

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

MAR 07 2001
U.S. DISTRICT COURT
MID. DIST. TENN.

MICHAEL ROSEN; BARBARA HUSKEY;)
EMANUEL MARTIN by his next friend,)
Cheryl Martin; WANDA CAMPBELL;)
CONNIE HOILMAN; MARK HUGHES;)
JACOB B. by his next friend, Martin B.;)
JACKIE BAGGETT; BRENDA CLABO;)
and PRADIE TIBBS, on their own behalf)
and on behalf of all others similarly situated,)

No. 3:98-627
Judge William J. Haynes, Jr.

Plaintiffs,)

v.)

TENNESSEE COMMISSIONER OF)
FINANCE AND ADMINISTRATION,)

Defendant.)

AGREED ORDER

This case was filed on July 8, 1998, challenging on due process grounds the state's policies and procedures for denying, reducing, suspending or terminating the health insurance coverage of certain individuals applying for, or enrolled in, TennCare, Tennessee's Medicaid managed care program. On January 19, 1999, the Court entered a preliminary injunction, which was modified by agreed order entered September 13, 1999.

On April 28, 2000, the plaintiffs filed a renewed motion for a preliminary injunction, asserting that defendant continued to violate the due process rights of TennCare applicants and enrollees. Plaintiffs sought reinstatement of class members wrongfully terminated and moved to enjoin defendant from denying, modifying or terminating coverage for class members without providing due process of law. At a

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the docket in compliance with
Rule 58 and/or Rule 79 (a),
FRCP on 3-12-01 By [Signature]

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hearing on May 5, 2000, the Court entered a temporary restraining order prohibiting state officials from terminating TennCare coverage to class members without first affording them notice and an opportunity for a hearing in accordance with applicable federal due process requirements. The temporary restraining order was extended by a series of agreed orders, and the motion for a preliminary injunction was held in abeyance pending negotiations. In September, the parties notified the Court that the negotiations had reached an impasse. An evidentiary hearing on the preliminary injunction motion was conducted October 2 – 3, 2000 and the motion was taken under advisement. By agreement of the parties, the temporary restraining order remained in effect pending disposition of that motion.

The parties subsequently resumed their negotiations and asked the Court to delay issuing a decision on the pending motion while they attempted to resolve their outstanding dispute by agreement. They have presented this order for the Court's review. Because it appears to be fair and reasonable, and adequately protects the interests of the plaintiff class, it will be approved. It is accordingly ordered by agreement as follows.

Injunctive Relief

1. The defendant Commissioner of Finance and Administrations is preliminarily and permanently enjoined from terminating, reducing or suspending the TennCare coverage of members of the plaintiff class who are enrolled in the TennCare program, without affording such individuals notice and an opportunity for a hearing in accordance with 42 C.F.R. Part 431, Subpart E. The defendant is further preliminarily and permanently enjoined from failing to afford such notice and opportunity for a hearing when class members' applications for TennCare are denied.

2. The State will reopen enrollment to uninsured adults during finite enrollment periods, as defined below. Reopening of enrollment is a time-limited commitment, through the expiration of the current waiver or any extension period of the current waiver under its current terms and conditions and program design, and not to extend beyond December 31, 2002. Prior to the first period of open enrollment, the State will initiate a process of notice relief that will be available exclusively to those former TennCare enrollees and applicants specifically identified in, and in the manner set out in, sections (a.) and (b.), below. Thereafter, as is set out more specifically in paragraph 3 below, enrollment will be opened to uninsured adults for a period of 60 days if, and only if, the total enrollment of the TennCare program is at least 5,000 enrollees less than 95 percent of the maximum enrollment cap of 1.5 million and shall remain open only until 95 percent of the enrollment cap is reached.

