

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

_____)	
A.L., <i>et al.</i> ,)	
)	No. 06 C 3520
	Plaintiffs,)	
	v.)	
)	Judge Guzmán
MICHAEL O. LEAVITT, Secretary of)	
Health and Human Services,)	Magistrate Judge Mason
)	
	Defendant.)	
_____)	

**MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

In their third attempt over the past four months to obtain emergency injunctive relief, the plaintiffs face a difficult task. Judge Guzmán has already held that A.L., the sole remaining named plaintiff, and the class of Title IV-E beneficiaries that she represents have failed to present concrete evidence that they will be denied Medicaid benefits—the only harm that could be considered irreparable. Plaintiffs have not made good use of their opportunity to present this Court with such evidence. Rather, plaintiffs have submitted a compilation of state regulations that were already in place when Judge Guzmán denied their motion for temporary restraining order (“TRO”) as well as a declaration based on statistics that do not include Title IV-E beneficiaries. The plaintiffs leave it to the Court to connect the wholly speculative dots that allegedly link this evidence to their “irreparable” injury.

Given this vague and general evidence, there is no basis for this Court to contradict Judge Guzmán’s finding on irreparable harm. Title IV-E beneficiaries, like all Medicaid recipients, will receive a reasonable opportunity to satisfy the documentation requirements of the Interim Final Rule. If they are unable to locate documents, the state must then assist them. However, even if these procedural protections fail, beneficiaries will still not lose their benefits until they have received a fair hearing. The plaintiffs have never demonstrated that, despite these time-consuming procedures, Title IV-E beneficiaries, such as A.L., will lose their benefits prior to the conclusion of this litigation.

In contrast, the Secretary explains below that his decision to include Title IV-E beneficiaries within the Interim Final Rule is not arbitrary or capricious, but comports with congressional intent. Plaintiffs assume that they are the only party deserving of a second opportunity to brief the preliminary injunction factors, but they are mistaken. Although Judge Guzmán assumed, without deciding, that the plaintiffs have a likelihood of success on the merits, a full discussion demonstrates that they do not.

Because the plaintiffs cannot demonstrate that Judge Guzmán’s decision on irreparable harm was incorrect or that they have a likelihood of success on the merits of their Title IV-E claim, this Court should deny the Motion for Preliminary Injunction.

BACKGROUND

On February 8, 2006, the President signed into law the Deficit Reduction Act of 2005.

Pub. L. No. 109-171, 120 Stat. 4. As of July 1, 2006, section 6036 of the Act effectively establishes new citizenship documentation requirements for applicants for Medicaid benefits as well as for redeterminations of eligibility “in the case of individuals for whom the [new documentation requirement] was not previously met.” 42 U.S.C. § 1396b Note. The statute specifically requires “satisfactory documentary evidence of citizenship or nationality” to be demonstrated by such individuals in order for federal financial participation (“FFP”) to be available to a state for expenditures on behalf of such individuals. *Id.* § 1396b(x)(1). On July 6, 2006, the Secretary, along with the Administrator of the Centers for Medicare and Medicaid Services (“CMS”) within HHS, promulgated an Interim Final Rule with Comment Period amending Medicaid regulations to implement section 6036. *See* Interim Final Rule with Comment Period: Medicaid Program; Citizenship Documentation Requirements, 71 Fed. Reg. 39214 (July 12, 2006) (“Interim Final Rule”).

In a Memorandum Opinion and Order dated September 14, 2006, Judge Guzmán dismissed plaintiffs’ various challenges to the Interim Final Rule for lack of subject matter jurisdiction with the sole exception of plaintiff A.L.’s Administrative Procedure Act (“APA”) claim that the Secretary’s application of the Rule’s documentation requirements to Title IV-E adoptees is arbitrary or capricious. In so holding, Judge Guzmán found that the plaintiffs had failed to allege that they were unable to comply with the requirements of the Rule and that any alleged threat to their benefits was therefore speculative. Sept. 14, 2006, Mem. Op. at 10-11. Judge Guzmán also noted that any such allegation at this point, prior to any actual attempt to comply with the Rule, would be “nothing more than conjecture.” *Id.* at 11.

