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

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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I. INTRODUCTION

This case concerns Tennessee's Medicaid program, called TennCare. *See* JX43 ¶¶ 1–3. Defendant is the Director of the Division of TennCare. *Id.* ¶ 4. Plaintiffs are current and former members in TennCare who allege that TennCare's policies and practices violate the Fourteenth Amendment's Due Process Clause, Medicaid Act, and Americans with Disabilities Act ("ADA"), resulting in unlawful terminations of members' health insurance coverage. After Plaintiffs filed an amended complaint, ECF 202, the Court certified a "Plaintiff Class" and "Disability Subclass," ECF 234. A bench trial was held on November 14–17 and 20, 2023. ECF 396–400.

The trial record includes testimony from 18 witnesses. Plaintiffs called 12 current and former TennCare members or their next friends: Donna Guyton, Carlissa Caudill, Samantha Turner, DiJuana Davis, William Gavigan, Kimberly Noe (remotely), Keith Cottle, Andrea Riley, Jeffrey King, Heath Stevens, Faith Grace (remotely), and William Monroe (ECF 401-1, 402). Plaintiffs also presented expert opinion testimony regarding disability accommodations from Dr. Peter D. Blanck, Ph.D. The Court also received testimony from five TennCare employees: Kathryn Evans, Talley Olson, Zane Seals, Kimberly Hagan, and Christopher Holt (ECF 393, 395-1).

II. PLAINTIFFS' PROPOSED FINDINGS OF FACT[1]

A. Eligibility Redeterminations and Appeals

1. To qualify for TennCare, individuals must meet certain eligibility criteria, including (1) citizenship and residency requirements; (2) "categorical eligibility" requirements for at least one of dozens of different eligibility categories, some of which require them to have certain medical needs or conditions; and (3) income and, for some categories, resource limits. JX43 ¶ 12.

[1] "The labels applied are not controlling[,]" *Utzinger v. United States*, 432 F.2d 485, 489 (6th Cir. 1970), and the Court may adopt findings and conclusions in the category it deems appropriate. Plaintiffs have also prepared an appendix of facts by witness, which is attached to this filing.

2. Once enrolled, members undergo an annual redetermination, or "renewal", of eligibility. *Id.* ¶¶ 24, 25. Initially, TennCare reviews a member's case to determine if it can verify eligibility without member input. *Id.* ¶ 26. If that information shows that the member is still eligible, their coverage is automatically renewed. *Id*. If not, TennCare issues a renewal packet that the member must complete and return within 40 days. Tenn. Comp. R. & Regs. 1200-13-20-.09. After reviewing the packet, TennCare may send a request for additional information ("RFI"), which the member must provide within 20 days. *Id.*; JX43 ¶ 31. If they fail to timely return a renewal packet, fail to timely respond to an RFI, or are found ineligible, TennCare issues a Notice of Decision ("NOD") terminating their coverage. JX43 ¶ 32.

3. Redetermination also occurs when TennCare receives a report of a change that could affect eligibility. *See* JX43 ¶ 25. If TennCare cannot independently reverify the member's eligibility, it sends a "preterm notice" stating that the member "may" no longer qualify and requesting additional information. ECF 234 at 4. If the member fails to respond, or provides information showing that she is ineligible, TennCare issues an NOD terminating coverage. *Id*.

4. A 90-day "reconsideration" period applies after coverage is terminated. 42 C.F.R. § 435.916(a)(3)(C)(iii). If a member fails to timely return a renewal packet or respond to an RFI but provides it within 90 days after termination and is found eligible, TennCare will reinstate and backdate coverage to their termination date. JX43 ¶ 37–38 (excludes Qualified Medicare Beneficiaries).

5. Any appeal of a termination decision must be made within 20 days to receive continuation of benefits ("COB") during the appeal, and in any event within 40 days. Holt Test., ECF 395-1 28:4-8; JX43 ¶ 76. Unless TennCare finds good cause for appealing late, TennCare denies

untimely appeals without a hearing. It also denies appeals that do not present a "valid factual dispute" ("VFD"). Holt Test., ECF 395-1 15:1-7, 21:15-21; JX43 ¶¶ 77–84.

6. Over several years, TennCare developed an automated Tennessee Eligibility Determination System ("TEDS"), which became operational statewide on May 30, 2019. *Id.* ¶¶ 46-50.

7. The COVID public health emergency largely stopped redeterminations and most disenrollments from March 18, 2020, to April 1, 2023. *Id.* ¶ 55. On April 1, 2023, TennCare restarted its redetermination processes again, which it refers to as the "unwinding." *Id.* ¶¶ 57–58.

B. TennCare Errors Make Due Process Safeguards Necessary

8. TennCare acknowledges the inevitability of technical flaws and human errors that result in the inadvertent termination of eligible members' coverage. Hagan Test., ECF 400 143:4-24: ECF 398 295:21–296:17, ECF 400 9:10-13; 58:13–59:6, 69:2-19. TennCare processes 300,000 eligibility renewals and reverifications monthly, Hagan Test., ECF 399 55:8-13, 59:7-9, 203:1-4, so even a two percent error rate costs thousands of eligible members their health coverage.

9. When TEDS went live in 2019, it was supposed to consider individuals for all eligibility categories, but it failed to, due to design flaws and bad data. Hagan Test, ECF 399 102:17-23, 103:3-21; ECF 398 295:21–296:17. Between May 2019 and November 2023, TennCare made "hundreds" of changes to how TEDS operates. Hagan Test., ECF 398 263:20–265:4. Some of these changes concerned "unforeseen flaws and misdesigned elements," and TennCare used its appeal process to identify system errors for correction. Hagan Test., ECF 400 143:19–144:3. Between March 19, 2019, and October 31, 2022, TennCare resolved over ***84%*** of timely appeals (74,629 out of 88,604) in the ***appellant's favor***. Holt Test., ECF 395-1 17:21-19:7, 19:16-20:5.

10. In converting members' eligibility records from its old system into TEDS, TennCare erroneously merged individual records into the wrong household. Hagan Test., ECF 398 297:17-

22. After TEDS went live, TennCare sent some notices to wrong addresses, some members submitted responses or documentation of eligibility that never made it into their records, and they were terminated for not responding. *See*, *e.g.*, JX44 ¶¶ 175–178; Cottle Test., ECF 397 64:11-70:24. TennCare does not know how many members were affected by these errors. Hagan Test. ECF 399 13:1-20. TennCare fixed these problems for individual trial witnesses but not for any other terminated individuals who remain without coverage. Hagan Test., ECF 398 297:22–298:11.

11. After March 2019, TennCare terminated the coverage of 108,175 individuals who remained without TennCare coverage as of June 2021. Hagan Test., ECF 398 297:3-16; JX43 ¶ 50.

C. TennCare's Notices Do Not Enable Recipients to Identify Errors.

12. When TennCare determines that an individual is ineligible for coverage, TEDS generates an NOD based on a template. JX14. The template identifies "trigger conditions" that determine which text, drawn from "Business Reference Tables," will appear in the notice. *See* JX43 ¶ 67.[2] TennCare's NODs do not include the information necessary to enable individuals to identify mistakes TennCare made in evaluating their eligibility.

13. If text does not appear in the template or in a Business Reference Table, it does not appear in the NOD. Consequently, for example, NODs do not describe TennCare's 90-day reconsideration period, which allows terminated members to have their coverage retroactively reinstated if they supply the missing information within 90 days of losing coverage. *Id.* ¶ 40. In addition, although TEDS is programmed to input standardized language into NODs' "<denial reason>" field

[2] Text under a heading "<Trigger Condition: Always>" appears in every NOD while text under other trigger condition headings appears when those conditions are met. Hagan Test., ECF 399 152:24–153:5. Some text includes placeholders—indicated by "< >" and yellow highlighting—which are populated from Business Reference Tables within TEDS. For example, the citation to the applicable regulation that supports a decision is pulled from the "EDPOLICYCITATIONS" Business Reference Table. JX43 ¶ 33 (citing JX16).

from the "EDREASON" Business Reference Table, *see* JX43 ¶ 34; JX14 at -2856, that table does not contain any language for denials based on a purported end in SSI coverage, *see* JX15 at 7 (no text for denial reason "SSI COVERAGE HAS ENDED"), or for the disabled adult child ("DAC"), Widow/Widower, or Pickle Amendment categories, *see generally id*.

14. Prior to December 2022, the ***only*** legal citation in NODs was to a 95-page compendium of TennCare eligibility rules. Hagan Test., ECF 398 300:14-17, 301:10-302:1, 302:16-19, ECF 400 17:9-18, 19:9–21:10. Every member who was terminated from TennCare before December 2022 received this NOD. *Id.* But TennCare knew that Medicaid regulations required it to cite a specific regulation. Hagan Test., ECF 400 18:17-21; *see* 42 C.F.R. § 431.210(c). TennCare admits that it could send revised notices to the individuals who received NODs before December 2022, but it has not done so. *See* Hagan Test., ECF 399 120:16–121:4.

15. NODs omit information regarding the coverage groups for which individuals were considered. Every NOD gives the generic assurance that TennCare considered the individual for all its "different kinds of coverage." JX43 ¶ 72; JX14 at -2842. NODs terminating coverage also say: (1) "We looked at the facts we have for you. We use those facts to review you for our coverage groups to decide if you qualify. But you don't qualify," JX14 at -2855; and (2) "Remember, we look at the facts we have for you before we make our decision. And we use those facts to review you for our coverage groups. Things like age, income, and resources can be different between each group," *id.* at -2857. NODs do ***not*** explain where an individual can get more information about coverage groups and do ***not*** identify the coverage group under which the individual was previously eligible or what has changed to make them no longer eligible in that category. *See generally*, JX14. Some NODs point individuals to TennCare's homepage, Hagan Test., ECF 400 174:21–176:6, but

that page does ***not*** include any links labeled "coverage groups" or "kinds of coverage," *see generally*, PX425, so it is not apparent where to find details about eligibility categories.

16. NODs tell members to call the TennCare Connect call center with questions, Hagan Test., ECF 400 165:25–166:4, but the call center staff cannot explain eligibility. TennCare Connect workers cannot tell members the specific rules that led to their termination because TennCare admits that they are "not eligibility specialists." Brooks Test., ECF 387-1 126:25–127:11; PX650 10:16-10:25, 22:40-23:08.

17. In only one circumstance do NODs describe other eligibility categories at all: If an individual does not fall into any category, the NOD lists some, but not all, eligibility categories. JX15 at -8363.[3] TennCare expects that this list gives recipients sufficient information to challenge their denial for a particular category. Hagan Test., ECF 400 11:15-14:16. But Ms. Hagan admits that eligibility is a "very complicated" subject that she is still learning about "every day," and even she would have to look up exactly how many eligibility categories there are, *id.* at 142:13-25.

18. If an individual falls into one or more categories but is deemed ineligible for coverage for another reason, such as income, the NOD mentions no eligibility categories at all. *Id.* at 92:3-20, 96:15-97:16; *e.g.*, PX425. Because their NODs did not identify any eligibility categories, individuals like Noe, Gavigan, Monroe, and Guyton were not given an adequate understanding of what coverage groups TennCare did or did not consider when making their eligibility decisions, making it difficult or impossible for them to identify the mistakes that TennCare made.

19. **Noe** got a notice stating that her brother's Medicaid coverage would end because he

[3] Such NODs state: "You're not in a group covered by TennCare.… Some of those groups include: children, pregnant women, caretaker relatives of minor children, people who are getting Social Security and who used to get SSI checks, people who need treatment for breast or cervical cancer, people who need long-term services or supports, or people who've been in the hospital for at least 30 days and meet the rules for aged, blind, disabled, a child, or pregnant." JX15 at -8363.

makes too much money "for the kind of TennCare Medicaid you could get," without specifying what category TennCare was referring to, and without any description of the other categories in which he might be eligible. PX425 at 2696; *see* Hagan Test., ECF 400 98:3-20, 99:11-100:1. She received another notice that stated: "Before we made our decision we looked at you for different kinds of coverage," and that "We received a change in your facts, so we checked to make sure you still qualify. We reviewed your facts and decided that you don't qualify anymore. This means your coverage will end." PX57. Noe could not tell from this notice what change TennCare thought had occurred or whether it had considered her brother for eligibility as a Disabled Adult Child (DAC). Noe Test., ECF 397 28:25-29:23. Noe could not tell from any of the notices "what category they had [him] in because they never could tell me." *Id.* at 36:16-20.

