UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARIE MENKING by her attorney-in-fact WILLIAM MENKING, on behalf of herself and of all others similarly situated,

Plaintiffs,

- against -

RICHARD F. DAINES, M.D., in his official capacity as Commissioner, New York State Department of Health, and DAVID A. HANSELL, in his official capacity as Commissioner, New York State Office of Temporary and Disability Assistance,

Defendants.

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MEMORANDUM AND ORDER

09-CV-4103 (LAP)(RLE)

LORETTA A. PRESKA, Chief United States District Judge:

Plaintiff Marie Menking—on behalf of herself and a certified statewide class of persons who are applicants for, or recipients of, benefits from the Medicaid Assistance Program ("Medicaid")[1]—brings this action against the New York State

[1] The present action was brought as a companion case to another class action, Shakhnes ex rel. Shakhnes v. Eggleston, No. 06 Civ. 4778. Like plaintiff in the present action, plaintiffs in Shakhnes alleged procedural deficiencies in the processing of appeals of Medicaid applications by New York agency defendants responsible for Medicaid administration. Shakhnes, however, involved claims in addition to the ninety-day violation claims at issue in the present action and concerned a certified class of individuals who make up a subset of Medicaid recipients, namely those requesting home health services but not challenging decisions related to their financial eligibility for Medicaid. (cont'd on next page)

Department of Health ("DOH") and the New York State Office of Temporary and Disability Assistance ("OTDA") (collectively, "Defendants") to enjoin Defendants' allegedly routine practice of failing to render final decisions following fair hearings within the required ninety-day period following fair hearing requests. Plaintiff asserts two causes of action under 42 U.S.C. § 1983 against both defendants jointly for (1) violations of the federal statutory provision governing Medicaid fair hearings and its implementing regulations; and (2) violations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (Compl. ¶¶ 27-30.)

This Opinion addresses Defendants' motion for summary judgment [dkt. no. 43] and Plaintiff's cross-motion for partial summary judgment [dkt. nos. 48, 53] on her first cause of action, namely Defendants' alleged violations of 42 U.S.C. § 1396a(a)(3), 42 C.F.R. § 431.244(f) and State Medicaid Manual

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In contrast, the class in the present action consists of all Medicaid applicants and recipients in the State of New York, for home health services or otherwise, who have not received a fair hearing decision within ninety days of a fair hearing request. Shakhnes ex rel. Shakhnes v. Eggleston, 740 F. Supp. 2d 602, 609-10 (S.D.N.Y. 2010), aff'd in part, vacated and remanded on other grounds, 689 F.3d 244 (2d Cir. 2012). The Court denied defendants' motion to dismiss in the present action along with pending motions in Shakhnes in a consolidated Memorandum Opinion and Order dated September 30, 2010. [dkt. no. 24.]

("SMM")[2] §§ 2903.2(A), 2902.10. For the reasons that follow, Defendants' motion for summary judgment is DENIED, and Plaintiff's motion for partial summary judgment is GRANTED.

I. BACKGROUND[3]

In New York, the DOH is responsible for administering the Medicaid program but has delegated the scheduling and holding of fair hearings as well as the issuing of recommended decisions to the OTDA. N.Y. Soc. Serv. Law § 363-a(1); see id. § 364-a(1). The scheduling and holding of fair hearings as well as final administration action must occur within ninety days following fair hearing requests. 42 U.S.C. § 1396a(a)(3); 42 C.F.R. § 431.244(f); State Medicaid Manual §§ 2903.2(A), 2902.10.

Plaintiff, a New York resident, was an inpatient at Fort Tryon Center for Rehabilitation and Nursing ("Fort Tryon") from fall 2005 through late spring 2006. (Pl.'s 56.1 Stmt. [dkt. no.

[2] The SMM is issued by the United States Department of Health and Human Services through the Centers for Medicare & Medicaid Services. A copy of the SMM can be found online at http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html (last accessed Aug. 28, 2012).

[3] The following facts are drawn from (i) the Local Rule 56.1 statements submitted by the parties and the exhibits submitted in connection with the motions [dkt. nos. 44, 55), (ii) the exhibits referenced therein and annexed to the Declaration of Robert L. Kraft in Support of Defendants' Motion for Summary Judgment [dkt. no. 45] ("Kraft Decl."), (iii) the exhibits referenced therein and annexed to the Declaration of Aytan Y. Bellin in Support of Plaintiff's Motion for Partial Summary Judgment [dkt. no. 54] ("Bellin Decl."), and (iv) plaintiff's Counter-Statement Pursuant to Local Rule 56.1 [dkt. no. 58]. The facts are uncontroverted, except as noted.