As to the plaintiffs’ additional allegation that they would be required to expend time and resources to satisfy the requirements of the Rule, Judge Guzmán found that the allegation was “sufficient to support . . . standing” for certain claims. *Id.* However, Judge Guzmán held that even this alleged injury would not be redressable with respect to the majority of the claims because any such injury would be a product of section 6036 of the Deficit Reduction rather than the Rule. *Id.* at 12. The only distinction that Judge Guzmán found between the Rule and section 6036 related to A.L.’s APA challenge to the Rule’s application to Title IV-E adoptees. *Id.* at 14. Assuming without deciding that the regulation “appears” to contradict the statute in this regard, Judge Guzmán allowed A.L. to proceed with her claim as a representative of a class of Title IV-E

beneficiaries. Id. at 14-15.

However, Judge Guzmán expressly denied A.L.’s motion for a temporary restraining order. Sept. 14, 2006, Order. Judge Guzmán analyzed A.L.’s two allegations of irreparable harm: (1) “she will suffer emotional distress from trying to comply with the requirement; and (2) she will suffer distress from anticipating that her benefits and, thus, her medical care will be terminated.” Sept. 14, 2006, Mem. Op. at 15. According to Judge Guzmán, the former allegation of harm “is not irreparable.” Id. at 16. Although the possible stress from the loss of benefits or medical care may support a finding of irreparable harm, Judge Guzmán found that “A.L. has not demonstrated that she is likely to suffer that harm” because A.L. “has not shown that she is in danger of losing her benefits if an injunction is not issued.” Id. According to Judge Guzmán, “[a]bsent 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. This failure “doom[ed] [A.L.’s] quest for injunctive relief.” Id. at 17

Judge Guzmán then referred the motion for preliminary injunction, as it applies to the sole remaining Title IV-E claim, to this Court.

TITLE IV-E STATUTORY BACKGROUND

Much of the pertinent statutory background to this Motion is set forth in Defendants’ Memorandum in Opposition to Plaintiffs’ Amended Motion for TRO and Preliminary Injunction (Docket Entry No. 52), which we incorporate here by reference pursuant to Fed R. Civ. P. 10(c). Accordingly, here we present only additional background relevant to plaintiffs’ sole remaining claim concerning A.L. and the class of plaintiffs she purports to represent who receive foster care and/or adoption assistance benefits under Title IV-E of the Social Security Act, 42 U.S.C. 670 et seq. See Am. Compl. ¶ 62.

Title IV-E, enacted in 1980, provides federal financial assistance to state foster care programs and programs for assisting the adoption of children with special needs. It replaced the foster care assistance formerly provided under the Aid to Families with Dependent Children (“AFDC”) program. Title IV-E provides federal matching funds for foster care maintenance payments and adoption assistance payments, 42 U.S.C. §§ 674(a)(1) & (2), and for administrative costs “found necessary by the Secretary for the provision of child placement services and for the proper and efficient administration of the State plan.” 42 U.S.C. § 674(a)(3).

Title IV-E also establishes a set of requirements governing a child’s eligibility for foster care and adoption assistance. In sections sometimes referred to as the “AFDC linkage” provisions, the statute requires that the child must have actually received or been eligible for AFDC benefits in the home from which the child was removed at or near the time of formal proceedings leading to the foster placement. See 42 U.S.C. § 672(a) (foster care assistance AFDC linkage); id. § 673(a) (adoption assistance AFDC linkage). The AFDC program was repealed by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and, along with certain other federal welfare programs, replaced with a single program of block grants to the states. See Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2112 (1996). The Title IV-E foster care and adoption assistance program, however, still links eligibility for foster care benefits to the AFDC eligibility provisions that were in effect as of July 16, 1996. See 42 U.S.C. §§ 672(a)(3), 673(a)(2)(A). Receipt of benefits pursuant to Title IV-E also permits IV-E beneficiaries to avoid an additional application for Medicaid. See 42 U.S.C. § 1396a(a)(10)(A)(i)(I) (state must make “medical assistance available” to Title IV-E beneficiaries); see also 45 C.F.R. § 1356.40(b)(3).

ARGUMENT

I. Standard of Review of a Motion for Preliminary Injunction

In order to establish the necessity of preliminary injunctive relief, plaintiffs must show: (1) that they have a reasonable likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) that it will suffer irreparable harm if the preliminary injunction is denied. Platinum Home Mortgage Corp. v. Platinum Fin. Group, Inc., 149 F.3d 722, 726 (7th Cir. 1998). As to irreparable harm, “[n]ot every conceivable injury entitles a litigant to a preliminary injunction. For example, speculative injuries do not justify this extraordinary remedy.” E. St. Louis Laborers’ Local 100 v. Bellon Wrecking & Salvage Co., 414 F.3d 700, 704 (7th Cir. 2005) (citations omitted). Accordingly, “a plaintiff cannot obtain” such extraordinary, emergency relief “by speculating about hypothetical future injuries.” Id. at 705-706.

