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
Chief District Judge Crenshaw
Magistrate Judge Newbern

DEFENDANT'S SUPPLEMENTAL REPLY BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION AND PRELIMINARY INJUNCTION

July 8, 2022

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ARGUMENT

At the hearing on the motions for class certification and preliminary injunction the Court made clear that before it could consider issuing an injunction it needed parties before it "that got kicked out before the moratorium and suffered or allege they suffered from the same due process violation." Hr'g Tr. at 57:7–10, Doc. 179 (Mar. 6, 2022). In response, Plaintiffs have added nine new putative class representatives, but they have done only half of what the Court asked. The new Plaintiffs are individuals who were disenrolled prior to the moratorium, but they do not "allege they suffered from the same due process violation." Rather, the new Plaintiffs present claims that are different from each other's claims and different from those of the original Plaintiffs, all while providing no basis whatsoever for the Court to conclude that any members of the class they seek to represent have the same claims that they advance. Def.'s Suppl. Br. in Opp'n to Pls.' Mots. for Class Certification and Prelim. Inj. at 16–20, Doc. 221 (July 1, 2022) ("Def.'s Suppl. Br.") In fact, none of the Plaintiffs who putatively represent a "Reinstatement Subclass" have asserted a plausible claim that could generalize to that whole group. Def.'s Suppl. Br. at 9–12. And certainly none of them say that they "got [a] notice" the other 108,000 also received "and it's misleading." Hr'g Tr. 48:14–15.

In their supplemental brief, nominally aimed at addressing how the additional Plaintiffs resolve the Court's concerns and provide an adequate basis for sweeping injunctive relief and certification of the Reinstatement Subclass, Plaintiffs do not even try to argue otherwise. In over ten pages dedicated to showing they are likely to succeed on the merits (and so qualify for preliminary injunctive relief), Plaintiffs devote more than a page to the case of Jeanne Gavigan, an individual who is not an alleged member of the Reinstatement Subclass and not a Plaintiff before the Court. *See* Pls.' Suppl. Mem. of Law in Support of Mots. for Prelim. Inj. and Class Certification

at 11–12, Doc. 225 (July 1, 2022) ("Pls.' Suppl. Br."). Their merits argument does not even *mention* any of the new Plaintiffs. *See id*. at 4–16. Instead, Plaintiffs' supplemental brief repackages prior arguments advanced by the original Plaintiffs based on their own very different experiences about "TennCare's defective notice and appeals policies and practices," without ever suggesting, much less proving, that those policies or practices were ever applied to any of the new Plaintiffs or that the challenged policies and practices caused their disenrollment. Pls.' Suppl. Br. at 25; *see also id.* at 4–16. TennCare has responded to all of these recycled arguments before and they all fail on their own terms. *See* Def.'s Resp. in Opp'n to Pls.' Mot. for Prelim. Inj. at 6–10, Doc. 165 (Jan. 4, 2022) ("PI Opp'n") (TennCare considers all bases of eligibility); *id.* at 12–14 (TennCare provides adequate information regarding basis for eligibility determination); *id.* at 15–18 (TennCare provides an adequate statement of appeal rights); *id.* at 19–21 (TennCare provides fair hearings as required by due process and the Medicaid Act).

The same is true for the class certification discussion. Where the State demonstrated in detail how each new Plaintiff's claim failed to satisfy the commonality, typicality, and adequacy requirements for certification, Def.'s Suppl. Br. at 16–25, Plaintiffs discuss the new representatives' connection to the class they represent at only the highest level of generality, *see, e.g.*, Pls.' Suppl. Br. at 21 ("Their claims arise from . . . the State's unlawful disenrollment of their TennCare coverage without adequate notice and opportunity to be heard."). These arguments also fail for reasons the State has already briefed. *See, e.g.*, Def.'s Resp. in Opp'n to Pls.' Mot. for Class Certification at 11–17, 22–24, Doc. 164 (Jan. 4, 2022).

