

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

RUBY BELL, et al, individually and on)	
behalf of all similarly situated persons,)	
)	
Plaintiffs,)	
)	
vs.)	No. 06 C 3520
)	
MICHAEL LEAVITT, Secretary of the)	Judge Guzmán
United States Department of Health and)	Magistrate Mason
Human Services,)	
)	
Defendant.)	

**PLAINTIFFS' MEMORANDUM DEMONSTRATING
IRREPARABLE HARM IN SUPPORT OF MOTION FOR A
PRELIMINARY INJUNCTION ON BEHALF OF CLASS C**

I. INTRODUCTION

In a Memorandum Opinion and Order dated September 14, 2006 (the "September 14 Order"), Judge Ronald A. Guzmán found that the named plaintiff A.L. and the class of foster and adopted children that she represents (collectively, "the children") are likely to succeed on the merits of their claim that the defendant's regulation applying to them a new citizenship documentation requirement for eligibility for the Medicaid program violates the Medicaid Act. September 14 Order at 15. Judge Guzmán referred the matter to this Court for a determination of whether the children meet the irreparable harm element that would entitle them to preliminary injunctive relief. *Id.* at 21. For the reasons stated herein, the children meet the irreparable harm requirement, with more of them experiencing irreparable harm every day. Every time the citizenship documentation requirement is applied to the children, they lose forever their right to an adjudication of whether the law applies to them. In addition, since the states are now implementing the law, every day children face the stress

and expense associated with the documentation rule and the potential loss of Medicaid, and some of them have the benefits delayed or denied, with resulting loss of medical care. The children are entitled to a preliminary injunction.

II. STATEMENT OF THE CASE

Plaintiffs are low income individuals eligible or applying for health coverage under the Medicaid program. 42 U.S.C. §§1396 et seq. Defendant Michael Leavitt is the Secretary of the Department of Health and Human Services (the "Secretary"), and in that capacity he is responsible for administration of the Medicaid program. In the Deficit Reduction Act of 2005, signed into law in February 2006, Congress adopted new procedures effective July 1, 2006, requiring that some beneficiaries and applicants for Medicaid who claim to be United States citizens must produce certain specified documentation of their citizenship and personal identity. Pub. L. No. 109-171 §6036, 120 Stat. 4, 81 (2005) ("Section 6036") (now codified in substantial part at 42 U.S.C. §§1396b(i)(22) and (x)). On July 12, 2006, the Secretary published "interim final" regulations implementing Section 6036. 71 Fed. Reg. 39214 (July 12, 2006).

On behalf of themselves and three proposed plaintiff classes (designated Class A, Class B, and Class C, which is the children's class), plaintiffs attacked the regulations as inconsistent with Section 6036 and the rest of the Medicaid Act and as unconstitutional. First Amended Complaint. In the alternative, plaintiffs attacked Section 6036 itself as unconstitutional. *Id.* Plaintiffs filed an Amended Motion for Temporary Restraining Order and Preliminary Injunction, and an Amended Motion for Class Certification.¹

¹ The original complaint and motions were filed at the end of June 2006, when the Secretary had not promulgated regulations to implement Section 6036. After the regulations were published on July 12, 2006, plaintiffs amended their complaint and both motions to reflect the changed situation.

Plaintiffs and the members of Class C assert that Section 6036, by its terms, does not apply to them. Section 6036 applies the new documentation requirement to people who declare their citizenship or nationality for purposes of Medicaid eligibility pursuant to 42 U.S.C. §1320b-7. 42 U.S.C. §§1396b(i)(22) and (x)(1). The members of Class C are eligible for Medicaid automatically as a result of their eligibility for other programs; they do not apply separately for Medicaid, and thus they are not required to produce the declaration of citizenship or nationality governed by 42 U.S.C. §1320b-7. See 42 U.S.C. §1396a(a)(10)(A)(i)(I) (including, among other programs, Foster Care and Adoption Assistance under Title IV-E of the Social Security Act). Thus, Class C claims that the documentation requirements of Section 6036 are never triggered as to them. Since the Secretary's implementing regulations apply the documentation requirements to them, 71 Fed. Reg. at 39216, Class C claims that the regulations violate Section 6036 and other relevant provisions of the Medicaid Act.

