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

MELISSA WILSON, *et al.*, *Plaintiffs*, v. WENDY LONG, in her official capacity as Deputy Commissioner of the Tennessee Department of Finance & Administration and Director of the Bureau of TennCare, *et al.*, *Defendants*.	No. 3:14-cv-1492 Judge Collier Magistrate Judge Newbern

DEFENDANTS' RESPONSE TO PLAINTIFFS' POST-HEARING BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DECERTIFY THE CLASS AND DISMISS THE CASE

Pursuant to the Court's April 27, 2017 Order, D.E. 210, Defendants (the "State") respectfully submit this Response to Plaintiffs' Post-Hearing Brief in Opposition to Defendants' Motion to Decertify the Class and to Dismiss the Case (May 11, 2017), D.E. 214, (hereinafter "Pls. Br.").

I. PLAINTIFFS' ARGUMENTS THAT THE CLASS CONTINUES TO SATISFY THE NUMEROSITY REQUIREMENT ARE WITHOUT MERIT.

A. Plaintiffs Ignore the Plain Language Meaning of "Opportunity."

Plaintiffs do not deny that *every* TennCare applicant with a delayed application who requests a fair hearing either receives a decision on that application (thus mooting the hearing request) or a fair hearing within the time limits set by the Court. Plaintiffs nevertheless argue that until there is a "final administrative ruling," applicants have not been " 'given' an opportunity for a fair hearing" and thus are in the Plaintiff class. Pls. Br. at 3. Plaintiffs'

argument conflates having an "opportunity" for something (in this case a fair hearing) with the actual receipt of that thing. That is not how the phrase "given the opportunity" for something is understood in common parlance or the case law. *See e.g.*, *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (recognizing that a hearing does not have to be held to fulfill due process requirements only that a "meaningful opportunity to be heard" be given); *cf. National Indep. Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 389 (1976) (recognizing that being "given an opportunity for a public hearing" means having the right to request one); *see also Opportunity*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1583 (1986) (defining "opportunity" as "a combination of circumstances, time and place suitable or favorable for a particular activity or action" and recognizing that a synonym of opportunity is "chance.").

The distinction between "an opportunity for a fair hearing" and receiving a "fair hearing" is illustrated by how those terms are used in the Preliminary Injunction Order. That Order requires the State "to provide the Plaintiff Class with an opportunity for a fair hearing on any delayed adjudication," and separately requires that a "fair hearing" must be held only in cases in which the applicant has requested a fair hearing and provided proof of a delayed Medicaid application. *See* Preliminary Injunction Order at 8 (Sept. 2, 2014), D.E. 91. The Preliminary Injunction thus requires the State to provide the "opportunity" for a fair hearing to *all* delayed applicants, but it need only provide the fair hearing itself to those delayed applicants who avail themselves of the opportunity by requesting it. The Class Certification Order and the Preliminary Injunction, fairly read together, recognize that being given an opportunity or chance for a hearing is not the same as actually availing oneself of that opportunity by requesting and receiving a hearing.

B. The Medicaid Regulations Do Not Support Plaintiffs' Linguistically Strained Argument

Plaintiffs next argue that because the Medicaid regulations set forth the procedural protections that must be included in the fair hearing process, the phrase "opportunity for a fair hearing" must be interpreted "to mean an actual hearing with concomitant procedural protections." Pls. Br. at 5. The State does not dispute that the required opportunity for a fair hearing must be meaningful, nor do we disagree that the administrative appeals process must include the procedural protections specified in the regulations. But Plaintiffs have not alleged that the State's fair hearing process fails to meet these standards; they have not alleged that the State is violating the Preliminary Injunction; nor have Plaintiffs petitioned the Court to require the State to alter its appeals process in any way.[1] More importantly, nothing in the regulations suggests that an appellant who does not have a fair hearing because he or she chooses not to ask for one has been denied the "opportunity" for a fair hearing.

For example, the regulations require that an appellant "be given an opportunity to," among other things, examine her case file and bring witnesses to the hearing. *See* 42 C.F.R. § 431.242. An appellant who chooses not to examine her file or present witnesses simply has not been denied the opportunity to do so. Yet Plaintiffs' interpretation of the phrase "given the opportunity" would compel the conclusion that these rights were denied by the State because "all the elements that make up this right" were not actually provided. Pls. Br. at 5.

