

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' OPPOSITION TO DEFENDANTS' MOTION
FOR STAY PENDING APPEAL

COMES NOW Plaintiffs, Flor Perez and Ana Perez (by their father and next friend, Fidel Perez), Brayan 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 Nkahinjo), 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., and, for their Opposition to Defendants' Motion for Stay Pending Appeal state as follows:

INTRODUCTION

On January 12, 2006, on the basis of extensive briefing, lengthy oral argument and the Court's comprehensive analysis, this Court issued an unequivocal Order, directing Defendants to reinstate Medical Assistance coverage for Plaintiffs. The Court's decision was based on its careful and supported findings that Plaintiffs readily met the four-prong test for the issuance of a Preliminary Injunction.

First, the Court undertook a detailed, comprehensive analysis of the applicable law and concluded that Plaintiffs were likely to succeed on the merits. It concluded that the Governor's decision to eliminate funding for Medical Assistance for immigrant pregnant women and children based on their alienage constituted a denial to them of their constitutional right to equal protection under the Maryland Declaration of Rights. Opinion at 16.

Second, the Court concluded that the balance of convenience tilted decisively in Plaintiffs' favor, specifically emphasizing the seriousness to the Plaintiffs of the loss of their health care coverage: "Plaintiffs are suffering great harm as a result of the State's budget cut because they can no longer receive the regular treatment and care previously provided under the Medical Assistance Program." *Id.* at. 20.

Third, the Court found that the Plaintiffs will be irreparably harmed, should an injunction not issue. Based on Plaintiffs' Affidavits, together with those of their treating physicians and other health care professionals, the Court determined that the Plaintiffs "current health status is one that requires consistent and continuing treatment – something that was provided to them under the previous Medical Assistance program." *Id.* at 22.

Finally, this Court found that "the public interest, as reflected in the enactment of the Welfare Innovation Act, is best served if the Defendants are required to provide the benefits to the Plaintiffs for which they are currently entitled ... It is in the public's best interest that the State be held accountable to the laws currently in effect." *Id.* at 24.

The Court's Opinion and Order was issued on January 12, 2006. Despite their efforts, Plaintiffs' Counsel were unable to discuss implementation of the Court's Order with Defendants' Counsel until Thursday, January 19, 2006. At that time, Defendants faxed to Plaintiffs' Counsel the papers they filed with this Court seeking a stay of the January 12, 2006 Order, noticing an

intent to appeal, an Answer to the Complaint, and a Scheduling Conference Statement.

Defendants' Counsel indicated that they had not, and did not intend to, comply with the week-old Order. They informed Plaintiffs' Counsel that the State "declined" to reinstate benefits to the Plaintiffs, in contravention of the only Order entered in this case. In response, Plaintiffs filed an Emergency Motion to Hold Defendants in Contempt of Court and for Sanctions on January 20, 2006, seeking enforcement of the preliminary relief this Court had granted.

Defendants now seek to stay this Court's Preliminary Injunction Order based on the very arguments this Court summarily rejected at the Preliminary Injunction hearing. For the reasons stated below, the Court should again reject their arguments and hold Defendants in contempt of court for their unilateral disregard of its Order.

ARGUMENT

1. The Court's Determination That Plaintiffs Require Preliminary Relief Render Issuance of a Stay Inappropriate.

A stay of an order pending appeal is left, in the first instance, to the discretion of the issuing court. Md. Rule 2-632(f). Traditionally, Maryland courts look to essentially the same factors in deciding whether to grant a stay as they do in considering whether a preliminary injunction should issue. *Berkshire Life Ins. Co. v. Maryland Ins. Admin.*, 142 Md. App. 628, 642, 791 A.2d 942, 950 (2002)(noting with approval the trial court's application of the four preliminary injunction factors as a guide in considering a stay, but clarifying that an order denying a stay is not appealable).

This Court's thoroughly reasoned decision to issue preliminary relief to Plaintiffs requires denial of the request for stay. By staying its order, the Court would be acting directly contrary to its own finding that these vulnerable children need immediate relief to prevent potentially life-threatening, irreparable harm. To deny that relief would subject them to the very

harm the Order was intended to avert. The relief sought is available at Defendants' fingertips. All Defendants need to do is to reactivate Plaintiffs' Medical Assistance cards, enabling them to receive healthcare that they have been wrongfully denied for the past six months. For this reason alone, issuance of a stay is unwarranted. However, although the Court has considered them before, we address the specific arguments Defendants renew in support of their misguided motion.

2. **The Defendants' Budgetary Actions Are Not Immune From Constitutional Challenge.**

Defendants contend that the provision in the Medical Assistance statute that provides for benefits subject to the "limitations of the State budget" permits them to remove funding on a discriminatory basis and then prevents them from reinstating coverage for the wronged Plaintiffs. Def. Mot. at § 5. The Defendants' argument is circular; it amounts to a contention that they can use their own illegal act as a defense.