20. **Gavigan** tried to appeal his daughter's loss of benefits by explaining that she should be eligible in the DAC category. But the notices did not say whether his daughter was previously enrolled in the DAC category or in a different category, or whether there were different rules for eligibility and services between DAC and another category. *See* Gavigan Test., ECF 396 220:25–221:7, 223:4-8. Only after reviewing Hagan's declarations *in this case* did Gavigan understand why his daughter's coverage was terminated and his appeal closed. *Id.* at 216:13–217:8.

21. **Monroe** appealed because he "received no renewal notice and believes he is still eligible for QMB and Medicaid through the Pickle Amendment." JX44 ¶ 246. TennCare sent him an NOD with generic assurances that it had considered all of his facts and all program rules before deciding he did not qualify for coverage. JX44 ¶ 257; DX321 at -3685, -3687. But the NOD only spoke to eligibility in the QMB and Institutional Medicaid categories. DX321. Even though he expressly stated in his appeal that he was eligible in the Pickle category, the NOD did not say whether TennCare had evaluated his Pickle eligibility. JX44 ¶ 257; DX321 at -3686-87.

22. **Guyton** received notices about her son that did not explain which eligibility categories TennCare considered for him, despite generic assurances that it considered different kinds of coverage before deciding he was ineligible. DX624 at 3. She received an NOD stating that her son's full Medicaid coverage would end on June 29, 2023, because "[t]he monthly income limit for the kind of TennCare Medicaid you could get is $914," without identifying the eligibility category to which that limit applied. *Id.* at 5. In fact, while her son's Social Security income was over $914, he still qualified in the DAC category, which does not count Social Security income against the category's income limit. Guyton Test., ECF 396 76:2-21, 102:20-103:17, 105:18-106:2; Hagan Test., ECF 400 54:21-55:14; JX43 ¶ 18(a). Guyton never received an NOD that explained if TennCare had found him eligible in the DAC category or even considered his eligibility for that category. DX624 at 5. The notice did not give enough information to understand how TennCare had erroneously concluded he was ineligible. Guyton Test., ECF 396 104:16-20, 106:5-22.

D. TennCare Systematically Denies Hearings and Erects Barriers to Appeals.

1. TennCare's appeal and hearing processes are defective.

23. TennCare contends that its appeals and hearing processes are "robust," Hagan Test., ECF 399 205:16-18, but it (1) does not automatically grant hearings for denials or terminations, Holt Test., ECF 395-1 10:8-16; (2) does not grant hearings to determine good cause to appeal, Hagan Test., ECF 399 31:10-14; 33:5-13; (3) unilaterally implements its good cause exception for untimely appeals much more restrictively than its rule provides, *see, e.g.*, JX27 at -1847; Hagan Test., ECF 400 32:11-33:10; (4) closes timely appeals under its VFD policy, and (5) fails to issue a decision within 90 days of an appeal request in 47.8% of cases. Holt Test., ECF 395-1 17:3-8, 21:22-22:24; PX68 ¶ 8/Ex. 1 (moved for admission without objection in deposition).

24. TennCare maintains that its appeals process "worked as intended" where the agency terminated coverage based on its own error or when it had notice of an eligibility determination

problem for months, where the member could not have known about or fixed the error, and that resulted in a harmful loss of coverage for a sustained period, *see* Hagan Test., ECF 400 113:6-120:20; 129:12-131:10. That happened to Plaintiffs Caudill, Jeffrey King, Daniel Stiffler, and Madison Stiffler as discussed below. *Id; see also*, JX44 ¶¶ 155-170, 219-224.

2. TennCare systematically denies fair hearings for eligibility appeals.

25. TennCare does not grant hearings to every individual who requests one on the grounds that the agency erred in deeming them ineligible or otherwise denied their coverage. Holt Test., ECF 395-1 10:8-16.

26. Before March 2022, TennCare's NOD stated, "If you don't think we made a mistake, you can't have a hearing". JX43 ¶ 85. Over 5,238 class members received this notice and were terminated. ECF 398 304:17-305:19. After March 2022, the NOD says, "You can have a fair hearing if you still think we made a mistake and, if you're right, you would qualify for our program." JX43 ¶ 87. But every current VFD Additional Information Notice still states, "If you don't think we made a mistake about a fact, you can't have a fair hearing." JX22 at -1901.

27. From March 19, 2019, to Oct. 31, 2022, out of 88,604 total timely appeals, *5,767* timely appeals were closed *without hearing* and were not withdrawn or otherwise resolved for an appellant.[4] Holt Test., ECF 395-1 17:11-21:7-14.

3. TennCare does not provide hearings for good cause and refuses to inform members about its Good Cause Rule.

28. TennCare's Good Cause Rule broadly defines good cause as "[a] legally sufficient reason" and "[i]n reference to an omission or untimely action, a reason based on circumstances outside the party's control and despite the party's reasonable efforts." Tenn. Comp. R. and Regs. § 1200-

[4] Between March 19, 2019, and April 1, 2023, the COVID moratorium was in effect, resulting in the suspension of annual renewals and most eligibility redeterminations. JX43 ¶ 55.

13-19-.02(20). TennCare's application of that rule is referred to as its Good Cause Policy. *See* Hagan Test., ECF 400 100:9-11.

a. TennCare does not inform members about the good cause exception and closes appeals that do not list a reason for good cause.

29. Under its Good Cause Policy, TennCare: (1) closes as untimely appeals that do not list a reason why an appeal was untimely (a "good cause reason"), Hagan Test., ECF 399 24:20-25:6; Leffard Test., ECF 387-19 51:13-25, and (2) also does not find good cause to grant COB if a member files a timely appeal but does not list a good cause reason. Hagan Test., ECF 399:25-2-6.

30. Members do not know that they can file an untimely appeal or request COB where they have good cause for lateness, resulting in erroneous loss of coverage. *See*, *e.g.*, Cottle Test., ECF 397 79:8-80:7; 89:16-21; King Test., ECF 397: 161:9-18; PX71; Hagan Test., ECF 399: 22:21-23:14, 25:22-26:17; Turner Test., ECF 396: 155:13-15.

31. TennCare's NOD and appeal form do not include any references to TennCare's Good Cause Rule or Policy or to members' ability to file a late appeal; they do not prompt the member to provide information that might show good cause. Hagan Test., ECF 399 14:20-25, 15:20-25, 16:6-11, 18:5-19:23, 34:24-35:1; PX45.0003-4; Leffard Test., ECF 387-20 190:13-191:5; JX14.

32. TennCare Connect agents, who field 70% of eligibility appeals, Holt. Test., 395-1, 28:16-19, ask appellants the same questions as the appeal form. Hagan Test., ECF 399 18:5-19:23.

33. TennCare also does not instruct its workers to suggest that members appeal if that appeal would be untimely. Hagan Test., ECF 399 29:13-20; 30:2-12. It instead tells the workers to advise members to re-apply. Davis Test., ECF 396 180:21-182:12; PX41 12:15-13:29; Hagan Test., ECF 399 27:3-29:3; ECF 400 39:4-40:24. This can result in TennCare failing to continue benefits for members who are entitled to that continuation. *see* Cottle Test., ECF 397 69:1-74:3,

79:8-80-7, 89:16-21, 95:11-96:21; JX44 ¶¶ 391,401; Caudill Test., ECF 396 137:5-14; PX39; Hagan Test., ECF 400 127:4-131:10. Reapplying also denies the retroactive coverage (except for children and pregnant women), which members obtain through a successful appeal. Holt Test., ECF 395-1 15:25-16:8; Hagan Test., ECF 399 28:10-29:2; 42 C.F.R. § 431.246.

34. TennCare Connect agents do not solicit reasons why someone may have missed a notice during reapplication. Hagan Test., ECF 399 27:5-15. They do not advise a member to both reapply *and* file an untimely appeal, even though that is allowed. Hagan Test., ECF 399 31:1-5.

35. TennCare's NOD does not refer to the Good Cause Rule, the Policy, or even hint that filing an untimely appeal is possible. In fact, *it categorically states the opposite*— "After <Appeal40Days> it's too late to appeal." JX14 at -2869 to -2870.

36. Similarly, every Appeals Closing Notice for an untimely appeal states categorically "**But it's too late to appeal this problem** . . ." JX27 at -1842, -1847. TennCare uses boldface for emphasis. Hagan Test. ECF 399 37:12-38:1; Hagan Test., ECF 398 300:24-301:7.

37. The Appeals Closing Notice does not refer to a member's right to a good cause review, and in contrast to the Good Cause Rule's breadth, does not mention "non-receipt" of a notice as a good cause reason. JX27. Reasons why a late appeal may be excused are limited to something "very bad" happening to the member or a family member or based on the member's health, mental health, learning problems, or disabilities (placed in normal font near the end). *Id.* at -1847; *see also* Hagan Test., ECF 399 40:2-17. By the time the appellant receives even that information, the appeal has already been closed, and they have no coverage. *Id.* 40:20-41:10.

38. As of summer 2022, a call center script asks a member who insists upon filing an untimely appeal if she had an issue receiving notice. Hagan Test., ECF 400 149:20-25. But since agents are supposed to tell would-be appellants to re-apply rather than file a late appeal, few ever

get asked about non-receipt. *See* Hagan Test. ECF 399 29:13-30:12. In any event an allegation of non-receipt is not enough to establish good cause. Hagan Test., ECF 398 307:22-308:6.

b. TennCare does not provide good cause hearings.

39. Even though TennCare's rules contemplate "good cause hearing[s]," Tenn. Comp. R. & Regs. § 1200-13-19-.07(3), TennCare does not provide hearings to determine if a member has good cause for failure to return information or missing the deadline to appeal or request COB. Hagan Test., ECF 399 31:10-14; 33:5-13. Even though TennCare does not meaningfully elicit information about why an appeal is late, TennCare unilaterally determines if good cause should be granted based on the information it has on hand. *See* Leffard Test., ECF 387-19 51:13-25; Hagan Test., ECF 399 29:13-17; 30:2-12.

40. Because allegations of non-receipt of a notice are not enough to establish good cause or even hold a hearing members must "prove a negative" that they did not receive notice. They must do so without a hearing, without guidance as to sufficient proof, and without recourse if they disagree with TennCare's decision. Hagan Test., ECF 400 32:11-33:10; 147:4-12; 149:7-16. TennCare maintains this policy even though it admits that members' allegations that they did not receive notices—like Cottle's description of misdeliveries to his address—are plausible. ECF 397 111:8-13, Hagan Test., ECF 399 22:21-23:12; Hagan Test., ECF 400 149:3-16. The only example TennCare could provide of an allegation of non-receipt of notice showing good cause was of a member who alleged that his neighbor stole his mail. *See* Hagan Test., ECF 400 32:18-33:10.

c. TennCare creates barriers to invoke good cause for non-receipt of a notice.

41. TennCare's Good Cause Policy's treatment of allegations of non-receipt of notices coupled with denying hearings to show good cause takes away crucial safeguards at a time when thousands are losing coverage for their failure to respond. From April 1 to September 30, 2023,

TennCare terminated 112,178 members—***76.2%*** of all 147,180 terminations—*for failure to return a renewal packet or requested information.* Hagan Test., ECF 398 284:14-16; 291:11-16; DX684.

