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

A.M.C., by her next friend, C.D.C., et al.,

Plaintiffs,

v.

STEPHEN SMITH, in his official capacity as Deputy Commissioner of Finance and Administration and Director of the Division of TennCare,

Defendant.

Civil Action No. 3:20-cv-00240

Class Action

Chief Judge Crenshaw
Magistrate Newbern

REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Date: June 5, 2020

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ARGUMENT

I. Class Members Without Health Coverage Face Ongoing Risk of Irreparable Harm

Today, nearly **180,000** low-income children and adults are without TennCare because the State's new TEDS system terminated their coverage. Aaron Decl., Doc. 64, ¶ 3 & n. 1. The State concedes that "problems related to conversion" of millions of eligibility files "did occur" during its rollout of TEDS. Hagan Decl., Doc. 63 ¶ 25. The State further admits to "unforeseen flaws or gaps in the TEDS design." *Id.* ¶ 83. These systemic problems have required nine major systems upgrades, numerous smaller upgrades, and—according to the State—there is more to be done. *Id.* ¶¶ 13, 35. The State's naked assertion that TEDS's many defects have been or will be fixed for good (*id.* ¶ 84), or that some people survive redeterminations unscathed, is cold comfort to those wrongfully denied healthcare coverage in the midst of a ruthless pandemic. The situation is so dire that the State voluntarily paused further terminations until it subsides. But individuals and families who were summarily kicked off *before* the State's change in direction remain at imminent risk of irreparable harm to their health and well-being. *See Wilson v. Gordon*, No. 3-14-1492, 2014 WL 4347807, at *4 (M.D. Tenn. Sept. 2, 2014), *aff'd*, 822 F.3d 934 (6th Cir. 2016).[1]

II. Plaintiffs Are Likely to Succeed on the Merits

The State's redetermination process violates Plaintiffs' rights by failing to provide adequate notice or fair hearings, regardless of whether the State accurately adjudicates eligibility for others. *Withrow v. Concannon*, 942 F.2d 1385, 1387–89 (9th 1991). The State's form notices fail

[1] The declarations filed with Plaintiffs' opposition to the State's motion to dismiss attest to the continuing denial of due process and need for preliminary injunctive relief. *See* Docs. 70-1—8.

to give beneficiaries sufficient information to catch its own mistakes and misstate enrollees' procedural rights to correct them. Mot., Doc. 26-1, at 21–24.[2] The notices also falsely represent that the State has "look[ed] at all of your facts, all of our program rules, and each kind of group we have" before making a coverage change. *E.g.*, Ex. B to Hagan Decl., Doc. 63-2, at 11, 12, 15. But the State's own evidence shows that it does not, at a minimum, reliably screen for disability-linked categories. Doc. 63 ¶ 35(a), (d), (f)–(i). Instead, the State's notices misled the many families whose members were improperly grouped by TEDS into different households, resulting in evidence of their eligibility never being considered. *E.g.* Compl., Doc. 1, ¶¶ 149, 184, 271, 371; Hagan Decl., Doc. 64 ¶ 25(a). This constitutes a violation of due process. *Crawley v. Ahmed*, No. 08-14040, 2009 WL 1384147, at *1, 26, 30 (E.D. Mich. May 14, 2009) (notifying enrollees they are ineligible "without reviewing their eligibility under disability-based categories" violates due process.).[3]

TennCare's appeals process is another due process violation. The State admits it does not inform enrollees of their right to a hearing to show good cause for failure to return a renewal packet or file a timely appeal, or of their right to regain their coverage by submitting required information within 90 days after termination. Hagan Decl., Doc. 64 ¶ 53, 57. And its throwaway assertion that TennCare's "good cause" requirement is protected by Eleventh Amendment sovereign immunity (Opp., Doc. 62, at 19–20) is unintelligible, as Plaintiffs' claims arise under federal law.