(a) Subject to the exclusions noted below, the defendant shall mail notices to all individuals, not currently enrolled, whose TennCare coverage was terminated at any time between July 11, 1998, and 60 days after the entry of this order. Issuance of the notice shall begin no later than 60 days after the entry of this order, and end by 120 days after the entry of this order; the distribution of mailings within that period shall be such that the average length of time for issuance of the mailing as a whole shall not exceed 90 days from the entry of this order. Those notified shall include any individuals who lost Medicaid coverage during this period and never regained TennCare coverage. Excluded from this notice requirement is any individual whose eligibility was terminated upon verification of his death, upon his written request, pursuant to an order entered by an administrative law judge,

or pursuant to the policies and procedures appended to the Agreed Order entered February 9, 2001 (Doc. No. 166) [enrollees who are incarcerated, have moved out of state, or have access to insurance]. The notice will offer these former enrollees the opportunity to reapply for TennCare as waiver eligible, with waiver of closed enrollment for uninsured adults. Recipients of the notice will be given 60 days within which to apply for reinstatement. Coverage will be effective the date the completed application is received by the TennCare Bureau. Former enrollees who received this notice shall be informed that they may appeal to seek a coverage date retroactive to the date of the termination of their coverage, subject to the requirements that they establish their eligibility as of the earlier date, and pay any premiums incurred between that date and the end of the period for which coverage is sought. If the applicant for reinstatement is not currently eligible (except that closure of enrollment to uninsured adults will be waived), reinstatement will be denied in conformity with the procedural safeguards contained in 42 CFR Part 431, Subpart E.

- (b) Within 30 days of the entry of this order, the TennCare Bureau shall accept and process requests for reinstatement from individuals identified to designated contact persons in the Bureau by plaintiffs' counsel as persons eligible to receive the notice relief prescribed in subparagraph (a). Individuals thus identified need not wait for such notice relief before being reinstated, if they establish that they currently meet TennCare eligibility requirements, as modified by subparagraph (a).

(c) At least 15 days prior to the open enrollment period set out in paragraph 3(a) this order, the defendant shall mail notice to all individuals, not currently enrolled, who between July 11, 1998 and the resumption of reverification have had an application for TennCare coverage as waiver eligible denied. Excluded from this notice requirement is any individual whose application was denied pursuant to an order entered by an administrative law judge. The notice will offer these individuals the opportunity to reapply for TennCare during the period of open enrollment. Completed applications received from these individuals prior to the enrollment period shall be retained and processed upon the opening of enrollment. Coverage shall be effective the date the completed application is received by the TennCare Bureau or the first day of open enrollment, whichever is later. Recipients of the notice who are currently eligible shall be informed that they may appeal to seek a coverage date retroactive to the date of the denial of their coverage, subject to the requirements that they establish their eligibility as of the earlier date, and pay any premiums incurred between that date and the end of the period for which coverage is sought. If the applicant is not currently eligible, the application will be denied in conformity with the procedural safeguards contained in 42 CFR Part 431, Subpart E.

(d) The notices required by subparagraphs (a) and (c) of this paragraph shall be written at or below a 6th grade level of readability and shall adhere to the following guidelines regarding notices to beneficiaries with limited English proficiency: Defendants agree to translate such notices into Spanish, provided that the Spanish translation of the notices described in subparagraphs (a) and (c) of

this paragraph does not exceed four pages. The Spanish translation shall be sent to all recipients of the English notice. On a different colored piece of paper to be included with the English and Spanish notices, Defendants agree to translate a one paragraph summary of the notice into Arabic, Bosnian, Kurdish Badini, Kurdish-Soroni, Vietnamese, and Somali. The one paragraph summary shall explain the notice sufficiently so that the reader will be able to determine whether the notice is applicable to him or her and whether he or she might be entitled to relief. The one paragraph summary shall provide a phone number to a translator who can provide more information, as needed, in that language. Any English posters shall be translated into Spanish and the Spanish versions shall be posted alongside the English posters, or, alternatively, the notices shall have both languages on one sheet of paper. The defendant agrees to send out, within 60 days after the entry of this order, press releases to those non-English speaking newspapers that the plaintiffs have identified to them prior to the entry of this order.

- (e) The notice shall be mailed to class members as identified above. The notices shall also be posted conspicuously in all local Department of Human Services offices, local health departments and local unemployment insurance offices and printed in each of the major newspaper in the state, as well as in minority newspapers identified to them by the plaintiffs prior to the entry of this order. Such notice shall be provided contemporaneously with the issuance of the written notices.
- (f) The defendant shall file a report to the Court within 15 days of the completion of the mailing of notices required by subparagraph (a), above, documenting compliance with that subparagraph.