55] ¶ 1.) After Plaintiff's application for Medicaid coverage of nursing home costs incurred during her stay at Fort Tryon was denied by an August 23, 2007 Notice issued by the New York City Human Resources Administration ("HRA"),[4] Plaintiff filed a timely request with Defendant OTDA on October 3, 2007 for a fair hearing to appeal the denial. (Id. ¶¶ 2, 3.) The OTDA issued Plaintiff a Notice of Fair Hearing dated January 17, 2008, 106 days after the request, and scheduled her fair hearing for February 7, 2008, 127 days after the request. (Id. ¶ 4; see Jan. 17, 2008 Notice of Fair Hearing, Bellin Decl. [dkt. no. 54] Ex. C.) After a number of adjournments requested by Plaintiff, the fair hearing concluded on November 7, 2008. (Pl.'s 56.1 Stmt. ¶ 5.) As of April 27, 2009, the date on which Plaintiff filed her complaint, even after excluding all adjournments, Plaintiff had not received a decision on her fair hearing. (Id. ¶ 6.)

The aforementioned delays in rendering a decision after Plaintiff's October 2007 request for a fair hearing are in clear violation of the ninety-day limit mandated by 42 U.S.C. § 1396a(a)(3), 42 C.F.R. § 431.244(f), and SMM § 2902.10. A

[4] New York is divided into fifty-eight local social services districts, and each district determines the eligibility of its residents who apply for Medicaid. The HRA administers the Medicaid program for residents of New York City, which constitutes one local social services district in the State. (Defs.' 56.1 Stmt. ¶¶ 10-12.)

decision after fair hearing ("DAFH") was issued to Plaintiff on May 7, 2009. (Defs.' 56.1 Stmt. [dkt. no. 44] ¶ 30.) The record for 2006-2008 and part of 2009 shows that in New York City alone, even after excluding adjournments, more than 13,000 fair hearing decisions rendered by Defendants were issued after the ninety-day period following fair hearing requests had passed.[5] (See Pl.'s 56.1 Stmt. ¶¶ 8-11; Statistical Summary Chart, Bellin Decl. Ex. I; E-mail from Robert Kraft (Jan. 26, 2010, 11:56 AM EST), Bellin Decl. Ex. J.)

In August 2011, Plaintiff moved for certification of class status pursuant to Fed. R. Civ. P. 23(a) and (b)(2) for "[a]ll current and future New York State applicants for, or recipients of Federal Medicaid who have requested or will request fair hearings for whom [D]efendants fail to render a fair hearing decision within ninety days from the date of the request . . . ." [dkt. no. 31.] In December 2011, Magistrate Judge Ronald L. Ellis issued a Report and Recommendation ("R&R"), recommending that Plaintiff's motion for class certification be granted. [dkt. no. 63.] On September 21, 2012, the Court adopted the R&R's recommendation of certifying

[5] The percentage of statewide Medicaid fair hearing decisions that were issued more than ninety days (after excluding adjournments) after the request for fair hearing, in New York City alone, was 38.2% for 2006, 41.7% for 2007, 35.7% for 2008, and 25.4% based on partial information for 2009. (Pl.'s 56.1 Stmt. ¶¶ 8-11.)

the proposed class, with the modification of including a statewide definition for the certified class as set forth in Plaintiff's motion for class certification ("Class Cert. Order"). [dkt. no. 67.]

In October 2011, Defendants moved for summary judgment [dkt. no. 43], and Plaintiff cross-moved for partial summary judgment [dkt. nos. 48, 53] pursuant to Fed. R. Civ. P. 56.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, interrogatories, admissions, and affidavits demonstrate that there are no genuine issues of material fact in dispute and that one party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In deciding a summary judgment motion, a district court must draw all reasonable inferences in favor of the nonmoving party. See id. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)); Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 137 (2d Cir. 1998). Thus, the court must not "weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary

judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." Amnesty America v. Town of W. Hartford, 361 F.3d 113, 122 (2d Cir. 2004) (quoting Weyant v. Okst, 101 F.3d 845, 854 (2d Cir. 1996)). Any evidence in the record pertaining to any genuine issue of material fact from which an inference could be drawn in favor of the nonmoving party precludes summary judgment. See Castle Rock Entm't, 150 F.3d at 137.