42. TennCare maintains its Good Cause Policy despite acknowledging facts that make non-receipt of a notice without fault by the member more likely. It has admitted sending notices to the wrong address or addressees, resulting in coverage gaps, Hagan Test., ECF 398 311:24–312:8 (Davis); JX44 ¶ 231 (Love), address data from third parties that can override the address members provided to TennCare, Hagan Test., ECF 398 312:25–313:24; Turner Test., ECF 387-6 149:16–150:9. TennCare mails to only one address even if TennCare knows of another active address for a member, Turner Test., ECF 387-6 145:4–146:20; Hagan Test., ECF 387-15 209:13–210:3.

43. Under its Good Cause Policy, TennCare denies those who do not receive a termination notice the chance to appeal before termination. *See* JX44 ¶¶ 175–178; Davis Test., ECF 396 180:21–182:12; PX41 (12:15–13:29); Cottle Test., ECF 397 69:1–74:3, 79:10–80-7; JX44 ¶¶ 391–92 (Cottle); *id.* ¶¶ 233–34 (Love). Alternatively, TennCare closes such appeals as untimely and never reviews them, JX44 ¶ 299 (Turner); *see also id.* ¶¶ 232–37 (closing appeal until TJC intervened). TennCare denies individuals who miss the deadline to apply for COB the opportunity to establish good cause, depriving them of benefits pending appeal. *See* Davis Test., ECF 396 183:7–185:20; JX44 ¶¶ 177–82 (Davis); JX44 ¶¶ 221–23 (King).

44. TennCare initially denied **Davis** and her family the opportunity to appeal and then denied COB for over a month pending appeal, even though it had sent her notices to the wrong address. JX44 ¶¶ 176-182. While without benefits, Davis had to cancel tubal ligation and uterine ablation surgeries, and her children had to share asthma medicine and use leftover ADHD medicine. Davis Test., ECF 396 178:19–180:5, 183:7–186:1, 190:4-191:13. When she regained coverage, Davis rescheduled her surgeries but had to cancel them because she was pregnant. *Id.* at

196:14-21. The pregnancy resulted in her developing preeclampsia, which can damage organs and have lifelong effects. *Id.* at 201:6–202:15.

45. Even when TennCare restores coverage, the effects of having lost coverage due to the Good Cause Policy remain. Davis, for example, suffered lasting harm to her health. *Id.* at 203:9-22. Even with restored coverage, **Love** could not get immunizations and other care due to an erroneous coverage start date that prompted the doctor to ask for prepayment out-of-pocket or payment of the outstanding balance of $2,647.95, which her mother could not afford. JX44 ¶¶ 230-237.

4. TennCare closes timely appeals under its VFD Policy.

46. Under the Medicaid Act and 42 C.F.R. § 431.220, TennCare is required to provide fair hearings to all members who appeal unless the appeal falls within the scope of subsection (b). Every appeal that TennCare closes under the VFD Policy is closed pursuant to 42 C.F.R. § 431.220(b) and in doing so TennCare relies on any federal or state law describing the requirements of eligibility to serve as the "Federal or State law requiring an automatic change adversely affecting some or all beneficiaries" within the meaning of § 431.220(b). JX43 ¶¶ 82-83.

47. TennCare devotes substantial resources to implementing the VFD Policy. *See* JX43 ¶ 81. The VFD process comes after an appeal is reviewed for timeliness and possible resolution. JX43 ¶¶ 80-81. Only timely appeals (or untimely appeals that are granted good cause) and that have not been resolved are then reviewed for a valid factual dispute by a TennCare attorney. *Id*.

48. Under its VFD Policy, TennCare requires that every appeal present a VFD to receive a hearing. Tenn. Comp. R. and Regs. § 1200-13-19-.05(3). TennCare defines a VFD as a "dispute, [that] if resolved in favor of the appellant, would prevent the state from taking the adverse action that is the subject of the appeal." *Id.* § 1200-13-19-.02(33); JX43 ¶ 78.

49. If TennCare believes that no VFD has been shown, it notifies appellants that to get a fair hearing they must give TennCare the facts needed to support the appeal. JX22 at -1900.

50. The VFD notice provides examples of mistakes that justify a hearing, then gives the appellant 10 days to describe—in writing—the mistake TennCare made, or to provide more facts to support the mistake the person already alleged. JX22 at -1899 to -1901; *see* JX43 ¶ 79.

51. The VFD Policy requires lay people who appeal to explain to a TennCare lawyer why TennCare is wrong, along with the facts supporting that claim, or face summary dismissal, *see* JX43 ¶ 81, 89. Hagan Test., ECF 400 11:15-24, 163:5-164:10, which members must do based on notices that do not provide sufficient context. *See* Part II.C.

52. As with its notice policies, TennCare maintains its VFD Policy even though Hagan admitted that TennCare eligibility is "very complicated," and that even after 17 years in TennCare's Eligibility Division she is still learning every day and would have to consult a chart of TennCare's "very large number of categories" to know just how many there are. Hagan Test., ECF 400 142:13-143:3.

53. Even if an appellant provides information satisfying TennCare's VFD definition, TennCare may still summarily dismiss her appeal under the VFD Policy. *See* Hagan Test., ECF 400 132:1–137:5; JX44 ¶¶ 307–17. Samantha Turner, for example, told TennCare that she did not receive a letter requesting more information and said, "I don't know what you want me to say. We're eligible. If my husband and I and my other kid gets it, then my other two kids should have insurance as well" but still had the appeals for the terminations of those two children closed without a hearing under TennCare's VFD Policy (and no fair hearing). TennCare later admitted that the children were eligible. *See* Hagan Test., ECF 400 136:8-137:5.

54. Applying its VFD Policy, TennCare erroneously terminated **Caudill** as ineligible in any category, even though she was eligible as a current SSI beneficiary. JX44 ¶¶ 155, 169. Caudill filed a timely appeal and explained that she urgently needed coverage to get treatment for her Stage

4 Chronic Obstructive Pulmonary Disease (COPD). Caudill Test., ECF 396 110:11–112:3. She lost coverage because of TennCare's incomplete historical SSI data. TennCare knew at the time that it was erroneously deeming some SSI beneficiaries ineligible due to that problem, but she had no way to know that. *See* Hagan Test., ECF 400 110:6-120:20, DX66. Because Caudill could not identify TennCare's mistake to its attorneys, TennCare dismissed her appeal. She had no access to medical care until her counsel's intervention led TennCare to reinstate her coverage. JX44 ¶¶ 149-161, 168, 170. To Hagan, TennCare's appeal process "worked as intended" in Caudill's case. Hagan Test., ECF 400 112:5-114:7.

55. Historically, TennCare invokes its VFD Policy to close 10 to 15 percent of all appeals without a hearing. Holt Test., ECF 395-1 45:2-4.

56. By peremptorily rejecting meritorious appeals, the VFD Policy frustrates TennCare's goals of protecting the coverage of eligible individuals and using the appeal process to identify and correct systems errors. Hagan Test., ECF 399 203:16-204:15, 205:9-14, 206:12-208:3.

5. TennCare fails to take final action within 90 days of an appeal.

57. In appeals that TennCare allows to go to a hearing, TennCare regularly misses the 90-day deadline to submit a written decision and regularly fails to even hold the hearing for an appeal within 90 days. *See* Holt Test., ECF 395-1 21:22-22:11; PX68 ¶ 8; *see also* Hagan Test., ECF 399 129:17-20.

58. Of the 6,706 timely appeals filed between March 19, 2019, to October 31, 2022, that went to hearing, TennCare did not hold those hearings within 90 days, or grant a continuance, for 3,206—***47.8%***.[5] Holt Test., ECF 395-1 21:22-22:11; PX68 ¶ 8. For example, TennCare took no action on **Anders**'s (JX44 ¶ 141), **Hill** (JX44 ¶¶ 204-207) and **Vaughn**'s (JX44 ¶¶ 339, 341, 342)

[5] During all but one year of this period, the COVID moratorium was in effect. JX43 ¶ 55.

appeals within 90 days. This failure rate does not include appeals where TennCare did hold hearings within 90 days but failed to issue a written decision within that time; TennCare admits that it needs time after holding a hearing to prepare a written decision. Holt Test., ECF 395-1 12:8-16.

59. Using TennCare's best available data, it did not continue benefits for 800 of the 3,206 appeals for which it did not conduct a hearing within 90 days, Holt Test., ECF 395-1 24:2-8, meaning the appellants did not have coverage for medicine, treatments, and preventative care.

60. For others, TennCare granted COB late. **Anders**' appeal, for example, lasted 102 days before TennCare granted COB, and then only after receiving a letter from Anders' pro bono counsel. JX44 ¶ 140-142.

61. While TennCare obtained a waiver in June 2023 from CMS to temporarily excuse compliance with its 90-day obligation, the Waiver was not activated at the time of trial, Holt Test., ECF 395-1 24:20-25:4, and, if activated after trial, expires on February 28, 2025. JX43 ¶¶ 92-93.

62. TennCare's temporary policy is to grant COB for 90 days to an appellant pending resolution of an appeal. JX43 ¶ 96. TennCare informs appellants for whom it continues benefits: "If you lose the appeal, you may have to pay us back for services you got during the appeal." Hagan Test., ECF 399 43:9-16; JX14 at -2870. This can cause appellants to forgo preventive care, treatments, and missed medications while their appeals are pending, *see*, *e.g.*, Caudill Test., ECF 396 117:2-119-3; 120:23-25; PX37 (1:39-2:11), for fear of losing and having to reimburse TennCare. *See*, *e.g.*, Caudill Test., ECF 396 120:23-25. This is true even for the 84% of members whose timely appeals are ultimately resolved in their favor. *See* Holt Test., ECF 395-1 17:21-18:14 (referencing 74,629 timely filed appeals out of 88,604)).[6]

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[6] This policy becomes effective *on or after* day 90 of the appeal, *not before*, *see* JX43 ¶ 96—meaning that someone who does not know to request COB is without coverage for up to 3 months.

E. TennCare's Systems Discriminate Against Individuals with Disabilities.

1. TennCare fails to consider disability-based categories of eligibility.

63. By summer 2021, 108,175 individuals who had been terminated after March 2019 remained disenrolled. *See* Hagan Test., ECF 398 297:14-298:11.

64. During that time, systemic defects in TEDS resulted in TennCare failing to reliably identify individuals in several disability-related categories. And "[T]EDS is only as good as the information in it." Hagan Test., ECF 400 9:10-13.

65. TennCare did not properly load special indicators for DAC and Widow/er data into TEDS leading to missed screenings for those categories—a problem that persisted as of April 2023. *See* Hagan Test., ECF 398 294:9–296:17; ECF 399 184:2–185:14; Flener Test., ECF 387-2 59:10–60:20; ECF 387-21 2:11-13:14.

66. TennCare also failed to reliably load data that affects consideration of three of TennCare's SSI Related categories: DAC, Widow/er, and Pickle, which require an individual to have both previously received SSI and currently receive Social Security benefits. JX43 ¶ 18. TEDS has lacked data that reliably showed members' prior receipt of SSI. Hagan Test., ECF 387-14 109:12-19; ECF 387-15 274:13-276:4; ECF 387-23 27:14-32:16. At trial, Hagan was silent on the issue of the missing historical SSI data. Hagan Test., ECF 399 103:3-113:25, 184:2-185:14; Hagan Test., ECF 398 295:12-296:17.[7]

67. TennCare compounded the problem by omitting questions from the renewal packet and

[7] On July 10, 2023, Hagan submitted a declaration stating that TennCare had taken steps to fix the problem of the missing historical data. ECF 311, ¶¶ 21-25 (not in evidence). The declaration partially contradicted testimony that she had given in depositions. ECF 387-23 27:14-28:14. TennCare subsequently sought to have all of her declarations admitted as her direct testimony, which after being denied required Hagan to give her testimony in court where it would be subject to cross-examination.

pre-term questionnaire that would prompt members to state that they previously received SSI. DX174; DX260.[8] The agency improperly categorized **Hill** and other individuals as eligible in the Pickle category, rather than the DAC and Widow/er categories as categorized by the Social Security Administration, and terminated coverage for which they were eligible, because of income limit differences among the categories. Hagan Test., ECF 399: 135:10-136:3; JX44 ¶ 191.[9] TennCare did not properly evaluate **Hill** for DAC during redetermination, including while he was appealing an earlier denial. JX44 ¶ 191, 197, 203.