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[1] Plaintiffs' counsel acknowledged at the hearing on the State's Motion to Decertify that the Defendants "are absolutely giving a fair hearing right now" and Plaintiffs are "not trying to argue that the hearing process that [Defendants] have created pursuant to the preliminary injunction order is itself deficient." Indeed, Plaintiffs' counsel admitted that "if that system had been in place in 2013 and 2014, we would not have brought the (a)(3) claim." Hearing on Mot. to Dismiss & Decertify Tr. at 55, 60 (Apr. 27, 2017), D.E. 215.

The Supreme Court's decision in *Armstrong v. Manzo*, 380 U.S. 545 (1965), cited by Plaintiffs, does not support Plaintiffs' strained interpretation. *Armstrong* simply recognized that the petitioner in that case was not afforded "the opportunity to be heard" when he was only granted a hearing after his parental rights had been terminated and the burden of proof shifted to him in a manner that would not have occurred if due process had been accorded to him in the first place. *Id.* at 551–52. The Court certainly did not conclude that if the petitioner had chosen not to seek a fair hearing, he would have been denied the "opportunity to be heard."

Plaintiffs implicitly acknowledge that an "opportunity for a fair hearing" cannot mean the actual receipt of a hearing by agreeing that an appropriate outcome of a delayed application appeal is for the State to adjudicate the underlying application as opposed to providing a hearing on the reason for the delay. Pls. Br. at 3. Plaintiffs have never contended that when an appeal is resolved because the underlying application has been adjudicated that the State is violating the Injunction or the Medicaid regulations by treating the appeal as moot and not taking the appeal to hearing. It would be nonsensical to conclude under those circumstances that the State nevertheless failed to provide that individual with the "opportunity for a fair hearing" simply because an actual hearing was not held. Plaintiffs' linguistically strained argument, however, leads to just that illogical conclusion.

C. Plaintiffs Mischaracterize the State's Position on What an Opportunity for a Fair Hearing Actually Requires.

Plaintiffs erroneously cast the State's position as requiring nothing more than access to a State administrative appeal system regardless of whether that system offers the procedural protections required by law. Pls. Br. at 6. As noted above, that is not the State's position. We acknowledge that the delayed application appeals process must provide a real opportunity for a fair hearing, but the undisputed evidence in the record demonstrates that it does just that—in

every case. *See* Declaration of Kim Hagan ¶ 7 (Sept. 16, 2016), D.E. 166 ("2016 Hagan Decl."); Supp. Decl. of Kim Hagan ¶ 3 (May 11, 2017), D.E. 213 ("2017 Hagan Decl."); *see generally* Tenn. Rules Chapter 1200-13-19.

Further, understanding that providing an "opportunity for a fair hearing" is not synonymous with holding an actual hearing does not create an improperly subjective definition as Plaintiffs suggest. Pls. Br. at 6. First, evaluating whether the State's delayed application fair hearing process, created following the entrance of the Preliminary Injunction, in fact provides an actual opportunity for a fair hearing and is an effective process can be done using objective criteria. Courts routinely are called upon to evaluate whether a policy or process meets due process standards. If at any point in time, Plaintiffs believed the system the State had put in place was not affording appellants a genuine opportunity for fair hearing or was systematically flawed, they could have raised that concern with the Court. Likewise, whether the delayed application fair hearing process is effective can be evaluated through objective criteria. The State immediately created an effective and compliant fair hearing process in response to the Preliminary Injunction, and that process has been functioning with one-hundred percent effectiveness since August 2015. Today, every single individual with proof of delayed TennCare application either has that application resolved or receives a hearing on the reason for the delay within 45 days, *see* 2017 Hagan Decl. ¶ 3, and there is no one who meets the criteria Judge Campbell established for class membership.

II. FAILURE TO MEET THE NUMEROSITY REQUIREMENT OF RULE 23(A) IS NOT A MERE TECHNICALITY CORRECTED BY MODIFYING THE CLASS DEFINITION.

The fact that the class as defined by the Court no longer meets the numerosity requirement of Rule 23(a) is not a mere "technical deficienc[y]" as Plaintiffs contend, *see* Pls.

