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 Judge Newbern

SUPPLEMENTAL REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTIONS FOR PRELIMINARY INJUNCTION AND CLASS CERTIFICATION

Date: July 8, 2022

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The State's brief (ECF 221, "Br.") tries to distract from the core of this case: TennCare's generally-applicable policies and practices for eligibility redeterminations failed to satisfy due process requirements. As explained in the verified Amended Complaint (ECF 202), Plaintiffs' memoranda (ECF 140-1, 141-1, 225), and herein, class certification and a preliminary injunction are appropriate to remedy TennCare's systemic denial of due process during the Terminations Period.

I. The Requested Preliminary Injunction Should Be Granted

Likelihood of Success on the Merits. Plaintiffs allege across-the-board deficiencies with TennCare's notices and appeals policies and practices. *See* Am. Compl. ¶¶ 495–500. Specifically, TennCare (1) misrepresented that it had considered all bases of eligibility (ECF 225 at 4–6), (2) omitted specific bases to support ineligibility decisions (*id.* at 6–8), (3) withheld information about enrollees' rights (*id.* at 8–9), (4) misstated enrollee appeal rights (*id.* at 9–11), (5) denied subclass enrollees fair hearings based on the illegal requirement that they first raise a valid factual dispute (*id.* at 11–14), (6) denied subclass enrollees hearings to show that they had good cause (*id.* at 14), and (7) systematically failed to provide subclass enrollees timely hearings (*id.* at 14–16).

The State's response fails on at least four levels. *First*, the State largely *ignores* Plaintiffs' allegations that TennCare failed to consider seven of the 25 categories of eligibility, and that its Notices of Decision (NODs) misrepresented to enrollees that it had done so. *See* ECF 225 at 4–6; 42 C.F.R. § 435.916(f)(1). Notices of Decision for termination, including those sent to *all* the newly added Plaintiffs (ECF 192-3 at 6; ECF 192-6 at 5; ECF 192-9 at 11) during the Terminations Period, misrepresented that TennCare checked each category of eligibility when it did not.[1]

[1] *See* ECF 225 at 4-6; ECF 227-1 at 6 (renewal NOD); ECF 227-2 at 4 (same); ECF 227-3 at 4 (same); ECF 227-4 at 5 (same); ECF 227-5 at 6 (change of status notice); ECF 227-6 at 4 (same); ECF 227-7 at 4 (denial NOD); ECF 227-8 at 4 (same); ECF 227-9 at 5 (approval NOD); ECF 227-10 at 6 (same). *See also* ECF 227-11 at 4 (renewal packet).

Second, despite Kimberly Hagan's retraction of her previous representations, TennCare discouraged appeals by broadly distributing notices that misrepresented enrollees' appeal rights. *Compare* 3/4/22 Tr. at 13–19, with ECF 222, ¶¶ 4, 6. Each of the new Plaintiffs received such notices, as did many in the Reinstatement Class who had *existing* coverage.[2] And *all* Subclass members received notices that were fatally misleading or incomplete in other respects. *See infra.*

Third, the State raises red herrings about its own practices and regulations. For example, the State claims it *did* provide notice of its good cause policy (ECF 222, ¶¶ 8, 31), but that notice (ECF 63-13) refers to accommodations based on disability, not the broad "legally sufficient reason" used in rule's definition of good cause and by the State *here*. *See* ECF 220-1; TennCare Rule §§ 1200-13-19-02(20), -.07(6)(c). And the State never allowed a hearing to contest a TennCare representative's denial of good cause. ECF 166, ¶ 72(c); ECF 202, ¶ 120; *cf.* Tenn. Comp. R. & Regs. §§ 1200-13-19-.06(3); 1200-13-19-.07(3). The State also avers that the 90-day grace period to gain reinstatement only applies during annual redetermination, *see* ECF 222, ¶¶ 7, 28, 31, but TennCare's regulations treat renewals and redeterminations the same and apply the grace period to all redeterminations. TennCare Rule §§ 1200-13-20-.02 (94)-(95), -.09(1)(a), (d)(11).