68. TennCare also failed to gather information needed to identify individuals in another disability-based category,[10] Institutional Medicaid, which covers individuals institutionalized in a health care facility for 30 days or more, or who receive home and community-based services based on their physical, intellectual, or developmental disabilities. JX43 ¶¶ 12, 20 and 22.

69. Even when members or their representatives had sufficient knowledge of eligibility

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[8] DX174 (pre-term). DX260 at 17 ¶ 12 (renewal packet). Those questions were added in September 2023 after the omissions were raised as issues in this case. *See* JX10 at 7 at -3116; Hagan Test., ECF 398 306:4-13; JX10 at 7 at -3116.

[9] *See* DX259 (row 54 dated April 21, 2020 stating, "That termination was generated by a TEDS action/notice from 9/25/2019 which stated that Michael Hills DAC Medicaid would be ending because he was over the income limit for that type of Medicaid (*he had been erroneously marked as Pickle Passalong at the time*)[.]" (emphasis added).

[10] The pre-term questionnaire asked, "Do you live in a medical facility or nursing home? Do you need home care either in a nursing home or at home?" DX174 at 5 ¶ 1. The renewal packet asked if someone in the household "live[s] in a medical facility or nursing home?" DX260 at 16 ¶ 1. The packet also asked if someone "need[s]" nursing home care; or qualifies for nursing home care but "want[s] care at home instead" or "qualif[ies] for care in an Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID), but want[s] care at home instead." *Id.* ¶¶ 2–4. The questions on both forms failed to identify individuals who lived elsewhere but were temporarily in a medical facility receiving inpatient care. The forms also failed to identify individuals who did not "need" nursing home care because they were already receiving it, or individuals who did not "want care at home instead," because they were already receiving it. The forms were revised to correct those omissions after they were raised as issues in this case. Hagan Test., ECF 398 306:4-13; JX10 at 8, at -3117 ¶¶ 14–15.

criteria to accurately explain to TennCare that they were eligible in one of the disability-related categories, TennCare was incapable of recognizing their eligibility. **Guyton**, for example, was eligible in both the DAC and Institutional Medicaid categories, but TennCare failed to recognize his eligibility as recently as May 2023. His mother, Donna Guyton, wrote on a pre-termination response form that her son was eligible in the DAC category, and she attached his approved care plan documenting that he was eligible for Institutional Medicaid eligibility through his participation in the TennCare-administered Department of Intellectual and Developmental Disabilities ("DIDD") waiver. DX620; Guyton Test., ECF 396 71:21–73:20. TennCare failed to recognize Guyton's DAC eligibility, resulting in the termination of TennCare's payment of his Medicare premiums through the Buy-in program. *See* PX52; PX56; Guyton Test., ECF 396 81:18–83:12. When Ms. Guyton called TennCare Connect, no one there had heard of the DIDD waiver or that its participants were TennCare eligible. Guyton Test., ECF 396 71:7–73:6.

70. TennCare uses humans to perform a "Pickle task" to help verify eligibility. Hagan Test., ECF 399 188:7-189:7. TennCare has had to alter the Pickle task in TEDS since implementation to reduce errors in evaluation for that category of eligibility. Hagan Test., ECF 399 189:14–190:2. **Monroe** was not properly evaluated for Pickle eligibility during redetermination nor through his appeal. JX44 ¶¶ 246, 267–69; Hagan Test. ECF 400 85:1-22.

71. TennCare erroneously terminated individuals like **Walker**, **Caudill**, and **Barnes** after it loaded data into TEDS that inaccurately indicated that they no longer were receiving SSI. TennCare knew of the issue by June 17, 2019, and Hagan herself knew of it by October 2, 2019, but TennCare did not classify the request to fix the issue as an emergency because an emergency fix "has to be something much less complicated. . . ." *See* DX66; Hagan Test., ECF 400 103:2–104:3, 107:16–109:10, 114:12-115:22.

72. TennCare did not take other steps to stop this error from harming affected individuals, including monitoring coverage terminations, appeals, or applications after it became aware of the issue. Hagan Test., ECF 400 114:4-115:8, 126:3-12. Only after it put a special process into place in 2020 did TennCare identify members who were wrongfully terminated and reinstate their coverage. Hagan Test., ECF 399 103:22-104:5, 109:2-9. And overall, TennCare reviews 15,000 cases a year—out of about 3.6 million. Hagan Test., ECF 399 55:8-13, 59:7-9, 202:12-14.

73. TennCare has repeatedly given assurances that it has fixed all problems with identifying categories of eligibility, but it admits that it will make mistakes in the future. Hagan Test., ECF 400 143:4-24. TennCare continues to be unable to properly identify disability categories (*e.g.*, Guyton as a DAC). *See* PX52; PX56; Guyton Test., ECF 396 81:18-83:12.

2. TennCare lacks a reliable reasonable accommodation system and fails to provide adequate in-person assistance to persons with disabilities.

74. TennCare's Office of Civil Rights Compliance ("OCRC") Director, Talley Olson, administers reasonable accommodations for TennCare. JX44 ¶ 100. At all relevant times, Olson was OCRC's ***only*** employee until TennCare hired a legal assistant three days before trial. Olson Test., ECF 398 136:14–137:13. This followed years of TennCare not increasing funding or resources for Olson's work despite her requests due to her high workload. *Id.* at 137:24–138:6.

75. Olson oversees civil rights compliance, including the ADA, for ***all*** of TennCare and its more than 50 contractors, including Automated Health Systems ("AHS") (TennCare's main call center contractor), as well as for TennCare's eligibility and redetermination processes. *See* Olson Test., ECF 398 130:19–134:22.

76. Olson is TennCare's sole decision-maker on reasonable accommodation for members. *Id.* at 152:10-15. Since 2020, she has never granted a reasonable accommodation request related to eligibility redeterminations. *Id.* at 157:6-10; *cf.* Olson Test., ECF 387-11 167:3-7.

77. TennCare has no policies stating what kind of documentation is required for requests for reasonable accommodations. Olson decides whether additional documentation is needed. Olson Test., ECF 398 156:2-5, 156:20–157:5.

78. TennCare has no policies stating how quickly a decision should be made on a request for reasonable accommodation. Instead, Olson decides whether the accommodation process is moving "at a reasonable pace." *Id.* at 155:18–156:1.

79. TennCare does not instruct renewal workers to review case notes to see if someone previously requested a reasonable accommodation. Brooks Test., ECF 387-1 208:24-209:4.

80. TennCare does not disclose to members their right to request a reasonable accommodation or information about reasonable accommodation in any notice, *see* JX1–JX7; JX9–JX14; JX21–JX27; JX29. TennCare Connect workers routinely do not inform callers who are disabled that they have a right to request a reasonable accommodation. Fields AHS Test., ECF 387-18 172:18-24.

81. Olson expects individuals to file complaints "or bring it up during the appeal or something," or write that "they're having some type of difficulty." Olson Test., ECF 398 193:4-21.

82. Olson says that no one has ever made a "request for a true reasonable accommodation" to her. Olson Test., ECF 398 157:13-14. However, **Grace** requested a reasonable accommodation—that, due to her disability, she had significant trouble receiving mail and needed TennCare to contact her by phone or e-mail if it needed to ask her for information, Grace Test., ECF 398 83:7-19, 85:20-86:5. TennCare stipulated that this was a reasonable accommodation, JX44 ¶ 423. But Olson still did not consider it to be one. Olson Test., ECF 398 185:17-19. Olson sent Grace a letter in the mail as the only confirming communication after Grace had raised having extreme difficulties receiving regular mail sent to her. Olson Test., ECF 398 189:17–190:7; DX712; JX44

¶ 426. Olson stated she was not aware that Grace included a request for email communication to TennCare to submit documents, as well as a request for a phone call to alert her of a mailed notice. Olson Test., ECF 398 188:6-17. A similar exchange happened between Olson and **Monroe**.[11]

83. TennCare does not allow members to use email to submit proof of eligibility. JX3 at -3329; JX10 at -3122. TennCare does not accept email even when a member makes known that it is her only feasible means of communication, and even though Medicaid regulations obligate TennCare to permit any individual, with or without a disability, to establish eligibility "through… commonly available electronic means." 42 C.F.R. § 435.907(a)(5); *id.* § 916(a)(2)(ii),(3) and (b).

84. Olson says that if a member "just needed help because of a disability," she and others at TennCare can provide help as "mitigating measures." Olson Test., ECF 398 158:5-11.

85. TennCare has no written policies identifying a complete list of "mitigating measures." *Id.* at 155:2-4, 220:1-11. TennCare offers its employees no training as to the circumstances when a renewal worker or contractor can grant more time, Hagan Test., ECF 387-15, 222:10-14, or to

[11] In response to an RFI, Monroe's representative sent a letter to TennCare on September 30, 2019, stating, "Mr. Monroe has minimal use of his hands due to a spinal cord injury. Because of this, he is unable to sign and return this letter, but he can give a verbal authorization over the phone." The letter indicated that, because of his minimal use of hands and inability to drive, Monroe was having difficulty gathering the remainder of the requested proof and requested in-person assistance. DX773; JX44 ¶ 251; *see* Monroe Test., ECF 401-1 8:12–9:9. Prior to her deposition, Olson never saw the September 30, 2019 letter. Olson Test., ECF 398 160:20-24, 166:1-15. As a result, she was unaware of Monroe's limited use of his hands. Olson Test., ECF 398 162:21-25, 166:16-21. When Olson replied on October 9, 2019, she assumed that Monroe was physically able to compile and present requested forms to her. Olson Test., ECF 398 166:16-21; PX482. Her reply letter stated, "The Tennessee Justice Center told us you may want to ask us for a *reasonable accommodation. They* thought you may need more time to complete your CHOICES application. If you would like to *request a reasonable accommodation for more time* to complete the application, please complete and return the forms that are included with this letter." PX482 (emphasis added). Olson did not purport to grant additional time to Monroe through this letter, because she does not "grant requests for more time." Olson Test., ECF 398 164:8-11. Instead, Olson sent Monroe a discrimination complaint form. Olson Test., ECF 398 166:16-21; PX482. TennCare's General Counsel's Office later granted more time, JX44 ¶ 255, and an AAAD representative performed a Pre-Admission Evaluation for a CHOICES application. JX44 ¶ 254.

check the member's case file in TEDS for information about a reasonable accommodation request. Olson Test., 387-12 203:12-16.

86. Olson assumes that AHS call center staff provide "mitigating measures" or "connect the person to that mitigating measure." Olson Test., ECF 398 172:6-9. She bases this assumption on "listening to calls and being familiar with how the processes work." Olson Test., ECF 398 172:10-16.

87. Olson does not regularly meet with AHS and is not familiar with call center staff job descriptions. Olson Test., ECF 398 152:6-9, 172:6-12, 172:17–173:13.

88. AHS is not familiar with "mitigating measures" as Olson described them. Fields AHS Test., ECF 387-16 87:11–88.3; PX118 60:5-6. AHS's authority is limited. AHS does not grant any requests for assistance, including disability accommodations seeking an extension of time to submit documents. Fields, AHS Test., ECF 387-18 156:19–162:13; PX118 60:8-15, 61:1-2. AHS cannot send a notice via e-mail to a member. Hagan Test., ECF 387-15 225:21-25.

89. According to AHS, there are two ways AHS staff can assist a member without getting the OCRC involved—by raising their voice to speak more loudly over the phone or by reading notices aloud to an individual. Fields AHS Test., ECF 387-17 98:7-20; PX118 60:6-8. AHS sends all other such requests for reasonable accommodations or mitigating measures to Olson. Fields AHS Test., ECF 387:17 98:14-24; PX118 60:8-11.