Br. at 8, but a failure to comply with a central, core, component for maintaining a class action. In rejecting the definition proposed by Plaintiffs, Judge Campbell intentionally decided to "include[ ] the limitation that class members were denied the opportunity for a fair hearing." Class Certification Order at 4 (Sept. 2, 2014), D.E. 90 ("Class Cert. Order"). While Plaintiffs assert that this limitation is "absurd," Pls. Br. at 7, the limited class the Court certified makes sense in light of its finding that "at a minimum, a common question exists as to whether the class members whose adjudication was delayed for 45 days (or 90 days for disability applicants) were provided an opportunity for a fair hearing." Class Cert. Order at 4.

Thus, contrary to the only case Plaintiffs cite where a court modified a class definition to address an empty class, *see New Jersey Carpenters Health Fund v. Residential Capital, LLC*, 288 F.R.D. 290, 296 (S.D.N.Y. 2013), the class here is not empty "due to unintended consequence of wording." Pls. Br. at 9. The Plaintiff class is empty because significant systematic and operational changes have occurred in the TennCare application and appeals processes since 2014. Further, unlike in *New Jersey Carpenters Health Fund*, the Court did not define the class based on an erroneous factual assumption that rendered the class empty from the moment of certification. *Id.* at 295–96. The Plaintiff class had members when it was certified by the Court, but the creation of an effectively operating fair hearing process to address claims of delayed applications has emptied out the class. When the circumstances have changed so dramatically from when the class was certified, there is no warrant to alter the class definition to drastically expand the class, particularly when such expansion would "encompass individuals excluded by the plain terms of the proffered class definition." *Muhammad v. PNC Bank, NA*, 2016 WL 5843477, at *3 (S.D. W. Va. Oct. 4, 2016).

III. PLAINTIFFS' ARGUMENTS THAT THE CLASS CONTINUES TO SATISFY THE TYPICALITY REQUIREMENT ARE WITHOUT MERIT.

Plaintiffs' request that the Court expand the class definition is made even more problematic by the fact that the named Plaintiffs' claims are no longer typical of the would-be expanded class members. While Plaintiffs attempt to dismiss the fundamental changes in the application and appeal processes that have taken place since 2014 as mere changes in the way TennCare communicates with the federal government, Pls. Br. 10, it is telling that they do not specifically address or analyze any of the myriad systematic and operational changes detailed in the record. *See, e.g.*, Declaration of Wendy Long ¶¶ 10–15 (Feb. 25, 2015), D.E. 105-2; 2016 Hagan Decl., ¶¶ 2–5 & Exhibit A, CMS Approved Mitigation Plan, D.E. 166-1. Plaintiffs' bald assertion that the "distinctions between TennCare's operation in 2014 and 2017 . . . are not material differences," Pls. Br. at 10, does not withstand even cursory examination.

In 2014 when the named Plaintiffs filed their claims, there was no delayed application appeals process whatsoever. That is undisputedly not true for applicants today. *See* 2017 Hagan Decl., ¶¶ 2–3. In 2014, TennCare applicants whose applications were "pended" by the Federal Exchange due to an income or citizenship inconsistency (which appears to be what happened to the applications of all the named Plaintiffs) had no access to a State application process through which the State could attempt to resolve the inconsistency and adjudicate the application. That is undisputedly not true for applicants today. *See id.* ¶ 5. The list of material and significant changes to the processes in 2014 as compared to today is in fact too lengthy to include in its entirety here, but a few additional highlights include: 1) the creation of a Hospital Presumptive Eligibility System; 2) the creation of an Immigrant and Refugee state application process; 3) the development of a contract with the Department of Health to provide assistance in health departments across the State to facilitate full Medicaid eligibility determinations for women

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granted presumptive eligibility. *See* 2016 Hagan Decl., Exhibit A, CMS Approved Mitigation Plan, D.E. 166-1.

In short, typicality is no longer satisfied because the entire application and hearing processes are so significantly different that any conclusions that the named Plaintiffs had a claim in 2014 says nothing about whether applicants in 2017 have a claim. Claims of today's applicants bear no resemblance to the claims of the named Plaintiffs in 2014 because they do not arise from the same event or course of conduct. *See Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007).

CONCLUSION

For the foregoing reasons, the State respectfully submits that the class should be decertified, the preliminary injunction should be vacated, and the case should be dismissed.

May 25, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Defendants' Response to Plaintiffs' Post-Hearing Brief in Opposition to Defendants' Motion to Decertify the Class and Dismiss the Case was served upon the following counsel of record on this 25th day of May, 2017 via the Court's Electronic Case Filing system:

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