The Task and Hour Standards does not contain a space for the nurse to allocate travel time to accompany a beneficiary to medical appointments or community activities, even though ADHS policy provides for such time. *See* ARChoices Provider Manual § 213.220(D)

(c) Third, during the ADHS nurse's home visit, the nurse determines the amount of care hours deemed medically necessary under the Task and Hour Standards that the individual can receive under the assigned Individual Service Budget level. *See generally* ARChoices Provider Manual §§ 212.200, 212.300. Home-delivered meals and the personal emergency response system also count against the budget. ADHS has set the value of each attendant care hour at $18.12, each home-delivered meal at $5.97, and the personal emergency response system at $32.62 per month. Arkansas Medicaid ARChoices Fee Schedule.[6] A person may not receive services costing more than the budget level, even if the ADHS nurse has determined that more care hours or other waiver services are medically necessary. *See* ARChoices Provider Manual § 212.300(D)(6). Conversely, a person cannot receive more care hours or other waiver

[6] *Available at* https://medicaid.mmis.arkansas.gov/Download/provider/docs/fees/ARCHOICES-fees.pdf

services than are determined to be medically necessary, even if their budget level is sufficient to afford more services. *See* ARChoices Provider Manual § 212.200(B)(5).

(d) Fourth, at some point after the home visit, the ADHS nurse sends the client a copy of the completed ARChoices Person-Centered Service Plan along with a Notice of Action. This mailing triggers a beneficiary's appeal rights.

33. ADHS assesses program participants at least once every year to determine their functional eligibility and, if eligible, to develop an updated person-centered service plan. *See* ARChoices Provider Manual § 212.320. Beneficiaries can be subject to re-assessment more than once a year if they experience a change in status or service needs. *See* ARChoices Provider Manual §§ 212.305, 212.500.

34. ADHS has no plans to switch to a different assessment tool, allocation methodology, or notice of action

V. DUE PROCESS GUARANTEES

35. Constitutional due process requires that ADHS inform a beneficiary of an adverse action by a "timely and adequate notice detailing the reasons for" a proposed action. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Various state and federal statutes and regulations further prescribe the notice's content, including the action to be taken, specific reasons for the action, the right to appeal, how to file an appeal, and how to receive continuing benefits pending the appeal decision. Ark. Code Ann. § 20-77-121; Ark. Medical Services Policy J-100 to 120; 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.201, 431.206, 431.210.

36. Constitutional due process also provides that individuals on Medicaid are entitled to an evidentiary hearing prior to the termination or reduction of their benefits. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 786-87 (1980)

("The Government cannot withdraw these direct [Medicaid] benefits without giving the patients notice and an opportunity for a hearing on the issue of their eligibility for benefits.").

37. The requirements for adequate notice of adverse action and an evidentiary hearing prior to the termination or reduction of a beneficiary's Medicaid benefits were clearly established law under the U.S. Constitution at the time of the violation of Ms. Dearmore's due process rights alleged here. With respect to adequate notice:

(a) In *Jacobs v. Gillespie*, 3:16-cv-119-DPM (E.D. Ark. Nov. 1, 2016), Judge Marshall held that ADHS provided deficient notice to ARChoices beneficiaries under the ArPath assessment and RUGs allocation methodologies in effect at that time.

(b) On October 2, 2018, White stated in an email that ADHS officials could be personally liable for notice deficiencies in the wake of *Jacobs*: "Because Judge Marshall ruled that the notice was constitutionally defective, any further action to enforce the defective notices could qualify as violation of a 'clearly established' right, endangering the qualified immunity of DHS employees and placing the State at risk."

38. Various federal and state Medicaid statutes and regulations enshrine the constitutional due process guarantee of an evidentiary hearing for adverse agency actions affecting a person's Medicaid benefits. *See, e.g.*, 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.205 (incorporating *Goldberg v. Kelly*, 397 U.S. 254 (1970)); Ark. Code Ann. § 20-77-121; Ark. Code Ann. § 25-15-208.

39. Federal Medicaid regulations explicitly provide that ADHS must send a notice of adverse action to a beneficiary at least 10 days before the date the adverse action will take effect. 42 C.F.R. § 431.211. If a beneficiary appeals before the date the adverse action is to take effect,

ADHS may not terminate or reduce Medicaid benefits until the outcome of an evidentiary hearing. 42 C.F.R. § 431.230. *See also* 42 C.F.R. § 431.231.

40. State Medicaid regulations provide that ADHS may not terminate or reduce Medicaid benefits until the outcome of an evidentiary hearing where a beneficiary appeals within 10 days of the date on the notice of adverse action. ADHS Medicaid Provider Manual § 161.500; Ark. Medical Services Policy J-100, J-110, L-120.

41. The applicable constitutional provisions, statutes, and regulations do not commit discretion to ADHS to reduce or terminate the Medicaid benefits of beneficiaries who appeal within 10 days of the date on the notice of adverse action unless the beneficiary requests reduction or termination.

VI. JACQUELYN DEARMORE

42. Jacquelyn Dearmore is a former elementary school teacher, florist and flower shop owner, and literacy instructor. She moved from eastern Arkansas to the Yellville area around 1980 to be closer to her family and, eventually, care for her ailing mother, who passed away in 2012.

43. Within two weeks of her mother's death in 2012, Ms. Dearmore was diagnosed with chronic myeloid leukemia, a form of cancer that she still has. Treatment for this form of leukemia involves medication that causes her to vomit, lose her hair, and gain significant weight.

44. Ms. Dearmore has multiple medical conditions apart from leukemia. She has chronic pain in her back and hips due to deteriorating discs and bone spurs, neuropathy in her arms and legs, osteoarthritis, osteoporosis, chronic urinary incontinence, bipolar disorder, and anxiety disorder.

45. Ms. Dearmore needs help with almost every aspect of daily life, including getting from one place to another, getting in and out of chairs, getting on and off the toilet, cleaning herself fully after using the toilet, showering, doing her daily grooming, cleaning the house, preparing meals, doing shopping, doing laundry, and going to medical appointments.

46. In 2012, Ms. Dearmore applied and was determined eligible for the Alternatives for Adults with Physical Disabilities Medicaid program, the predecessor program to ARChoices. Every year since then, ADHS has assessed her and determined her eligible for the program under the criteria in Paragraph 25.[7]

47. Pursuant to Ms. Dearmore's plan of care in effect prior to November 8, 2019, DHS authorized Ms. Dearmore to receive 143 hours per month of attendant care, seven home-delivered meals per week, and a personal emergency response system (plan attached and incorporated as Exhibit 1). She had been receiving 143 hours per month of attendant care since August 2017 and, on information and belief, several previous years. Since December 2017, the Area Agency on Aging for Northwest Arkansas is the agency that provides her care.

48. On November 8, 2019, DHS mailed Ms. Dearmore a Notice of Action and an ARChoices Person-Centered Service Plan authorizing her to receive 103 hours per month of combined attendant and personal care under the ARChoices program, with a handwritten notation that the service level will be effective as of December 1, 2019. The service plan expires on July 1, 2020. The packet also contained a Task and Hour Standards form (notice, plan, and accompanying documents attached and incorporated as Exhibit 2).

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[7] The individual must be unable to perform either (1) at least 1 of the 3 activities of daily living (ADLs) of transferring/locomotion, eating or toileting without extensive assistance from, or total dependence upon another person; or (2) at least 2 of the 3 ADLs of transferring/locomotion, eating, or toileting without limited assistance from another person.

49. The Notice of Action does not identify that a reduction has taken place and does not provide any specific reasons for the reduction with reference to the care allocation process described in Paragraph 32. Ms. Dearmore did not understand from the notice or service plan why her services were being reduced.

50. Ms. Dearmore's functional abilities have not improved at all between 2017 and present. In contrast, her functional abilities have declined.

51. On November 15, 2019, without being represented by counsel, Ms. Dearmore completed a form to appeal ADHS's decision to reduce her care hours and checked a box marked "I want to continue getting medical assistance until the hearing" (attached and incorporated as Exhibit 3). The form was emailed to DHS.appeals@dhs.arkansas.gov in accordance with its instructions. ADHS received the appeal within 10 days of November 8, 2019.

52. Starting December 1, 2019, ADHS authorized Ms. Dearmore to receive only 103 hours per month of combined attendant and personal care. Because of this, Ms. Dearmore's care agency has been able to provide no more than 103 hours per month of care from December 1, 2019 to present.

53. Because of the reduced care hours, Ms. Dearmore's aides do not have enough time to meet all of her care needs in the house. She has been forced to skip about one meal every day, lie in urine-soaked pads or clothing for periods several hours longer than before, take a shower only every other day instead of every day as she needs and wants to, use dirty towels or clothes because all of her laundry cannot get done, live in a dirty house because her incontinence means that she sometimes leaves urine trails around the house, and give up going outside of her house. She has suffered increased skin problems from not being cleaned enough, including in her genital area.

54. Because of the reduced care hours, Ms. Dearmore has had to miss at least four medical appointments—including with her oncologist, cardiologist, psychiatrist, and ophthalmologist—because she does not have enough care hours for an aide to accompany her to appointments. Medicaid transportation will not permit her to ride without a care aide. The cancelled appointments have caused her to forego diagnostic procedures and treatment necessary to manage her medical conditions.

55. Because of the reduced care hours, Ms. Dearmore experiences much stronger symptoms of depression and spends much more time crying than before the cuts.

56. Ms. Dearmore does not have any family or friends available to provide additional care voluntarily.

57. Pursuant to Ms. Dearmore's November 15, 2019 appeal, ADHS scheduled an administrative hearing for February 12, 2020. The hearing was continued for purposes of obtaining legal representation. A new date has not yet been set.

58. The administrative hearing does not encompass questions about the agency's violation of constitutional due process obligations to furnish continuing benefits pending the outcome of the hearing.

59. The administrative hearing officer does not have jurisdiction to decide issues arising under the United States Constitution or grant the relief requested here.

60. Because Ms. Dearmore's service plan expires on July 1, 2020, she will undergo re-assessment and the accompanying service allocation determinations around May 2020. She could face re-assessment before then upon a change in health status or hospitalization.

61. ADHS will re-assess Ms. Dearmore and determine the amount of services she receives using the same ARIA assessment tool, related algorithms, and service allocation process currently in effect. ADHS has no plans to change materially the processes presently in use.

62. In the event of an adverse action, ADHS will notify her using the same notice of action currently in use. ADHS has no plans to change materially the notice presently in use, which has been in use in substantially the same form since January 1, 2019.

VII. ADHS's MANAGEMENT STRUCTURE AS RELATED TO ARCHOICES

63. ADHS has nine divisions and five offices. Those most relevant to this lawsuit are the Division of Aging, Adult, and Behavioral Health Services (DAABHS), the Division of Provider Services and Quality Assurance (DPSQA), and the Office of Chief Counsel (OCC).