Once the movant has demonstrated that no genuine issue of material fact exists, such that it is entitled to judgment as a matter of law, then "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). "Conclusory allegations will not suffice to create a genuine issue. There must be more than a 'scintilla of evidence,' and more than 'some metaphysical doubt as to the material facts.'" Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990) (citing Anderson, 477 U.S. at 252; Matsushita, 475 U.S. at 586.) Instead, the nonmoving party must present "concrete evidence from which a reasonable juror could return a verdict in his favor." Anderson, 477 U.S. at 256. Only disputes over material facts "that might affect the outcome of the suit under the governing law" will properly preclude the entry of

summary judgment. *Id.* at 248; see also Matsushita, 475 U.S. at 586.

III. DISCUSSION

A. Defendant's Motion for Summary Judgment

1. Plaintiff Menking Has Article III Standing to Sue

Defendants renew an argument that was unsuccessfully raised in their opposition to Plaintiff's motion for class certification: Menking has no standing to sue because she has not suffered any injury-in-fact, a requisite element of Article III standing to sue. (Compare Defs.' Mem. Supp. Mot. Summ. J. [dkt. no. 46] at 9-11, and Defs.' Reply Mem. Supp. Mot. Summ. J. [dkt. no. 62] at 2-5, with Defs.' Mem. Opp'n Mot. Class Certification [dkt. no. 36] at 10-12.) Specifically, Defendants (1) argue that although no DAFH had been issued by the date of filing of the complaint, Plaintiff lacks standing because she had suffered no injury from a lack of medical care prior to the date of filing, since it is not in dispute that Plaintiff received nursing home care during her stay at Fort Tryon and services in the community paid for by Medicaid after she left Fort Tryon (Defs.' Mem. Supp. Mot. Summ. J. at 10; see May 7 DAFH Findings of Fact ¶ 1, Kraft Decl. [dkt. no. 45, Ex. 1]); and (2) attempt to distinguish Menking from plaintiffs in Shakhnes, where the Court affirmed their standing to sue because "[u]nlawful administrative delays constitute an injury that

. . . the plaintiffs were likely to suffer during the fair hearing resolution process. Nothing more is needed for purposes of the Constitutional standing requirement." Shakhnes ex rel. Shakhnes v. Eggleston, 740 F. Supp. 2d 602, 632 (S.D.N.Y. 2010), aff'd in part, vacated and remanded on other grounds, 689 F.3d 244 (2d Cir. 2012).

Defendants do not dispute that as of April 27, 2009—the date on which Plaintiff filed her complaint and the ninety-day window after her October 2007 fair hearing request was long past—even after excluding all adjournments, Plaintiff had not received a decision on her fair hearing. For the same reasons previously set forth in the Court's confirmation of Menking's standing in its certification of the proposed class, the Court concludes that, like the Shakhnes plaintiffs, Menking has standing because unlawful administrative delay in scheduling and holding a fair hearing past the required ninety-day period constitutes the requisite "injury in fact." See Class Cert. Order at 8-11.

2. Plaintiff Has Private Right of Action to Bring First Cause of Action Under § 1983

Plaintiff's first cause of action alleges that Defendants have violated 42 U.S.C. § 1983 by failing to resolve fair hearings within the required ninety-day window as set forth in the federal statutory provision governing Medicaid fair hearings

and its implementing regulations. (Compl. ¶ 28 ("Defendants have violated and will violate 42 U.S.C. § 1983 in that they . . . have violated and will violate 42 U.S.C. 1396a(a)(3), 42 C.F.R. § 431.244(f), and 45 C.F.R. § 205.10(a)(16).").) Defendants argue that 42 U.S.C. § 1396a(a)(3), the federal statutory provision governing Medicaid fair hearings, does not confer a private right of action under § 1983. (Defs.' Mem. Supp. Mot. Summ. J. at 12-14.) For the reasons set forth below, the Court reaffirms its finding in Shakhnes that the statutory right to opportunity for Medicaid fair hearings "expressed in 42 U.S.C. § 1396a(a)(3) is enforceable through a 42 U.S.C. § 1983 cause of action." 740 F. Supp. 2d at 615-16.