Defendants' failure to appropriate funds to provide the health care coverage to immigrant women and children provided under Maryland law is the Defendants' unconstitutional act. Eliminating funding for this targeted group of legal immigrant pregnant women and children was an unconstitutional, improper exercise of the Governor's budgetary authority. Defendants cannot seek protection in the very act that the Court has already found unconstitutional. Allowing them to do so by staying the Preliminary Injunction Order would be acquiescing to the astonishing proposition that the Executive's budgetary acts are not subject to constitutional scrutiny and redress. It would permit the Executive to achieve through the budgetary process what no policymaker could achieve directly – discrimination on an impermissible, unconstitutional basis. This is unquestionably not the law of this State, and Defendants, not surprisingly, have no support for such a reprehensible proposition. Indeed, the answer to their

preposterous argument is clear from the Maryland Constitution and confirmed by the Court of Appeals.

Art. III §52(4)(g) of the Maryland Constitution makes clear that the Governor's Budget must conform to and fulfill the directives of Maryland's Constitution and laws: "Each Budget shall embrace an estimate of all appropriations ...as follows ...for such other purposes as are set forth in the Constitution or laws of the State." Thus, Maryland's Constitution itself provides for limitations on the Governor's budgetary authority and requires it to be exercised in a manner consistent with state law. Indeed, the history of the Constitutional provision providing for Governor's budgetary powers demonstrates that the framers of the provision intended that the budgetary power of the Executive be subject to constitutional requirements. As the Court of Appeals noted, the Goodnow Commission explained in 1916 the intent behind Art. III Sec. 52: "Our thought in drafting the proposed amendment has been First-To impose upon the Governor the sole responsibility, **within the limits of the Constitution and the provisions of existing law**, of presenting to the Legislature a complete and comprehensive statement of the needs and resources of the State...." *Maryland Action for Foster Care Children v. State*, 279 Md. 133, 144 (1977)(emphasis added). In sum, the Governor's budgetary authority is not unfettered and does not provide any basis for relieving Defendants from providing the relief ordered by this Court.

3. The Cases Relied Upon by the Defendants Do Not Support Their Request for Stay.

The Defendants rely on two cases to support their position that the Order at issue here is a "departure from Maryland appellate decisions." However, neither *Maryland Action for Foster Children, Inc. v. State of Maryland*, 279 Md. 133 (1977)("Maryland Action") nor *Maryland State Department of Health and Mental Hygiene v. Prince George's County Department of*

Social Services, 47 Md. App. 436 (1980) (“*DHMH v. PGDSS*”) is relevant, because neither involves a challenge to a constitutionally flawed budgetary action.

Maryland Action was a suit brought by an association on behalf of foster care children and foster parents challenging the failure to provide sufficient funding for statutorily-mandated services. The plaintiffs were not part of a protected class and raised no equal protection claims. The Court found that the funding of the program was constitutionally committed to the governor’s discretion, over the strong dissents of Chief Judge Murphy and Judge Smith. Even in upholding the power of the Executive, however, the Court made clear that such power must be exercised in accordance with constitutional principles.

The Court in *Maryland Action* reviewed the requirements of Art III Sec 52, specifically the clause requiring the Budget “include appropriations for other purposes as are set forth in the Constitution or laws of the State.” While acknowledging that the Governor has discretion to reduce appropriations for items provided for by statute, the Court specifically cautioned that this discretion is not without limit: “Of course, other constitutional provisions may also limit the Governor’s revisory power, such as, e.g. , the prohibition against changing the salary of a public officer during his term (Art. III s. 35)” *id* at footnote 5. The Court further explained that **“assuming that no other constitutional principle is violated**, the Judiciary has no authority to control the Governor’s discretion and require him to include more funds in the Budget Bill...” *Maryland Action*, 279 Md. at 152 (emphasis added). The Court left no doubt but that it lies within the well-established province of the judicial branch to rectify a budgetary decision that violates the Constitution. That is exactly the case here. This Court has determined that the Governor’s elimination of funding for legal immigrant children and pregnant women violates the guarantee of equal protection embodied in the Maryland Declaration of Rights. This Court

exercised its fundamental responsibility, in our well-established system of checks and balances, to right this constitutional wrong and order the reinstatement of Medical Assistance benefits for the Plaintiffs. There is nothing in *Maryland Action* that supports the Defendants' proposition that the Governor may violate bedrock constitutional principles in the creation of the budget.