Secretary of ADHS

64. Defendant Gillespie is the Secretary of ADHS and has ultimate supervisorial responsibilities over all aspects of ADHS, including Arkansas's Medicaid program. *See* Ark. Code Ann. §§ 25-10-101; 25-10-102(c)(1)(A); 25-10-106. She has been ADHS's director from February 2016 to present.

65. In June 2016, Gillespie issued a memorandum to ADHS staff that she was undertaking a reorganization of DHS to centralize oversight because "the DHS Director has no consistent visibility into the core business functions of the agency and no clarity on accountability and responsibility."

66. In September 2016, Gillespie hired Dennis Smith to serve as Special Adviser on Medicaid. Smith has at least weekly communications with Gillespie to advise and inform her about all aspects of the state's Medicaid program, including ARChoices.

67. Based on ADHS procedures, Gillespie must approve all policies or rules that require promulgation under the Arkansas Administrative Procedure Act, Ark. Code Ann. § 25-15-201 *et seq.* Before Gillespie approves a policy or rule requiring promulgation, the director of the responsible division or office and the director of the Office of Chief Counsel must approve it. ADHS Administrative Procedures Manual § 906; ADHS Policy § 3000.[8]

68. For policies that do not require promulgation, Gillespie must ultimately approve any policy that applies to more than one division or office. *Id.* The process has four steps. First, the director of the Office of Chief Counsel must approve the policy at issue. Second, the policy proceeds to an executive committee for review. Third, the policy goes to the Policy Review Committee, the members of which Gillespie designates, for review and recommendations about approval. Fourth, Gillespie approves it. Gillespie designated Defendant Sterling and, until his departure from ADHS, Craig Cloud as Policy Review Committee members. On information and belief subject to confirmation after a reasonable opportunity for discovery, Gillespie assigned Defendant White to the Policy Review Committee in October 2019.

69. Gillespie holds monthly executive meetings attended by the heads of all divisions and offices. Gillespie holds monthly meetings with directors and senior staff of individual divisions and offices. Between meetings, Gillespie communicates with directors and senior staff about other issues of importance to ADHS, including about significant projects. In addition, Gillespie receives weekly updates from the communications department that include any media stories about ADHS.

[8] The Administrative Procedures Manual does not appear to be available online. ADHS Policy § 3000 summarizes APM § 906—but does not restate it—and is available at https://humanservices.arkansas.gov/images/uploads/policies/DHS%20Policy%203000.pdf.

70. Gillespie drafts and maintains a document called "DHS Goals" that lists and tracks the progress of each division's or offices's goals over the course of a year. The document lists milestones for each goal, milestone dates, notes for each goal, status for each goal, and a monthly report for each goal. Gillespie updates the chart on a monthly basis with information she receives from each division.

71. In her official capacity, Gillespie was the defendant in *Jacobs v. Gillespie*, 3:16-cv-119-DPM (E.D. Ark. Nov. 1, 2016), in which Judge Marshall ruled that ADHS provided constitutionally deficient notice to ARChoices beneficiaries facing adverse actions under the assessment and allocation methodologies in effect at that time.

72. In her official and individual capacity, she is one of the defendants in *Elder v. Gillespie et al.*, 3:19-cv-155-KGB (filed May 23, 2019), in which the plaintiff Ginger Elder alleges that the defendants deprived her of the constitutional right to continuing services pending resolution of her appeal.

73. Gillespie asks Defendant Sterling for updates on any significant litigation in which ADHS is involved, including *Jacobs*, *Elder*, and *Ledgerwood v. ADHS*, 60CV-17-442 (Pulaski County Circuit Court, May 14, 2018), in which the court invalidated the then-existing service allocation methodology for ARChoices for not following notice-and-comment requirements of the state's Administrative Procedures Act.

Division of Aging, Adult, and Behavioral Health Services

74. Prior to about October 2017, there was a Division of Aging and Adult Services and a separate of Division of Behavioral Health Services, which were then merged into DAABHS. Craig Cloud was the DAAS Director until the merger, at which time he became the

Director of the newly-formed Division of Provider Services and Quality Assurances. Prior to October 2017, DAAS exercised sole control over operation of the ARChoices program.

75. Since October 2017, operation of the ARChoices Medicaid program is shared between DAABHS and DPSQA. Operation of the ARChoices Medicaid program includes, among other activities, managing the assessment and service allocation processes, managing ADHS's nurses involved in the ARChoices program, maintaining appropriate staffing levels, managing appeals and hearings, setting state policy with respect to ARChoices, insuring compliance with federal laws, interfacing with the federal Center for Medicare and Medicaid Services that oversees state Medicaid programs, coordinating with other ADHS divisions or offices as needed, setting licensing standards for Medicaid providers, and managing relationships with and providing information to Medicaid providers.

76. Jay Hill has been DAABHS Director from approximately October 2017 to present. From October 2017 to February 2018, Hill did not assert supervisorial authority over ARChoices. During that time, DPSQA Director Cloud exercised sole supervisorial authority over ARChoices. In February 2018, Mark White became DAABHS's Deputy Director and assumed DAABHS's supervisorial responsibility over the operation of ARChoices. White shared supervisorial authority over ARChoices with Cloud from February 2018 until August 2019, when Cloud left ADHS, and with Jerald Sharum, Cloud's replacement as DPSQA Director, until White left his role as DAABHS deputy director in October 2019. From October 2019 to present, supervisorial authority over ARChoices has been shared by Sharum and current DAABHS Deputy Director Patricia Gann. On information and belief subject to confirmation after a reasonable opportunity for discovery, White continued to have supervisorial responsibility over

the operation of ARChoices through November 2019 as Gann transitioned into the role of deputy director.

77. From 2016 through February 2018, Cloud communicated daily about ARChoices, including appeals, policy, staffing, and oversight issues, with his direct subordinate, DAAS and later DAABHS Assistant Director Stephenie Blocker. From February 2018 to August 2019, Cloud communicated with Blocker about ARChoices program issues at least once per week. From February 2018 to October 2019, White communicated daily with Blocker about ARChoices program issues.

78. As DAABHS Deputy Director, White communicated daily with the DPSQA Director—first Cloud, then Sharum—about ARChoices program issues.

79. Every month from 2016 through February 2018, DAABHS staff members provided written reports about information technology, policy and program development, and appeals and hearings to Cloud. Starting in February 2018, those written reports were provided to White. The appeals and hearings report includes information about the number of appeals, the outcome of appeals, and the number of assessments resulting in termination or denial of services.

80. Cloud as DAAS Director attended Gillespie's monthly executive team meetings. On information and belief subject to a reasonable opportunity for discovery, White has attended the executive team meetings since become Gillespie's chief of staff in October 2019 and, separately, has informed her of all significant issues with ARChoices, including the new assessment system, the high number of appeals, and the failure to continue benefits.

81. Cloud as DAAS Director and White as DAABHS Deputy Director set the yearly goals for DAAS and DAABHS as related to the ARChoices program and communicated about ARChoices program operations with Gillespie. Significantly, one 2017 goal was "Implement

Aging Transformation Rule Change," which referred to the development and implementation of the current system for ARChoices assessment and service allocation. This goal listed Office of Chief Counsel as another necessary division to be involved.

Division of Provider Services and Quality Assurance

82. DPSQA shares responsibility for the operation of ARChoices with DAABHS.

83. DPSQA has direct oversight responsibility of Medicaid providers, including Medicaid providers who provide personal care and attendant care. The DPSQA director communicates regularly with ARChoices providers about their clients whose services have been reduced or terminated. The DPSQA director oversees the Office of Long-Term Care, which makes ARChoices eligibility decisions for applicants or beneficiaries. On information and belief subject to confirmation after a reasonable opportunity for discovery, the DPSQA director oversees the prior authorization and billing processes to ensure that providers are paid only for the ARChoices services that ADHS has authorized.

84. As DPSQA director, Cloud attended Gillespie's monthly executive team meetings, set DPSQA's yearly goals related to the ARChoices progam, and communicated about ARChoices program operations with Gillespie. Gillespie designed Cloud to be a member of the Policy Review Committee. On information and belief subject to confirmation after a reasonable opportunity for discovery, Sharum has replaced Cloud in all of these roles since becoming DPSQA director.

Office of Chief Counsel

85. The director of the Office of Chief Counsel (previously titled the Office of Policy and Legal Services) is responsible for the creation of agency policies, assuring compliance with the policies, and providing legal advice and services to the agency. The director oversees

ADHS's legal representation, policy drafting, and civil rights compliance. The director also oversees ADHS's Office of Appeals and Hearings, which manages administrative adjudications. Defendant Sterling has been the director of OCC since approximately February 2015.

86. Sterling attends Gillespie's monthly executive team meetings, sets OCC's goals, and communicates with her regularly regarding OCC's operations.

87. Before any policy proceeds to Gillespie for ultimate approval—whether it requires promulgation or not—Sterling must review and approve it as Chief Counsel. In addition, Gillespie designed Sterling as the chairperson of ADHS's Policy Review Committee, which must review and approve internal ADHS policies that affect more than one division or office. Sterling sends a report from the Policy Review Committee to Gillespie and meets with her in person to review policies prior to Gillespie approving them.

88. Every month, Sterling sends a report from OCC to Gillespie that shows the number of appeals pending and workloads from the General Counsel Section and OAH. In addition, Sterling regularly sends Gillespie internal reports from various divisions across DHS and updates about proposed federal laws or policy changes.

89. Sterling informs Gillespie about any significant litigation involving ADHS, including *Jacobs, Elder, and Ledgerwood.*

90. Sterling has direct supervisorial responsibility over Defendant Rosen and the General Counsel Section managed by Rosen. The General Counsel Section provides legal assistance, advice, and representation to the various divisions within the Department, including in administrative fair hearings and litigation in federal and state courts. The General Counsel Section regularly provides advice and direction to the divisions on legal questions involving personnel issues, Medicaid, and other program matters.

91. Sterling has direct supervisorial responsibility over the Office of Appeals and Hearings. The Office of Appeals and Hearings receives ARChoices beneficiaries' requests for appeals, schedules and conducts appeal hearings, informs implicated divisions or office about hearings, and issues hearing decisions.

92. Every month, Sterling receives a report from the General Counsel Section and, separately, from OAH that includes the number of cases being handled, staffing levels, and other issues.

93. Sterling appears as the agency's counsel of record in court proceedings, including in *Jacobs* and *Ledgerwood*.

94. Sterling is a defendant in his official and individual capacities in *Elder*.

95. Defendant Rosen is the Managing Attorney of the General Counsel Section with ADHS's Office of Chief Counsel and has been in this role since at least 2015. He reports to Defendant Sterling. He has direct supervisorial responsibility over the ADHS attorneys assigned to appeal hearings and advises various agency divisions. In addition, Mr. Rosen appears as ADHS's counsel of record in court proceedings, including in *Jacobs* and *Ledgerwood*. He is a defendant in his official and individual capacities in *Elder*.