Nothing short of an "unambiguously conferred right" can support a cause of action brought under § 1983, which "provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States. Accordingly, it is rights, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) (emphasis in original); accord Blessing v. Freestone, 520 U.S. 329, 340 (1997) ("In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law.") (citing

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989)).

To determine whether statutory language creates rights enforceable under § 1983, courts look to three traditional factors that the Supreme Court provided in Blessing and clarified in Gonzaga: (1) whether the statutory text is phrased in terms of the persons benefited, (2) whether the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence, and (3) the statute must unambiguously impose a binding obligation on the States. Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury, 445 F.3d 136, 149-50 (2d Cir. 2006) (internal quotation marks omitted) (citations omitted).

The Court of Appeals affirmed this Court's finding in Shakhnes that application of the above three-prong inquiry to the federal statutory provision governing Medicaid fair hearings, 42 U.S.C. § 1396a(a)(3), shows that "Congress intended to confer individual rights upon a class of beneficiaries," with the rebuttable presumption that these rights are enforceable under § 1983. 740 F. Supp. 2d at 615-16 & n.3; accord Shakhnes ex rel. Shakhnes v. Berlin, 689 F.3d 244, 254 (2d Cir. 2012) ("The District Court correctly held that 42 U.S.C. § 1396a(a)(3)—as construed by the regulation—creates a right, enforceable under § 1983, to receive a fair hearing and a fair

hearing decision '[o]rdinarily, within 90 days' of a fair hearing request."). 42 U.S.C. § 1396a(a)(3) provides that a State plan for medical assistance must "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." (emphasis added). The Shakhnes Court found, in relevant part: "(1) the statutory text is literally phrased in terms of the 'individual' aggrieved, (2) the right protected—fair hearings—is easily administered by judicial institutions, which are intimately familiar with issues of process, and (3) the statute unambiguously imposes a binding obligation: the fair hearing 'must' be provided for." 740 F. Supp. 2d at 615.

This satisfaction of the three-prong inquiry raises a rebuttable presumption that 42 U.S.C. § 1396a(a)(3) confers an individual right enforceable under § 1983, shifting the burden to Defendants "to demonstrate that Congress has foreclosed a Section 1983 remedy, either by express [s]tatements in the underlying statute, or by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under Section 1983." Id. at 616, n.3 (quoting DaJour B. v. City of New York, No. 00 CIV.2044(JGK), 2001 WL 830674, at *8 (S.D.N.Y. July 23, 2001)). Defendants make no attempt to meet this burden. Accordingly, the presumption that Plaintiff's

individual right to a fair hearing as created by 42 U.S.C. § 1396a(a)(3) is enforceable under § 1983 prevails.

Defendants argue that 42 U.S.C. § 1396a(a)(3) does not confer a private right of action under § 1983 because it fails the last two prongs of the three-prong inquiry set forth in Gonzaga: (1) it "does not even mention any time period by which fair hearings must be completed and, thus determination of the precise length of the statutory timeliness requirement would be 'so vague and amorphous that its enforcement would strain judicial competence;'" and (2) it "does not 'unambiguously' impose an obligation on the States to complete fair hearings within 90 days." (Defs.' Mem. Supp. Mot. Summ. J. at 13 (quoting Blessing, 520 U.S. at 340-41); see also id. at 11-12 (arguing that plain language of 42 U.S.C. § 1396a(a)(3) merely requires State agency to provide opportunity for fair hearing and does not explicitly impose ninety-day requirement, and that 42 C.F.R. § 431.244(f)'s requirement for State agency to take final administrative action "ordinarily" within ninety days from fair hearing request does not mandate strict completion of the fair hearing process within ninety days in all cases).)

