IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

MELISSA WILSON, *et al.*, ***Plaintiffs,*** **v.** **DARIN GORDON, in his official capacity as Deputy Commissioner of the Tennessee Department of Finance & Administration and Director of the Bureau of TennCare, *et al.*,** ***Defendants.***	**No. 3-14-1492** **Judge Campbell** **Magistrate Judge Bryant**

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Plaintiffs' opposition to the motion to dismiss largely rehashes arguments to which the State has already responded. *See* Memorandum in Support of Motion to Dismiss, Doc. 58; Opposition to Motion for Preliminary Injunction, Doc. 51. Rather than repeating what has been said previously, this reply focuses on a single point that deserves further elaboration: the fact that the State does not have access to the information it needs to adjudicate Plaintiffs' applications in the manner proscribed by federal law.

When someone applies for Medicaid through an exchange, federal regulations require the exchange to create and maintain a "case file"—sometimes called a "[c]ase record"—that "contains information on a beneficiary regarding program eligibility." 42 C.F.R. § 431.958. Access to the case file is a prerequisite to any state agency hearing on the application. "The applicant . . . must be given an opportunity to . . . [e]xamine . . . [t]he content of the applicant's . . . case file . . ." both before and during the hearing, *id.* § 431.242, and the state agency must

have before it "[a]ll papers and requests filed in the proceeding," *id.* § 431.244(b). The undisputed record in this case establishes that the State neither possesses nor has any means of acquiring Plaintiffs' case files from the Federal Exchange. *See* Long Supplemental Decl. ¶¶ 4, 11, Doc. 80-3. Unlike the relevant case files, the "special flat files" the Federal Exchange has provided the State contain neither reliable application dates nor any of the correspondence between the Federal Exchange and the listed applicants. *Id.* ¶ 6. Without access to that critical information, the State cannot adjudicate Plaintiffs' applications in a manner that is consistent with federal law.

Plaintiffs seek to avoid the force of this fact by emphasizing that the State was able to use an alternative process through which a small number of eligible class members successfully enrolled in TennCare. MTD Opp. 5-6, Doc. 92. But this process, which involves combining the limited information available to the State from the Federal Exchange with supplemental submissions from class members, is not the process federal law mandates. To the contrary, the ACA requires that those who apply for Medicaid through an exchange "receive notice of eligibility . . . without any need to provide additional information or paperwork" unless the information already submitted is "insufficient to determine eligibility." 42 U.S.C. § 18083(b)(2). Whatever else can be said of the ad hoc process by which the State has enrolled some class members, it is not the "[s]treamlin[ed] . . . procedure[ ] for enrollment through an Exchange" that the ACA demands. *Id.* § 18083.

It is no answer to say that the State may hold a *de novo* hearing on the merits of Plaintiffs' applications. *See* MTD Opp. 6. In the first place, the regulations Plaintiffs cite for this proposition apply only when state officials hear an appeal from "the decision of a local evidentiary hearing"; they do not govern in cases of unreasonable delay at the hands the Federal

Exchange. *See* 42 C.F.R. §§ 431.232, 431.233; Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, 78 Fed. Reg. 4,594, 4,682 (Jan. 22, 2013) (proposing to define "[l]ocal evidentiary hearing" as "a hearing held on the local or county level serving a specified portion of the State"). In any event, which standard of review a state hearing officer applies is a distinct question from what evidence he must consider. Federal law is clear that a state official who hears a Medicaid eligibility appeal must have before him *all* of the information in an applicant's case file, 42 C.F.R. § 431.244(b), and it is an undisputed fact that the State has no way to access much of that information. Even to the extent that state officials use a *de novo* standard to review Plaintiffs' applications, that will not relieve them of the legal obligation to consider evidence they cannot access.

Plaintiffs thus seek to put the State in the impossible position of hearing appeals without access to the complete appellate record that federal law requires. There is a simple solution to this problem: Plaintiffs should join as defendants the federal officials who have exclusive access to the relevant case files and who delayed the processing of Plaintiffs' applications in the first place. Because Plaintiffs have refused to do so, the complaint should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should grant the State's motion to dismiss.

September 22, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 22nd day of September, 2014, via the Court's Electronic Case Filing system.

s/ Michael W. Kirk