96. Rosen communicates at least weekly with Sterling regarding the operations of the General Counsel Section and sends him the monthly General Counsel Section report.

97. From 2016 to present, Rosen has communications about ARChoices at least once per week with the DAAS director, DAABHS deputy director, or DPSQA director to discuss ARChoices program rules, appeals, and notices, including, on May 31, 2017, directing that a DAAS employee start testifying in administrative hearings about the reasons for reductions in beneficiaries' ARChoices services.

VIII. DEVELOPMENT OF PRESENT ASSESSMENT SYSTEM

98. While the ArPath assessment system and RUGs service allocation methodology were in effect—January 1, 2016, through May 14, 2018, and around October 8, 2018, to December 31, 2018—ADHS considered shifting to a different assessment and allocation system.

99. Cindy Gillespie designated Dennis Smith, ADHS's Special Adviser on Medicaid, to act on her behalf for all matters relating to the consideration, development, and implementation of a new independent assessment system for ARChoices and other programs ADHS administers.

100. On October 4, 2016, Smith sent Gillespie and Cloud an email discussing different systems for conducting assessments for ARChoices and other programs ADHS administers.

101. On October 25, 2016, Gillespie, Sterling, and Cloud received an email with the draft Request for Proposals to solicit bids from prospective contractors to implement a new assessment system for ARChoices and other ADHS programs. Gillespie, Sterling, and Cloud each had received, reviewed, and approved previous drafts of the document. The document specifies that ADHS will coordinate administrative hearings and that successful bidders must participate in appeals, administrative hearings, and other legal proceedings regarding assessment results and the reduction or denial of services. The document also specifies that the bidder must have a database about assessment notices to be shared with ADHS.

102. On January 16, 2017, Gillespie sent Sterling and Cloud a document called "2017 Goals" that listed "Implement Aging Transformation Rule Change." That document listed DAAS as the lead agency, July 1 as the expected completion date, OCC as another division involved in the process, contract review as the next milestone, and various technological and regulatory changes that needed to be implemented with no specified date.

103. Pursuant to the Request for Proposal issued in 2016, ADHS chose Optum for the independent assessment contract in early 2017.

104. On May 30, 2017, Cloud sent Smith revisions on the draft concept paper to explain ADHS's new assessment system for ARChoices and other ADHS programs.

105. On June 12, 2017, Smith sent Sterling the concept paper to explain ADHS's new assessment system and wrote, "David, this might be helpful to you to prepare for Wednesday review of Optum contract…Am happy to discuss with you as well."

106. After ADHS contracted with Optum, Cloud, Sterling, and Gillespie, acting at times through Dennis Smith, oversaw implementation of the new independent assessment system. Starting in February 2018, White joined the others in overseeing implementation of the new independent assessment system. Their actions include the following:

(a) In 2017 and 2018, Cloud and, once he became DAABHS deputy director, White had multiple communications per week with Optum to decide issues regarding implementation of the assessment system, including assessment questions, eligibility criteria, criteria for setting Individual Service Budgets, development of the Task and Hour Standards, and intra-agency processes needed for implementation. White authorized Optum and other consultants to implement changes, including to eligibility criteria and tier logic on December 20, 2018 and February 13, 2019. Cloud approved intra-agency processes regarding the assessments, including in December 2018 and January 2019 in response to lack of coordination between Optum, DAABHS, and DPSQA.

(b) White drafted, revised, and authorized proposed ARChoices policy manuals regarding the new assessment system and related documents for promulgation and the federal ARChoices waiver application for submission to the Centers for Medicare

and Medicaid Services (CMS). Smith and Cloud reviewed all such documents and provided relevant information prior to and during the promulgation and federal approve processes, including on November 10, 2018, and December 12, 2018. White and Cloud directly received written approval from CMS on December 27, 2018, which White then immediately transmitted to Smith.

(c) Sterling initially approved proposed ARChoices policy manuals regarding the new assessment system and related documents for promulgation. Sterling later reviewed the relevant ARChoices documents for promulgation as chair of the Policy Review Committee, which reviewed and recommended that Gillespie approve the documents sometime in the summer of 2018.

(d) Gillespie directly approved all documents needed for promulgation of the independent assessment system for ARChoices in August or September 2018.

(e) Smith, a former CMS official, organized and participated in telephone meetings with CMS to facilitate approval of the new assessment system, including on December 17, 2018.

(f) Cloud and White represented ADHS during the promulgation process for the new assessment system, including in five public meetings between October 7, 2018, and November 7, 2018, and in hearings before legislative committees on December 10, 18, and 20, 2018. White drafted responses to public comments. On December 20, 2018, White asked that Cloud and Smith review and approve a document called Setting the Record Straight to persuade the legislature to approve the new assessment system.

(g) ADHS's communications team enlisted Smith and White to respond to media questions about the new assessment system, including on December 5, 2018.

IX. CERTAINTY OF INCREASED APPEALS

107. Gillespie, Cloud, White, Sterling, and Rosen knew that the change of the ARChoices assessment and care allocation system on January 1, 2019, would cause high numbers of appeals.

108. ADHS saw a spike in appeals when it last significantly changed the ARChoices assessment and service allocation system upon implementing the RUGs algorithm-based system on January 1, 2016. In 2014 and 2015 combined, ADHS received about 328 appeals relating to the predecessor programs to ARChoices.[9] In 2016 and 2017 combined, ADHS received at least 529 appeals regarding ARChoices, an increase of 61%.

109. With respect to ARChoices during 2016, 2017, and 2018:

(a) Sterling received monthly appeals reports from OAH and the General Counsel Section detailing the number of appeals.

(b) Sterling and Rosen provided ARChoices appeal numbers to counsel in discovery in September or October 2016 as part of the *Jacobs* litigation. Cloud served as the agency's representative in the *Jacobs* litigation

(c) Cloud received DAAS appeals reports every month detailing the number of ARChoices appeals and the number of assessments resulting in denial or termination of services. Cloud held weekly DAAS division review meetings with Blocker and other DAAS management staff to discuss staffing levels, budget issues, and program operations, including discussion of ARChoices appeals. Cloud learned from Blocker that

[9] Prior to 2016, ADHS operated two home- and community-based services programs for beneficiaries who had disabilities or were elderly: Alternatives for Adults with Physical Disabilities (AAPD) for people under 65 and Elder Choices for people 65 and older. These programs were combined into ARChoices.

appeals were burdening staff resources and delaying other program work, including around April 11, 2016, and September 1, 2016. Cloud learned from Blocker around June 15, 2017, that the DAAS nurses believed that the appeals process needed to be updated to lessen the burden on them.

(d) Once White joined ADHS as DAABHS deputy director in February 2018, he received DAAS appeal reports every month detailing the number of ARChoices appeals and the number of assessments resulting in denial or termination of services. He also held weekly DAAS division review meetings to discuss staffing levels, budget issues, and program operations, including discussion of ARChoices appeals and resulting burdens on staff.

(e) The increased appealed caused DAAS/DAABHS to delay reviewing cases involving appeals, delayed completion of paperwork, computer entry, and intra-agency communication relevant to maintaining ARChoices services for people appealing, delayed producing information to the General Counsel Section for inclusion in hearing files, and delayed informing care agencies and/or PALCO about continuing benefits. Cloud and White knew about these delays.

(f) Rosen monitored case levels of attorneys under his direct supervision and noted that number of ARChoices appeals was significantly higher than in past years. As a result of the increased ARChoices appeals, General Counsel Section attorneys delayed reviewing new appeal files, delayed collecting information from other relevant divisions or units needed to prepare for hearing, and produced appeal hearing files to hearing officers and opposing parties later than requested or normal. Rosen also learned of the staff burden of increased appeals from OCC employee Kitten Dixon, who wrote on June

10, 2016, that her duties included, among other things, "assign and coordinate Appeals and Hearings cases for 8 attorneys about 75 cases a month" and "calendaring, tracking, continuing, getting hearing files disbursed."

(g) Rosen informed Sterling of the increased caseloads and the resulting delays. Sterling also learned of the staff burden of increased appeals from OCC employee, Kitten Dixon, who wrote on February 16, 2017, that she had "many many emails" about "personnel issues,...hiring issues for all of OCC, reports,...hearing cases questions, [and]...assigning EJJ and Circuit cases..."

(h) Television station KARK investigated ADHS's use of the RUGs algorithm and aired its three-part series in November 2017.[10] Cloud represented the agency in interviews with Gillespie's approval and was quoted as saying, among other things, "Each person has the opportunity to an objective, fair appeal hearing."[11]

(i) On information and belief subject to confirmation after a reasonable opportunity for discovery, Gillespie received information about the high number of ARChoices appeals from Smith, Sterling, Cloud, and, once he joined ADHS as DAABHS deputy director, White.

110. Prior to implementation of the ARChoices assessment system on January 1, 2019, Cloud, Gillespie, Rosen, Sterling, and White knew that the new system predicted reductions in services that would give rise to appeal rights:

(a) The concept paper referenced in Paragraphs 104 and 105 states that one purpose of the independent assessment system was to "help generate $835 million in

[10] https://www.kark.com/news/working-4-you-series-a-formula-for-care-in-arkansas/

[11] https://www.kark.com/news/working-4-you-explaining-the-formula-for-care-claimed-to-cause-cuts-to-needy/

budgetary savings" in part "by targeting resources most appropriately across the aging...population[]," which refers to people on the ARChoices program. These statements assumed a reduction in the number of ARChoices beneficiaries and/or the amount of services beneficiaries would receive. Smith drafted this document with review or revisions by Cloud on May 30, 2017, and, on information and belief subject to confirmation after a reasonable opportunity for discovery, Gillespie and Sterling.

(b) A document called "Arkansas LTSS Transformation Overview draft" produced before October 2018 states there is a "reduction of 10% of remaining Attendant Care hours was included due to a new definition of Attendant Care." The reduction of attendant care hours is an adverse action granting beneficiaries appeal rights. On information and belief subject to confirmation after a reasonable opportunity for discovery, Cloud, White, and Smith drafted, reviewed, or approved this document.

(c) A document called "ARChoices Expenditures Work File draft" produced before October 2018 shows that at least 1,641 existing ARChoices beneficiaries—19%—would certainly face a reduction in services solely due to the state's imposition of Individual Service Budgets (described in Paragraph 32). Based on the document, as many as 2,630 more beneficiaries could face a reduction in services solely due to the imposition of Individual Service Budgets. On information and belief subject to confirmation after a reasonable opportunity for discovery, Cloud, White, and Smith drafted, reviewed, or approved this document and informed Gillespie about the potential adverse impact on beneficiaries.