Both motions also must fail because Plaintiffs' arguments regarding alleged systemic deficiencies and resulting harm are utterly unconnected (both in reality, and in Plaintiffs' briefing) to any new Plaintiff's case. Plaintiffs have failed to demonstrate that any new Plaintiff was harmed

as a result of the deficiencies the original Plaintiffs have generally alleged. For example, none of the new Plaintiffs had an appeal closed for lack of a valid factual dispute, *see* Suppl. Hagan Decl., Doc. 222, ¶¶ 24, 27, 36–37, 52 (July 1, 2022), so none may challenge the valid factual dispute procedures TennCare applies as part of the appeal process. "Standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *see also Rosen v. Tenn. Comm'r of Fin. and Admin.*, 288 F.3d 918, 931 (6th Cir. 2002) ("The Supreme Court has repeatedly held that to have standing in federal court, a party must assert his own legal interests, rather than those of third parties." (citation omitted)). Because the new Plaintiffs have not argued that they were disenrolled due to the policies and procedures challenged by the original Plaintiffs, they lack standing to assert those claims. "If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." *Lewis*, 518 U.S. at 358 n.6. Plaintiffs' attempts to certify the Reinstatement Subclass and to seek sweeping injunctive relief run afoul of this fundamental principle.

Nevertheless, Plaintiffs argue that the mere presence of allegedly deficient language in some notices, or the existence of the "good cause" and "valid factual dispute" requirements, confer on all 108,000 putative Reinstatement Subclass members a right to immediate reinstatement, regardless of whether those alleged deficiencies played any role in their disenrollment (and there are no allegations nor any evidence in the record that they did). That is not correct; Plaintiffs must also show that each individual member of the putative subclass was actually prejudiced by the allegedly defective notices and policies. *See* Def.'s Suppl. Br. at 11 (citing binding authority). Plaintiffs cite one statute and several regulations they assert create this entitlement, *see* Pls.' Suppl. at 17–18, but those statutes do no such thing. *See* 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.205,

431.210, 435.917(b)(2), 435.930(b), 435.916(f)(1), 435.952(d). Notably, none of these provisions say that reinstatement is required if TennCare is eventually determined to have failed to provide the required notices and procedures. The only regulation Plaintiffs cite that even mentions reinstatement requires TennCare to "reinstate and continue services until a decision is rendered after a hearing" only,

> if action is taken without . . . advanced notice . . .; the beneficiary requests a hearing within 10 days from the date that the individual receives the notice of action . . .; and [t]he agency determines that the action resulted from other than the application of Federal or State law or policy.

42 C.F.R. § 431.231(c) (cleaned up). By its own terms, this section applies only to a narrow subset of cases in which a beneficiary who did not receive advance notice of an action requests a hearing within ten days of receiving after-the-fact notice and the agency determines that the action was not the result of the application of Federal or State law or policy. *See* Def.'s Suppl. Br. at 24. Plaintiffs have not even tried to show the newly added class representatives satisfy these requirements, much less each of the 108,000 members of the proposed Reinstatement Subclass. Plaintiffs' arguments that the Medicaid statutes and regulations create an exception to *Lewis* must fail as a matter of straightforward statutory and regulatory interpretation.

Plaintiffs' arguments in favor of this broad conception of harm (and even broader conception of an appropriate remedy) cannot sustain their due process suit. Whether considered as a necessary element of a due process claim, *see* Def.'s Suppl. Br. at 11–12, or as a failure to meet the injury-in-fact or causation elements of Article III standing, *see* PI Opp'n at 2–4, in order to certify this Reinstatement Subclass, or seek this injunction, the new Plaintiffs must prove that they were actually harmed by the TennCare policies and procedures they are challenging. They have failed to make this showing, and the State has affirmatively proven that each of the new Plaintiffs was properly disenrolled, in full compliance with the State's due process obligations, because each

of the new Plaintiffs failed to submit requested information necessary to determine eligibility. *See* Def.'s Suppl. Br. 3–9.

Finally, the new Plaintiffs have not even attempted to remedy the defects in the original Plaintiffs' class certification motion. Litigation of the claims Plaintiffs seek to advance on behalf of the 108,000-member Reinstatement Subclass would, at a minimum, require individualized determinations that (i) each class member was in fact eligible for TennCare at the time of their disenrollment, *see id*. at 15, (ii) each class member was subjected to the same policies and procedures, *see id*. at 17–18, and (iii) each class member was actually prejudiced by the challenged policies and procedure—that is, that each class member would not have been disenrolled absent application of the challenged polices, *see id*. at 18–20. The new named Plaintiffs cannot make any of these showings for themselves, and it is not possible to determine whether any of the members of the putative subclass can make any of them without an individualized review of all 108,000 cases.

CONCLUSION

Plaintiffs' have failed to come forward with anyone from the putative Reinstatement Subclass who can say he or she was disenrolled as a result of the application of the policies and procedures challenged by the original Plaintiffs. For these reasons, and those stated in the State's prior briefing, the Court must deny the pending motions for class certification and preliminary injunction.

July 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served via the Court's electronic filing system on this 8th day of July, 2022.

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