3. (a) The defendant shall reopen enrollment to uninsured adults 150 days after resumption of the reverification process for persons other than those described in the agreed order of February 9, 2001, provided that, 120 days after resumption of reverification, TennCare enrollment is less than the threshold figure of 5,000 persons below 95 percent of the enrollment cap of 1,500,000 enrollees. If the enrollment at 120 days exceeds that threshold figure, enrollment will be opened within no more than 30 days after enrollment drops below the level described above. Enrollment will be open for a period of 60 days, or until the level of 95 percent of enrollment is reached, whichever occurs first.
- (b) Subject to the contingency described below, the defendant shall reopen enrollment to uninsured adults a second time. This second open enrollment period shall begin 12 months from the beginning date of the first period of open enrollment prescribed by the preceding subparagraph, or by November 1, 2002, whichever occurs first. The enrollment period shall last 60 days or until 95 percent of the enrollment cap is reached, whichever is sooner. This second opening of enrollment is contingent upon TennCare enrollment being below the threshold figure of at least 5,000 less than 95% of the maximum enrollment cap.
- (c) During periods of open enrollment of uninsured adults, completed applications from persons seeking such coverage will be processed in the order in which they are received by the TennCare Bureau. If an application is received from an individual, other than one who is entitled to receive notice under subparagraph 2(c), prior to the opening of enrollment, has not been denied in accordance with due process but is still pending at the time enrollment opens, the TennCare

Bureau shall process the application as if the applicant had submitted it during the enrollment period. If an application is incomplete, TennCare will pend the application. The Bureau shall attempt to contact the applicant in writing and orally, provided the application contains an address and/or phone number, and shall allow the applicant 30 days within which to respond. During the open enrollment period, in order to follow up on incomplete applications, the Bureau will elicit from persons who indicate that they need accommodation due to disability the name and contact information for the person who assists them in completing such documents. No waiting list will be maintained. For purposes of applying the upper limit on enrollment, applications will be reviewed in the order in which they are received in complete form. If an incomplete application is received during the open enrollment period from an applicant who has affirmatively indicated in column 12 of the application that he or she has a physical or mental disability, or is an applicant for whom a name and contact information has been elicited as provided above, and that individual's application is completed within 30 days of the Bureau's contact with the applicant, but after the enrollment period has closed, the application will still be considered and the person approved, if eligible and if enrollment remains below 95% of the cap. Coverage will be effective the date the completed application is received by the TennCare Bureau.

Future procedural protections

4. The State is undertaking several initiatives that will strengthen the TennCare program and enhance the procedural protections available to members of the plaintiff class.

TennCare has expanded, and is currently proceeding with, an external review of policies and procedures affecting the program's eligibility determination and appeal system. The process for reforming these policies and procedures is set out in the parties' Settlement Agreement, which is incorporated herein by reference.

5. Pursuant to Rule 23, subdivisions (c) - (e), of the Federal Rules of Civil Procedure, the Court hereby determines that the plaintiff class which is bound by the terms of this order is defined as all past, present or future TennCare applicants or beneficiaries who have been or will be eligible for TennCare coverage under the federal waiver, rather than under traditional Medicaid eligibility rules.

6. The terms of this order shall be explained in the notice required to be sent to certain class members under injunctive relief paragraph 2, above. The remaining members of the plaintiff class have previously been afforded adequate notice of their right to relief under earlier orders in this case. The Court finds, pursuant to Rule 23(e), F.R.C.P., that the notice prescribed in injunctive relief paragraph 2, combined with the earlier notices sent to other class members, together afford members of the plaintiff class adequate notice of their rights in this litigation.

Reservations and Exclusions

7. This order shall not affect the right of any individual class member to seek any and all relief that is otherwise available through administrative review proceedings against the State before the Tennessee Claims Commission based upon alleged actions or omissions of the State defendants, or through litigation authorized by other state or federal law. It is intended to adjudicate with respect to the class only those claims for classwide relief which were made on their behalf in the complaint and subsequent motions for injunctive

relief, and to thus bar further proceedings by class members seeking similar classwide declaratory and injunctive relief under 42 USC § 1983. The Court's determination that the terms of this order adequately protect the interests of absent class members is, in part, based on the parties' agreement that no individual claims of any class member are foreclosed by this settlement. The parties acknowledge the State may assert any and all defenses available in any such administrative appeal, Claims Commission proceeding or other litigation.