However, the unambiguous individual right conferred by 42 U.S.C. § 1396a(a)(3) and enforceable under § 1983 is the right to opportunity for fair hearings within some period of time, so the statutory language of 42 U.S.C. § 1396a(a)(3) need not

explicitly mention the ninety-day requirement for violations to be actionable under § 1983. "It is well-settled that, '[a]s an agency interpretation of a statute, a regulation may be relevant in determining the scope of the right conferred by Congress.'" Shakhnes, 689 F.3d at 251 (quoting Save Our Valley v. Sound Transit, 335 F.3d 932, 943 (9th Cir. 2003)). 42 C.F.R. § 431.244(f), the implementing regulation at issue which explicitly states that final administrative action ordinarily must be taken within the required ninety days, "merely further defines or fleshes out the content" of the statutory right to opportunity for fair hearing that is conferred by Congress through 42 U.S.C. § 1396a(a)(3) and enforceable under § 1983. Shakhnes, 689 F.3d at 253 (quoting Harris v. James, 127 F.3d 993, 1009 (11th Cir. 1997)); see D.D. ex rel. V.D. v. New York City Bd. of Educ., 465 F.3d 503, 513 (2d Cir. 2006) (finding that the Individuals with Disabilities Education Act "creates the right to a free appropriate public education enforceable through § 1983," and that the federal regulation 34 C.F.R. § 300.342(b)(1)(ii) "merely defines the scope of that right with respect to the requisite time frame for implementing" the right).

As the Court of Appeals clarified in Shakhnes, the inquiry for whether a specific statutory right conferred upon the

plaintiff—as defined by a regulation implementing the statute—is enforceable under § 1983 follows the rubric below:

> [S]o long as the statute itself confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right, then the statute—in conjunction with the regulation—may create a federal right as further defined by the regulation. . . .
>
> On the other hand, if the regulation defines the content of a statutory provision that creates no federal right . . ., or if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision, . . . the regulation is too far removed from Congressional intent to constitute a "federal right" enforceable under § 1983.

Shakhnes, 689 F.3d at 251 (quoting Harris, 127 F.3d at 1009).

Defendants cite Abrahams v. MTA Long Island Bus, 644 F.3d 110, 117-118 (2d Cir. 2011) for the position that a federal regulation cannot by itself give rise to an implied right of action. Putting aside the question of whether this contention is correct for a § 1983 case, which Abrahams is not, Abrahams is inapposite for two reasons. First, rather than seeking the direct and independent enforcement of a federal regulation under § 1983, Plaintiff is seeking to enforce an unambiguous individual right that is conferred by federal statute 42 U.S.C. § 1396a(a)(3) and further defined by regulation 42 C.F.R. § 431.244(f). Second, plaintiffs in Abrahams could not enforce certain regulatory provisions because said provisions created

obligations that were outside the scope of the statute conferring enforceable rights. See 644 F.3d at 119-20 (no private right of action exists to enforce regulation 49 C.F.R. § 37.137(c), since its requirement for ongoing public participation in determining scope of paratransit bus routes exceeded right-originating statute's requirement for public participation only when public entity is submitting its initial plan or annual plan update). Here, as discussed before, regulation 42 C.F.R. § 431.244(f) merely defines the ninety-day timeframe for the statutory right to a fair hearing unambiguously conferred by 42 U.S.C. § 1396a(a)(3) and does not exceed the scope of that statutory right.

Last but not least, Defendants argue that inclusion of the term "ordinarily" in 42 C.F.R. § 431.244(f)(1)'s requirement for State agency to take final administrative action within ninety days from fair hearing request does not mandate strict completion of the fair hearing process within ninety days in all cases. (Defs.' Mem. Supp. Mot. Summ. J. at 12.) However, "read as a whole the regulation is not ambiguous; it explains to which extraordinary situations the ninety-day requirement is inapplicable." Shakhnes, 740 F. Supp. 2d at 618; accord id. at 619-20 (noting that SMM § 2902.10's interpretation of ninety-day requirement is a reasonable interpretation of 42 C.F.R. § 431.244(f), which "provides for limited exceptions to the 90 day

rule in unusual cases," and consistent with both § 431.244(f)'s focus on prompt action and basic due process principles inherent in right to fair hearing granted by 42 U.S.C. § 1396a(a)(3)) (citations omitted).

Subsections (2) and (3) of 42 C.F.R. § 431.244(f) unambiguously set forth the following exceptions to the ninety-day requirement:

> (2) As expeditiously as the enrollee's health condition requires, but no later than 3 working days after the agency receives, from the MCO or PIHP, the case file and information for any appeal of a denial of a service that, as indicated by the MCO or PIHP—
>
> (i) Meets the criteria for expedited resolution as set forth in § 438.410(a) of this chapter, but was not resolved within the timeframe for expedited resolution; or
>
> (ii) Was resolved within the timeframe for expedited resolution, but reached a decision wholly or partially adverse to the enrollee.
>
> (3) If the State agency permits direct access to a State fair hearing, as expeditiously as the enrollee's health condition requires, but no later than 3 working days after the agency receives, directly from an MCO or PIHP enrollee, a fair hearing request on a decision to deny a service that it determines meets the criteria for expedited resolution, as set forth in § 438.410(a) of this chapter.