In the September 14 Order, Judge Guzmán made several rulings with respect to the two motions as to Class C.² As to the Motion for Temporary Restraining Order and Preliminary Injunction, Judge Guzmán ruled that "the regulations appear to conflict with the Medicaid statute", and that the Class C named plaintiff A.L., who receives Medicaid as a result of her eligibility for Foster Care and Adoption Assistance under Title IV-E of the Social Security Act, has a "substantial likelihood of success on this claim." September 14 Order at 14, 15 (referring to A.L. and not Class C, because certification of Class C occurred

² This proceeding only involves Class C. The September 14 Order also made several dispositions regarding proposed plaintiff Class A and Class B, none of which are involved here.

later in the order). Judge Guzmán also ruled that, "Because A.L. cannot be compensated for any harm the regulations may cause her, she has no adequate legal remedy." Id. at 15.

As to the irreparable harm element for preliminary relief, Judge Guzmán stated that the stress related to anticipated loss of benefits and medical care may be irreparable, but that, "A.L. has not shown that she is in danger of losing her benefits if an injunction is not issued. Absent evidence that the regulations are likely to cause her to lose her benefits, she has not shown that she has any reason to anticipate – and, thus, to be damaged by anticipating – that loss." Id. at 16. Judge Guzmán ruled that A.L.'s "motion for a TRO is, therefore, denied." Id. at 17, 20.

Judge Guzmán certified Class C, but narrowed the definition plaintiffs had proposed in the First Amended Complaint (which had included beneficiaries of all programs that provide automatic Medicaid eligibility) to encompass only the children whose Medicaid eligibility derives from their status with respect to the Foster Care and Adoption Assistance program under Title IV-E of the Social Security Act (who are "the children" here):

All persons who are receiving or will receive health coverage under the Medicaid Program, 42 U.S.C. §1396 et seq., and who are not required to make a declaration of citizenship under 42 U.S.C. §1320b-7 in connection with an application for Medicaid because they acquire their eligibility for Medicaid coverage as a result of the determination of their eligibility for Foster Care and Adoption Assistance under Title IV-E of the Social Security Act.

Id. at 20-21.

Finally, Judge Guzmán referred the "amended motion for a preliminary injunction" to this Court. Given the district court's rulings on likelihood of success and on A.L.'s allegations of irreparable harm for purposes of a TRO, the parties agreed in establishing this

briefing schedule that the issue for this Court is to determine the issue of irreparable harm for purposes of the amended motion for a preliminary injunction.

III. THE CHILDREN WILL SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT ENTERED

There are two kinds of harm that the children will suffer in the absence of a preliminary injunction. First, the children will suffer forever the loss of their claim that they have a right not to be subjected to the documentation requirement at all. Second, they will suffer the harm of the stress associated with exposure to and anticipated loss of Medicaid benefits and health care and, for some of them, that loss itself.

A. The irreparable harm standard is low

As the children will demonstrate below, they are exposed to a high likelihood of significant irreparable harm in the absence of a preliminary injunction. In any event, however, their burden of showing irreparable harm is low because it has already been established that they have a "substantial likelihood of success" on their claim. September 14 Order at 15. In weighing the competing factors on a preliminary injunction motion, the likelihood of success on the merits is inversely related to irreparable injury. "[T]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in [a plaintiff's] favor; the less likely [a plaintiff] is to win, the more need it weigh in [a plaintiff's] favor." Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 387 (7th Cir. 1984). In other words, a movant's apparent success on the merits of the claim will result in a decreased burden of persuasion with regard to irreparable harm. 13 Moore's Federal Practice § 65.22(5)(g) (citing Roland Machinery).

As noted above, the district court ruled that that the regulation appears to contradict various provisions of the Medicaid Act. September 14 Order at 15. The wording of Section 6036 makes it applicable only to cases in which the path to Medicaid eligibility includes the making of a declaration of citizenship under 42 U.S.C. §1320b-7. The children's Medicaid eligibility does not take that path, but instead flows from their eligibility for Title IV-E assistance as foster children or adoptees. Despite of this clear textual command, the Secretary's implementing regulation applies the documentation rules to the children. In the face of this apparently unlawful regulation, Judge Guzmán held that the children have a "substantial" likelihood of success on their claim that the regulation violates the statute in this regard. September 14 Order at 15. With such a high likelihood of success on the merits, plaintiffs' burden to show irreparable harm is minimal. See Elrod v. Burns, 427 U.S. 347, 373 (1976) (observing that deprivation of a constitutional right for even a minimal period of time constitutes irreparable injury); Nat'l People's Action v. Wilmette, 914 F.2d 1008, 1002-13 (7th Cir. 1990) (same); Daniel v. City of Tampa, 818 F. Supp. 1491, 1493 (M.D. Fla. 1993) (preliminarily enjoining, with scant discussion of irreparable harm, enforcement of an unlawful ordinance where plaintiff showed a "substantial" likelihood of success on the merits); cf. Youakim v. Miller, 562 F.2d 483, 494-95 (7th Cir. 1977) (on motion for preliminary injunction or summary judgment, position on the merits so strong that court entered summary judgment with no discussion of irreparable harm), affirmed, 440 U.S. 125 (1979).