If the movant meets the first three conditions, “then the court must balance the harm to the movant if the injunction is not issued against the harm to the defendant if it is issued improvidently.” See Storck U.S.A. L.P. v. Farley Candy Co., 14 F.3d 311, 314 (7th Cir. 1994); see also, e.g., Abbott Labs v. Mead Johnson & Co., 971 F.2d 6, 12 (7th Cir. 1992). The

balancing process also takes into consideration the consequences to the public interest of granting or denying preliminary relief. Storck, 14 F.3d at 314.

II. The Plaintiffs Have Again Failed to Justify Emergency Injunctive Relief

The plaintiffs' approach to the Motion for Preliminary Injunction pending before this Court relies on a fundamental misreading of Judge Guzmán's decision and, consequently, a misunderstanding of the procedural posture of the motion. Judge Guzmán has already decided that A.L., the sole remaining named plaintiff, has "fail[ed] to show irreparable harm." Sept. 14, 2006, Mem. Op. at 17. According to Judge Guzmán, that decision on irreparable harm, even taking into account Judge Guzmán's assumption of a likelihood of success on the merits, "dooms [A.L.'s] request for injunctive relief." Id. As the standards that a plaintiff must satisfy in order to justify a TRO or preliminary injunction are the same, including the likelihood of irreparable harm, see Sept. 14, 2006, Mem. Op. at 6 (quoting Chicago United Indus., Ltd. v. City of Chicago, 445 F.3d 940, 946 (7th Cir. 2006) ("stating that 'a TRO issued after notice . . . is procedurally as well as functionally . . . like a preliminary injunction'")), Judge Guzmán's TRO denial dooms A.L.'s request for a preliminary injunction in the absence of concrete proof of irreparable harm. And plaintiffs have not now provided the additional evidence required by Judge Guzmán.

Judge Guzmán explained in his Order what this additional evidence must establish in order for the plaintiffs to demonstrate irreparable harm: "[a]bsent evidence that the regulations are likely to cause her to lose her benefits, [A.L.] has not shown that she has any reason to anticipate - and, thus, to be damaged by anticipating - that loss." Sept. 14, 2006, Order at 16. Thus, the burden is on the plaintiffs to demonstrate that the Interim Final Rule issued by the defendant is "likely to cause her to lose her benefits," as this is the only harm that could be determined to satisfy the requirement of irreparable harm. See id. at 15-16 (holding that "emotional distress from trying to comply with the requirement . . . is not irreparable.")).

The memorandum submitted to this Court by the plaintiffs in support of their Motion for Preliminary Injunction wholly ignores Judge Guzmán's concerns.

A. The Plaintiffs Misstate the Standard for Determining Irreparable Harm

Before submitting any evidence to demonstrate harm, the plaintiffs begin by arguing that the harm that they must demonstrate is, in fact, low because they have demonstrated a "substantial likelihood of success" on their claim. Pls.' Mem. in Supp. at 5. This argument is

contradicted by Judge Guzmán's earlier denial of A.L.'s motion for TRO. As discussed, even though Judge Guzmán assumed a "likelihood of success" based on the very limited discussion of the Title IV-E question in the TRO papers, which had to address myriad claims by plaintiffs, Judge Guzmán concluded that A.L.'s "failure to show irreparable harm dooms her quest for injunctive relief." Sept. 14, 2006, Mem. Op. at 17 (citing Cooper, 196 F.3d at 813).

The plaintiffs' assertion to the contrary is not persuasive. First, a finding of likelihood of success at this early stage of the litigation does not eliminate the need to demonstrate irreparable harm. See, e.g., Abbott Labs., 971 F.2d at 11 (holding that if the moving party fails to demonstrate *either* irreparable harm or a likelihood of success, "a court's inquiry is over and the injunction must be denied"). Otherwise, any lawsuit where plaintiff has a likelihood of success on the merits would necessitate immediate action from the Court, no matter how speculative the plaintiffs' assertion of injury in the interim might be. Cf. E. St. Louis Laborers' Local 100, 414 F.3d at 704. Rather than eliminating the threshold requirement of irreparable injury, a high likelihood of success is relevant only to the balancing inquiry that occurs after the prerequisites to preliminary injunctive relief have been met. See Storck, 14 F.3d at 313-14 (applying "sliding scale" approach to balancing test once injunction prerequisites had been met); Abbott Labs., 971 F.2d at 12 (same).

