

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

MELISSA WILSON, et al., individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

DARIN GORDON, et al.,

Defendants.

Civil Action No. 3:14-CV-01492

Judge Campbell
Magistrate Judge Bryant

**PLAINTIFFS' UNOPPOSED MOTION
FOR LEAVE TO FILE SUR-REPLY TO
DEFENDANTS' MOTION TO DISMISS**

Plaintiffs hereby respectfully seek leave to file a two-page sur-reply to respond to arguments raised for the first time in Defendants' Reply in Support of Their Motion to Dismiss (D.E. 94). For the first time, Defendants make the argument that CMS regulations require Defendants to possess the entire case file in order to adjudicate an application or hold a fair hearing. Plaintiffs seek leave to file a short sur-reply to clarify the meaning and requirements of these regulations. *See, e.g., Filtrexx Int'l, LLC v. Truelsen*, No. 5:12CV58, 2013 WL 587582 (N.D. Ohio Feb. 13, 2013) (finding good cause existed for Plaintiff's sur-reply where Defendants raised new arguments in their reply brief). Defendants do not oppose this motion.

DATED September 25, 2014.

Respectfully submitted,

/s/ Sara Zampierin
On Behalf of Counsel for Plaintiffs

Michele Johnson TN BPR 16756
Gordon Bonnyman, Jr. TN BPR 2419
Christopher E. Coleman TN BPR 24950
TENNESSEE JUSTICE CENTER
301 Charlotte Avenue
Nashville, Tennessee 37201
Phone: (615) 255-0331

FAX: (615) 255-0354

Sara Zampierin (admitted *pro hac vice*)
Samuel Brooke (admitted *pro hac vice*)
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
Montgomery, Alabama 36104
Telephone: (334) 956-8200
Fax: (334) 956-8481
sara.zampierin@splcenter.org
samuel.brooke@splcenter.org

Jane Perkins (admitted *pro hac vice*)
Elizabeth Edwards (admitted *pro hac vice*)
NATIONAL HEALTH LAW PROGRAM
101 E. Weaver St., Suite G-7
Carrboro, NC 27510
Telephone: (919) 968-6308
Fax: (919) 968-8855
perkins@healthlaw.org
edwards@healthlaw.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed with the Court through the CM/ECF filing system, and that by virtue of this filing notice will be sent electronically to all counsel of record, this 25th day of September, 2014.

/s/ Sara Zampierin

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

MELISSA WILSON, et al., individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

DARIN GORDON, et al.,

Defendants.

Civil Action No. 3:14-CV-01492

Judge Campbell
Magistrate Judge Bryant

**PLAINTIFFS' SUR-REPLY IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS**

Defendants assert that the State “does not have access to the information it needs to adjudicate Plaintiffs’ applications in the manner proscribed by federal law.” Defs.’ Reply 1 (D.E. 94.) For the first time, they make the argument that they need the entire case file in order to adjudicate an application or hold a fair hearing, citing various CMS regulations. This new argument is erroneous.

Defendants cite no statute or regulation that requires the State to have the entire record before it in order to adjudicate the application, nor one that requires that the record before the Administrative Law Judge document every correspondence or contain every piece of evidence. Instead, the regulations acknowledge that “[h]earing recommendations or decisions must be based exclusively on evidence introduced at the hearing.” 42 C.F.R. § 431.244(a). Thus, the requirement that the record of the hearing include “[a]ll papers and requests filed in the proceeding” refers to all documents and requests filed in the fair hearing proceeding. 42 C.F.R. § 431.244(b). *See also* Ctrs. for Medicare and Medicaid Svcs., State Medicaid Manual § 2903.1 (interpreting 42 C.F.R. § 431.244(b) as requiring the record to include “any exhibits, papers or

requests *filed in the appeal*” (emphasis added)); *id.* § 2903.2(B) (same).¹ [Copy appended as Attachment A.]

If credited, Defendants’ argument would turn the existing regulations and procedures on their head by allowing any State to evade its responsibility for providing an adjudication or a fair hearing by failing to maintain an adequate case file. The regulations cited by Defendants instead are designed to ensure due process and that all applicants are able to review and confront the evidence relevant to the hearing and the ultimate decision. *See* 42 C.F.R. §§ 431.242(a); 431.244(a), (b).

The regulations also clearly contemplate that the applicant can introduce any relevant evidence at the hearing. *See* 42 C.F.R. § 431.242. Though Defendants correctly note that the ACA protects individual applicants from being required to submit additional documentation if the application is complete, it does not prevent individuals from voluntarily submitting more information in requesting a fair hearing or attempting to obtain an adjudication more quickly. Moreover, the regulations do not afford any deference to any previous agency decisions made before the hearing. This evidentiary hearing must comply with due process, which requires a meaningful and impartial hearing and a decision based solely on the legal rules and evidence introduced at the hearing. *See Goldberg v. Kelly*, 397 U.S. 254, 267–68, 271(1970); *see also* 42 C.F.R. §§ 431.205(d); 431.244(a).