90. The lack of understanding between Olson and AHS regarding reasonable accommodations or mitigating measures leaves large gaps in assistance that persons with disabilities need to navigate TennCare's system, including in-person assistance, extra time, and knowledgeable contacts to answer questions and explain the content of notices. PX118 61:1-4. Only a small number of requests for accommodations to provide assistance with eligibility procedures make their

way to Olson. PX118 62:3-4.

91. Until 2022, AHS was not aware that reasonable accommodations were part of its job responsibilities, Fields AHS Test., ECF 387-18 144:2-23, and Olson did not know that AHS was unaware of this responsibility. Olson Test., ECF 398 146:3-6.

92. During this time, AHS did not have a reasonable accommodation script or procedures, Olson Test., ECF 398 149:8-18.

93. In 2022, Olson placed AHS under a corrective action plan, *id.*, but the training under this plan—which occurred once—does not mention "mitigating measures," Olson Test., ECF 398 219:16-25, states that reasonable accommodations "are considered to be discrimination complaints," PX118 53:10-14; JX38 at 7, and fails to describe an actual process for granting or denying accommodation requests other than going through complaint procedures. *Id.*; PX118 52:9-14.

94. Olson, and thus OCRC, does not have access to the TEDS database. Olson Test., ECF 398 168:15. She does not know how many members with disabilities are going through the TennCare redetermination process. *Id.* at 180:20-23. She does not know whether anyone at TennCare reaches out to individuals who requested assistance with renewals in the past to see if the same assistance is needed for another renewal year. *Id.* at 178:21-24. Olson has not talked to Hagan since TennCare restarted the renewal process in 2023. *Id.* at 184:23–185:1. She has not reviewed how many members in disability-related categories have lost coverage, how many have lost coverage for not returning the renewal packet or verification documents overall, or how many of the latter are disabled. *Id.* at 185:2-11.

95. With TEDS, TennCare has more capacity to process and analyze data than ever before. TennCare's TEDS does not track information about disabilities, types of reasonable accommodation, or prevalence data about disabilities. This includes information that is predictable and

continuing, such as for permanent disabilities or for requests for reasonable accommodation in the *annual* redetermination process. Hagan stated that doing so is "not needed for our business." *See* Hagan Test., ECF 387-23 17:25–18:15, 21:10–22:10, 23:25–24:15, 25:1-24; Olson Test., ECF 398 180:11-16, 20-23; Flener Test., ECF 387-2 239:22–240:25; 247:9–248:8; PX118 69:7-10.

96. Outside of Long Term Services and Supports ("LTSS"), TennCare and its contractors do not track the number of members who will or may require a reasonable accommodation for redetermination. This includes those who are visually impaired, deaf, hearing impaired, cognitively impaired, and members who are unable to use their hands to write or type. Hagan Test., ECF 387-15 240:8-242:9.

97. TennCare does not run any reports to make sure individuals with disabilities are not disproportionately terminated. Hagan Test., ECF 387-15 227:6-9.

98. Olson does not assess the prevalence of disabilities among members or the potential need for reasonable accommodation among members with disabilities. She does not know of anyone at TennCare who does. Olson Test., ECF 387-10 54:22-55:11.

99. Olson maintains a Complaint Log in an Excel spreadsheet that is used to identify civil rights discrimination complaints generally and that is accessible to Olson and two General Counsel workers. Olson Test., ECF 387-11 163:23-164:19.

100. Apart from the Log, TennCare does not have any aggregate way to track reasonable accommodation requests. Olson Test., ECF 387-12 244:22–245:4.

101. TennCare does no affirmative outreach to members based on the claims data it receives regarding the medical services that members receive. Hagan Test., ECF 398 260:3-11.

102. In contrast, in 2002, TennCare represented that its redetermination process (1) identified members assessed as having certain severe disabilities in its case management system, (2)

required its contractor to make contact with individuals with certain severe disabilities who failed to respond to DHS within 30 days of the initial renewal notice, (3) established alternative arrangements, including in-home interviews for members with special needs, (4) had eligibility caseworkers provide assistance, including helping individuals obtain requested verification or resource information, and (5) reviewed claims/encounter records in TennCare's management information system, searching three years of data for diagnoses that would identify members with conditions that might be disabling. *See* PX599 at 17–18, 19–21, Appx. 1-2, 11-12, State's Proposed Findings of Fact and Conclusions of Law, Doc. 481, *Rosen v. Tenn. Comm'r of Fin. & Admin.*, No. 3:98-627 (M.D. Tenn. Aug. 5, 2022); ECF 398 255:4-6 (objecting to admission but admitting authenticity).

103. Peter Blanck, Ph.D., J.D., presented expert testimony for Plaintiffs on this subject.

104. TennCare does not object to his credentials or expertise. *See* ECF 336, 336-1.[12]

105. Blanck evaluated TennCare's approach to granting reasonable accommodations and access to persons with disabilities. He focused on policies and practices and methods of administration that affirmatively provide access to TennCare's redetermination processes that: (1) identify and provide reasonable accommodations to members with disabilities; (2) do not screen out members with disabilities; (3) provide appropriate monitoring and oversight of program accommodations; and (4) provide appropriate monitoring and oversight of access to the TennCare redetermination process. PX118 8:17–9:16.

106. Blanck reviewed thousands of pages of documents, including call recordings, TennCare policies and reports, and documentation and sworn testimony of state officials and members of the Disability Subclass. PX118 8:8-14; Blanck Test., ECF 398 13:13–14:5. He conducted

[12] Dr. Blanck is a University Professor, the highest faculty rank at Syracuse, in addition to other duties. He is the Burton Blatt Institute's Chairman, whose mission is to advance the civil, economic, and social participation of persons with disabilities. PX118 at 2; ECF 331 ¶¶ 2-3.

primarily qualitative research, employing the methodology of triangulation, frequently used in his field, which surveys data points across multiple sources to see whether they converge or diverge. Blanck Test., ECF 398 12:12–13:10, 16:13-19; PX118 7:5–8:1. He evaluated issues of accountability, clarity, validity, and reliability of the organizational design and culture of TennCare and access to persons with disabilities.

107. Blanck's use of the triangulation methodology and his evaluation are replicable by a researcher with expertise who reviews documents similar to those reviewed by Blanck. Blanck Test., ECF 398 15:8-18. The triangulation method complies with Fed. R. Evid. 702 and has been accepted by other courts. *See*, *e.g.*, *Johnson v. BLC Lexington SNF, LLC,* 478 F. Supp. 3d 578, 586–87 (E.D. Ky. 2020).

108. Blanck is a qualified expert to opine on TennCare's reasonable accommodation system.

109. As Blanck found, TennCare has only an *ad hoc* process to provide persons with disabilities access to redeterminations. Blanck Test., ECF 398 10:17-23. The process does not include quality assurance. Olson Test., ECF 398 at 157:6-10; *cf.* Olson Test., ECF 387-12 167:3-7.

110. Olson used the term "mitigating measures" to be broadly interchangeable with reasonable accommodations, *see* Olson Test., ECF 387-11 138:12-24, but the terms are different. "Reasonable accommodations" take into account the limitations resulting from disabling conditions and determine the ways a person's environment can be adjusted, so that the person can have equal access to the system. Blanck Test., ECF 398 19:18–20:9. "Mitigating measures" are assistance that is already available, regardless of disability. PX118 59:13-15.

111. Olson does not monitor whether assistance is provided to individuals with disabilities who need them and has no access to TEDS, PX118 60:1-4, which makes the efficacy of the

use of “mitigating measures” difficult to determine, Blanck Test., ECF 398 21:3-11.

112. Members often need help understanding notices. Blanck Test., ECF 398 51:2-11. Persons with disabilities do not generally understand they have an affirmative right to a reasonable accommodation. *Id.* at 21:12-19. Enrollees with disabilities need to receive a notice that provides a clear affirmation that they are entitled to a reasonable accommodation. *Id.* at 21:20-24, 24:3-8.

113. TennCare provides a special insert with almost every notice sent to the public. Olson Test., ECF 398 198:4-8. The insert, which has the title “Do You Need Special Help?” does not describe what a “disability” may be, and it does not distinguish between that status and a “mental health” or “learning problem.” The notice gives no information regarding requesting and obtaining reasonable accommodations as a legal right of persons with disabilities. DX298 at 5; PX118 57:2-10. And neither do the separate “Need special help?” short taglines that Olson created to appear in the footer of other documents. *See generally*, JX7, 9, 10, 11, 14.

114. A disability can impact a person’s ability to spend time waiting on the phone, to process and respond to information, and to physically complete application tasks. PX118 15:12-16:7. A person with a disability may need direct, in-person assistance to successfully navigate the administrative processes. PX118 15:10-17:3.

115. TennCare relies on contractors as part of its redetermination process. One of these contractors is the Tennessee Department of Human Services (“DHS”), which is supposed to provide a computer kiosk to access TennCare or fax documents at DHS county offices. Bryson DHS Test., ECF 387-3 18:20-19:9. But DHS lacks TEDS access, Hagan Test, ECF 387-13 41:4-5, and access to the side portal TennCare staff uses. Bryson DHS Test., ECF 387-3 24:12-15. DHS does not give in-person, in-home assistance to members with disabilities. *Id.* at 35:15-22. DHS refers such requests back to TennCare. *Id*. at 35:23–36:1. DHS does not receive referrals from TennCare

or AHS regarding individuals with disabilities who need reasonable accommodations. Bryson DHS Test., ECF 387-4 108:22–109:1. When persons with disabilities ask DHS for accommodation, DHS refers them back to TennCare. *Id.* at 113:20–114:8.

116. The Tennessee Area Agencies on Aging and Disability ("AAADs") are nine quasi-non-governmental organizations across the state that are supposed to provide in-person assistance during the redetermination process. *See* Evans Test., ECF 396 233:1-3. AAAD's employees are not eligibility specialists. JX43 ¶ 112. They are not expected to be eligibility counselors or experts in the categories. Turner Test., ECF 387-6 202:7-16. They have less experience than contractors at TennCare's call center and are trained only "to the extent that they can assist someone with *applying* for coverage," *id.* at 202:24–203:3 (emphasis added), which is a different process than redetermination, Hagan Test., ECF 387-13 28:10–29:4.

117. As of April 2023, TennCare's redeterminations website did not list in-person assistance being provided by AAADs. Hagan Test., ECF 387-14 148:24–152:25, 161:11–162:25.

118. In a memo dated September 6, 2023 that TennCare's LTSS "senior deputy of operations sent to all of [TennCare's] partners as a reminder of their responsibility to assist members in the renewal process," Evans Test., ECF 396 242:18-20, TennCare did not list AAADs' responsibility to perform in-person assistance for renewals. *See* DX83.

119. TennCare's most recent contract obligates AAADs to perform only in-person assistance for members in one specific TennCare category (CHOICES, TennCare's category that covers stays in nursing homes). *See* JX35, Attach. A., Definitions (stating "CHOICES Member (Member) – A Medicaid participant who has been enrolled into TennCare into CHOICES"); *see also* Evans Test., ECF 396 285:17–286:17.

120. AAADs did not produce in-person assistance reports from 2019 until April 2023.

Evans TennCare Test., ECF 387-22 33:7–34:9; JX43 ¶ 114. AAADs did not receive added funds to produce such reports in April 2023. *See* Evans TennCare Test., ECF 387-22 45:23–46:7.

121. AAADs reported providing in-person redetermination assistance to only four TennCare members in April 2023, Evans Test., ECF 396 236:24–237:1; three in May 2023, *id*. at 238:7-10; seven in June 2023, *id.* at 239:10-12; and 13 in July 2023, *id.* at 240:1-3. *See also* PX44.

122. From April to July 2023, TennCare has no report from the Greater Nashville AAAD or the East Tennessee AAAD showing that either provided in-person assistance to anyone. *See* PX44. TennCare has no record of these two AAADs providing ***any*** in-person assistance during the entire class period. *See* Evans TennCare Test., ECF 387-22 33:7–34:9; JX43 ¶ 114.