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[2] The State's attempt to reimagine *Barry v. Lyon* as requiring only that it provide the requisite information "*in some form*" (Doc. 62, at 7) ignores the case's clear holding that a state "cannot satisfy due process by requiring notice recipients to call elsewhere." 834 F.3d 706, 720 (6th Cir. 2016). Calling elsewhere is nonetheless futile. Some form notices, for example, direct enrollees to look online or call TennCare Connect for the factual basis for the State's decision. But the missing information is not available online, and call center operators cannot access it. Compl., Doc. 1, ¶ 106; *cf. Kerr v. Holsinger*, No. Civ.A.03-68-H, 2004 WL 882203, at *6–7, 9–10 (E.D. Ky. Mar. 25, 2004) (notices "lack[ing] specificity as to why Plaintiffs no longer met the [eligibility] criteria," warranted injunction).

[3] The State did not even request information necessary to identify such eligibility until *after* this case was filed. Hagan Decl., Doc. 64 ¶ 59(f),(h).

The same is true of the State's rule requiring all appellants to show that their appeal raises a "valid factual dispute" and, if they don't, closing the appeal without a hearing. Hagan Decl., Doc. 63 ¶ 71(f); Tenn. Comp. R. & Regs. § 1200-13-19-.05(3). This violates the clear requirement that Medicaid agencies provide a hearing upon request unless "the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients." *Rosen v. Goetz*, 410 F.3d 919, 926 (6th Cir. 2005) (quoting 42 C.F.R. § 431.220(b)). The "change" referred to is a change in law that affects people regardless of individual circumstances. The Sixth Circuit permitted the State to screen appeals for a valid factual dispute in *Rosen,* because the facts of that case precisely fit the regulatory exception.[4] Fifteen years later, Plaintiffs challenge errors and surrounding procedures that misapply the eligibility requirements to their individual circumstances, not a new law. The State's closure of appeals without a hearing violates *Goldberg v. Kelly*, 397 U.S. 254 (1970), and is unsupported by either the federal regulatory exception or cases applying it.

In addition, the State admits that it has not been able to hold hearings within 90 days as required. Hagan Decl., Doc. 64 ¶ 70. The State does not disclose how many of those delays continue indefinitely, effectively amounting to denials of hearings. Compl., Doc. 1, ¶¶ 295–304. Perversely, TennCare closes appeals on the ground that it agrees with the appellants, but issues an adverse eligibility decision or no decision at all. Compl., Doc. 1, ¶ 174; Gallaher Decl., Doc. 70-3. There can thus be no dispute that the State fails to provide adequate notice or an opportunity for

[4] In 2005, CMS approved a wholesale change to the TennCare waiver that eliminated entire categories of eligibility, and *Rosen* involved the appeal rights of individuals no longer eligible in the eliminated categories. That same year, Judge Nixon allowed the State to limit hearings in medical service appeals for the same reason. *Grier v. Goetz*, 402 F. Supp. 2d 876, 922 (M.D. Tenn. 2005). The same TennCare waiver revision had imposed total limits on coverage for certain medical services. Nonetheless, Judge Nixon cautioned, "A statement as simple as: 'I am appealing because I did not get my medicine or treatment' . . . must be treated as raising a 'valid factual dispute.'" *Id.* at 922 (Adding an additional evidentiary hurdle violates due process).

a pre-termination hearing. And the State's mantra that wrongfully terminated enrollees can simply reapply is no answer to its systemic failure to ensure *pre*-deprivation notice and hearings, which is a textbook due process violation. Plaintiffs are likely to succeed on their due process claims.[5]

III. The Public Interest and Balance of Equities Favor Plaintiffs

The public's strong interests in maintaining a healthy populace, ensuring public assistance for eligible beneficiaries, and protecting constitutional and civil rights weigh heavily in favor of granting this injunction.[6] The State cannot tip the scale with its wildly inflated projections of fiscal ruin. Opp., Doc. 62, at 30. In fact, "[c]ourts routinely uphold preliminary injunctions where the alleged irreparable harm involves delay in or inability to obtain medical services and the party against whom the injunction is issued claims that the injunction places significant costs on them." *Wilson*, 822 F.3d at 958. And any marginal costs here would arise out of the State's own failure to comply with federal law *before* terminating coverage for class members in the first place.