Moreover, Judge Guzmán's finding on likelihood of success was based on an assumption, derived from a limited discussion of the issue in the extensive briefs, that the Interim Final Rule contradicts the statute in the manner in which it applies to Title IV-E beneficiaries. See Sept. 14, 2006, Mem. Op. at 15 ("*If, as it appears*, the regulation contradicts the statute . . .") (emphasis added). As the defendant's discussion in Part III will demonstrate, the plaintiffs are by no means justified in assuming a likelihood of success on the merits of the sole remaining issue in this case.

B. The Additional Evidence Submitted by the Plaintiffs in Support of their Motion Fails to Contradict Judge Guzmán's Conclusion on Irreparable Harm

In their Memorandum in Support of the Motion for Preliminary Injunction, plaintiffs assert two kinds of irreparable harm that they argue Title IV-E beneficiaries will suffer in the absence of preliminary injunctive relief: (1) "loss of their claim that they have a right not to be subjected to the documentation requirement," and (2) the "anticipated loss of Medicaid benefits

and health care” with accompanying psychological harm. Pls.’ Mem. in Supp. at 5.

The plaintiffs’ first allegation of harm requires little discussion, as Judge Guzmán has already rejected it as a basis for preliminary injunctive relief in this case: “Though obtaining the documents necessary to fulfill the requirement may be aggravating or annoying, the stress associated with that task is a far cry from that which has been held to constitute irreparable harm.” Sept. 14, 2006, Mem. Op. at 16; see also Sampson v. Murray, 415 U.S. 61, 90 (1974) (“The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”). In any event, the mere requirement of compliance with an agency regulation does not harm an individual in the absence of some concrete proof that compliance causes an imminent injury.¹ See MetroBanc v. Fed. Home Loan Bank Bd., 666 F. Supp. 981, 984 (E.D. Mich. 1987) (“compliance with an unconstitutional statute or regulation [does not] constitute[] irreparable harm *per se*. . . . The simple claim that a rule is unconstitutional is insufficient to demonstrate irreparable harm absent a showing of an imminent concrete and irreparable injury.”).

The second allegation of harm by the plaintiffs – the danger of actually losing benefits under the mandates of the Rule – is the only one that has been identified by Judge Guzmán as relevant to a finding of irreparable harm. See id. at 16; see also Pls.’ Mem. in Supp. at 8. However, the evidence submitted by the plaintiffs falls well short of concrete evidence demonstrating an imminent likelihood of a loss of benefits.

Rather than submitting affidavits of individuals to correct the standing deficiencies identified by Judge Guzmán in his September 14, 2006, Memorandum Opinion, the plaintiffs submit generalized allegations of the vulnerabilities of children receiving public benefits, and examples of state regulations specifying that the documentation requirements will be applied to Title IV-E beneficiaries. Such vague and general allegations provide the Court with no basis to determine whether a specific individual, such as A.L., is in imminent danger of losing benefits; whether any beneficiary has been threatened with the imminent loss of benefits due to the Rule; or whether to date any specific beneficiary has even attempted compliance with the new

¹ As will be discussed in detail below, the plaintiffs have not even provided evidence that the sole remaining named plaintiff in this litigation, A.L., has been ordered to comply with the documentation requirements of the Rule. Thus, there is no concrete evidence that A.L., or any other Title IV-E beneficiary, will “lose her claim” prior to the expiration of this litigation.

documentation requirements. Cf. Adamszewski v. Local Lodge 1487, Int'l Ass'n of Machinists and Aerospace Workers, 496 F.2d 777, 786 (7th Cir. 1974) (holding that allegation of irreparable harm from disciplinary proceedings was entirely speculative when no plaintiff had in fact been disciplined); White Eagle Co-op. Ass'n v. Johanns, 396 F. Supp. 2d 954, 961 (N.D. Ind. 2005). Certainly the mere existence of state regulations, like the mere existence of the Rule itself, is not evidence of any concrete injury to Title IV-E beneficiaries.² But plaintiffs make no attempt in their Memorandum to demonstrate that Title IV-E beneficiaries are unable to comply with the regulatory mandates – the very deficiency that Judge Guzmán found defeated the plaintiffs' eligibility for a TRO.³ See Sept. 14, 2006, Mem. Op. at 16.