8. The plaintiffs will not initiate contempt proceedings to enforce the terms of this order until they have first provided the defendant with written notice of the alleged systemic violation, setting out with specificity the factual and legal basis of plaintiffs' concerns regarding noncompliance. If, within 10 business days thereafter, the defendant raises a good faith dispute concerning whether the plaintiffs' claim of noncompliance is based on matters beyond the scope of the injunctive relief set out in paragraph 1 of this order, the parties will attempt, for a period of 20 days, to resolve the issue through good faith negotiations. However, if the alleged systemic violation threatens class members with immediate harm, the plaintiffs may seek immediate enforcement from the Court.

Attorneys Fees

9. The plaintiffs shall be considered prevailing parties for purposes of their entitlement to an award of attorneys' fees under 42 U.S.C. §1988 for legal services rendered by their counsel in connection with these proceedings. The plaintiffs shall file their application for fees within 45 days from the entry of this order.

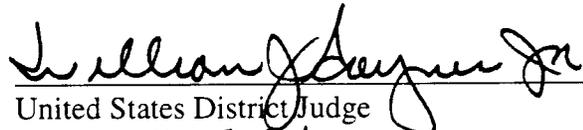
Withdrawal of pending motions for injunctive relief and for contempt

10. The plaintiffs' pending motion for contempt and for the imposition of sanctions, and the plaintiffs' motion for preliminary injunctive relief are withdrawn.

Reports to the Court

11. In addition to the reports otherwise provided for above and in the Settlement Agreement, the defendants shall, for a period of two years from the entry of this order, submit quarterly reports to the Court documenting their compliance with the terms of this order and with the Settlement Agreement.

IT IS SO ORDERED.


United States District Judge
3-8-01

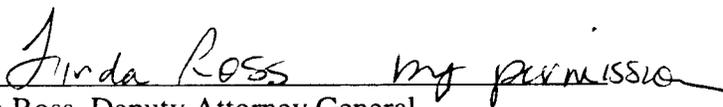
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filed
3-7-01

SETTLEMENT AGREEMENT

Rosen v. Tennessee Commissioner of Finance and Administration

Docket No. 3:98-627 (U.S. District Court for the Middle District of Tennessee)

This Settlement Agreement is made and entered into this 7th day of March, 2001.

This agreement has been negotiated following full discovery and an evidentiary hearing on the plaintiffs' motion for a preliminary injunction. The Agreed Order is an original part of this agreement.

I. Review and Enhancement of TennCare Procedures

A. Scope of Review. The State has contracted with the Pacific health Policy Group (Pacific Group) to assist in evaluating those policies, procedures and systems that affect determinations of waiver eligibility and the appeal process relating to waiver eligibility and conditions of eligibility. The Pacific Group is working with the State to assess those policies, procedures and systems in terms of their ability to ensure TennCare's compliance with applicable federal regulations, 42 CFR Section 431, Subpart E. For purposes of the reporting and consultation processes described in sections B and C, below, the scope of the Pacific Group's review shall be as follows:

1. Conduct periodic monitoring of determinations of eligibility and processing of applications to ensure that TennCare's policies and procedures are followed;
2. Conduct periodic monitoring of the TennCare Information Line, including periodic undercover calls, to ensure that TennCare's policies and procedures are followed and correct information is communicated;
3. Conduct an operational review of the management information system (MIS) to assess whether the automated processes produce outcomes in accordance with the policies and procedures governing the determination of eligibility for TennCare and whether the mandated notices are generated. In addition, an evaluation of the process of posting premium payments will be conducted.
4. Review administrative appeals files to monitor the processing of appeals by the Administrative Appeals Unit to ensure that TennCare's policies and procedures are followed, and that appeal decisions are implemented;
5. Conduct an operational review of the Office of General Counsel (OGC) and the Secretary of State's Administrative Procedures Division (APD) to assess processing of hearing requests

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and compliance with timeliness requirements, communication between OGC and APD concerning policy.

6. Evaluate policies and procedures utilized by the Department of Health in performing reverification functions; develop standardized policies, procedures, and an operational manual; develop method of reviewing any variation from these standards required as a result of individual county's circumstances;

7. Develop policies and procedures concerning accommodations for people with known disabilities or limited English proficiency during the application, reverification, and appeals processes, including standards by which to identify applicants or enrollees who may have a disability or limited English proficiency, and processes by which to retain this information in the person's TennCare file, for subsequent use in providing notice to the person.