DHMH v. PGDSS, 47 Md. App. 436 (1980), involved Prince George's County efforts to obtain funding from the State to provide treatment at a specific private facility for a Child In Need of Assistance (CINA). The case did not present any constitutional issues and surely did not raise the issue presented here of whether the Executive must exercise its budgetary authority within constitutional limits. Rather, the Court addressed the extent to which a court could direct specific expenditures of agency funds and concluded that the trial court exceeded its powers when it ordered DHMH to spend its funds to keep a CINA in a particular private facility. *See id.* at 441, 449-50. In *DHMH v. PGDSS* there were no constitutional protections at issue that would warrant judicial review of a budget decision. Rather, the action of the trial court was, in effect, micro-managing the agency by telling it how to administer its funds on a person-by-person basis. By contrast, this Court examined the Governor's decision to eliminate funding for a class of Medical Assistance recipients solely because of their alienage status and determined that the decision to eliminate the funding constituted illegal discrimination. As this Court recognized, while the Governor enjoys considerable latitude in budgetary decisions, those decisions cannot be based on unconstitutional premises and none of the cases Defendants cite permit otherwise.

These Plaintiffs do not challenge the Governor's authority to develop the budget and the discretion he enjoys in doing so, other than to limit that discretion to what is lawfully permitted under the Maryland Declaration of Rights. The Executive remains free to seek cost savings in any programs, as long as the way those savings are achieved do not illegally discriminate against

a protected class or otherwise violate Maryland's Declaration of Rights. Here, the Governor's decision to achieve those savings by denying benefits to legal immigrant children and pregnant women violates of the Maryland Declaration of Rights' equal protection guarantees and is therefore an impermissible means to achieve his policy goal.

4. Maryland Law Supports This Court's Authority to Right a Constitutional Wrong

Maryland courts clearly have the power to review budgetary decisions by the Governor and the legislature.¹ In *Judy v. Shaffer*, 331 Md. 239 (1993), Medical Assistance recipients challenged the Governor's reduction to the program's budget. The *Judy* plaintiffs were not members of a suspect class, but rather were low-income residents of Maryland. There was no basis, as there is here, to apply strict scrutiny review to decisions that adversely affected them and their challenge failed. Nonetheless, even though those plaintiffs were not successful, the Court of Appeals once again made perfectly clear that the Executive's budgetary decisions are not insulated from judicial review. The Court explained that, in quasi-legislative actions by the Governor, such as budgetary actions, judicial review is "limited to assessing whether the Governor ... [was] acting within [his] legal boundaries." *Id.* at 266. In *Judy*, the Governor was acting pursuant to provisions in the Maryland Code that allowed for certain types of budgetary reductions. The Court concluded that the challenged actions were therefore within his "legal boundaries." *Id.* at 266.

By contrast, this Court has ruled that Defendants acted outside of their legal boundaries when they eliminated funding for Medical Assistance for immigrant pregnant women and children. The Court found that the challenged provisions of the Budget Bill, and its implementation, violate the guarantee of equal protection embodied in Article 24 of the

¹ See also *Panitz v. Comptroller of the Treasury*, 247 Md. 501 (1967) (the Court held a supplementary appropriation to be invalid under the Maryland Constitution).

Maryland Declaration of Rights. Defendants do not and cannot assert that the Governor is not bound by the Maryland Declaration of Rights. If that were the case, a Governor could use the budgetary process with impunity to implement virtually any unconstitutional policy, as noted above.

As the *Judy* opinion notes, the Constitutional provision establishing the Governor's budgetary authority was enacted long after and against the well-established backdrop of Article 24 and the fundamental protections it affords. The later budgetary enactment was to protect against deficit spending. *See Judy*, 331 Md. at 246. As noted above, the framers' intent was to place the Executive's discretion within the confines of Maryland's constitutional framework. *See Maryland Action*, 279 Md. at 144.

Defendants' argument flies in the face of centuries of American jurisprudence regarding the separation of powers and the ultimate primacy of the courts in deciding questions of law. Perhaps the most fundamental responsibility of the courts is to prohibit unconstitutional encroachments of power by the other branches of government. *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 220, (1975) (“*DNR v. Linchester*”).

In *DNR v. Linchester*, the Court of Appeals examined the separation of powers issue in the context of judicial consideration of the constitutionality of the acts of the legislature in delegating authority to administrative agencies. The Court stated that “when the Legislature confers, by enactment, powers upon one of the other branches of government which are beyond those permitted under the Constitution, or when one of the three branches of government takes unto itself powers denied to it or those strictly within the sovereignty of another branch, the courts of this State must step in and declare such encroachments to be constitutionally prohibited...” *Id* at 220. The Court looked to the centuries old, definitive pronouncement of

judicial power set forth in *Marbury v. Madison*: “It is emphatically the province and the duty of the judicial department to say what the law is... If the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply,” 1 Cranch 137 at 177-178, 2 L.Ed. 60 (1803). Here this Court was well within its well established province when it subjected the challenged provision of the Executive’s Budget Bill to constitutional scrutiny and determined that the provision violated Maryland’s Declaration of Rights. Where there is a constitutional violation, it is incumbent upon the Judiciary to declare such encroachments to be constitutionally prohibited.²

5. Defendants Are Readily Able to Comply with the Order of this Court and Provide Plaintiffs With Medical Assistance During the Pendency of An Appeal.