(d) The notice of rule-making issued on October 7, 2018, about the changes to the ARChoices assessment and allocation processes states that "DHS estimates that the

proposed changes outlined above are expected to result in a net decreased in aggregate Medicaid expenditures of $9.27 million in State Fiscal Year 2019 and $13.92 million in State Fiscal Year 2020." These statements assumed a reduction in the number of ARChoices beneficiaries and/or the amount of services beneficiaries would receive. White, Cloud, and Smith drafted, reviewed, and authorized this document. Gillespie and Sterling approved the promulgation in August or September 2018.

(e) The notice of rule-making issued on October 7, 2018, about the changes to the ARChoices assessment and allocation processes states the following:

> "Taken together, all of the proposed changes outlined above will impact beneficiaries. Individual beneficiaries may see an increase or reduction in the amount, level, duration, frequency, type, and mix of services available to them, or their services may remain the same. Initial or continued eligibility for or enrollment in the ARChoices…program[]…may be positively or adversely affected in individual cases."

White, Cloud, and Smith drafted, reviewed, and authorized this document. Gillespie and Sterling approved the promulgation in August or September 2018.

(f) As part of the promulgation of the new ARChoices assessment system, White and Cloud represented ADHS before the state legislature on December 10, December 18, and December 20, 2018. During those meetings, White or Cloud told the legislature that the appeals process was a safeguard for beneficiaries who face adverse actions. Sterling attended at least one of these meetings. Gillespie monitored the approval process and received updates from White, Cloud, or Sterling.

111. In 2018, having not yet implemented the new assessment system for ARChoices, ADHS had implemented new assessment systems to determine eligibility and service allocation levels for Medicaid beneficiaries seeking personal care services (separate from ARChoices), behavioral health services, and services for individuals with developmental disabilities as part of

a major, new managed-care enterprise titled Provider-led Arkansas Shared Savings Entities (PASSE). In 2018, decisions based on those assessments generated 866 appeals, an increase of at least 300 over the previous year. Cloud, Rosen, Smith, Sterling, and White monitored the appeals numbers. In 2018, Cloud, Smith, and Sterling informed Gillespie about the number of appeals as part of her oversight of the PASSE program and the related independent assessment system.

112. After the implementation of the present ARChoices assessment system on January 1, 2019, Cloud, Gillespie, Rosen, Sterling, and White knew that the new ARChoices assessment system caused significant numbers of appeals:

(a) Every month from January 2019 to present, White, even after he changed roles in October 2019, and Cloud, until he left ADHS in August 2019, received a monthly report from Optum showing the number of ARChoices appeals.

(b) On June 3, 2019, ADHS reported to the Arkansas Democrat-Gazette that 27% of ARChoices beneficiaries assessed under the new system were found to be ineligible.[12] At that time, White was reported as noting in an email that "recipients found to be ineligible can file an administrative appeal."

(c) On June 12, 2019, the Arkansas Democrat-Gazette quoted an ADHS spokesperson as stating that the agency has "continued to see the number of eligibility denials for existing clients increase."[13]

(d) On July 9, 2019, White presented about the new assessment system to the Senate Committee on Children and Youth and the House Committee on Aging, Children

[12] https://www.arkansasonline.com/news/2019/jun/03/gauge-cuts-medicaid-assisted-living-eligibility-ro/

[13] https://www.arkansasonline.com/news/2019/jun/12/dhs-to-conduct-review-of-assisted-livin/

and Youth, Legislative and Military Affairs meeting jointly.[14] In that presentation, accompanied by a powerpoint,[15] White stated that beneficiaries can appeal and ask for services to continue while appeals are pending. On information and belief subject to confirmation after a reasonable opportunity for discovery, Gillespie, Smith, Sterling, and/or Cloud reviewed the presentation, offered input, and approved it.

(e) Subsequent to the July 9 hearing, oversight of the ARChoices assessment system was referred to the Arkansas Legislative Council's Review Subcommittee. Starting in September 2019, White submits a report to the subcommittee every month showing the number of appeals and other statistics. On information and belief subject to confirmation after a reasonable opportunity for discovery, Gillespie, Smith, Sterling, and/or Sharum review the report, offer input, and approve it.

113. ADHS received 497 appeals relating to ARChoices in 2019, including from Ms. Dearmore.

X. REPEATED FAILURE TO CONTINUE BENEFITS PENDING APPEAL

114. Between 2016 and present, ADHS has engaged in a pattern and practice of failing to continue ARChoices benefits despite timely appeal.

115. The approximately 30 beneficiaries identified in Paragraph 116 and attached exhibits actually appealed adverse actions within 10 days, requested continuing services pending appeal, and improperly had their services reduced or terminated.

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[14] https://www.arkansasonline.com/news/2019/jul/10/benefits-eligibility-denials-draw-look-/

[15] Exhibit D, *available at* http://www.arkleg.state.ar.us/assembly/2019/2019R/Pages/MeetingDetailsPopupPage.aspx?meetingId=52257&CalType=ME&List=Meetings&btnok=nook

116. ADHS repeatedly received allegations that the agency had failed to continue ARChoices services despite timely appeals:

(a) On April 8, 2016, Legal Aid of Arkansas e-mailed Rosen contending that ADHS had not maintained the ARChoices services of a beneficiary who appealed an adverse action within 10 days. The email mentioned constitutional due process. On April 11, 2016, Rosen responded that the beneficiary "is being reinstated for continuation of services pending appeal." These emails are attached and incorporated as Exhibit 4.

(b) On April 15, 2016, Legal Aid of Arkansas e-mailed Rosen contending that ADHS had not maintained the ARChoices services of a beneficiary who appealed an adverse action within 10 days. This email is attached and incorporated as Exhibit 5.

(c) On April 27, 2016, Legal Aid of Arkansas e-mailed Rosen contending that ADHS had not maintained the ARChoices services of a beneficiary who appealed an adverse action within 10 days. Legal Aid "would highly recommend the agency immediately institute measures to guarantee that individuals who file fair hearing requests within 10 days of receipt of notice of adverse action have their service levels maintained at the pre-adverse action levels." This email is attached and incorporated as Exhibit 6.

(d) On July 28, 2016, Legal Aid e-mailed Rosen contending that ADHS had not maintained the ARChoices services of a beneficiary who appealed an adverse action within 10 days. This email is attached and incorporated as Exhibit 7.

(e) On September 23, 2016, Legal Aid e-mailed Rosen contending that ADHS had not maintained the ARChoices services of four beneficiaries who appealed adverse actions within 10 days. This email is attached and incorporated as Exhibit 8.

(f) On September 26, 2016, Legal Aid e-mailed Rosen contending that ADHS had not maintained the ARChoices services of ten beneficiaries who appealed an adverse action within 10 days. This email is attached and incorporated as Exhibit 9.

(g) On October 5, 2016, Legal Aid e-mailed Rosen contending that ADHS nurses were discouraging ARChoices beneficiaries from exercising their rights to maintain services pending an appeal. This email is attached and incorporated as Exhibit 10.

(h) From November 1, 2016 through approximately January 31, 2017, ADHS suspended all adverse actions against ARChoices beneficiaries due to the *Jacobs* ruling,

(i) On April 12, 2017, Legal Aid e-mailed Rosen contending that ADHS had not maintained the ARChoices services of a beneficiary who appealed an adverse action within 10 days. Rosen responded that he "instructed DAAS to restore the hours pending the hearing..." Additionally, Legal Aid contended that a process to maintain services would be beneficial and that "it would certainly work better for everyone if DHS met its obligations without requiring clients to contact an attorney to then contact a DHS attorney." These emails are attached and incorporated as Exhibit 11.

(j) On June 21, 2017, Legal Aid e-mailed Rosen contending that ADHS had not maintained the ARChoices services of two beneficiaries who appealed an adverse action within 10 days. Additionally, Legal Aid "encourage[d] the agency to improve the communications between its various employees to ensure that reductions are not implemented before the 10 days from the date of the notice of action" because, "[i]n the majority of our clients' cases, reductions are implemented immediately after a plan of care is finalized and sent to the provider...." Legal Aid contended that it was "available

to consult with the agency to ensure that it meets its obligations under relevant Medicaid and constitutional law." On June 22, 2017, Rosen responded that "the care agencies have been advised to continue the recipients' hours." These emails are attached and incorporated as Exhibit 12.

(k) On June 23, 2017, Legal Aid e-mailed Rosen contending that ADHS had not maintained the ARChoices services of six beneficiaries who appealed an adverse action within 10 days. Legal Aid wrote that it "would hope the agency implements a system-wide resolution to this issue sooner rather than later." This email is attached and incorporated as Exhibit 13.

(l) On July 14, 2017, Legal Aid phoned Rosen contending that ADHS had not maintained the ARChoices services of a beneficiary who appealed an adverse action within 10 days. On July 17, 2017, Rosen responded via email that "...DAAS advised PALCO to restore the care plan" pending the beneficiary's appeal. These emails are attached and incorporated as Exhibit 14.

(m) On July 21, 2017, Legal Aid e-mailed Rosen asking that he ensure that ADHS not reduce the ARChoices services of a beneficiary who appealed an adverse action within 10 days. Rosen responded that he "forwarded [the] email to DAAS and...will confirm continuation of services pending appeal" on the next business day. These emails are attached and incorporated as Exhibit 15.

(n) On July 27, 2017, Legal Aid e-mailed Rosen contending that a beneficiary's ARChoices services had not been restored despite a timely appeal request on May 11, 2017, and an email to Rosen on June 23, 2017. On July 28, 2017, an ADHS attorney under Rosen's supervisorial authority, Nicholas Windle, stated that the

beneficiary's ARChoices services were restored on July 7, 2017. On August 9, 2017, Legal Aid e-mailed Rosen contending that the beneficiary's ARChoices services had still not been restored. On August 15, 2017, Windle admitted that there was an "issue" with PALCO. On September 2, 2017, Legal Aid e-mailed Rosen contending that the beneficiary's ARChoices services were still not restored despite the earlier requests. On September 6, 2017, Rosen responded that "DAAS confirmed that the hours are restored...." These emails are attached and incorporated as Exhibit 16.

(o) On August 10, 2017, Legal Aid e-mailed Rosen and Sterling with a letter attached and explicitly requested that they forward the letter to Defendant Gillespie and other ADHS officials. The letter's purpose was "so that all relevant stakeholders may be fully aware of our clients' positions and our overall willingness to again attempt amicable resolution." Legal Aid contended that there were various problems with ARChoices, including the following:

> **(1) Premature Reduction of Services.** Clients who appeal within 10 days of the notice of action do not have their services maintained at pre-reduction levels as required by federal regulations, even with explicit requests to do so. While Mr. Rosen has been helpful in restoring the hours of those clients whose services were prematurely reduced, his involvement required correspondence from a Legal Aid attorney after the Department failed to take note of an explicit request in the appeal paperwork. If the agency's system for tracking appeals is not working well for program participants with an attorney, one can only imagine the adverse effects on unrepresented individuals. *DHS should adopt new internal procedures for appeals so that DAAS nurses do not forward the Person Centered Service Plan to Palco or agency providers until 15 days have elapsed from the date the notice of adverse action is sent. Relatedly, OAH should coordinate with DAAS to ensure that nurses are promptly made aware of all appeals so that they do not implement a reduction for a beneficiary who appealed within 10 days.*

The email and letter are attached and incorporated as Exhibit 17.