B. Evaluation Methodology. The Pacific Group shall report its findings and recommendations with supporting documentation, similar to the report which was prepared in July, 2000 regarding the TennCare Appeals Unit. (Filed October 2, 2000 as Defendant's Exhibit 1). The Pacific Group shall provide its final report to plaintiffs' counsel and to State officials simultaneously. However, the requirement of simultaneous submission of this report is in no way intended to interfere with the Pacific Group continuing in its current consultative role of providing on-going systems assessment, in-put, and assistance to the State. Pacific Group evaluators and knowledgeable TennCare staff shall be available to answer questions and discuss with plaintiffs' counsel their findings and recommendations.

C. Reforms. If the evaluation by the Pacific Group reveals problems implicating the reliability of the eligibility determination and appeal process, the State and the Pacific Group shall confer with plaintiffs' counsel regarding the formulation of appropriate reforms. However, the State retains ultimate responsibility and authority to decide what reforms, if any, are to be instituted.

D. Monitoring of Implementation. The plaintiffs' counsel shall be afforded a reasonable opportunity, via informal discovery, to monitor the progress and effectiveness of any policy and procedure reforms instituted as a result of the evaluation and subsequent consultations among the parties and the Pacific Group. The parties agree that the informal discovery available to the plaintiffs may include the inspection of documents and operations. TennCare will make appropriate knowledgeable staff or contractors available, upon reasonable notice, to answer the questions of plaintiffs' counsel concerning the instituted reforms. The scope of such informal discovery shall be such as is reasonably related to the exercise of due diligence by plaintiffs' counsel, in fulfilling their responsibilities to protect the interest of the plaintiff class. The plaintiffs shall discharge those responsibilities in a manner which imposes the least possible delay, disruption, or administrative burden on the TennCare program. In the event of a discovery dispute, the parties shall submit the dispute to the Magistrate Judge to whom the case is assigned for case management.

E. Reports to the Court. If, following an opportunity for consultation and monitoring as described above, the parties are in agreement that TennCare policies and procedures are

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sufficient to ensure compliance with applicable federal regulations at 42 CFR Section 431, Subpart E, they shall report their agreement to the Court by means of a written stipulation, or stipulations. If, following an opportunity for consultation and monitoring as described above, the parties cannot reach agreement regarding such a stipulation, either party may immediately move the Court to review the State's policies and procedures, and determine whether the policies and procedures, if implemented, violate the injunction in this case. The process for reporting to the Court is intended to afford the defendant a "safe harbor" within which the State can be assured that it is in compliance with the injunction entered in this case.

F. Future Policy and Procedures Changes.

1. The defendant and his successors shall provide to plaintiffs' counsel any proposed changes in policies or procedures or any proposed new policies and procedures that could potentially affect the manner in which the State complies with the settlement agreement and court order in this case. The defendant shall provide such changes or new policies and procedures to plaintiffs' counsel at least 30 days prior to their submission to the Health Care Financing Administration for review and/or the initiation of rule making procedures for their promulgation, whichever comes first. Within 15 days of their receipt of a proposed change or new policy and procedure, plaintiffs' counsel shall provide the State with a written statement of their position concerning the proposal. Within the remaining period, the defendant and plaintiffs' counsel shall engage in good faith consultations with respect to any objections raised in writing by plaintiffs' counsel that the proposed changes or new policies and procedures potentially violate the injunction entered in this case. If proposed changes or new policies and procedures are developed under circumstances that fall within the scope of Tenn. Code Ann. 4-5-208 or 4-5-209 (emergency or public necessity), the defendant shall give plaintiffs' counsel thirty days notice except in circumstances that to do so would jeopardize federal financial participation. In those cases, the defendants will provide the plaintiffs such notice as soon as is practicable.

2. Notwithstanding objections on the part of the plaintiffs, the defendant and his successors may proceed to adopt and implement any changes or any new policies and procedures relating to the manner in which the State complies with the applicable federal regulations at 42 CFR Section 431, Subpart E, or may report unilaterally to the Court and request the Court's review, provided that they have first given notice thereof to plaintiffs' counsel as described above in section F(2), and that such changes or new policies and procedures do not violate the injunction entered in this case. Similarly, the plaintiff may seek court review of any policy or policy change that threatens to violate the court order.

