

**IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND**

**FLOR PEREZ, et al.**

**Plaintiffs,**

**vs.**

**ROBERT L. EHRLICH, JR., GOVERNOR, et al.**

**Defendants.**

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**Case No. 265850**  
**The Honorable Durke G. Thompson**

**PLAINTIFFS’ EMERGENCY MOTION TO HOLD DEFENDANTS IN CONTEMPT OF COURT AND FOR SANCTIONS**

Plaintiffs, Flor Perez and Ana Perez (by their father and next friend, Fidel Perez), Brayán Herrera, Osvaldo Herrera, Leslie Herrera (by their mother and next friend, Martha Herrera), and Gabriel Ntitebem, Henry Anu, and Vitalis Atemafac, (by their mother and next friend, Ajong Pamela Nkahirjo), and Eelaaf Zahid, and Muhammad Loulak Zahid (by their father and next friend Muhammad Zahid Iqbal), (the “Plaintiffs”) by and through their undersigned attorneys, Bregman, Berbert, Schwartz & Gilday, LLC and the Maryland Legal Aid Bureau, Inc., pursuant to Maryland Rules 15-201 through 15-208 and Rule 1-341, and the Maryland Courts and Judicial Proceedings Article § 1-202, hereby move this Honorable Court to hold Defendants, Governor Robert Ehrlich, Jr., (“Ehrlich” or “the Governor”), Secretary of the Department of Health and Mental Hygiene S. Anthony McCann, and Treasurer Nancy Kopp (collectively the “Defendants”) in contempt of this Court’s order dated January 12, 2006 (the “Order”).

Defendants have informed Plaintiffs’ Counsel that they do not intend to comply with this Court’s unequivocal Order that they reinstate Plaintiffs’ Medical Assistance coverage. When asked what statutory or constitutional authority Defendants were relying on to support

their willful disregard of an order of a court, Defendants' Counsel responded that they were merely relying on the fact that they believe that the judge was "incorrect". Their refusal to abide by this Court's clear and unequivocal directive constitutes a profound abuse of power and proceeds from the fundamentally misguided and dangerous notion that the Executive is above the law. It is not. Until and unless this court issues a stay of its preliminary injunction Order (which, for the reasons set forth in Plaintiffs' forthcoming opposition, it should not), Defendants must reinstate Plaintiffs' Medical Assistance to enable them to access the care these children so desperately need. Plaintiffs seek an Order directing that Defendants be held in contempt for failing to reinstate Plaintiffs' Medical Assistance coverage, as ordered, fines for every day they continue to deny Plaintiffs access to healthcare and attorneys' fees for proceeding in flagrant disregard of a judicial order. In support of this Motion, Plaintiffs state the following:

1. On October 26, 2005 Plaintiffs filed their Complaint, seeking relief for the Defendants' violation of Plaintiffs' right to equal protection under the Maryland Declaration of Rights for eliminating funding for Medical Assistance for legal immigrant pregnant women and children. With their Complaint, Plaintiffs filed a Motion for Preliminary Injunction, seeking injunctive relief restoring Plaintiffs' Medical Assistance coverage pending final disposition of the action.

2. Plaintiffs' Complaint does not challenge the Governor's budgetary authority. Rather, it asserts that the Governor's misuse of that authority violated the guarantee of equal protection in Article 24 of the Maryland Declaration of Rights because it discriminates based on alienage against a class of persons for whom the Legislature had provided an entitlement to basic healthcare.

3. On November 28, 2005, Defendants filed a Motion to Dismiss and Opposition to Plaintiffs' Motion for Preliminary Injunction. Shortly thereafter, Plaintiffs opposed and replied to both of Defendants' papers.<sup>1</sup>

4. On December 21, 2005, this Court heard extensive argument from both parties. Subsequently, having considered the pleadings and oral argument, the Court issued a twenty-five (25) page Opinion and Order granting Plaintiffs' Motion for a Preliminary Injunction. In relevant part, this Court's Order stated:

[i]t was found that good cause does exist to GRANT the Plaintiffs' Motion for Preliminary Injunction.

IT IS THEREFORE ORDERED, that the Plaintiffs' Motion for Preliminary Injunction be, and it is

FURTHER ORDERED, that the benefits payable under the Health-General Article § 15-103, *et seq.* previously denied to the Plaintiffs be, and they are, hereby retroactively REINSTATED; and it is

FURTHER ORDERED, that the benefits payable under the Health-General Article § 15-103, *et seq.* be, and they are, hereby REINSTATED until final disposition of this action.