If the plaintiffs' state regulation exhibits demonstrate anything, it is that the states are implementing the procedural protections mandated by the Interim Final Rule for Title IV-E beneficiaries and other Medicaid recipients. For example, the Georgia regulations provide that an eligibility determination may be made only “after the recipient has been given a ‘reasonable opportunity’ to present evidence of citizenship” if the recipient is acting in good faith. See Georgia regulations at 6 (included in Ex. B to Pls.' Mem. in Supp.); see also 71 Fed. Reg. at 39216. If a Title IV-E beneficiary is unable to locate documents in good faith, then the “caseworker must assist the individual in securing evidence of citizenship.” See id. And federal regulations supplement these protections by requiring that any denial resulting from the documentation requirements may be appealed by a beneficiary. See 71 Fed. Reg. at 39217

² Moreover, even if the examples of general state regulations submitted by the plaintiffs could provide the Court with a concrete indication of whether any Title IV-E beneficiary is at imminent risk of losing benefits, the plaintiffs admit that this evidence is not new. According to the plaintiffs, “[m]ost states have been applying these requirements since July 2006.” Pls.' Mem. in Supp. at 12. Thus, the state regulations were in effect when Judge Guzmán found no likelihood of irreparable harm and denied the plaintiffs' Motion for a TRO. The plaintiffs provide no indication why this Court should view the regulations any differently from Judge Guzmán, or why they failed to present such exhibits with either of their previous motions for preliminary injunction.

³ Additionally, the regulations submitted by the plaintiffs were all issued by states, not by the defendant. If a beneficiary were denied benefits based upon a provision of one of the regulations that was not mandated by the Interim Final Rule, or omitted a requirement of the Rule that could have corrected the injury, then the injury is traceable not to actions of the Secretary but to those of the state. See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976).

(citing 42 C.F.R. §§ 431.210, 431.211); see also 42 C.F.R. § 431.205. Until that appeal is heard and decided, the Title IV-E beneficiary will continue to receive Medicaid. See 42 C.F.R. § 431.230. There is therefore no reason to conclude, based upon a simple citation to state regulations, that a denial of benefits is imminent.

The only other evidence submitted by the plaintiffs in support of their Motion is a declaration from Jill Hanken, a staff attorney at the Virginia Poverty Law Center, and a newspaper article. This evidence, like the plaintiffs' citation to existing state regulations, provides no support for the allegation that any specific Title IV-E beneficiary is likely to suffer a denial of benefits prior to a ruling in this case. In fact, plaintiffs' exhibits are not even unique to Title IV-E beneficiaries. The plaintiffs admit in their Memorandum that the "FAMIS" program statistics supporting the Hanken affidavit *do not include* Title IV-E beneficiaries. See Pls.' Mem. in Supp. at 12 (speculating, in discussion of alleged drop in Virginia Medicaid enrollment, that, "[w]hile 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" (emphasis added)). And the newspaper article offered similarly fails to mention the Title IV-E program. See Ex. B to Hanken Decl., attached to Pls.' Mem. in Supp. as Ex. D.

C. The Plaintiffs' Memorandum Ignores Their Sole Remaining Plaintiff, A.L.

Even if the plaintiffs' discussion of the impact of section 6036 could demonstrate a general effect on Title IV-E beneficiaries, it is entirely silent on the one individual that matters for purposes of subject matter jurisdiction: the sole remaining named plaintiff, A.L. As the sole remaining plaintiff, A.L. must independently demonstrate her standing to pursue her claim. She may not satisfy the requirements of Article III by "piggy-back[ing] on the injuries of the unnamed class members." See Payton v. County of Kane, 308 F.3d 673, 682 (7th Cir. 2002) ("That, of course, would be impermissible 'Standing cannot be acquired through the back door of a class action.'") (quoting Allee v. Medrano, 416 U.S. 802, 828-29 (1974) (Burger, C.J., dissenting)). Similarly, A.L. is also responsible for demonstrating, on behalf of the class, her own likelihood of irreparable harm to justify injunctive relief. See Lewis v. Casey, 518 U.S. 343, 357-58 (1996) (holding that injunctive relief must be determined by reference to injury of named plaintiffs); Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1045 (9th Cir. 1999) (en banc) ("Any injury unnamed members of this proposed class may have suffered is simply irrelevant to the

question whether the named plaintiffs are entitled to the injunctive relief they seek.”).