G. The Parties' Intent. The parties intend that this Settlement Agreement be construed and implemented consistent with their following shared understanding and intent:

1. The defendant is responsible for ensuring TennCare's compliance with the injunction in this case and with the regulations which the injunction embodies.

2. The consultation, monitoring, and reporting process agreed upon herein does not give the plaintiffs veto power over the State's exercise of its policy-making prerogatives.

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3. The plaintiffs' agreement with respect to policies and procedures and any subsequent modifications thereto (as referenced in sections e and f. above) shall not be unreasonably withheld, consistent with the parties' recognition that the State retains the discretion and authority to modify policies and procedures so long as such modifications are in compliance with applicable federal and state law and the injunction in this case.

4. The parties acknowledge that the State's decision to open enrollment periods for uninsured adults significantly reduces the potential for irreparable harm to plaintiff class members resulting from the possibly erroneous or procedurally defective termination of TennCare coverage, and intend that TennCare's policies and procedures and eligibility determination and appeal system be evaluated in light of the enrollee's opportunity to apply for reenrollment.

5. The consultation and monitoring process is intended to afford plaintiffs' counsel a reasonable opportunity to ensure compliance with the injunction, with as little cost, disruption, and administrative burden as possible.

II. TennCare Enrollment of Uninsured Adults

- A. The defendant shall reopen enrollment of adults classified as "uninsured" under the terms of the TennCare waiver. This shall be accomplished as set out in the Agreed Order.
- B. Eligibility—Uninsured adults shall be defined in accordance with TennCare Rule 1200-13-12-.02, as amended to read as follows:

UNINSURED shall mean any person who does not have health insurance under an individual health insurance policy or who does not have directly or indirectly through another family member, coverage under or access to employer-sponsored health insurance, or COBRA benefits throughout the COBRA benefits period, or another government health plan, and continues to lack this access. "Another government health plan" shall include, but not be limited to, benefits from Medicare or TRICARE (formerly CHAMPUS). "Another government health plan" shall NOT include Veteran's Administration benefits, nor health care provided through a government clinic or program such as, but not limited to, vaccinations, flu shots, mammograms, and care or services received through a disease- or condition- specific program such as, but not limited to, the Ryan White Care Act.

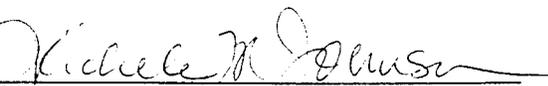
In addition to the preceding definition, the defendant may apply the following eligibility restrictions:

1. Except with respect to dislocated workers, an uninsured applicant over the age of 19 who seeks coverage under paragraph 3 of the Agreed Order must currently meet the definition of uninsured *and* must have been uninsured on the month that precedes by four months the open period of enrollment during which he applies. Enrollment for uninsured children shall be unaffected.

Settlement Agreement in Rosen v. Tennessee Commissioner of Finance and Administration

2. If a person was eligible during an enrollment period but failed to apply for TennCare coverage during the enrollment period, such person will not be eligible to enroll in TennCare as “uninsured” until a subsequent open enrollment period.
 3. Any person with a premium liability who voluntarily leaves TennCare without any other health insurance coverage may be subject to a ten day waiting period before they may requalify for TennCare unless the person has a condition which immediately threatens life or serious permanent injury.
- C. Optional changes to eligibility determination policies and procedures. The state may make the following changes regarding the determination of TennCare eligibility so long as the implementation of any change is consistent with the agreed order and this settlement agreement:
1. The state may impose a requirement that each applicant provide documentation of income and specified employer information.
 2. The state may impose a verification requirement concerning access to insurance before the applicant is enrolled.
- D. The State shall use paid advertising, including culturally sensitive advertising in diverse media markets, comparable to the advertising campaign that was employed prior to and during the last period of open enrollment of uninsured adults, to inform members of the public who are potentially eligible of the availability of coverage, and the importance of applying during the enrollment period. However, this public outreach campaign shall not be undertaken until after the enrollment period that is available exclusively to former TennCare enrollees, as set out in Section 2(a) of the Agreed Order.

TENNESSEE JUSTICE CENTER

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Settlement Agreement in *Rosen v. Tennessee Commissioner of Finance and Administration*

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