The children's burden is also less because they seek to preserve the status quo. Prior to the Secretary's regulation, the children (in accordance with the statutory scheme described above) were not subject to citizenship documentation rules. They received

Medicaid health coverage as part of the package of services designed to rescue them from abuse and neglect and lift them into a safe, healthy and promising new family situation. The regulation imposes a new condition, which upsets the status quo. Now the children will not have access to the Medicaid benefits for which they are statutorily eligible unless they clear the documentation hurdle. By seeking a preliminary injunction, the children thus seek to preserve the status quo. It can hardly be said that the Secretary, who has provided the children with Medicaid for decades without subjecting them to the citizenship requirement, will suffer irreparable harm in the period that the preliminary injunction is in effect to preserve the status quo. Am. Med. Ass'n v. Weinberger, 522 F.2d 921, 926 (7th Cir. 1975).

B. Without an injunction, the children will lose their claim with no chance to adjudicate it

Section 6036(b) makes the documentation rules effective as of July 1, 2006 for new applications. It also makes the rules applicable to Medicaid recipients found eligible prior to July 1, 2006. All Medicaid recipients will be required to comply with the rule when they go through procedures to redetermine their eligibility for Medicaid, which must occur at least once every twelve months, 42 C.F.R. § 435.916. Thus all of the children are subject to the new rules during the year between July 1, 2006, and July 1, 2007. Every day another cohort of children is subjected to the documentation rules. Every one of these children has lost forever their claimed right not to be subject to that process, a claim that they have a "substantial likelihood" of winning when the court comes to a final decision on the merits in this case. This right has value apart from whether or not the children will be able to document their citizenship. Every child whose case comes up for redetermination without

the preliminary injunction in place loses the child's claimed right not to be subject to the documentation requirement.

As Judge Guzmán held, the children have no adequate remedy at law to compensate them for wrongful exposure to the documentation rules because they cannot sue the federal government for their damages. September 14 Order at 15. This is a holding closely related to whether there is irreparable harm associated with this kind of permanent and unreviewable and irremediable deprivation of a claimed legal right. The children have a valuable claim of right that they should not be subject to Section 6036's documentation rules. If the regulation is ultimately adjudged invalid, the children will be left with no remedy against the Secretary for violation of that right. The loss of their meritorious claim not to be subject to the documentation requirement without any chance to adjudicate that claim is irreparable harm. Ohio Oil Co. v. Conway, 279 U.S. 813 (1929) (finding irreparable harm in payment of an allegedly unconstitutional tax where state law did not provide a remedy for its return should the statute ultimately be adjudged invalid); see also Cooper v. Salazar, 196 F.3d 809, 816-17 (7th Cir. 1999) (finding irreparable harm in subjecting civil rights claimants to state procedures that threatened the wrongful termination of their claims; if procedures were later found unconstitutional claimants would have no redress for civil rights violations.)

C. Without an injunction, the children face termination, denial or delay of coverage

Judge Guzmán ruled that the stress related to anticipated loss of benefits and medical care may be irreparable, but that "A.L. has not shown that she is in danger of losing her benefits if an injunction is not issued. Absent evidence that the regulations are likely to cause her to lose her benefits, she has not shown that she has any reason to anticipate – and,

thus, to be damaged by anticipating – that loss." September 14 Order at 16. While A.L. perhaps had not made that showing with respect to the very short period of time involved in a temporary restraining order, the case now involves a nationwide certified class, and the period this Court must examine is the period between now and the entry of a final judgment. As the children demonstrate below, they are already suffering irreparable harm every day of the sort identified by Judge Guzmán, plus some of them are suffering the far greater harm of actual loss of health coverage and medical care.