(p) On August 16, 2017, Rosen e-mailed Legal Aid that he "reviewed your letter and forwarded it to my client" and "expect[s] to meet with DAAS about your letter." The email is attached and incorporated as Exhibit 18.

(q) Rosen and Sterling responded to the August 10, 2017 letter with a letter and follow-up emails, none of which addressed the premature reduction of services.

(r) On September 2, 2017, Legal Aid e-mailed Rosen contending that ADHS had not maintained the ARChoices services of a beneficiary who appealed an adverse action within 10 days and asked that ADHS "please work out a functioning system so that people who appeal within 10 days get to keep the pre-reduction services to which they are entitled...." On September 6, 2017, Rosen responded that "DAAS has confirmed that the hours are restored...." These emails are attached and incorporated as Exhibit 19.

(s) On January 10, 2018, Legal Aid e-mailed Rosen contending that ADHS had not maintained the ARChoices services of two beneficiaries who appealed an adverse action within 10 days. On January 11, 2018, Rosen responded that the services "are reinstated or continuing at their prior level." These emails are attached and incorporated as Exhibit 20.

(t) Between May 14, 2018, and October 8, 2018, ADHS initiated no adverse actions based on functional assessments for ARChoices due to litigation invalidating the allocation methodology in effect at that time. On information and belief subject to confirmation after a reasonable opportunity for discovery, from October 8 to December 31, 2018, ADHS did not terminate or reduce the services of any ARChoices beneficiary based on functional assessments.

(u) On March 12, 2019, Legal Aid of Arkansas e-mailed Rosen and White contending that ADHS had not maintained the ARChoices services of six beneficiaries who appealed an adverse action within 10 days. On March 13, 2019, Rosen responded that five of the beneficiaries' services were continued without stopping but that one had "services stopped for an unknown reason but was reinstated effective today." These emails are attached and incorporated as Exhibit 21.

117. On May 23, 2019, Ginger Elder filed a lawsuit against Cloud, Gillespie, Rosen, and Sterling alleging that her benefits were terminated despite timely appeal. In responsive filings, ADHS admitted that "Elder's benefits were mistakenly discontinued." *Elder v. Gillespie*, Dkt. 11, p. 26-27. ADHS stated that the termination was "wholly inadvertent" and that, in the matter most favorable to Ms. Elder, the allegations only "arguably demonstrate negligence." *Id.*, p. 15. Having reinstated Ms. Elder's benefits after receiving notice of the lawsuit, ADHS then argued that "there is no ongoing alleged violation" and that Ms. Elder's complaint should be dismissed for lack of standing.

118. On July 25, 2019, ADHS issued a notice of action and person-centered service plan reducing the combined monthly personal and attendant care hours of Washington County ARChoices beneficiary D.M. from 94 to 85. On August 1, 2019, D.M. faxed a letter of appeal to OAH and asked that his benefits "be continued at the pre-reduction level pending the outcome of the appeal." Starting August 5, 2019, D.M. received only 85 care hours per month. Because Legal Aid emailed Ashley Fisher, the assigned ADHS attorney, on D.M.'s behalf on December 13, 2019, and January 3, 2020, ADHS restored his hours on January 6, 2020.

119. On November 22, 2019, ADHS issued a notice of action terminating the ARChoices eligibility of Baxter County resident M.G. and stating that her services would stop on

January 2, 2020. On November 27, 2019, M.G. faxed a letter of appeal to OAH stating, "I also elect to continue to receive ARChoices Waiver Medicaid Benefits and Services while the appeal is pending." Starting January 3, 2020, M.G. received no Medicaid services, including ARChoices in-home care. Because Legal Aid contacted ADHS on her behalf on January 6, 2020, ADHS restored her ARChoices on January 7, 2020.

120. Around November 24, 2019, ADHS issued a notice of action terminating the ARChoices eligibility of Clay County resident J.D. and stating that her services would stop on December 4, 2019. Within 10 days, J.D. sent a letter of appeal to OAH and wrote that she wanted to continue receiving ARChoices benefits pending the outcome of the appeal. On December 5, 2019, she stopped receiving home-delivered meals under the ARChoices program. Because Legal Aid contacted ADHS on her behalf on January 28, 2020, ADHS restored her meals, and she began receiving home-delivered meals on February 12, 2020.

121. On December 4, 2019, ADHS issued a notice of action terminating the ARChoices eligibility of Washington County resident B.K. and stating that her services would stop on January 20, 2020. On December 11, 2019, B.K. faxed a letter of appeal to OAH stating, "I want my benefits to continue at their current level until the outcome of the hearing." Starting January 21, 2020, B.K. received no Medicaid services, including ARChoices in-home care. Because Legal Aid contacted ADHS on her behalf on January 28, 2020, ADHS restored her Medicaid the following day.

122. On January 8, 2020, ADHS issued a notice of action terminating the ARChoices eligibility of Washington County resident C.N. and stating that his services would stop on January 21, 2020. On January 10, 2020, C.N. sent a letter of appeal to OAH and wrote that "I request my benefits continue at their current level until the outcome of the hearing." On January

21, 2020, C.N. received no Medicaid services, including ARChoices in-home care. Because Legal Aid contacted ADHS on his behalf on January 22, 2020, ADHS restored his ARChoices the following day.

123. Between 2016 and present, ARChoices beneficiaries not identified in Paragraphs 116 to 122 received notices of adverse action issued by ADHS, filed an appeal within 10 days from the date on the notice, and experienced a reduction or termination of ARChoices services prior to the outcome of the appeal.

XI. MECHANICS OF THE APPEALS PROCESS AND CONTINUING BENEFITS

124. On April 26, 2019, pursuant to Arkansas's Freedom of Information Act, Legal Aid of Arkansas requested "all public records pertaining to ADHS policies, procedures, and processes currently in effect and those that were in effect as of February 28, 2019 for continuing benefit eligibility for Medicaid beneficiaries who appeal adverse agency decisions."

125. In response to the April 26, 2019 FOIA request, ADHS did not produce any written policy, procedure, or process for continuing benefit eligibility for Medicaid beneficiaries who appeal adverse agency decisions.

126. In response to subsequent FOIA requests, ADHS has not produced any written policy, procedure, or process for continuing benefit eligibility for Medicaid beneficiaries who appeal adverse agency decisions.

127. ADHS does not have any written policy, procedure, or process for continuing benefit eligibility for Medicaid beneficiaries who appeal adverse agency decisions.

128. Because ADHS does not have written policies, procedures, or processes for continuing benefit eligibility for Medicaid beneficiaries who appeal adverse agency decisions,

the agency's actual process for maintaining benefit eligibility for beneficiaries who timely appeal is knowledge solely within the possession of the Defendants.

129. Plaintiff alleges the following about the agency's process for continuing benefit eligibility for ARChoices beneficiaries who appealed within 10 days from the date on the notice of adverse action during the period of January 1, 2016, to December 1, 2019:[16]

(a) Upon deciding to take an adverse action, the relevant divisions or units within ADHS programmed the agency's computer systems to terminate or reduce a beneficiary's benefits immediately or, at the latest, on the 10th day following the date on which ADHS sent out a notice of adverse action. In the case of ARChoices, the relevant divisions or units included, but were not limited to, the Office of Long-Term Care (OLTC), which is presently an office within the Division of Provider Services and Quality Assurance (DPSQA), the Division of Aging, Adult, and Behavioral Health Services (DAABHS), which was formerly the Division of Aging and Adult Services (DAAS), the Division of Medical Services (DMS), and the Division of County Operations (DCO).

(b) To determine whether a beneficiary was eligible to receive continuing services pending appeal, the agency had to first determine whether the appeal was filed within 10 days of the date of the notice of adverse action. If the appeal was timely filed, the agency had to then take the steps necessary to continue the beneficiary's services. Since the necessary steps involved multiple divisions or units, each involved division or unit had to be notified to take the necessary action. Then, for a beneficiary to actually

[16] December 1, 2019 is the date on which ADHS reduced Ms. Dearmore's services pursuant to a November 8, 2019 notice of adverse action. *See* Paragraph 52.

receive the continuing services, ADHS had to inform the beneficiary's care provider that the agency had authorized continuing services.

(c) The Office of Appeals and Hearings (OAH) received all appeal requests, which were either sent directly to OAH via mail or fax by beneficiaries or sent to OAH by a county DHS office where a beneficiary submitted an appeal request.

(d) OAH employees failed to review appeal requests to determine if they were filed timely for purposes of continuing benefits. OAH employees failed to take any steps necessary to ensure benefits were continued without interruption.

(e) Upon receiving an appeal involving ARChoices, OAH sent an email notification of appeal to DAAS/DAABHS, OLTC, DMS, and the General Counsel Section.

(f) OLTC, DMS, and General Counsel Section employees failed to review appeal requests to determine if they were filed timely and failed to take steps necessary to continue benefits.

(g) An employee within DAAS/DAABHS reviewed appeal requests to determine if they were filed timely for purposes of continuing benefits, subject to the following clarifications:

(i) DAAS/DAABHS did not perform this function as part of an established agency policy for reviewing appeals for timeliness for purposes of continuing benefit eligibility.

(ii) From January 1, 2016, until March 2017, no DAAS/DAABHS employee was designated to review appeal requests to determine if they were filed timely for purposes of continuing benefits.

(iii) From March 2017 to April 2018, DAAS/DAABHS designated Mitchell Harlan, one employee in the central office in Little Rock, to review all appeal requests to determine if they were filed timely for purposes of continuing benefits. There was no back-up DAAS/DAABHS employee to review appeal requests. In 2017, Cloud, Rosen, and Sterling learned that Harlan was receiving more appeals from OAH than he could reasonably manage and that beneficiaries' benefits were not always being continued despite timely appeal. After starting as DAABHS deputy director in February 2018, White learned that beneficiaries' benefits were not always being continued despite timely appeal.

(iv) From April 2018 to December 1, 2019, no DAAS/DAABHS employee was designated to review appeal requests to determine if they were filed timely for purposes of continuing benefits.

(h) Upon identifying a timely appeal, the DAAS/DAABHS employee had to inform a DAAS/DAABHS nurse in the county office where the beneficiary lives to take steps necessary to continue benefits.

(i) To continue benefits, the DAAS/DAABHS nurse in the local county office had to complete written paperwork, manually enter information in ADHS's computer system, and then inform OLTC, DMS, and DCO to take additional steps necessary to maintain benefits.