The plaintiffs’ failure to even discuss A.L. in their Memorandum in Support is telling, as Judge Guzmán has already determined that A.L.’s allegations regarding her potential loss of benefits are entirely speculative. In his September 14, 2006, Memorandum Opinion, Judge Guzmán explained how the affidavit of A.L.’s mother did not concretely demonstrate that A.L. could not satisfy the documentation requirements of the Interim Final Rule: “A.L.’s mother says that she does not have a birth certificate⁴, final adoption decree, passport, driver’s license or any other form of picture identification of A.L., but she does not assert that she: (1) cannot obtain ‘a statement from a State approved adoption agency that shows [A.L.’s] name and U.S. place of birth’; (2) *does not have* or cannot obtain insurance, medical or census records or records from any of the facilities in which A.L. has resided that show her birthplace; or (3) cannot obtain any of the acceptable identity evidence.” September 14, 2006, Mem. Op. at 10 (emphasis added, internal citation omitted). As the Court’s discussion demonstrates, the affidavit of A.L.’s mother does not demonstrate that she cannot obtain or *does not currently possess* many of the documents listed in the Rule that would provide alternative means of establishing citizenship or identity.⁵ Without some indication that such documents are not readily available to A.L. and her mother, it is entirely speculative to assume that A.L. would be denied benefits.

Moreover, the likelihood that A.L. or other Title IV-E beneficiaries would be at risk of losing benefits is lessened by the fact that citizenship documents are already a necessary part of the adoption or foster care process. For example, A.L.’s mother states in her affidavit that A.L. was adopted “pursuant to a Title IV-E adoption agreement.” App. in Supp. of Pls.’ First Am.

⁴ It is important to note that A.L.’s mother does not declare that she does not currently have a birth certificate, or at least a copy of the certificate. In fact, she acknowledges in her affidavit that she once had a copy of the certificate but that she simply does “not know” whether she still has it. See App. in Supp. of Pls.’ First Am. Compl. at Tab 7.

⁵ Judge Guzmán’s conclusion that it is entirely speculative whether A.L.’s mother currently possesses documents to satisfy the Rule should defeat Article III standing for A.L., as there is no concrete indication that A.L. would be subject to *any* increased time or effort as a result of the Rule. However, this Court need not decide this question in order to determine whether to grant the motion for preliminary injunction, as Judge Guzmán has held that the only injury that would be irreparable is a loss of benefits. Judge Guzmán’s opinion establishes that A.L. has failed to demonstrate such injury in her existing affidavit.

Compl. at Tab 7, ¶ 4. Such agreements are entered into as part of the adoption of a special needs child prior to the entry of a final decree of adoption. See 42 U.S.C. § 673. Accordingly, even if an individual such as A.L. cannot locate a form of primary documentary evidence under the Rule, that individual could use the final adoption decree or, subject to certain conditions in the absence of a final decree, a statement from a State approved adoption agency to demonstrate citizenship.⁶ See 71 Fed. Reg. at 39223. Thus, acceptable proof of citizenship should necessarily be created in the process of demonstrating eligibility for adoption assistance benefits. The individual therefore faces little burden beyond that already imposed by the Title IV-E application process.

III. A Thorough Discussion of the Plaintiffs' Title IV-E Claim Demonstrates Its Lack of Merit

Plaintiffs argue that their likelihood of success on the merits has been conclusively decided. Plaintiffs are mistaken: based upon the limited discussion in the parties' prior briefing, Judge Guzmán assumed, without deciding, that there is a likelihood of success on plaintiffs' Title IV-E claim "[i]f, as it appears, the regulation contradicts the statute." Sept. 14, 2006, Mem. Op. at 15. Judge Guzmán has now referred the Motion for Preliminary Injunction on the Title IV-E claim to this Court, and a full discussion of the issue reveals that the plaintiffs' position lacks merit.