Defendants contend that Maryland law prohibits their expenditure of funds to cover Plaintiffs’ medical expenses because the expenditure is not pursuant to funds appropriated in the budget making process. However, as set forth in Plaintiffs’ Emergency Motion to Hold Defendants in Contempt of Court and for Sanctions, incorporated herein by reference, there are a variety of lawful, constitutionally permissible options available to Defendants to cover such costs. Indeed, as the Governor’s own budget explicitly states, Defendants regularly seek deficiency funds to cover unanticipated Medical Assistance costs incurred during the prior year. *See Ex. 1 to Plaintiffs’ Emergency Motion; see also Maryland Fiscal Year 2007 Budget*

² The *Linchester* Court quoted Chief Justice Marshall at length, and its reliance is worth repeating:

‘It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

‘So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

‘If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Highlights, <http://www.gov.state.md.us> (“FY 2007 Budget”) p. 158. Additional mechanisms for compliance include use of the Secretary of DHMH’s power to transfer funds among units. MD. CODE ANN., HEALTH-GEN. § 2-104(h). Furthermore, the Executive may seek a supplemental appropriation. *See* MD. CODE ANN., STATE FIN, & PROC. , § 7-209.

In this regard, it is important to underscore what this Court already knows – that Plaintiffs’ healthcare costs are a negligible fraction of the overall costs of Medical Assistance. Indeed, the estimated total cost of healthcare for all wrongfully terminated legal immigrant women and children is \$7 million, less than .02% of the \$4 billion Maryland expends for Medical Assistance.

The choice of method is, of course, up to Defendants. The only choice they do not have is to fail to reinstate health care coverage for Plaintiffs.

6. No Bond or Surety Will Protect the Interests of the Plaintiffs If The Operation of the Preliminary Injunction Order is Stayed.

Maryland Rule 2-632(a) provides that any stay of the operation of an interlocutory order be accompanied by conditions the court considers proper to insure the security of the adverse party. However, no security or bond can protect the interests of the Plaintiffs. Each day that the Plaintiffs go without health care carries with it the entirely foreseeable and potentially irreparable harm caused by serious medical conditions left untreated, as well as the harm associated with undetected health risks that might otherwise become apparent were Plaintiffs to receive the preventive care guaranteed to children under the Medical Assistance program. Plaintiffs continue to experience this serious ongoing harm, each day Defendants disobey this Court’s January 12th Order. Plaintiffs will continue to suffer irreparable harm until they are able to

id at 521, quoting *Marbury v. Madison*, 1 Cranch 137, 177-178, 2 L.Ed. 60 (1803).

access the health care they to which they are entitled. As this Court has recognized, such harm is not compensable later in damages.³

CONCLUSION

For the foregoing reasons, which Defendants had previously raised in opposing the issuance of a preliminary injunction and which this Court squarely rejected, Defendants are not entitled to a stay of the Preliminary Injunction Order. A stay would nullify the immediate protection this Court found was necessary to spare Plaintiffs further, irreparable harm. A stay is not justified as a matter of law nor a matter of fact. Until and unless this Court's Order is reversed by an appellate court, Defendants must reinstate Plaintiffs' Medical Assistance coverage.

Respectfully submitted,

BREGMAN, BERBERT, SCHWARTZ & GILDAY, LLC

By: _____

Douglas M. Bregman
Heather Libman Kafetz
Catherine Harrington
7315 Wisconsin Avenue
Suite 800 West
Bethesda, Maryland 20814
(301) 656-2707 – telephone
(301) 961-6525 – facsimile

-and-

³ Defendants have also strenuously argued that Plaintiffs are not entitled to monetary damages. Although their argument misconstrues the relief Plaintiffs are seeking (benefits due them, rather than some kind of tort damages), their insistence on their immunity from a damages award confirms the inadequacy of a later remedy.

LEGAL AID BUREAU, INC.

By: _____

Hannah E.M. Lieberman
Regan Bailey
6811 Kenilworth Avenue
Suite 500
Riverdale, Maryland 20737
(301) 560-2143 – telephone
(301) 927-4258 – facsimile

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January ____, 2006, a copy of the foregoing Plaintiffs' Opposition to Defendants' Motion for Stay Pending Appeal was sent by facsimile and mailed, first-class postage paid, to:

Margaret Ann Nolan
Steven M. Sullivan
Joel L. Tornari
Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
Counsel to Defendants

Douglas M. Bregman