(j) To maintain benefits, OLTC, DMS, and DCO had to complete written paperwork and manually enter additional information in ADHS's computer system.

(k) In ADHS's system, the initial action to terminate or reduce a beneficiary's Medicaid benefits was stopped and benefits were continued *only when* all information was entered into the computer system by all necessary ADHS divisions or units.

(l) Even after all ADHS divisions or units entered the necessary information in the computer system, a beneficiary could not actually receive the continuing services until ADHS notified the beneficiary's care agency and/or PALCO that services were to be continued. *See* Paragraph 24. ADHS did not designate an employee to notify care agencies or PALCO.

(m) It took a minimum of three business days—and often took longer—to complete the process to stop an adverse action, continue benefits, and notify the care agency and/or PALCO.

(n) As a matter of practice or policy, no employee from any ADHS division sought confirmation from the various divisions and units involved that each involved division or unit took the steps necessary within their purview to continue a particular beneficiary's benefits. As a matter of practice or policy, the various divisions and units involved did not send such confirmation to any ADHS employee.

(o) Unless a beneficiary's attorney contacted ADHS, no ADHS employee in any division or unit was designated to ensure that the process to continue benefits was completed for any particular beneficiary.

(p) In every instance where ADHS continued the benefits of an ARChoices beneficiary who timely appealed, ADHS was contacted either by a beneficiary's attorney or care agency with a request to continue or restore benefits. In the alternative, even if ADHS ultimately completed the process to maintain a beneficiary's benefits without

being contacted by a beneficiary's attorney or care agency, beneficiaries experienced at least temporary reductions or terminations of ARChoices because ADHS implemented the adverse action by the 10th day from the date on the notice of action without allowing sufficient time to stop the adverse action for appeals filed towards the end of the 10-day timeframe.

(q) ADHS failed to complete the process to continue benefits for about 30 identified beneficiaries who timely appealed until those beneficiaries' attorneys contacted ADHS. *See* Paragraphs 115 to 122. ADHS failed to complete the process for other beneficiaries who timely appealed. *See* Paragraph 123.

(r) ADHS failed to complete the process for Ms. Dearmore.

130. Because ADHS's process for continuing benefit eligibility for ARChoices beneficiaries involves multiple divisions and offices, it is the type of ADHS internal policy that would require Sterling's review, Policy Review Committee approval, and Gillespie's approval.

XII. LONG-STANDING PROBLEMS WITH ADHS'S HEARING OFFICE

131. ADHS's Office of Hearings and Appeals (OAH) has long-standing problems that render it unable to fulfill any role it has in the process to continue benefits pending appeal.

132. On February 4, 2016, then-chief Administrative Law Judge Teri Hays informed Sterling referred to the hearings and appeal system as a "broken system," noting "dysfunction in the total system," "a high number of continuances," that "OAH regularly receives an incomplete file," and that "OAH sometimes gets the wrong record." In response, Sterling admitted "big problems at several levels."

133. On July 5, 2016, chief ALJ Hays recommended that Sterling hire an attorney coordinator in the Office of Chief Counsel to identify "backlogs and other possible problems" in

the hearing system, evaluate "personnel resource needs, including...logical alignment of work functions," perform "monitoring and implementation of, and compliance with, chief counsel directives and policies," and to "research DHS Divisional legal needs (what legal needs of the DHS divisions not currently being met that can, or do, result in legal actions—i.e. Review of notices for legal sufficiency....etc."

134. On July 5, 2016, chief ALJ Hays recommended that Sterling hire someone to supervise OAH operations, including, but not limited to, "[c]ontinual monitoring of workload trends in response to DHS organizational changes, law or policy changes, and social changes, and making adjustments as needed, "[a]ssuring that all time frames are met for all cases and legal activities, "[w]orking with other divisions to share and coordinate relevant data, "[s]upervising accurate and timely processes in the legal support and front office areas including correspondence; scheduling; subpoenas; tracking entries; case file management; timely securing of central registry; obtaining additional information needed."

135. On July 5, 2016, chief ALJ Hays recommended that Sterling hire someone to supervise the quality of OAH work, including, but not limited to, the "quality of pre-hearing actions," "the conduct of hearings," "assuring data collection and record uploads," "performance monitoring," and "[r]ecommending changes to laws and policies to improve the fair hearing processes."

136. In 2016, Sterling refused Hays' recommendations to hire an attorney coordinator, an operations supervisor, and a quality supervisor for OAH. On information and belief subject to confirmation after a reasonable opportunity for discovery, Sterling has not hired any such person to date.

137. Because of increased ARChoices appeals in 2019, OAH routinely takes between three and eleven days to notify other involved ADHS divisions or units once receiving a beneficiary's appeal request, leaving insufficient time for benefits to be continued without interruption. In at least one instance, OAH took 46 days to inform other involved ADHS divisions or units, having received an appeal request on April 4, 2019 and having informed other divisions or units on May 20, 2019.

138. From 2019 to present, Sterling has not hired sufficient staff to process appeals and inform other involved divisions or units in a manner to ensure continuing benefits. On information and belief subject to confirmation after a reasonable opportunity for discovery, Sterling has not asked for additional funds to hire sufficient staff to process appeals and inform other divisions or units in a manner to ensure continuing benefits.

139. From 2019 to present, Gillespie has not authorized, requested, or designated funds for Sterling to hire sufficient staff to process appeals and inform other involved divisions or units in a sufficient manner to ensure continuing benefits.

XIII. DEVELOPMENT OF DEFICIENT NOTICES

140. From January 1, 2016, until present, Cloud, Rosen, and White approved the form of all notices of adverse action, including making specific wording decisions:

(a) On July 1, 2016, Cloud and Rosen notified DAAS nurses that all ARChoices notices of adverse action receive their approval before being sent to beneficiaries.

(b) From November 1, 2016 through approximately January 31, 2017, ADHS suspended all adverse actions against ARChoices beneficiaries due to the *Jacobs* ruling,

(c) From November 2016 until April 2018, ADHS designated DAAS/DAABHS employee Mitchell Harlan to redesign its ARChoices notices under the supervision of Cloud and Rosen.

(d) On February 8, 2017, Harlan met with Cloud to determine the content of the notice and the ADHS unit or division ultimately responsible for sending it out. Rosen participated in the decision.

(e) Rosen made specific wording decisions about the notice on at least December 22, 2016, January 9, 2017, May 2, 2017, and September 11, 2017. On September 11, 2017, Harlan required Rosen to "sign off on" the notice before sending it to his DAAS/DAABHS superiors.

(f) Based on information and belief subject to confirmation after a reasonable opportunity for discovery, in 2018, Cloud, White, Rosen, and Sterling drafted, reviewed, and approved the form of the notices currently in use, including that which Ms. Dearmore received.

XIV. CLAIMS FOR RELIEF

141. At all relevant times, the Defendants were acting under color of law in the administration of ADHS.

142. Ms. Dearmore asserts her right to relief against the Defendants jointly, severally, or in the alternative with respect to the reduction of her ARChoices services and resulting harms. Questions of law or fact common to all Defendants include all facts relating to Ms. Dearmore's ARChoices eligibility, the amount of services allocated to her, the timeliness of her appeal, her request for continuing services, the content of the notice provided to her, all facts pertaining to ADHS's process for continuing the benefits of Medicaid beneficiaries who timely request

appeal, all facts pertaining to ADHS's failure to continue Ms. Dearmore's ARChoices services pending the outcome of an evidentiary hearing, and all facts pertaining to the extent of damages.

143. Equitable relief is necessary because relief at law is inadequate to avoid further harm to Ms. Dearmore while this case is ongoing.

144. There is an actual controversy between the parties because Ms. Dearmore has suffered harm and is suffering ongoing harm based on ADHS's unlawful reduction of her services and failure to provide her adequate notice.

145. Ms. Dearmore is likely to suffer irreparable harm in the absence of injunctive relief because she presently has insufficient ARChoices services to meet her care needs, faces the possibility of a hearing without adequate notice about the reasons for the reduction in her services, is subject to re-assessment and the resulting adverse action, and faces the threat of the reduction or termination of benefits even upon timely appeal.

146. The harm that Ms. Dearmore suffers outweighs any injury that would be caused to the Defendants by implementing procedures to ensure that ARChoices benefits are continued for beneficiaries who appeal adverse agency actions within 10 days.

147. The public interest is significant in protecting ARChoices beneficiaries' due process rights to adequate notice and an evidentiary hearing prior to the termination of services because Medicaid provides medically necessary services to people who live in or near poverty and who cannot otherwise afford such services.

148. Ms. Dearmore is likely to succeed on the merits of her claim, as all claims are enforceable by private parties and based on facts establishing the Defendant's unlawful conduct.

149. The Defendants have engaged in reckless and callous indifference to Ms. Dearmore's constitutional rights such that punitive damages are needed to punish and deter such conduct.

150. As a direct and proximate consequence of the Defendants' conduct, Ms. Dearmore is entitled to damages, including, but not limited to, the following to be specified at trial: expenses incurred as a result of the reduction of ARChoices, the value of the ARChoices services withheld, compensatory damages for delays in medically necessary care, mental anguish, physical suffering, and other compensatory and punitive damages.

Official Capacity Claims

COUNTS ONE and TWO: The defendants in their official capacities violated Ms. Dearmore's constitutional due process right to continuing benefits pending appeal and adequate notice of the reasons for the adverse action.

151. Ms. Dearmore incorporates Paragraphs 1 through 150.

152. Ms. Dearmore has a property interest in continuing coverage through the ARChoices Medicaid program. Ms. Dearmore has a legitimate claim of entitlement to ARChoices services because she was determined eligible for and receiving ARChoices continually since 2012 and has been receiving 143 hours of care since at least 2017.

153. The Due Process Clause of the Fourteenth Amendment prohibits states from denying, reducing, or terminating Medicaid services without due process of law. According to *Goldberg v. Kelly*, 397 U.S. 254 (1970), and subsequent cases, the constitutional right to due process includes, among other things, the right to adequate notice of the reasons for an adverse action and an evidentiary hearing prior to the termination or reduction of benefits. The due process requirements in *Goldberg* were explicitly integrated into federal Medicaid regulations. *See* 42 C.F.R. § 431.205(d).

154. ADHS mailed a notice of action to Ms. Dearmore on November 8, 2019. The notice does not identify that a reduction has taken place and does not explain the reasons that her benefits were reduced from 143 care hours per month to 103 care hours per month. As a result, Ms. Dearmore does not understand the reasons for the reduction in her services.

155. Ms. Dearmore appealed the adverse action on November 15, 2019 and asked that her services be continued pending appeal.

156. On December 1, 2019, ADHS reduced her combined attendant and personal care hours from 143 per month to 103 per month. As a result of the reduction, Ms. Dearmore has suffered extensively, including lying in urine-soaked clothes, having increased skin problems, skipping meals, missing medical appointments, and being shut in.