5. Although over a week has passed since this Court issued the foregoing Order, Defendants have not taken any steps to restore Plaintiffs' Medical Assistance benefits. Plaintiffs remain unable to access critical, life-sustaining care that they desperately require and that this Court's Order had provided.

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<sup>1</sup> On December 13, 2005, Plaintiffs filed their Opposition to Defendants' Motion to Dismiss. Plaintiffs filed their Reply to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction on December 19, 2005.

6. Restoration of benefits is not difficult. Until July 1, 2005, Plaintiffs had valid Medical Assistance cards which enabled them to seek medical care, for which the medical provider then bills the State, as it would for any recipient of Medical Assistance. All that is required is activation of their Medical Assistance card; the entire administrative framework for processing Medical Assistance benefits is in place and available to all other Medical Assistance recipients. Defendants are simply refusing to flick the switch to activate Plaintiffs' ability to seek the care for these vulnerable children that is dangerously overdue.

7. Defendants seek a stay of this Court's preliminary injunction Order pending appeal. No stay has been entered and therefore the existing Order is the law. In support of their motion for stay, Defendants contend that the preliminary injunction Order intrudes upon the Governor's budgetary prerogatives. The short answer to this argument is that, whatever its merits, it does not permit Defendants to act as their own judge and jury and "decline" to obey the Court. They were not able to persuade this Court of the merits of their "budgetary prerogative" argument in the December 21, 2005 hearing. Of course, Defendants are free to raise the argument on appeal, as they apparently intend to do. They must, however, obey the current Order until and unless it is superceded.

8. In addition, Defendants' suggestion that there is no money to pay for these Plaintiffs' reinstatement on Medical Assistance is indisputably wrong. We raise this issue not because it goes to whether Defendants are in contempt – which they clearly are – but to demonstrate the egregiousness of their contemptuous conduct.

9. Compliance with the Court's Order is indisputably within Defendants' power. Indeed, states routinely have unanticipated expenses. For example, Maryland has a mechanism to enable units of the Executive branch to meet unanticipated expenses through an appropriation

amendment procedure. *See* Md. Code Ann. State Finance and Procurement § 7-209. The Governor also routinely includes in his budget amounts to cover prior years' deficiencies, including deficiencies associated with the Medical Assistance program. *See, e.g.*, Exhibit 1.

10. In addition, Secretary McCann has the power to "transfer by . . .written directive, and function, staff or funds from any unit in the Department to. . .another unit in the Department." Md. Code Health-Gen. § 2-104(h). Plaintiffs' costs are negligible – less than 1% -- in light of the overall Medical Assistance and DHMH budget. Thus, there are at least several ways in which the State can meet whatever additional expenses are associated with restoring Medical Assistance benefits to plaintiffs and there is simply no justification for Defendants to defy this Court's carefully reasoned Order.

11. Even were there no specific appropriation mechanism to cover unanticipated state expenses, the bottom line is that this Court has found that the Governor violated the guarantee of equal protection of the Maryland Constitution. If Defendants were right, the State could ignore any Court Order with which the Executive disagreed, or violate fundamental constitutional rights with impunity, on the ground that compliance could affect the budget. Budgetary decisions, however made, do not and cannot trump Maryland's Declaration of Rights. They certainly do not permit the Executive to act above the law.

12. Plaintiffs' Counsel has attempted to resolve this without seeking contempt. They have had several conversations with Defendants' Counsel but, while Defendants' Counsel could not provide legal support for their unilateral defiance, Defendants were unwilling to restore Medical Assistance benefits to enable Plaintiffs to access the care they sorely need. As Defendants flout this Court's Order, children are getting sicker and the consequences of their illnesses or lack of care may well be irreversible. A finding of contempt, which can only be

purged by reinstatement of Plaintiffs' Medical Assistance is vitally necessary to enforce the Court's Order and avoid the harm issuance of the preliminary injunction was intended to mitigate.

WHEREFORE, for the foregoing reasons, Plaintiffs demand that this Honorable Court find that the Defendants are in contempt for their failure to obey this Court's lawful Order of January 12, 2006, impose a daily fine for continued noncompliance and pay attorneys' fees and costs for the expenses associated with this Motion.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on January \_\_\_\_, 2006, a copy of the foregoing Emergency Motion to Hold Defendants in Contempt of Court and for Sanctions was sent by facsimile and mailed, first-class postage paid, to:

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