It is important first to identify who these children are. The children are among our society's most vulnerable and desperate people. Simply as children, they are vulnerable. But as abused and neglected children, they are desperate and deeply in need of health care for the full range of acute and chronic physical and mental medical conditions, not to mention being highly likely to be far behind on preventive medical measures such as well-baby and well-child visits, immunizations, and routine diagnosis (nevermind treatment) of developmental issues in hearing, vision, cognition, and socialization. Children who enter the abuse and neglect system by definition do not have ordinary parental care and oversight. They are disproportionately in need of immediate and ongoing medical care. Termination or denial of care is deeply problematic for them. Delay of care equates with denial, for the need is immediate and any delay is just a permanent loss of needed care. Anxiety about care is deeply disturbing, especially when it involves the often frustrating process of trying to document birth when the system is often trying to distance the child from the circumstances of her birth. See, Child Welfare League of America's August 4, 2006 comments submitted to the Centers for Medicare and Medicaid Services in response to the Secretary's July 12, 2006 interim final rules (attached hereto as Exhibit A and available at

<http://www.cwla.org/advocacy/medicaid060804.htm>). In its comments, CWLA points out that children enter foster care in poor health and need vastly more care and more coordinated care than other children. For example, citing the American Academy of Pediatrics, CWLA points out that compared with children from the same socioeconomic background, children in foster care "have much higher rates of serious emotional and behavioral problems, chronic physical disabilities, birth defects, developmental delays and poor school achievement." *Health Care of Young Children in Foster Care*, American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care, Pediatrics, Vol. 109, No. 3, March 2002. Also, according to CWLA's comments, research shows that access to care, especially in the first days of placement, is important, and delays, denials, and fragmentation of care due to the citizenship documentation requirements not only endanger the foster children's health, but also threatens their well-being in foster placement and jeopardizes family reunification with their natural parents.

The majority of states have now implemented written policies that adhere to the requirements of the interim regulations issued by the Secretary of DHHS. See Exhibit B, attached hereto (collected website references to all current state implementation provisions that plaintiffs' counsel can locate) and Exhibit C, attached hereto (effective dates of state provisions applying the documentation rules to the children or not exempting them). These states require applicants for and recipients of Medicaid to meet citizenship and identity documentation requirements. Consistent with the statute and regulations, states typically exclude Medicare beneficiaries and SSI recipients from the documentation requirements. By contrast, the children in the class here -- children in the Title IV-E system -- are not excluded. Thus, the children are required to produce documents demonstrating that they

meet the citizenship and identity verification requirements for purposes of Medicaid eligibility. See, e.g., Georgia Department of Community Health, "Basic Eligibility Criteria: Citizenship and Alienage," October 2006 (providing that "citizenship/alienage status *must* be established for a child to receive Medicaid under IV-E . . . ") (emphasis original), attached hereto as Exhibit B; Iowa Department of Human Services, Guide for Citizenship and Identification, 9/06 (specifying that the documentation requirements must be applied to Title IV-E eligible children); Alabama Medicaid Agency, "Documents Needed for Proof of Citizenship," July 27, 2006, (specifying that documentation requirements be applied to all applicants other than SSI and Medicare recipients); Nevada Division of Welfare and Supportive Services, "Citizenship," (same); see also thirty additional states listed in Exhibit B. There are more than 170 thousand children in the Title IV-E systems in these 34 states who are Medicaid eligible. Child Welfare League of America, *Ten Years of Leaving Foster Children Behind: The Long Decline in Federal Support for Abused and Neglected Children*, July 2006, pp. 16-24 (state by state tables).

State policies now in effect make it clear that if class members cannot provide required documentation within a certain time, their benefits will be terminated. See, e.g., policies from Georgia (providing that individuals may be made eligible for up to 90 days only if they "continuously" show good faith effort to present evidence of citizenship); Rhode Island (same); Vermont (same). See Exhibit B (web citations).³

³ It appears that some of these state policies are treating new Title IV-E children as "applicants" for Medicaid and requiring them to comply with documentation rules before being allowed to access Medicaid health coverage. If so, this is a separate violation of the Medicaid Act, where 42 U.S.C. §1396a(a)(10)(A)(i)(I) provides these children with "categorical" or automatic Medicaid eligibility. The children should all be treated as "recipients". This matters under the documentation regulations as well, because the regulation gives applicants a time-limited "reasonable opportunity" period to produce required documentation, while it gives recipients a more open-ended reasonable opportunity period. Treating the children as Medicaid applicants, instead of recipients, heightens the likelihood of irreparable harm.

The children have been suffering this harm for months. Most states have been applying these requirements since July 2006. See Exhibit C (listing Alabama, Arizona, Connecticut, Delaware, D.C., Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Missouri, Nevada, New Mexico, New York, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia as implementing citizenship documentation requirements beginning in July 2006).