123. The Tennessee Community Services Agency ("TNCSA") is another TennCare contractor with a role in the redetermination process. TNCSA does not interact with individuals seeking help in person, either in a home or in the agency's office. Whitfield TNCSA Test., ECF 387-7 38:4-15. TNCSA has not assessed callers who might need in-person assistance because of their disability. *Id.* at 83:18-21. It has not reached out to any AAAD to connect them with individuals that need in-person assistance with the redetermination process. *Id.* at 81:10-23; Whitfield TNCSA Test., ECF 387-8 140:4-11. TNCSA does not have access to TEDS. Hagan Test, ECF 387-13 41:6-7. It has no TennCare policies related to reasonable accommodation. Whitfield TNCSA Test., ECF 387-8 95:15-20.

124. TNCSA has not received reasonable accommodation requests from callers. Whitfield TNCSA Test., ECF 387-8 90:22-25. TennCare has not referred members to TNCSA when they request in-person assistance. *Id.* at 127:20–128:5.

III. PROPOSED CONCLUSIONS OF LAW

125. TennCare has three sets of legal obligations relevant to this case, which provide the safety net for mistakes that TennCare concedes are inevitable. *See* Part II.B.

126. *First*, TennCare must comply with the Medicaid Act and its implementing regulations, *Hughes v. McCarthy*, 734 F.3d 473, 475 (6th Cir. 2013), including that it (1) "consider all bases of eligibility" for a member before "making a determination of ineligibility," 42 C.F.R. § 435.916(f)(1); (2) provide "timely and adequate written notice" of any decision to terminate a member's coverage, *id.* § 435.917(a); (3) include in such notice a "clear statement of the specific reasons," the "specific regulations" supporting termination, an explanation of the member's right to request an evidentiary hearing if one is available, and the circumstances in which COB is granted pending an appeal, *id.* § 431.210; (4) "maintain[] a hearing system" for individuals who appeal terminations, *id*. § 431.205; 42 U.S.C. § 1396a(a)(3); (5) ensure that the hearing system "meet[s] the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970)," 42 C.F.R. § 431.205; and (6) take final administrative action within 90 days of an appeal's filing in all but exceptional cases, *id.* at § 431.244—which means issuing a written decision for appeals with hearings. *Shakhnes v. Berlin*, 689 F.3d 244, 254 (2d Cir. 2012).

127. *Second*, because members have a property interest in TennCare coverage protected by the Due Process Clause, TennCare must provide "adequate notice" and a "meaningful" opportunity to be heard before termination. *Hamby v. Neel*, 368 F.3d 549, 559–60 (6th Cir. 2004).

128. *Third*, TennCare must comply with the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

A. Due Process Claims

1. TennCare's notices are inadequate.

129. To be adequate, notices must "detail[] the reasons for a proposed termination," including "the legal and factual bases" for the decision. *Goldberg*, 397 U.S. at 267–68. They must

"clearly" explain "the availability of an avenue of redress." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13–14 n.15 (1978), and be "reasonably calculated" to communicate this information. *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). Failure to include any required information offends due process, even if other aspects of the notice are sufficient. *See*, *e.g.*, *Memphis Light*, 436 U.S. at 14 ("[W]hile adequate to apprise … the threat of termination … was not 'reasonably calculated' to inform them of the availability of 'an opportunity to present their objections'"); *Barry v. Lyon*, 834 F.3d 706, 719 (6th Cir. 2016) (finding notice inadequate that referred to right to appeal but omitted "a detailed statement of the intended action" or "the reason for the change in status").

130. To satisfy 42 U.S.C. § 1396a(a)(3) and its implementing regulations, notices must state the action being taken, the "specific reasons" for it, the "specific regulations" supporting the action, the right to a hearing or, in cases of a "change in law, the circumstances under which a hearing will be granted," when benefits will continue pending the hearing, and tell members of their right to a hearing and the method to obtain one. 42 C.F.R. § 431.210, § 431.206.[13]

131. TennCare's NODs fail to adequately explain termination decisions, fail to explain how to seek redress, and discourage appeals.

132. *First*, all NODs issued before December 2022 referred recipients to TennCare's 95-page compendium of regulations and thus failed to provide the required explanation of the legal basis for the termination decision, as required by 42 C.F.R. § 431.210. *See supra* Part II ("FoF") ¶ 14; *e.g.*, *Rodriguez ex rel. Corella v. Chen*, 985 F. Supp. 1189, 1195–96 (D. Ariz. 1996).

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[13] *See also Crawley v. Ahmed*, 2009 WL 1384147, at *26 & n.7 (E.D. Mich. May 14, 2009) (finding that § 1396a(a)(3) requires timely and adequate notice of decisions under 42 C.F.R. §§ 431.206–.211 and § 435.919 (now codified at § 435.917); *Guadagna v. Zucker*, 2021 WL 11645538, at *13 (E.D.N.Y. Mar. 19, 2021) (finding right under § 1396a(a)(3) encompasses "a number of provisions fleshing out the right to pre-termination notice").

133. *Second*, the NODs do not "fully apprise" members of the factual bases for ineligibility determinations. *Hamby*, 368 F.3d at 561; *see* FoF ¶¶ 15, 17-22. Such notices "hardly qualify as 'adequate'" because they lack a "determination of eligibility on all relevant grounds." *Crawley*, 2009 WL 1384147, at *26. This violates TennCare's duty to allow an individual who would be eligible under more than one category to have her eligibility determined for the category she selects. 42 C.F.R. § 435.404.

134. *Third*, the representation in all NODs that TennCare reviewed each recipient for all of the "different kinds of coverage" available is false. *See* FoF ¶¶ 15, 19-22, 63-73.

135. *Fourth*, TennCare's failure to inform members about the 90-day reconsideration period or Good Cause Rule, *see* FoF ¶¶ 13, 31, violates TennCare's obligation to employ "means . . . such as one desirous of actually informing" members about their rights. *Mullane*, 339 U.S. at 315. "[C]ommon sense dictates that the likelihood of the state employing the [] authority is much less when a recipient (ignorant of the state's authority) does not request" it. *Bliek v. Palmer*, 102 F.3d 1472, 1477 (8th Cir. 1997).

136. *Fifth*, TennCare's shifting written notice of its VFD Policy unlawfully discourages recipients from pursuing appeals. TennCare updated the language, JX43 ¶¶ 85-86, but the NODs continue to contain the misleading and discouraging sentence: "You don't have a right to a fair hearing just because you don't like this decision or think it will cause problems for you." JX14 at –871; *see, e.g.*, DX406 -7534. This confusing language makes it unduly difficult for members to know whether they might satisfy TennCare's VFD Policy. *See* FoF section II.D.4.

137. TennCare's notice of appeal rights in its NODs is misleading and discouraging. The notice violates due process and the prohibition on "interfer[ing] with the . . . freedom to make a request for a hearing." 42 C.F.R. § 431.221(b); *see also Hamby*, 368 F.3d at 561; *Gonzalez v.*

Sullivan, 914 F.2d 1197, 1203 (9th Cir. 1990); *Dozier v. Haveman*, 2014 WL 5480815, at *11 (E.D. Mich Oct. 29, 2014).

2. TennCare systematically denies fair hearings.

138. Medicaid members have a well-established property interest in their Medicaid benefits. *Hamby*, 368 F.3d at 559. Given the "brutal need" of the Medicaid members, *Goldberg* requires a pre-termination fair hearing before benefits can be denied, reduced, or terminated. 397 U.S. at 261; *Memphis Light*, 436 U.S. at 16 (noting that the Court "consistently has held that 'some kind of hearing is required at some time before a person is finally deprived of his property interests'") (citation omitted)). The hearing must occur before termination because, although benefits "may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation." *Id.* at 20.

139. TennCare's "hearing system 'must meet the due process standards set forth in *Goldberg*,'" ECF 234 at 6 (quoting 42 C.F.R. § 431.205), which require that "a recipient must be allowed to state his position orally" because "[w]ritten submissions are an unrealistic option for most recipients," 397 U.S. at 269. "A system or procedure that deprives persons of their claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated." *Logan v. Zimmerman Brush*, 455 U.S. 422, 434–35 (1982).

140. Under the Medicaid Act, TennCare must grant a fair hearing to "[a]ny individual who requests it because he or she believes the agency has taken an action erroneously" or "denied his or her claim for eligibility," unless the "sole issue is a Federal or State law requiring an automatic change adversely affecting some or all beneficiaries," 42 C.F.R. § 431.220(a), (b). TennCare "may not limit or interfere with the . . . freedom to make a request for a hearing," *id*. § 431.221(b), and it must "reinstate and continue services until a decision is rendered after a hearing if . . . [a]ction

is taken without the advance notice" required by the Medicaid regulations, *id.* § 431.231(c).[14]

141. TennCare systematically violates these constitutional and statutory requirements.

a. TennCare's fair hearing policies are unlawful.

142. TennCare's fair hearing policies violate the Medicaid Act and its implementing regulations. In violation of Section 431.220(a)(1), TennCare does not automatically grant hearings to individuals who believe that the agency has denied their eligibility claims, FoF ¶¶ 23, 25-27. From March 19, 2019 to October 31, 2022, TennCare received over 5,767 timely appeals but either did not provide a timely hearing or did not resolve the appeal before it was withdrawn. FoF ¶ 27.

143. TennCare's current VFD Policy violates 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 431.220(a)(1)'s requirement that a state agency afford a fair hearing to "any individual who requests it because he or she believes the agency has taken an action erroneously." *Id*. TennCare relies on the narrow exception of 42 C.F.R. § 431.220(b), which provides that an appeal may be closed without a hearing only "if the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all beneficiaries." FoF ¶ 46. But in none of the appeals discussed at trial did TennCare purport to terminate the appellant's eligibility because it was required to do so automatically by federal or state law. TennCare claims that its VFD Policy ***itself*** is a "state law describing the requirements of eligibility," *id*, but the VFD Policy does not apply automatically (TennCare must review appeals to apply it) and does not describe eligibility requirements (only supposed appeal standards). It effectively allows TennCare to terminate any appeal.

144. The VFD Policy is defective for additional reasons. It results in the denial of fair hearings for appeals that raise factual issues or issues involving the application of law to the facts.

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[14] *See K.B. v. Mich. Dep't of Health & Hum. Servs.*, 367 F. Supp. 3d 647, 661–62 (E.D. Mich. 2019) (42 U.S.C. § 1396a(a)(3) requires notice of hearing opportunity under 42 C.F.R. § 431.210).

See FoF section II.D.4. The VFD Policy also impermissibly burdens due process by conditioning access to a fair hearing on an appellant's ability to justify their appeal in writing, a tall order in an eligibility process that TennCare concedes is "very complicated." FoF ¶ 52; *cf. Goldberg*, 397 U.S. at 269 ("Written submissions are an unrealistic option for most recipients[.]").

145. TennCare's reliance on *Rosen v. Goetz*, 410 F.3d 919 (6th Cir. 2005), is misplaced. In *Rosen*, the Sixth Circuit ruled that TennCare's application of the VFD Policy in existence nearly 20 years ago was authorized by 42 C.F.R. § 431.220(b). The issue in *Rosen* arose out of TennCare's wholesale elimination of several eligibility categories in 2005. 410 F.3d at 922. The terminations being appealed involved those eliminated eligibility categories and thus did result from a "Federal or State law requiring an automatic change adversely affecting *some or all* beneficiaries." *Id.* at 926. That is not the case here, where none of the terminations at issue is attributable to such a law.