Fourth, the State attempts to frame Plaintiffs' claims of systemic harms as isolated complaints by the new Plaintiffs and to blame disenrollments on third parties. *See* Br. 3–9. According to the State, an enrollee is entitled to due process if, and only if, she can identify a factual mistake on TennCare's part. Such a result is antithetical to fundamental fairness and violates the plain

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[2] *See*, *e.g.*, ECF 227 at ¶¶ 4, 8-10 (Harrell Supp. Decl.); ECF 227-12 at (termination notice for leaving household); ECF 227-20 at 4; ECF 227-13 at 3-4 (appeal); ECF 227-14 at 3-4 (appeal); ECF 227-15 at 2-3 (appeal template); ECF 227-16 at 6 (approval and denial); ECF 227-17 at 2 (premium assessment); ECF 227-18 at 17 (template denial); ECF 227-19 at 4 (scope of appeal of effective date); ECF 227-21 at 3 (appeal template for renewal termination); ECF-192-6 at 7 (Person); ECF 222-2 at 7 (M.P.L); ECF 222-33 at 10 (J.R. family).

language of 42 U.S.C. § 1396a(a)(3). Plaintiff M.P.L.'s experience is illustrative. M.P.L. is two years old and was disenrolled despite his eligibility. His mother pleaded with TennCare to reinstate his coverage because she had never received a crucial mailing, but TennCare denied his appeal and did not tell her about the grace period leaving him uninsured for years. Am. Compl., ¶¶ 354–362. While the State contends its denial was valid because of the Postal Service's faulty deliveries (Br. 4), M.P.L. was entitled to a hearing. That right was not diluted by any mistake from the Postal Service. Had M.P.L. received the hearing to which he was entitled, he would have been found eligible and retained his coverage. *See* ECF 220-1 at 2–3. TennCare's failure to accurately disclose his right to a good cause hearing and to his right to reinstatement upon submission of eligibility information were both violations of due process that were the product of systemic TennCare policy and practice. ECF 166, ¶¶ 53, 58 (admitting good cause and grace period not disclosed).

The State's argument (Br. 11–12) that the Reinstatement Subclass suffered no "prejudice," fails. Each Subclass member was disenrolled pursuant to policies and procedures that Plaintiffs allege violated due process. Courts have certified classes and remedied systemic failures to provide adequate Medicaid termination notices. *E.g., J.M. ex rel. Lewis v. Crittenden*, 337 F.R.D. 434, 438, 449–50 (N.D. Ga. 2019). Courts have also recognized reinstatement as a remedy for due process violations. *See* ECF 225 at 17–19; *Banks v. Burkich*, 788 F.2d 1161, 1163 (6th Cir. 1986). Reinstatement is warranted under Medicaid regulations. No Reinstatement Subclass members received adequate notice under 42 C.F.R. § 431.210. *cf.* 42 C.F.R. § 431.231(c)(1)-(2). And the terminations "resulted from other than the application of Federal or State law or policy," for TennCare's failure to consider all categories of eligibility, refusal to a afford good cause hearings, and failure to apply the state policy on the reinstatement grace period were all at odds with State regulations. Further, the State's point (Br. 4) that the adequacy of notice must be evaluated in each case is simply wrong.

See, e.g., *Barry v. Corrigan*, 79 F. Supp. 3d 712, 752 (E.D. Mich. 2015), *aff'd sub nom. Barry v. Lyon*, 834 F.3d 706 (6th Cir. 2016); *Crittenden*, 337 F.R.D. at 438, 449. *Keene Grp, Inc. v. City of Cincinnati* is also inapplicable; it involved an individual claim. 998 F.3d 306, 312 (6th Cir. 2021).