The situation in Virginia illustrates the ongoing irreparable harm. The State began implementing the citizenship documentation requirements in July 2006. See Exhibit C. Title IV-E children who are Medicaid applicants and recipients are subject to the requirements. See Exhibit B. Virginia Medicaid officials have reported a significant drop in the enrollment of children in the Medicaid program since July 2006. Declaration of Jill Hanken, attached hereto as Exhibit D. See also, Chris L. Jenkins, *Rules Deter Poor Children From Enrolling in Medicaid: Needed Documents Unavailable to Some Families, Officials Say*, WASH. POST, Oct. 8, 2006, at C05 (Attachment B to Hanken Declaration). For example, when determining Medicaid eligibility for children with family incomes at or below 133% of the federal poverty level, Virginia Medicaid was processing an average of 1,314 cases per month. In July 2006, only 391 cases were processed; in August, 416 cases. *Id.* ¶ 6. As of September 14, 2006, 1,800 cases were being held pending receipt of citizenship and identity documentation. *Id.* In addition to this backlog of applications, the numbers of children actually qualifying for Medicaid has been dropping since June 2006. *Id.* ¶ 7. While IV-E children are not included in the FAMIS figures, because Title IV-E children are also subject to the documentation requirements, they are likely experiencing similar delays.

Wrongful termination of Medicaid benefits constitutes irreparable harm. See Kai v. Ross, 336 F.3d 650, 656 (8th Cir. 2003) ("[T]he danger to plaintiffs' health, and perhaps even their lives, gives them a strong argument of irreparable injury."); Mass. Ass'n of Older Americans v. Sharp, 700 F.2d 749, 753 (1st Cir. 1983) ("Termination of benefits that causes individuals to forego . . . necessary medical care is clearly irreparable injury."). In the Seventh Circuit irreparable harm is found even where a lack of access to needed health care is only threatened. In American Medical Ass'n v. Weinberger, 522 F.2d 921 (7th Cir. 1975), plaintiffs challenged Medicare and Medicaid regulations that required a determination, within 24-hours of a patient's admission to a hospital, of whether the admission is medically necessary. Id. at 923. If the admission is not determined medically necessary, the hospital would not be reimbursed by the government. Id. The court found that the regulation, which could cause doctors to refrain from hospitalizing certain patients who they believe should be hospitalized, posed a "substantial risk" of irreparable injury. Id. at 926. Likewise, the mere threat that Section 6036 poses to the availability of needed health care for the children constitutes a substantial risk of irreparable injury.

The vulnerability of the children exposed to Section 6036 further supports a finding of irreparable harm. See Moore v. Miller, 579 F. Supp. 1188, 1192 (N.D. Ill. 1983) (noting that although financial harm is generally insufficient to find irreparable harm, where the case involved individuals in the "grip of poverty," even a small welfare payment decrease can cause irreparable harm); Sockwell v. Maloney, 554 F.2d 1236 (2d Cir. 1977) (per curiam) (finding irreparable harm because foster children, who depend on certain government benefits for daily needs, faced possible unwillingness of the foster parents to continue foster care if benefits cease or are reduced). The harm experienced by the children

can be irreparable even in cases where it is only emotional. See Robertson v. Granite City Cmty. Unit Sch. Dist. No. 9, 684 F. Supp. 1002, 1005 (S.D. Ill. 1988) (recognizing emotional harm as irreparable harm); Norton v. Richardson, 333 F. Supp. 1382, 1384 (E.D. Wis. 1971) (same).

Additionally, foster children, who in many cases have already suffered neglect and abuse at the hands of their parents, could subsequently suffer great harm merely attempting to gather such documentation which is most likely in the possession of the parents from whom they have been removed. Further, the custodial state agencies who now serve in a loco parentis role for the children are further harmed financially by the administrative burden of attempting to verify citizenship for these children. Finally, the States who continue to grant health care coverage to otherwise eligible foster children in spite of the loss of the vital federal funding to which they are clearly entitled, will suffer harm through the loss of those funds that will inevitably lead to a decrease in Medicaid coverage overall. Time is of the essence and the administrative burden of providing documentation will delay necessary care. As Illinois demonstrates in its Amici filed in this action, the Illinois Department of Children and Family Services must screen children for serious health issues immediately upon foster care placement and, thus, must obtain coverage for these children as quickly as possible. See Memorandum of State Amici Curiae in Support of Plaintiff's Motion for Preliminary Injunction, pp. 4-5.

IV. CONCLUSION

For the reasons stated, named plaintiff A.L. and Class C, the class of foster and adopted children that A.L. represents, meet the irreparable harm requirement. Therefore, a preliminary injunction should be entered as to this class of children.

Respectfully submitted

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By: /s/ Mary E. Anderson

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