146. Even assuming *arguendo* that the eligibility appeals at issue here arose as a result of wholesale changes in eligibility laws similar to those of 2005, *Rosen* still would not apply. TennCare acknowledged in *Rosen* that, even in the context of mass terminations automatically triggered by a law, § 431.220(b) guaranteed a hearing *unless* that law was the "sole issue" raised by an appeal. *See* 410 F.3d at 926. TennCare also represented that an individual would not have to establish Medicaid eligibility to get a hearing and would receive all reasonable inferences in determining whether they had established a VFD. *Id.* at 929. As amicus curiae on appeal, CMS assured the Sixth Circuit that the 2005 version of the VFD Policy was consistent with federal regulations because it sought to deny hearings only for program-wide changes as a result of federal or state law requiring the change. *Rosen*, 410 F.3d at 927. Assurances like these caused the court in *Grier v. Goetz* to conclude that "in the context of an individualized challenge to a denial of prior authorization, benefits or services, *it will be the rare case indeed* that is dismissed for failure to

raise a 'valid factual dispute.'" 402 F. Supp. 2d 876, 923 (M.D. Tenn. 2005) (emphasis added).

147. TennCare's current VFD Policy, as applied, is very different. To provide just one example, while an allegation that a member did not receive redetermination forms presented a VFD under the old policy, *Rosen,* 410 F.3d at 929-930, it does not under the current one. *See* FoF ¶ 53. And even when TennCare concedes that an appellant has presented a VFD, the policy still allows it to deny them a hearing. *See* FoF ¶¶ 53-54. *Rosen* cannot save the current VFD Policy, which denies class members fair hearings in violation of 42 U.S.C. 1396a(a)(3) and 42 C.F.R. § 431.220.

b. TennCare arbitrarily denies good cause hearings.

148. The individual's "property interest in … TennCare coverage," *Hamby*, 368 F.3d at 559, includes the right to invoke "good cause" to prevent loss of benefits, Tenn. Comp. R. & Regs. § 1200-13-19-02(20) (defining good cause broadly). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). TennCare's rules acknowledge members' rights to hearings on good cause in determining eligibility appeals. Tenn. Comp. R. & Regs. § 1200-13-19-.07(3) (referring to "a good cause hearing").

149. TennCare violates the Due Process Clause and the Medicaid Act by not providing members pre-termination notice of their right to assert good cause and by denying them a hearing to contest denials of their claims to good cause. *See* FoF section II.D.3; *Memphis Light*, 436 U.S. at 13–14, n.15. TennCare also applies a good cause standard that is far more restrictive than the Good Cause Rule allows ("a reason based on circumstances outside the party's control and despite the party's reasonable efforts."). *See* FoF section II.D.3; TennCare Comp. R. & Regs. § 1200-13-190.02(20). Even if appellants were given fair notice of the opportunity to present good cause, the

appeals unit's reliance on a call center operator's summary, or even on the appellant's own attempt to make her case in writing would be a "wholly unsatisfactory" substitute for an oral hearing. *Goldberg*, 397 U.S. at 269. Without affording due process, TennCare systematically denies good cause to members whose circumstances should entitle them to the Rule's protection.

c. TennCare does not take final action within 90 days of appeal.

150. TennCare is required to issue a final, written administrative decision within 90 days of the claimant's request for a hair hearing. JX43 ¶ 92; 42 C.F.R. § 431.244(f); 42 U.S.C. § 1396a(a)(3); *Shakhnes*, 689 F.3d at 254. TennCare falls short of this requirement at least ***47.8%*** of the time. FoF ¶¶ 23, 57-58.[15] To address long delays for hearings, TennCare has a temporary policy of giving COB lasting 90 days pending resolution of an appeal. FoF ¶ 62. But this only becomes effective after day 90, meaning members are without coverage for up to three months even though 84% of timely appeals are resolved for the appellant, not TennCare. *Id*.

3. TennCare fails to consider all categories of eligibility.

151. TennCare must "consider all bases of eligibility" before "making a determination of ineligibility," 42 C.F.R. § 435.916(f)(1), but it has not done so. FoF ¶¶ 21-22, 63-73. *Crippen v. Kheder*, 741 F2d 102 (6th Cir. 1984).

B. TennCare Has Violated the ADA.

152. The ADA prohibits states from discriminating against people with disabilities and requires them to actively ensure access to programs and services, including through program design, policy choices, and evaluations of access. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b); *Tennessee v. Lane*, 541 U.S. 509, 524-26, 531 (2004) (ADA is a "prophylactic measure" needed to

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[15] While TennCare obtained a temporary waiver of this deadline due to COVID, it was not active at the time of trial and, if activated, would expire on February 28, 2025. FoF ¶ 61.

counter "systematic deprivations of fundamental rights"); *Ability Ctr. of Greater Toledo v. Sandusky*, 385 F.3d 901, 907 (6th Cir. 2004). A state must not only make reasonable accommodations to its policies and procedures when necessary to ensure access to people with disabilities, it must also ensure that the program does not discriminate by design or policy, including for reasonable accommodation. 42 U.S.C. § 12101(a)(5) (ADA purpose includes discriminatory policies and criteria); *Ability Ctr. of Greater Toledo,* 385 F.3d at 909-11; *Disabled in Action v. Bd. of Elections*, 752 F.3d 189, 200-02 (2d Cir. 2014). The relevant inquiry is "whether those with disabilities are as a practical matter able to access benefits to which they are legally entitled." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 (2d Cir. 2003).

153. TennCare violates the ADA by systemically screening out people with disabilities when renewing their coverage, due to its failure to screen for some disability-related categories and its lack of a valid and reliable system for granting reasonable accommodations.

1. TennCare systematically screens out individuals with disabilities.

154. States cannot use methods of administration that defeat or substantially impair achieving program objectives or impose eligibility criteria that screen out people with disabilities. 42 C.F.R. § 35.130(b)(3), (8); *Ability Ctr.,* 385 F.3d at 910-11; *Henrietta D.*, 331 F.3d at 275. This duty requires states to affirmatively accommodate members to ensure that facially neutral rules do not discriminate in practice. *Id.*

155. TennCare violated the ADA by implementing systems and policies that wrongfully screen out people eligible in disability-related categories, including SSI, DAC, Widow/er, and Pickle. For SSI, TennCare knew about a data issue that terminated coverage for Walker, Caudill, Vaughn, and others as of June 17, 2019, but did not classify the fix as an "emergency" and did not act to reduce or prevent that harm until many months later. FoF ¶ 71.

156. TennCare wrongfully terminated coverage for people eligible under the disability-

related categories of DAC and Pickle, including Noe/Hill, Gavigan, Monroe, Guyton. FoF ¶ 19-23; JX44 ¶¶ 335-38; *see* FoF II.E.1. TennCare has lacked the historical SSI data necessary to reliably assess eligibility for these SSI-related categories of eligibility. FoF ¶¶ 66-67. Until September 2023, TennCare's renewal packets did not include questions to identify prior receipt of SSI to help screen for these categories. FoF ¶ 67. TennCare failed to adequately plan, act to reasonably remediate problems, or prevent harm from known issues affecting equal access to coverage and its administration of the redetermination process discriminated against members with disabilities.

2. TennCare lacks a valid and reliable system for granting reasonable accommodations.

157. The ADA requires TennCare to provide program access by granting reasonable accommodations where needed. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(3) & (7); *Ability Ctr. of Greater Toledo,* 385 F.3d at 907. TennCare cannot have a system that thwarts requests for reasonable accommodations or otherwise limits access to the reasonable accommodation process through its design, policies, or lack thereof. *Id.*; *Henrietta D.,* 331 F.3d at 272; *Disabled in Action*, 752 F.3d at 201. The right to access "should not be contingent on the happenstance that others are available to help" and an *ad hoc* policy of remedying barriers is inadequate when a state does not respond to many of the access issues brought to its attention. *Id.* at 200-01.

158. Courts look at the relationship between the parties and at context to determine what triggers the reasonable accommodation process. *See Marble v. Tennessee*, 767 F. App'x 647, 652-53 (6th Cir.2019). This is not a case in which, for example, an employee readily understands their essential job functions and what accommodation they need. TennCare is a complex system with an automated system making many of its decisions. FoF ¶ 6. TennCare has a distinct information advantage over its members, including the information, data sources, processes, and rules that it uses to make an eligibility determination, as well as an understanding of the complex rules of the

program. *See* FoF ¶¶ 6, 17-18, 101. TennCare members often do not know of the specific assistance or accommodation that might resolve system errors and other problems that they encounter in the redetermination process. *See*, *e.g.*, FoF ¶¶ 19-23.

159. To request a reasonable accommodation, magic words are not required and "a covered entity may need to infer that a request is a request for accommodation if 'context' shows that it is meant to compensate for medical restrictions." *Marble*, 767 F. App'x at 653; *see also Isaac v. Louisiana Dep't of Child & Fam. Servs.,* 2015 WL 4078263, at *4 (M.D. La. July 6, 2015) (revelation of disability and limitation was sufficient to trigger the accommodation process). The request is supposed to trigger an individualized inquiry by the entity to determine if it can make reasonable accommodations for the individual. *Marble*, 767 F. App'x 652-53; *see also Randolph v. Rodgers*, 170 F.3d 850, 858-59 (8th Cir. 1999) (stating request requirement does not allow entity to claim there was no request when it declines to discuss the issue). The entity must look at the individual's needs; it may not simply match a disability to a pre-defined accommodation. *Marble*, 767 F. App'x at 652.

160. Given the circumstances, an assertion by a TennCare member that they have a disability and need help to retain their coverage is legally sufficient to trigger TennCare's obligation to investigate if it can provide an accommodation and, where necessary, provide more information to a member to determine what accommodation might be needed.

161. TennCare violates this obligation. Despite claims that its system merely requires someone to "raise their hand" to ask for help, TennCare does not have the structure, policies, or monitoring to ensure that help is actually provided or to provide further accommodations if needed. FoF ¶¶ 74-101, 109, 111, 113, 115-124. TennCare instead has *ad hoc* policies and assumptions. FoF ¶ 109. It relies on unwritten policies and assumptions that employees just know what to do,

but it has no meaningful monitoring, reporting or other mechanisms to support those assumptions. FoF ¶¶ 93-100, 111. TennCare's "system" is essentially one person—Olson—overseeing the entirety of civil rights compliance for the entire TennCare system and its dozens of contractors without critical operational policies, structure, or consistent processes for oversight, monitoring, and enforcement. FoF ¶¶ 74-101, 111, 113, 115-124.

162. There are also significant gaps in TennCare's purported "system." Although it relies on mitigating measures, it does not give its frontline staff clear information about providing them. FoF ¶¶ 84-93. Olson admitted that she had not discussed TennCare's plan to restart redeterminations with Hagan, had not reviewed reports regarding loss of coverage for people with disabilities, did not have an idea of how many people with disabilities would likely go through redetermination, and was unaware of key leadership at the call center, among others. FoF ¶¶ 87, 94.

163. TennCare's process for requesting and granting accommodations does not follow clear policies and does not reliably grant accommodations, much less provide for ongoing accommodations. FoF ¶¶ 77-95. The "Special Help Insert" and "Need special help" taglines on the footers of notices that Olson drafted do not include clear information about reasonable accommodations or members' right to request one. FoF ¶ 113. Olson suggested that "mitigating measures" can do the work of reasonable accommodations, but TennCare has no list of such measures, FoF ¶ 85, no written policies differentiating mitigating measures from accommodation, and no policies stating what is required to request a reasonable accommodation, the criteria used, the decision timeline, or how to appeal. FoF ¶¶ 77-82, 85, 93.

164. TennCare's lack of a meaningful system has led it to deny reasonable accommodations to members who are entitled to them. By any reasonably objective measure Mon-

roe and Grace requested accommodations based on their disabilities to help them access the redetermination process; however, TennCare did not consider Grace's and Monroe's requests for assistance based on disability and assumed narrow solutions without conducting an individualized inquiry of need, as the law requires. FoF ¶¶ 82, 83. When confronted with this evidence, Olson insisted that she had never seen a true request for accommodation, FoF ¶¶ 76, 82 indicating that TennCare has a profound misunderstanding of what the ADA requires.

3. The State does not provide adequate in-person assistance.

165. Aside from its ADA duty to ensure access through in-person assistance as a reasonable accommodation, TennCare has a separate duty under the Medicaid Act to provide in-person assistance with the redetermination process "in a manner that is accessible to individuals with disabilities." 42 C.F.R. § 435.908(a); *see also* § 435.916; § 435.905(b). TennCare does not do this in any meaningful way. FoF ¶¶ 115-124.