Review of agency action under the APA is "highly deferential." Israel v. U.S. Dept. of Agriculture, 282 F.3d 521, 526 (7th Cir. 2002); see also Ambach v. Bell, 686 F.2d 974, 981 (D.C. Cir. 1982) (APA review is "highly deferential . . . [and] presumes the agency's action to be valid." (citations omitted)). As even plaintiffs admit, see Mem. in Supp. of Pls.' Am. Mot. for TRO and Prelim. Inj. at 18 (stating that the Interim Final Rule is due Chevron deference), the Secretary's interpretation of section 6036, embodied in the Interim Final Rule, is entitled to great deference, as it represents the agency's interpretation of a statute it administers. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-843 & n.11 (1984) (court must uphold agency's interpretation if construction is permissible under the statute; court need

⁶ Although the cause is unspecified, A.L.'s mother indicates that she does not have a final adoption decree for A.L. However, she does have certain unspecified "adoption papers." App. in Supp. of Pls.' First Am. Compl. at Tab 7, ¶ 9. A.L.'s mother concedes that she cannot determine whether these "papers" will satisfy her state's interpretation of the documentation requirements contained within the Interim Final Rule. Id. This admitted uncertainty renders any hardship from compliance with the Rule entirely speculative.

not conclude that agency construction was the only one it permissibly could have adopted or even the reading the court would have reached); see also Wisconsin Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 497 & n.13 (2002) (“We have long noted Congress’ delegation of extremely broad regulatory authority to the Secretary in the Medicaid area.”). By authorizing the Secretary to issue regulations under section 6036, Congress made “an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” Chevron, 467 U.S. at 843-44. Accordingly, the Secretary’s “regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” Id. at 844.

Plaintiffs argue that the Secretary’s interpretation of section 6036 as it applies to Title IV-E beneficiaries is, in fact, contrary to the statute. Specifically, they take issue with the application of the documentation requirements contained within the Interim Final Rule to Title IV-E beneficiaries. They allege that the application of the Rule to such individuals is arbitrary and capricious because the “plain language” of section 6036 “applies to people who establish their citizenship for Medicaid purposes by declaration under 42 U.S.C. § 1320b-7,” rather than to Title IV-E beneficiaries. Am. Compl. ¶ 62. However, the language and purpose of section 6036 belie plaintiffs’ argument.

By its plain language, section 6036 applies to those Medicaid applicants or beneficiaries who are required to declare their citizenship pursuant to section 1137(d)(1)(A) of the Social Security Act. See 42 U.S.C. § 1396b(i)(22). Section 1137(d)(1)(A) of the Social Security Act, codified at 42 U.S.C. § 1320b-7, establishes an income and eligibility verification system, including a citizenship verification requirement, that applies as a condition of “eligibility for benefits under a program listed in subsection (b) of this section.” 42 U.S.C. § 1320b-7(d)(1)(A). Among the programs listed in subsection (b) is “the Medicaid program under subchapter XIX of this chapter.” Id. § 1320b-7(b)(2). Thus, the verification requirement established by section 1137 applies to *all* individuals who apply for or receive Medicaid, including dual recipients of Title IV-E and Medicaid benefits; the application of section 1137’s requirements to the Medicaid program in subsection (b) makes no distinction between people who separately apply for Medicaid or gain benefits by virtue of an application for Title IV-E benefits.

Simply put, nothing in the statute exempts Title IV-E beneficiaries whose eligibility for Medicaid is derivative; section 1137(d)(1)(A) of the Social Security Act, 42 U.S.C. § 1320b-7,

still directs states to subject such individuals to those verification requirements. While Congress has required states to make “medical assistance” available to Title IV-E beneficiaries, see 42 U.S.C. § 1396a(a)(10)(A)(i)(I), that provision does not conflict with the conclusion that section 1137 applies to Title IV-E recipients of Medicaid. While section 1396a might remove the need for an individual to file a separate eligibility application for Medicaid (or to independently demonstrate income eligibility under another subpart of the section), nothing in section 1396a contradicts the express requirement that the verification obligations of section 1137 apply to all recipients of Medicaid. Moreover, as we discuss below, a contrary conclusion would violate the purpose of Congress as expressed in the structure of section 6036. See Smith v. Doe, 538 U.S. 84, 92 (2003) (“We consider the statute’s text and its structure to determine the legislative objective.”).