The State's billion-dollar estimate of complying with a preliminary injunction is bogus. TennCare's actual estimate of $788 million is several times the actual *state* cost. The estimate improperly includes $506 million in federal matching funds (which are available for costs incurred "under a court order," 42 CFR § 431.250(b)(2)), $99 million to maintain coverage for current enrollees who are not in the proposed class, and an undisclosed amount for CHIP enrollees who are not proposed class members. Aaron Decl., Doc. 64 ¶¶ 4–8. The State also omits significant

[5] Plaintiffs are also likely to prevail on their claims under the Americans with Disabilities Act. At a minimum, the State unlawfully failed to consider their disability-related categories of eligibility. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7)(i), (b)(8).

[6] *See Planned Parenthood Greater Memphis Region v. Dreyzehner*, 853 F. Supp. 2d 724, 739 (M.D. Tenn. 2012) (public health); *Watkins v. Greene Metro. Hous. Auth.*, 397 F. Supp. 3d 1103, 1110 (S.D. Ohio 2019) (public assistance); *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014) (first amendment rights).

offsetting funds, including the 6.2 percentage-point increase in Federal Medical Assistance Percentage it has received in exchange for its moratorium on terminations, $390 million in unobligated reserve funds for TennCare, and a 6% tax returned to the State by health-management organizations on behalf of enrollees.[7] And the State assumes that *every one* of the 179,000 individuals whose coverage it terminated in the past year is ineligible, *see* Doc. 64 ¶ 4, despite Plaintiffs' documented experiences to the contrary, *see* Docs. 70-1—8. The State's fiscal argument is utterly lacking in substance and should be ignored by the Court.

IV. The Requested Injunction Is Appropriately Tailored

Finally, the Court should reject the State's misplaced argument that the proposed injunction is too vague to satisfy Fed. R. Civ. P. 65(d). Opp., Doc. 62, at 31–35. Rule 65(d)(1) requires that an injunction "state its terms specifically" and describe the acts restrained or required "in reasonable detail." But it "does not require a torrent of words when more words would not produce enlightenment about what is forbidden." *Windmill Corp. v. Kelly Foods Corp.*, 76 F.3d 380, 1996 WL 33251, *7 (6th Cir. 1996).[8] The *Wilson* court enjoined TennCare from "continuing to refuse to provide 'fair hearings' on delayed adjudications" and required it to timely provide such hearings. 2014 WL 4347807, at *5, *aff'd* 822 F.3d 934 (6th Cir. 2016). Requiring the State "to prospectively reinstate TennCare coverage" for absent class members who remain disenrolled and prohibiting it from terminating such coverage without due process, as Plaintiffs request (Doc. 26), is not materially different from the *Wilson* injunction and thus warrants the same outcome.

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[7] *See* Pub. L. 116-127, § 6008 (FMAP increase); State of Tennessee, The Budget, Fiscal Year 2020–2021, at xxvii (TennCare reserve), available at https://bit.ly/372fg7z; T.C.A. § 56-32-124(a) (HMO tax); Hagan Decl., Doc. 63 ¶ 2 (provision of healthcare through MCOs).

[8] "[T]he words of the injunction must be read in the context of the Court's entire decision and," then, "they are not ambiguous and the injunction satisfies Rule 65(d)(1)'s requirements." *Fowler v. Johnson*, No. CV 17-11441, 2017 WL 6540926, at *1 (E.D. Mich. Dec. 21, 2017).

CONCLUSION

Plaintiffs' motion should be granted.

Dated: June 5, 2020

By: /s/ *Catherine Millas Kaiman*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document is being served via the Court's electronic filing system on this 5th day of June, 2020 on the following counsel for the Defendant:

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