42 C.F.R. § 431.244(f)(2)-(3) (emphasis added).

3. Plaintiff's Second Cause of Action Alleging Due Process Violation Survives Dismissal

Plaintiff's second cause of action under 42 U.S.C. § 1983 is that Defendants' failure to resolve fair hearings within the

required ninety-day window "violated and will violate the Due Process Clause of the 14th Amendment to the United States Constitution." (Compl. ¶ 30.) Defendants argue that this claim should be dismissed pursuant to N.Y. State Nat'l Org. for Women v. Pataki, 261 F.3d 156 (2d Cir. 2001), cert. denied, 534 U.S. 1128 (2002), in which the Court of Appeals vacated the district court's award of injunctive and declaratory relief to § 1983 class action members who alleged that a state agency's delay in the administrative adjudication of their cases violated their Fourteen Amendment due process rights. (Defs.' Mem. Supp. Mot. Summ. J. at 16-18.) Specifically, the Court of Appeals found that despite the state agency's extensive delays in processing the members' complaints, their due process rights were satisfied by the availability of other procedures such as Article 78 proceedings, a state court remedy that "could have reduced claimants' risk of experiencing prejudicial delay," Pataki, 261 F.3d at 168 (citing N.Y. C.P.L.R. 7801-06); the rationale was that "[o]nce the delay in the processing of any claim . . . became unreasonable, each member could have brought an Article 78 proceeding to mandamus [state agency] officials to proceed expeditiously to resolve the . . . claim." Id. (citations omitted).

Pataki is inapposite because unlike the present action, which involves a due process challenge to post-deprivation

administrative delays, it only involved "the issue of whether [pre-deprivation] government delay, in and of itself, can constitute a deprivation." 261 F.3d at 166 (citations omitted). "[I]n the Fourteenth Amendment due process context the availability of state remedies can defeat a claim if (and only if) those remedies are constitutionally adequate." Shakhnes, 740 F. Supp. 2d at 614 (citing Pataki, 261 F.3d 156, 167-69). While the Court of Appeals in Pataki determined that Article 78 proceedings were a constitutionally adequate remedy defeating the plaintiff's pre-deprivation due process claim, "due process may not be satisfied if hearings come months after a deprivation, or where delays are egregious and without rational justification, or if it is the established state procedure that destroys plaintiff's entitlement without according him proper procedural safeguards." Id. at 614 (citing Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002); Kraebel v. New York City Dep't. of Hous. Pres. & Dev., 959 F.2d 395, 405 (2d Cir. 1992)) (internal quotation marks omitted).

It is well-established that unless the alleged deprivation of a property interest "is caused by random, unauthorized state conduct and an adequate post-deprivation hearing is available," "§ 1983 generally allows plaintiffs with federal or constitutional claims the right to sue in federal court without first resorting to state judicial remedies or state

administrative remedies." Kraebel, 959 F.2d at 404 (citations omitted). Here, Plaintiff Menking—who had already been denied Medicaid benefits at the time of filing of the Complaint—is making a due process claim in the post-deprivation context and alleging that Defendants' failures to render final decisions following fair hearings within the required ninety-day period are systematic failures not adequately remedied by post-deprivation fair hearings. Hence, the Court reaffirms its reasoning and ruling in Shakhnes and declines to dismiss Plaintiffs' due process claim based on the availability of Article 78 mandamus proceedings. See 740 F. Supp. 2d at 614-15.

For the reasons set forth above, Defendants' motion for summary judgment is denied.

B. Plaintiff's Motion for Partial Summary Judgment

Plaintiff has moved for partial summary judgment on behalf of herself and class members with respect to her first cause of action, namely Defendants' alleged violations of 42 U.S.C. § 1396a(a)(3), 42 C.F.R. § 431.244(f), and SMM §§ 2903.2(A), 2902.10 by failing to resolve fair hearings within the required ninety-day window.