157. The reduction of Ms. Dearmore's ARChoices services was caused by ADHS's systematic failure to implement and oversee an effective process to identify timely appeals and take whatever steps are necessary to maintain ARChoices services and ADHS's custom, policy, or practice to terminate or reduce the services of beneficiaries subject to adverse agency actions regardless of the timing of any appeal request. Additionally or in the alternative, the reduction of Ms. Dearmore's services resulted from the failure of an ADHS employee responsible for identifying timely appeals and continuing services perform the necessary tasks.

158. ADHS's de facto requirement that continuing benefits pending appeal requires additional action, such as communication from a beneficiary's attorney or care agency, is incompatible with due process.

Individual Capacity Claims

COUNT THREE: Rosen in his individual capacity violated Ms. Dearmore's constitutional due process right to continuing benefits pending appeal.

159. The Plaintiff incorporates the contentions of Paragraphs 1 through 158.

160. Rosen manages the General Counsel Section within the Office of Chief Counsel.

161. On information and belief subject to confirmation after an opportunity for investigation or discovery, in 2016, Rosen refused to have the General Counsel Section involved in the process of reviewing appeals for purposes of continuing benefits despite requests from other ADHS divisions or units.

162. From 2016 to 2019, Rosen received allegations from Legal Aid that ADHS unlawfully terminated or reduced the benefits of ARChoices beneficiaries who appealed adverse agency action within 10 days.

163. Rosen and his subordinates in the General Counsel Section can effectuate a continuation or restoration of benefits, as seen when Rosen responded to Legal Aid's contentions with statements that benefits were or would be restored, continued, or reinstated. *See, e.g.,* Paragraph 116, Exhibits 4, 11-12, 14-16, 19-21.

164. Rosen received Legal Aid's letter dated August 10, 2017 contending that ADHS did not ensure that ARChoices beneficiaries who appealed an adverse action within 10 days would receive continuing services and that beneficiaries without counsel would be adversely impacted. *See* Paragraph 116, Exhibits 17-18

165. Any Rosen made in an email referenced in Paragraph 116 that he spoke with his client or DAAS involved a conversation with either Cloud, White, or Blocker.

166. Outside of incidents referenced in Paragraph 116, Rosen spoke about the agency's failure to continue benefits for ARChoices beneficiaries who timely appealed with Cloud, White, or Blocker between January 1, 2016 and present.

167. Rosen spoke with Sterling multiple times between January 1, 2016 and present about the agency's process for continuing benefits for ARChoices beneficiaries who timely appealed, including in response to Legal Aid's August 10, 2017 letter.

168. Between January 1, 2016, and December 1, 2019, OAH e-mailed notifications of every beneficiary appeal to Rosen or a subordinate in the General Counsel Section.

169. Between January 1, 2016, and December 1, 2019, Rosen received monthly reports about the number of incoming appeals and his subordinate attorneys' caseloads.

170. Rosen knew the assessment and care allocation system implemented on January 1, 2019, would lead to a significant increase in the number of appeals.

171. As of January 1, 2019, Rosen knew that OAH, DAAS, DAABHS, and DPSQA could not accurately review appeals for timeliness and complete the process for continuing benefits pending appeal.

172. As of January 1, 2019, Rosen had not:

(a) taken any steps to ensure that benefits were continued for a beneficiary who timely appealed unless contacted by a beneficiary's attorney;

(b) implemented any policy or procedure within the scope of his authority to ensure that ARChoices beneficiaries who timely appealed adverse actions would receive continuing benefits pending appeal;

(c) instructed subordinates in the General Counsel Section to take steps necessary to ensure that benefits are continued for beneficiaries who timely appeal unless contacted by a beneficiary's attorney;

(d) designated any subordinate to be responsible for assuring the agency's compliance with its obligation to continue benefits pending appeals;

(e) undertaken any audit, study, or review of the process for continuing the benefits of beneficiaries who timely appeal or modified existing reports to track continuing benefits;

(f) provided written training materials to his subordinates in the General Counsel Section to ensure that benefits are continued for beneficiaries who timely appeal;

(g) based the evaluations of his subordinates in the General Counsel Section on their practices regarding continuing benefits for beneficiaries who timely appeal;

(h) recommended in writing to Sterling, Cloud, Gillespie, or White any policy or procedure to ensure that benefits are continued for a beneficiary who timely appeals;

(i) hired sufficient staff to process appeals and inform other involved divisions or units in a manner to ensure continuing benefits; or,

(j) on information and belief subject to confirmation after a reasonable opportunity for discovery, asked for additional funds to hire sufficient staff to process appeals and inform other divisions or units in a manner to ensure continuing benefits.

173. Rosen knew that the new assessment system resulted in significant numbers of adverse actions against beneficiaries by March 2019. No later than May 23, 2019, Rosen definitively learned that ADHS had failed to continue the benefits of at least one ARChoices beneficiary facing an adverse action under the new assessment system when he received the complaint in the *Elder* lawsuit.

174. From May 23, 2019 to December 1, 2019, Rosen did not undertake any of the actions in Paragraph 172.

175. Rosen failed to review Ms. Dearmore's appeal request for timeliness and failed to take steps necessary to continue her benefits.

176. Rosen's subordinate to whom Ms. Dearmore's case was assigned failed to review her appeal request for timeliness and take steps necessary to continue her benefits.

177. Rosen has an ethical duty as an ADHS attorney to inform his supervising attorney, Sterling, of potentially unconstitutional acts such as the pre-hearing termination or reduction of Medicaid benefits for beneficiaries who timely appeal. Rosen informed Sterling in accordance with his ethical duty.

178. Rosen has an ethical duty as an ADHS attorney to inform his client entities within ADHS of potentially unconstitutional acts involving their programs, such as the pre-hearing termination or reduction of Medicaid benefits for beneficiaries who timely appeal. Rosen informed DAAS, DAABHS, and DPSQA in accordance with his ethical duty.

179. Rosen demonstrated deliberate indifference to the systemic failure to ensure continuing benefits beneficiaries who timely appeal, including Ms. Dearmore, through the acts attributed to him in this complaint.

180. Rosen was personally involved in the violation of Ms. Dearmore's constitutional rights by directly failing to take action to continue her benefits, by wrongly exercising his supervisorial authority over policies and procedures, and by failing to train or supervise his subordinates.

COUNT FOUR: Rosen in his individual capacity violated Ms. Dearmore's constitutional due process right to adequate notice of adverse action.

181. The Plaintiff incorporates the contentions of Paragraphs 1 to 180.

182. Rosen developed or approved the form of the notice that Ms. Dearmore received.

COUNT FIVE: Sterling in his individual capacity violated Ms. Dearmore's constitutional due process right to continuing benefits pending appeal.

183. The Plaintiff incorporates the contentions of Paragraph 1 to 182.

184. As Chief Counsel, Sterling is charged with authority to develop and review ADHS policies and procedures, monitor agency compliance with federal and state laws, represent the agency in lawsuits, and manage the operations of the Office of Appeals and Hearings and General Counsel Section.

185. On information and belief subject to confirmation after an opportunity for investigation or discovery, in 2016, Sterling refused requests from other ADHS divisions or units to have the General Counsel Section involved in the process of continuing benefits pending appeal or authorized Rosen's refusal of the same.

186. Sterling knew that ADHS had not been continuing benefits of ARChoices beneficiaries despite timely appeal during the period of 2016 to 2018.

187. Sterling was involved in the development of the new assessment and care allocation systems.

188. Sterling knew the assessment and care allocation system implemented on January 1, 2019, would lead to a significant increase in the number of appeals

189. As of January 1, 2019, Sterling had not:

(a) implemented any policy or procedure within the scope of his authority to ensure that ARChoices beneficiaries who timely appealed adverse actions would receive continuing benefits pending appeal;

(b) instructed subordinates in OAH or the General Counsel Section to take steps necessary to ensure that benefits are continued for beneficiaries who timely appeal;

(c) designated any subordinate to be responsible for assuring the agency's compliance with its obligation to continue benefits pending appeals;

(d) undertaken any audit, study, or review of the process for continuing the benefits of beneficiaries who timely appeal or modified existing reports to track continuing benefits;

(e) provided written training materials to his subordinates in OAH or the General Counsel Section to ensure that benefits are continued for beneficiaries who timely appeal;

(f) based the evaluations of his subordinates in OAH or the General Counsel Section on their practices regarding continuing benefits for beneficiaries who timely appeal;

(g) recommended in writing to Cloud, Gillespie, or White any policy or procedure to ensure that benefits are continued for a beneficiary who timely appeals;

(h) hired sufficient staff to process appeals and inform other involved divisions or units in a manner to ensure continuing benefits; or,

(i) on information and belief subject to confirmation after a reasonable opportunity for discovery, asked for additional funds to hire sufficient staff to process appeals and inform other divisions or units in a manner to ensure continuing benefits.

190. Sterling knew that the new assessment system resulted in significant numbers of adverse actions against beneficiaries by March 2019. No later than May 23, 2019, Sterling definitively learned that ADHS had failed to continue the benefits of at least one ARChoices beneficiary facing an adverse action under the new assessment system when he received the complaint in the *Elder* lawsuit.

191. From May 23, 2019 to December 1, 2019, Sterling did not undertake any of the actions in Paragraph 189.

192. On information and belief subject to confirmation after an opportunity for investigation or discovery, between January 1, 2016, and December 1, 2019, Sterling authorized ADHS's process for continuing benefits explained in Paragraph 129.

193. Sterling's subordinate in OAH who received Ms. Dearmore's appeal request failed to take steps necessary to continue her benefits, and his subordinate in the General Counsel Section to whom Ms. Dearmore's case was assigned failed to take steps necessary to continue her benefits.

194. Sterling has an ethical duty as an ADHS's Chief Counsel to inform Gillespie of potentially unconstitutional acts such as the pre-hearing termination or reduction of Medicaid benefits for beneficiaries who timely appeal. On information and belief subject to confirmation after opportunity for investigation and discovery, Sterling informed Gillespie in accordance with his ethical duties, including by passing on the letter from Legal Aid dated August 10, 2017.

195. Sterling has an ethical duty as an ADHS Chief Counsel to inform his client entities within ADHS of potentially unconstitutional acts involving their programs, such as the pre-hearing termination or reduction of Medicaid benefits for beneficiaries who timely appeal. Sterling informed DAAS, DAABHS, and DPSQA in accordance with his ethical duty.

196. Defendant Sterling demonstrated deliberate indifference to the systemic failure to ensure continuing benefits beneficiaries who timely appeal, including Ms. Dearmore, through the acts attributed to him in this complaint.

197. Sterling was personally involved in the violation of Ms. Dearmore's constitutional rights by wrongly exercising his supervisorial authority over policy and by failing to train or supervise his subordinates.