For these reasons and those contained in Plaintiffs’ Opposition (ECF No. 92), the Court should deny the State’s motion to dismiss.

¹ Courts have granted deference to the State Medicaid Manual, which is promulgated by CMS. *See, e.g., Hobbs ex rel. Hobbs v. Zenderman*, 579 F.3d 1171, 1187 (10th Cir. 2009); *Sai Kwan Wong v. Doar*, 571 F.3d 247, 253 n.6, 258–60 (2d Cir. 2009); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 590 n.6 (5th Cir. 2004).

DATED September 25, 2014.

Respectfully submitted,

/s/ Sara Zampierin
On Behalf of Counsel for Plaintiffs

Michele Johnson TN BPR 16756
Gordon Bonnyman, Jr. TN BPR 2419
Christopher E. Coleman TN BPR 24950
TENNESSEE JUSTICE CENTER
301 Charlotte Avenue
Nashville, Tennessee 37201
Phone: (615) 255-0331
FAX: (615) 255-0354

Sara Zampierin (admitted *pro hac vice*)
Samuel Brooke (admitted *pro hac vice*)
SOUTHERN POVERTY LAW CENTER
400 Washington Avenue
Montgomery, Alabama 36104
Telephone: (334) 956-8200
Fax: (334) 956-8481
sara.zampierin@splcenter.org
samuel.brooke@splcenter.org

Jane Perkins (admitted *pro hac vice*)
Elizabeth Edwards (admitted *pro hac vice*)
NATIONAL HEALTH LAW PROGRAM
101 E. Weaver St., Suite G-7
Carrboro, NC 27510
Telephone: (919) 968-6308
Fax: (919) 968-8855
perkins@healthlaw.org
edwards@healthlaw.org

Attorneys for Plaintiffs

Attachment A

STATE MEDICAID MANUAL

TABLE OF CONTENTS

- *Part 1 Grants to States For Medical Assistance Programs - Section 1000
- Part 2 State Organization - Section 2000
- Part 3 Eligibility - Section 3000
- Part 4 Services - Section 4000
- *Part 5 Early and Periodic Screening, Diagnosis, and Treatment of Individuals Under the Age 21 - Section 5000
- Part 6 Payments for Services - Section 6000
- Part 7 Quality Control - Section 7000
- *Part 8 Program Integrity - Section 8000
- Part 9 Utilization Control - Section 9000
- Part 11 Medicaid Management Information Systems - Section 11000
- Part 13 State Plan Procedures and Preprints - Section 13000
- Part 15 Medicaid Eligibility Determination and Information Retrieval System -Section 15000

* TO BE ISSUED AT A LATER DATE

2903. HEARING DECISION

2903.1 Basis for Hearing Officer Recommendation, Decision, And Opportunity to Examine Official Record (42 CFR 431.244).--The hearing officer's recommendation or decision shall be based only on the evidence and testimony introduced at the hearing. The record of the proceedings, which consists of the transcript or recording of the hearing testimony, any exhibits, papers or requests filed in the appeal, including the documents and reasons upon which the determination being appealed is based, and the hearing officer's written recommendation or decision shall be available to the claimant or his representative at a convenient time and at a place accessible to him or his representative, to examine upon request. If any additional material is made part of the hearing record it too shall be made available.

2903.2 Hearing Decision And Notification to Claimant (42 CFR 431.232, 233, 244(b)and(d) and 431.245).--

A. General.--A conclusive decision in the name of the State agency shall be made by the hearing authority. That authority may be the highest executive officer of the State agency, a panel of agency officials, or an official appointed for the purpose. No person who has previously participated at any level in the determination upon which the final decision is based may participate in the decision. For example, a person who participated in the original determination being appealed may not participate in the appeal; nor may a person who participated in a local hearing participate in the agency hearing.

The officially designated hearing authority may adopt the recommendations of the hearing officer, or reject them and reach a different conclusion on the basis of the evidence, or refer the matter back to the hearing officer for a resumption of the hearing if the materials submitted are insufficient to serve as basis for a decision except where the appeal involves the issue of disability and SSA has issued a disability determination which is binding on the program. Remanding the case to the local unit for further consideration is not a substitute for "definitive and final administrative action."

B. Hearing Records.--All hearing recommendations or decisions must be based exclusively on evidence introduced at the hearing. The record must consist only of:

- o The transcript or recording of testimony and exhibits, or an official report containing the substance of what happened at the hearing; and
- o All papers and requests filed during the appeal; and
- o The recommendation or decision of the hearing officer.

C. Local Evidentiary Hearing--Where you provide a local evidentiary hearing, include the following information in the decision and take the action described.

- o Inform the applicant or recipient of the decision;
- o Inform the applicant or recipient that he has the right to appeal the decision to the State agency within 15 days of mailing the decision;
- o Inform the applicant or recipient of his right to request that the appeal be a de novo hearing, subject to the limit set forth in paragraph A;