There is no genuine dispute of material fact that (1) Defendants scheduled Plaintiff's fair hearing for February 7, 2008, 127 days after her timely October 3, 2007 request for a fair hearing regarding the HRA's August 23, 2007 denial of

Plaintiff's application for Medicaid coverage; (2) the fair hearing concluded on November 7, 2008 after a number of adjournments requested by Plaintiff; and (3) that as of April 27, 2009, the date on which Plaintiff filed her complaint and 171 days after the conclusion of the fair hearing, Plaintiff had not received a decision on her fair hearing. (Pl.'s Mem. Supp. Mot. Partial Summ. J. at 6.) Said delays in scheduling Plaintiff's fair hearing, let alone in rendering a decision after the fair hearing, are in clear violation of the ninety-day limit mandated by 42 U.S.C. § 1396a(a)(3), 42 C.F.R. § 431.244(f), and SMM § 2902.10. Moreover, the record reflects that in New York City alone, Defendants' rate of noncompliance with the ninety-day requirement (after excluding all adjournments) as a percentage of total number of statewide Medicaid fair hearing decisions rendered was 38.2% for 2006, 41.7% for 2007, 35.7% for 2008, and 25.4% based on partial information for 2009. (Pl.'s 56.1 Stmt. ¶¶ 8-11.)

Defendants' only objection to Plaintiff's motion for partial summary judgment is that whether Plaintiff has suffered an injury-in-fact due to Defendants' conduct, a prerequisite to her standing to bring a claim, is an issue of material fact purportedly in dispute. (Defs.' Mem. Opp'n Pl.'s Mot. Partial Summ. J. [dkt. no. 59] at 2-3.) The Court reiterates that for the same reasons previously set forth in the Court's decision to

grant her motion for class certification, Menking has standing because unlawful administrative delay in scheduling and holding a fair hearing past the required ninety-day period constitutes the requisite "injury in fact". See Class Cert. Order at 8-11.

Plaintiff's position is that although Defendants are required to achieve total compliance with the requirements of 42 U.S.C. § 1396a(a)(3), 42 C.F.R. § 431.244(f), and SMM §§ 2903.2(A), 2902.10 regarding the timely issuance of Medicaid fair hearing decisions,[6] they have failed even to satisfy a substantial compliance standard with those requirements. (Pl.'s Mem. Supp. Mot. Partial Summ. J. [dkt. no. 56] at 7.) The Court need not decide what level of compliance with the ninety-day requirement is sufficient to defeat summary judgment in Plaintiff's favor, because Defendants' noncompliance rates from 2006 through 2009 for New York City alone were too high and because Defendants do not assert substantial compliance as a defense. See Shakhnes, 740 F. Supp. 2d at 636. "Noncompliance in more than a third of cases is conclusive evidence of unlawful administrative delay, under a substantial compliance standard or

[6] See, e.g., D.D. ex rel. V.D. v. New York City Bd. of Educ., 465 F.3d 503, 511-12 (2d Cir. 2006) (finding that substantial compliance standard could not be applied to enforcement of individual rights to free appropriate public education conferred by the Individuals with Disabilities Education Act); Withrow v. Concannon, 942 F.2d 1385, 1386-89 (9th Cir.1991) (rejecting "substantial compliance" defense and requiring State agency to "eliminate[ ] all but the truly inevitable instances of noncompliance" with Medicaid ninety-day requirement).

otherwise." Id. (citing Morel v. Giuliani, 927 F. Supp. 622, 637 (S.D.N.Y. 1995) and opinions from other district and circuit courts).

Accordingly, there is no genuine issue of fact as to whether Defendants complied with their ninety-day obligation. For the reasons stated above, the Court grants Plaintiff's motion for partial summary judgment on behalf of herself and all class members with respect to Defendants' violations of 42 U.S.C. § 1396a(a)(3), 42 C.F.R. § 431.244(f), and SMM §§ 2903.2(A), 2902.10 by failing to resolve fair hearings within the required ninety days after Medicaid fair hearing requests.

IV. CONCLUSION

Defendant's motion for summary judgment [dkt. no. 43] is DENIED, and Plaintiff's motion for partial summary judgment [dkt. nos. 48, 53] is GRANTED.

Counsel shall confer and inform the Court by letter within ten business days of the date hereof how they propose to proceed to resolve this action.

SO ORDERED.

Dated: New York, New York
September 21, 2012

Loretta A. Preska

LORETTA A. PRESKA
Chief U.S. District Judge