COUNT SIX: Sterling in his individual capacity violated Ms. Dearmore's constitutional due process right to adequate notice of adverse action.

198. The Plaintiff incorporates the contentions of Paragraphs 1 to 197.

199. Sterling approved the form of the notice that Ms. Dearmore received.

COUNT SEVEN: White in his individual capacity violated Ms. Dearmore's constitutional due process right to continuing benefits pending appeal.

200. The Plaintiff incorporates the contentions of Paragraphs 1 through 199.

201. In his role as DAABHS deputy director, White administered ARChoices. On information and belief subject to confirmation after a reasonable opportunity for discovery, he continued to exercise authority over the operation of ARChoices through November 2019 even after changing roles in October 2019.

202. White knew that ADHS had not been continuing benefits of ARChoices beneficiaries despite timely appeal during the period of 2016 to 2018.

203. White was involved in the development of the new assessment and care allocation systems.

204. White knew the assessment and care allocation system implemented on January 1, 2019, would lead to a significant increase in the number of appeals.

205. As of January 1, 2019, White had not:

(a) implemented any written policy or procedure within the scope of his authority to ensure that ARChoices beneficiaries who timely appealed adverse actions would receive continuing benefits pending appeal;

(b) designated or hired sufficient staff to process appeals and inform other involved divisions or units in a manner to ensure continuing benefits;

(c) undertaken any audit, study, or review of the process for continuing the benefits of beneficiaries who timely appeal or modified existing reports to track continuing benefits;

(d) provided written training materials to his subordinates in DAABHS to ensure that benefits are continued for beneficiaries who timely appeal;

(e) based the evaluations of his subordinates in DAABHS on their practices regarding continuing benefits for beneficiaries who timely appeal, including failing to update the DAABHS registered nurse training manual to specify the nurses' role in continuing benefit eligibility;

(f) recommended in writing to Cloud, Gillespie, or Sterling any policy or procedure to ensure that benefits are continued for a beneficiary who timely appeals; or,

(g) on information and belief subject to confirmation after a reasonable opportunity for discovery, asked for additional funds to hire sufficient staff to process appeals and inform other divisions or units in a manner to ensure continuing benefits.

206. White knew that the new assessment system resulted in significant numbers of adverse actions against beneficiaries by March 2019. As of March 12, 2019, White received Legal Aid's contention that six beneficiaries were in danger of having services reduced or terminated despite timely appeal. As of March 13, 2019, White learned that at least one of the six had services unlawfully terminated. On May 23, 2019, White definitively learned that ADHS had failed to continue the benefits of at least one additional ARChoices beneficiary facing an adverse action under the new assessment system when he received the complaint in the *Elder* lawsuit.

207. From May 23, 2019 to December 1, 2019, White did not undertake any of the actions in Paragraph 205.

208. White's DAABHS subordinate who received Ms. Dearmore's appeal request failed to take steps necessary to continue her benefits.

209. White has an obligation as someone with supervisorial authority over ARChoices to inform Cloud and Sharum of potentially unconstitutional acts such as the pre-hearing termination or reduction of Medicaid benefits for beneficiaries who timely appeal. White informed them.

210. White demonstrated deliberate indifference to the systemic failure to ensure continuing benefits beneficiaries who timely appeal, including Ms. Dearmore, through the acts attributed to him in this complaint.

211. White was personally involved in the violation of Ms. Dearmore's constitutional rights by wrongly exercising his supervisorial authority over policy and by failing to train or supervise his subordinates.

COUNT EIGHT: White in his individual capacity violated Ms. Dearmore's constitutional due process right to adequate notice of adverse action.

212. The Plaintiff incorporates the contentions of Paragraphs 1 to 211.

213. White drafted or approved the form of the notice that Ms. Dearmore received.

COUNT NINE: Gillespie in her individual capacity violated Ms. Dearmore's constitutional due process right to continuing benefits pending appeal.

214. The Plaintiff incorporates the contentions of Paragraphs 1 through 213.

215. In her role as ADHS Secretary, Gillespie has ultimate authority over all aspects of the Medicaid program, including ARChoices. She directly supervised Cloud, Sterling, and Sharum. She designated Dennis Smith to be her liaison on the independent assessment project, and Smith worked with White and Cloud in overseeing implementation of the new independent assessment system.

216. Gillespie knew that ADHS had not been continuing benefits of ARChoices beneficiaries despite timely appeal during the period of 2016 to 2018. On information and belief subject to confirmation after an opportunity for investigation or discovery, between February 2016, and December 31, 2018, Gillespie authorized the actual process ADHS had in place for continuing benefits for individuals who timely appeal.

217. Gillespie was involved in the development of the new assessment and care allocation systems, both on her own and through Smith.

218. Gillespie knew the assessment and care allocation system implemented on January 1, 2019, would lead to a significant increase in the number of appeals.

219. As of January 1, 2019, Gillespie had not:

(a) implemented a policy or procedure to ensure that ARChoices beneficiaries who timely appealed adverse actions would receive continuing benefits pending appeal;

(b) designated any subordinate to implement a policy or procedure to ensure that ARChoices beneficiaries who timely appealed adverse actions would receive continuing benefits pending appeal;

(c) designated any subordinate to oversee the process for continuing benefits pending appeal and ensure that beneficiaries who timely appealed received continuing benefits;

(d) hired sufficient staff to process appeals and inform other involved divisions or units in a manner to ensure continuing benefits;

(e) authorized funds for her subordinates to hire sufficient staff to process appeals and inform other involved divisions or units in a manner to ensure continuing benefits;

(f) undertaken any audit, study, or review of the process for continuing the benefits of beneficiaries who timely appeal or modified existing reports to track continuing benefits;

(g) ordered the development of written training materials to ensure that benefits are continued for beneficiaries who timely appeal;

(h) based the evaluations of her subordinates on their practices regarding continuing benefits for beneficiaries who timely appeal;

220. Gillespie knew that the new assessment system resulted in significant numbers of adverse actions against beneficiaries by March 2019. No later than May 23, 2019, Gillespie learned that ADHS had failed to continue the benefits of an ARChoices beneficiary facing an adverse action under the new assessment system when she received notice of the complaint in the *Elder* lawsuit.

221. From May 23, 2019 to December 1, 2019, Gillespie did not undertake any of the actions in Paragraph 219.

222. Gillespie demonstrated deliberate indifference to the systemic failure to ensure continuing benefits beneficiaries who timely appeal, including Ms. Dearmore, through the acts attributed to her in this complaint.

223. Gillespie was personally involved in the violation of Ms. Dearmore's constitutional rights by wrongly exercising her supervisorial authority over policy and by failing to train or supervise her subordinates.

COUNT TEN: John Doe in their individual capacity violated Ms. Dearmore's constitutional due process right to continuing benefits pending appeal.

224. The Plaintiff incorporates the contentions of Paragraphs 1 through 223.

225. Either a single ADHS employee or multiple employees were involved in the mechanics of identifying timely appeals and taking the steps necessary to maintain ARChoices services for beneficiaries.

226. The involved ADHS employee(s) failed to take the steps necessary to maintain Ms. Dearmore's benefits. The involved ADHS employee(s) failed to review her appeal request, correctly fill out paperwork, send an email to a proper ADHS recipient, enter information into ADHS's computer system, and/or confirm that all necessary steps were taken.

227. As a result, Ms. Dearmore's ARChoices services were reduced, causing the harms alleged in this complaint.

228. The involved ADHS employee(s) worked in OAH, the General Counsel Section, DAABHS, or OLTC under the direct supervision of Sterling, Rosen, White, Cloud, or Sharum, respectively, and under the ultimate supervision of Gillespie.

229. The failure of the involved ADHS employee(s) to maintain Ms. Dearmore's benefits was caused by the inadequate ADHS training, supervision, policy, or procedures recited generally in this complaint and specifically in the counts against Gillespie, Rosen, Sterling, and White.

230. John Doe was personally involved in the violation of Ms. Dearmore's constitutional rights by directly failing to take action to continue her benefits.

XV. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully request that the Court grant the following relief:

1. Upon motion by the Plaintiff, issue a temporary restraining order and/or a preliminary injunction pursuant to the official capacity claims that orders the Defendants to (1) immediately increase Ms. Dearmore's ARChoices services to the levels contained in the last

service plan in effect prior to November 8, 2019; (2) hold the unscheduled administrative hearing in abeyance pending the resolution of this suit; and (3) refrain from assessing her or determining the amount of services she receives using the system presently in effect until this suit is resolved or she requests an increase in services.

2. Issue a declaratory judgment pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 that Defendants' actions, policies, procedures and practices as alleged herein are in violation of the Fourteenth Amendment of the U.S. Constitution.

3. Grant a permanent injunction that orders Defendants in their official capacity to implement an adequate notice and an adequate process to ensure that Ms. Dearmore and other ARChoices beneficiaries who timely appeal adverse agency actions receive continuing benefits pending the outcome of the evidentiary hearing. The notice and process ordered should be tailored to address the specific deficiencies established upon proof.

4. Pursuant to the individual capacity claims,[17] grant a money judgment representing compensatory damages, including for all expenses incurred by Ms. Dearmore as a result of the loss of ARChoices, the value of the ARChoices services withheld, costs for delays in medically necessary care, mental anguish, physical suffering, and other compensatory damages. The amount of damages is to be determined at trial.

5. Pursuant to the individual capacity claims, grant a money judgment representing punitive damages for Defendants' willful violations of the United States Constitution. The amount of damages is to be determined at trial.

6. Pursuant to the individual capacity claims, grant a money judgment representing pre-judgment and post-judgment interest, if applicable.

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[17] Ms. Dearmore does not maintain a claim for damages against the defendants in their official capacities.

7. Award Ms. Dearmore the costs of this action and reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

8. Retain jurisdiction over this action to ensure Defendants' compliance with the with the Court's orders.

9. Waive the requirement for the posting of a bond as security for the entry of relief.

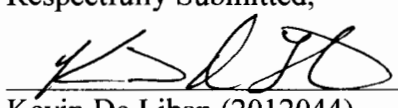
10. Provide such other relief as the Court deems to be just and proper.

JURY DEMAND

Plaintiff demands a trial by jury of all issues in this action and reserves the right to amend this Complaint, including, but not limited to, additional counts, plaintiffs, and facts supportive of damage claims as discovery develops.

DATED: February 24, 2020

Respectfully Submitted,



Kevin De Liban (2012044)
kdeliban@arlegalaid.org
LEGAL AID OF ARKANSAS
310 Mid-Continent Plaza, Suite 420
West Memphis, AR 72301
P: (800) 967-9224 x. 2206
F: (870) 732-6373

Trevor Hawkins (2017224)
thawkins@arlegalaid.org
LEGAL AID OF ARKANSAS
714 S. Main St.
Jonesboro, AR 72401
P: (800) 967-9224 x. 6313
F: (870) 910-5562