IV. REQUESTED INJUNCTIVE RELIEF

166. A plaintiff seeking injunctive relief must establish: (1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate; (3) that, considering the balance of hardships between the parties, equitable relief is warranted; and (4) that it is in the public interest. *Barry v. Lyon*, 834 F.3d 706, 720–21 (6th Cir. 2016). An explanation of each factor is not necessary if the Court explains "why the injunction was appropriate—indeed, why it was necessary—and precisely what action the state was required to undertake." *Id.* Irreparable harm is shown "if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002). Denial of Medicaid benefits constitutes irreparable harm, *E.g., Markva v. Haveman*, 168 F. Supp. 2d 695, 718 (E.D. Mich. 2001), as does termination of benefits that causes individuals to forgo necessary medical care. *Massachusetts Ass'n of Older Americans v. Sharp*, 700 F.2d 749, 753 (1st Cir. 1983).

A. Notice and Appeals Relief

167. An injunction is necessary here to remedy the harm to the class flowing from TennCare's inadequate policies and practices, which led it to deny coverage to tens of thousands of members without adequate notices or hearings—denials that TennCare admits can cause physical and financial harms. *See*, *e.g*., Hagan Test., ECF 398 282:1-3 ("In some cases, even a temporary disruption of coverage can result in serious harm to a member right?" "Sure.").

To remedy these, harms, TennCare must:

168. *Amend the NODs.* TennCare must revise its NODs so that they clearly communicate the reasons for its decisions. *Hamby*, 368 F.3d at 560. The notices must explain: (1) what eligibility category the member was previously enrolled in; (2) the eligibility requirements for that category; (3) what facts or circumstances TennCare thinks have changed to make them ineligible; and (4) all other eligibility categories TennCare considered and the location where an individual can obtain additional information about them. In *Crawley*, the court granted a similar injunction preventing Michigan from terminating Medicaid benefits until it provided class members written notice that:

> details the factual reasons why their eligibility ended under the category for which they previously had been eligible and the policy items under which the eligibility criteria they did not meet are spelled out … [and] the factual reasons why they are not eligible under other relevant eligibility categories, including disability-based categories, and [the eligibility criteria] they failed to meet are spelled out.

2009 WL 1384147, at *26. In *Dozier*, similarly, the court entered a class-wide preliminary injunction requiring the state to issue new notices that described *all* Medicaid eligibility categories. 2014 WL 5480815, at *10. The *Dozier* notices, like TennCare's NODs, already stated that a member "was not eligible because she was not 'under 21, pregnant, or a caretaker of a minor child in your home' or 'over 65 (aged), blind, or disabled,'" but omitted reference to other categories. *Id.* Without that information, the notices did not provide "a determination on all relevant grounds, thereby

undermining the opportunity for a fair hearing." *Id.*; *See also Barry v. Corrigan*, 79 F. Supp. 3d 712, 752 (E.D. Mich. 2015) (enjoining state to provide notices with eight specific types of information to fulfill due process), *aff'd* 834 F.3d 706 (6th Cir. 2016).

169. TennCare must also add to all NODs new language regarding the existence of a good cause exception, such as: "Did you miss the deadline to appeal or to keep your benefits, through no fault of your own? If so, tell us what happened and you may still be able to file an appeal, and keep your benefits during the appeal." For individuals terminated for not providing documents, TennCare must also include a description of the 90-day reconsideration period that specifies (a) what information TennCare believes is missing; (b) the specific date by which an individual must return the missing information; and (c) the availability of retroactive coverage under the policy. These additions are necessary to ensure that notices clearly communicate the avenues of redress available. *See Bliek v. Palmer*, 102 F.3d 1472, 1476-78 (8th Cir. 1997).

170. *Amend the Good Cause Policy*. TennCare must revise its Good Cause Policy to come into compliance with the Good Cause Rule itself and by: (a) retraining TennCare Connect call center staff to inform callers about the possibility of establishing good cause for an untimely appeal, including with COB; (b) revising the appeal form to alert members about the possibility of establishing good cause and prompt them to supply allegations to support good cause; and (c) before denying a member's good cause exception, providing them an opportunity to present evidence to establish good cause at a hearing—allowing them to present orally when written submissions might not establish good cause. *See Goldberg*, 397 U.S. at 269 ("written submissions … do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important;" "[p]articularly where credibility and veracity are at issue, [w]ritten submissions are a wholly unsatisfactory basis for decision"); *see generally Friedrich v. Sec'y Health & Human*

Servs., 894 F.2d 829, 837-38 (6th Cir. 1990) (fundamental part of due process is to having the opportunity to be heard in a meaningful manner).

171. *Rescind the VFD Policy and Amend Hearing Policy.* Injunctions are necessary to enjoin these unlawful policies. *See Goldberg*, 397 U.S. at 268-69; *Yee-Litt v. Richardson,* 353 F. Supp. 996, 1000 (N.D. Cal. 1972), *aff'd, Carlson v. Yee-Lit*, 412 U.S. 924. TennCare should be enjoined from requiring an appellant to present a VFD or to do anything more that submit a timely request to obtain a fair hearing, unless TennCare (a) acts pursuant to a "Federal or State law requiring an automatic change adversely affecting some or all beneficiaries;" 42 C.F.R. § 431.220(b); ***and*** (b) ensures "that a member will receive a hearing to contest factual matters pertaining to their particular eligibility to continued enrollment" and denies only "pro forma hearings for those members who are . . . challenging only the program-wide changes that automatically end their enrollment eligibility." *Rosen v. Goetz,* 410 F.3d at 927 (quoting CMS amicus).

172. *Ensure Final Action within 90 days.* TennCare must ensure that it has sufficient staff, resources, and policies in place to issue final written decisions within 90 days of an appeal. Until it can reliably do so, TennCare must automatically provide COB for all appeals, during the full length of those appeals, without threat of recoupment. For fair hearings, TennCare must ensure that written decisions are issued within 90 days of an appeal's filing.

173. *Pause Terminations and Reinstate Coverage*. "[I]n suits concerning a state's payment of public benefits under federal law, a federal court may enjoin the state's officers to comply with federal law by awarding those benefits in a certain way going forward[.]" *Price v. Medicaid Dir.*, 838 F.3d 739, 746-47 (6th Cir. 2016). Where adequate notice has not been provided, relief should include ordering a state to pay Medicaid benefits until it has mailed each plaintiff a separate, timely and adequate notice of the reduction. *Kimble v. Solomon,* 599 F.2d 599, 605 (4th Cir. 1979);

Barry 79 F. Supp. 3d at 752 (enjoining "denying, reducing, or terminating public assistance … without first providing notice that explains, in detail," eight specific categories of information).

174. The Court should enjoin TennCare to provide class members with coverage until TennCare provides all class members with notices and hearing opportunities that comply with the Medicaid Act and the Due Process Clause—pausing future terminations for those individuals who have not yet lost coverage and reinstating coverage for those whose benefits it terminated and remain without. "[W]here [a state] failed to comply with the notice regulations, it has not instituted a legally effective reduction in its Medicaid benefits," and the right to Medicaid continues until such process is provided. *Kimble*, 599 F.2d at 604-605.

175. Prospective reinstatement is an appropriate remedy. TennCare relies on members to "raise their hand" to identify errors, *see* Hagan Test., ECF 399 13:1-23, 206:4-24, but its notices and appeals policies have not allowed them to effectively raise their hands and be heard. TennCare must provide a lawful opportunity for each class member to contest TennCare's decision that they are ineligible. This is especially urgent for the 108,000 individuals who lost coverage from 2019 to 2020, a period in which TennCare has admitted that TEDS—and it caseworkers—made numerous mistakes, FoF II.B., and when TennCare provided members whose coverage it was terminating with only a citation to a 95-page compendium of regulations, FoF ¶ 14.

176. This reinstatement would be temporary, lasting until TennCare revises its notices and provides class members with a meaningful hearing opportunity. Reinstating coverage for those who are eligible cannot be a burden, as TennCare is legally required to provide them with benefits. The burden for those who are ineligible and do not respond to TennCare's notices would be minimal, requiring only a notice and lasting only 75 days. Hagan Test., ECF 399 9:3-11. For any who do respond but turn out to be ineligible, any cost can "be speedily remedied by compliance

with the [] injunction." *Banks v. Trainor*, 525 F.2d 837, 843 (7th Cir. 1975).

177. Without reinstatement, any injunction would provide only ***post***-termination notice and do nothing to redress the injury that *Goldberg* warned of: "depriv[ing] an eligible recipient of the very means by which to live while he waits." 397 U.S. at 264. It would also give TennCare a perverse incentive to systemically deny coverage to as many members as possible, knowing that it would face no system-wide consequences for doing so.

B. ADA Relief

178. TennCare must be enjoined from: (1) using processes that do not provide ongoing reasonable accommodations to those with disabilities who require them and have made their need known; and (2) refusing to use a mode of communication that the requester prefers and can be reasonably accommodated. The elimination of those practices is necessary, but far from sufficient, to reasonably ensure accessibility. TennCare cannot fix its problem piecemeal but must develop and implement policies and procedures that address problems systemically.

179. TennCare must further develop and submit a remedial plan in consultation with a qualified expert within 90 days. The plan must provide for a system that reliably and effectively provides reasonable accommodation to individuals with disabilities who need assistance to establish and maintain their TennCare eligibility. It should include the following terms:

1. "Analysis of the types and amounts of assistance that can be reasonably anticipated, based on an assessment of the prevalence of different disabilities in the TennCare population, using clinical encounter or billing data, as well as other information resources readily available to TennCare.

2. Based on such analysis, a plan for the development and maintenance of staffing capacity to meet the anticipated need for reasonable accommodation.

3. Development of a written Reasonable Accommodation Policy, including clear assignments of responsibility and timelines for all entities involved in implementation, and provision for their effective interaction. This policy would include identification of readily available assistance, when to escalate requests, and address when and how in-person assistance would be available.

4. Development of policies and procedures to ensure that TennCare and its contractors recognize, record, and act upon a member's indication that he or she needs reasonable accommodation of a disability, including engaging in an interactive process with the individual, in order to effectively complete the eligibility process; it must also provide for ongoing accommodations.

5. Development of policies and procedures that ensure that such requests are acted upon timely and in accordance with the Reasonable Accommodation Policy and that provide for the appeal of denials of such requests to a neutral decisionmaker not involved in the denial of the request.

6. Effective, accessible notice to all members of their right to a reasonable accommodation, common accommodation types, how to make a request, and, for those who make a request, notice of its disposition and how to appeal.

7. Effective oversight and coordination of the Policy and its implementation, including monitoring of compliance of all entities involved in its implementation.

8. Verified assurances that the entities and individuals responsible for the Policy's implementation have adequate guidance, training, and resources to fulfill their responsibilities as well as sufficient authority, training, and resources to effectively monitor and enforce compliance."

180. For each of the SSI, DAC, Widow/er, Pickle, and Institutional Medicaid categories, TennCare must (1) file a certification by a third-party expert(s) agreed to by the parties (or, failing agreement, selected by the Court) that they have analyzed TennCare's policies, data sources, and automated processes and determined that they reliably support the identification of individuals eligible in each category, and the maintenance of their coverage; (2) for any of the above categories using human intervention, to submit a tailored quality control plan to reduce the risk that human error results in wrongful denials; and (3) to create monitoring tools to review members terminated from the categories for 12 months after fixes (1)-(2) are implemented and make any adjustments.

CONCLUSION

Plaintiffs are entitled to judgment on their claims and to the relief discussed above and a declaratory order that the Defendant is in violation of 42 U.S.C. § 1396a(a)(3) and its implementing regulations, the ADA, and the Due Process Clause of the Fourteenth Amendment.

Dated: March 8, 2024

By: *__/s/ Brant Harrell__*

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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 March, 2024.

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