Irreparable Harm. The State argues (Br. 12–14) that there will be no irreparable harm because "the terminations for all the new Plaintiffs were appropriate." By contesting the merits of individual Plaintiffs' terminations and attempting to shift blame for terminations of those whom the State admits are eligible (*see* Br. 13), the State ignores Plaintiffs' allegations that *every termination* during the Terminations Period failed to satisfy due process and ignores cases like *Crittenden* that recognize some harm to every enrollee for systematic failures to provide adequate Medicaid termination notices. 337 F.R.D. at 438, 449. The State's claim (Br. 14) that most of the Subclass likely acquired other health insurance ignores Plaintiffs' allegations (*e.g.*, Am. Compl. ¶¶ 392–93) that terminations caused the Subclass to forego medical care, which constitutes irreparable harm. *See* ECF 141-1 at 21–22.

Balance of Equities. The State argues that the injunction should be denied because for cost. Br. 14. But "[i]f costs were the criterion, the basic procedural protections of the [14th] Amendment could be read out of the Constitution." *Mackey v. Montrym*, 443 U.S. 1, 27 (1979). Plaintiffs adopt their previous response here (ECF 141-1 at 23–24, ECF 170 at 5). During the moratorium, estimates show the State had a net gain of $1.4 billion. *See* ECF 227-22, App'x 1(comparing extra funding State received from CMS to expenditures on additional moratorium enrollees). This enabled the State to add $500 million to TennCare's reserve fund, which totals *$1 billion.* ECF Nos. 171; 171-1; 171-2, at 4. And the State would have two/thirds of its costs paid for by CMS to comply with a court order. 42 C.F.R. § 231.250(b)(2). *Georgia v. Heckler*, 768 F.2d 1293 (11th Cir. 1985), is inapposite; it turned on a controlling federal ban on abortion funding.

II. All Requirements for Class Certification Are Met In This Case

Typicality and Adequacy. The State argues (Br. 15) that determining class membership would require individualized determinations of eligibility, but "ascertainability" does not apply to Rule 23(b)(2). *See Cole v. City of Memphis*, 839 F.3d 530, 541–42 (6th Cir. 2016).[3] As the State recognizes, the Plaintiffs actually seek to represent "all individuals who have lost (or will lose) TennCare coverage since March 19, 2019[.]" ECF 164 at 9.[4] Plaintiffs will prove that policies applicable to all Class members violated due process, ECF 225 at 4–16. As a result, the Reinstatement Subclass is entitled to reinstatement. *Id.* at 17–19. The State's argument (Br. 18–19) that the Court must assess whether each class member relied upon language is wrong as a matter of law.

Commonality and Rule 23(b)(2). Commonality "is satisfied if there is a single factual or legal question common to the entire class," *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007). A Rule 23(b)(2) class is appropriate to address generally applicable pattern or practice, even if some class members were not injured by it. *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012). Here, Plaintiffs raise several common deficiencies that support reinstatement as a matter of law to every class or subclass member. ECF 225 at 4–19. While the State asserts (Br. 17) that Plaintiffs' harms were not "common to all class enrollees," the record reflects that TennCare violated the rights of every Subclass member terminated during the Terminations Period. Certification under Rule 23(b)(2) is therefore appropriate.

CONCLUSION

Plaintiffs respectfully request that the Court grant their motions.

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[3] The State ignores *Cole* and relies (Br. 21, 24) on non-binding and inapposite cases like *Romberio v. UnumProvident Corp.*, 385 F. App'x 423 (6th Cir. 2009) (applying ascertainability requirement not applicable to Rule 23(b)(2) class and involving constructive trust). *See* ECF 169 at 4–5.

[4] The phrase "meet the eligibility criteria" in the Class definition refers to each member being previously enrolled in the program. ECF 140-1 at 12.

Dated: July 8, 2022

By: /s/ *Brant Harrell*

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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 8th day of July, 2022 on the following counsel for Defendant.

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