As the plaintiffs recognized in their Memorandum in Support of their Amended Motion for TRO and Preliminary Injunction, individuals receiving Supplemental Security Income (“SSI”) benefits are also individuals who must have “medical assistance” made available to them pursuant to 42 U.S.C. § 1396a(a)(10)(A)(i). See Mem. in Supp. of Pls.’ Am. Mot. for TRO and Prelim. Inj. at 31 n.18. Accordingly, both SSI and Title IV-E recipients establish section 1396a eligibility in the same manner. See id. However, recipients of SSI benefits are expressly exempted from the documentation requirements of section 6036, even though SSI (like Title IV-E assistance) is not separately listed in section 1137(b) as one of the programs to which the verification requirement of the section applies.⁷ See 42 U.S.C. §§ 1320b-7(b), 1396(x)(2)(B). Accordingly, because Congress deemed it necessary to exempt SSI recipients from the requirements of section 6036, it is clear Congress understood the existing verification requirements of section 1137 apply to such individuals despite their “derivative” or “automatic” eligibility for Medicaid benefits. See Hohn v. United States, 524 U.S. 236, 249 (1998) (“We are reluctant to adopt a construction making another statutory provision superfluous.”). Since (as

⁷ 42 U.S.C. § 1320b-7(b)(5) does include a reference to any “State program” under subchapter XVI. This reference does not apply to SSI, however, since SSI is a purely federal program. The reference is, instead, to the program of Grants to States for Aid to the Aged, Blind, or Disabled which prior to January 1, 1974 existed in all states. This program was replaced by the SSI program in all states except in Puerto Rico, Guam, and the Virgin Islands, where it continues to exist. See 42 U.S.C. §§ 1381 Note - 1385 Note.

plaintiffs concede) SSI and Title IV-E beneficiaries stand in an otherwise identical posture, Congress's differing treatment of them is meaningful. *Id.* Thus, Congress's express exemption of certain "automatic" eligibles from the reach of section 6036 is a dispositive indication that Congress did not intend to exempt other such individuals from the reach of the statute.

Plaintiffs' contrary view would render Congress's exemption for SSI beneficiaries both redundant and superfluous. Accordingly, plaintiffs' interpretation must be rejected, since this Court should read the statute "with the assumption that Congress intended each of its terms to have meaning," *Bailey v. United States*, 516 U.S. 137, 145 (1995), and "avoid[] interpreting [it] in a way that 'renders some words altogether redundant.'" *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 347 (1998) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995)). Rather, the Court should affirm the Secretary's interpretation under *Chevron* and its progeny. Moreover, the Secretary's reasonable interpretation of the reach of section 6036 is the only construction that gives effect to the entire statute. *See Chevron*, 467 U.S. at 842-843 & n.11.

Finally, Congress's application of the new documentation requirements to Title IV-E beneficiaries makes sense as a matter of policy, since Title IV-E beneficiaries have long been allowed to provide sworn self-attestations as the sole means of verifying their citizenship for Title IV-E purposes, and that is precisely the mechanism section 6036 is intended to supplant.⁸

IV. The Balance of Equities Favors the Secretary

While plaintiffs have not established that they will suffer irreparable harm absent emergency relief, the government will be harmed by an injunction that prevents efficient implementation of a statutory command of Congress. By the same token, the public interest is in

⁸ The legislative history of section 6036 makes no distinction between recipients of both Medicaid and Title IV-E or solely Medicaid. Indeed, all federal Medicaid reimbursements to states were intended by Congress to be subject to the requirements of the law as a program-wide protection against fraud. *See* H.R. CONF. REP. NO. 109-362, at 341 (2005) ("Under the House bill, states would be prohibited from receiving federal reimbursement for medical assistance provided under Medicaid to an individual who has not provided satisfactory documentary evidence of citizenship or nationality."); H.R. REP. NO. 109-276, at 553 (2005) ("In order to reduce the number of individuals receiving Medicaid benefits who are not lawfully in the United States, section 3145 adds a new subsection (a)(22) to Section 1903 of the Social Security Act to prohibit states from receiving Federal reimbursement for medical assistance provided under Medicaid to an individual who has not met the documentary requirements of a new subsection (y), as described below.").

carrying out Congressional intent that only those who are truly eligible for scarce public resources and benefits receive such benefits, and in protecting against the danger of fraudulent certifications of citizenship that motivated Congressional action. See Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515 (1937) (statutory policy of Congress “is in itself a declaration of the public interest which should be persuasive” to courts); cf. H.R. CONF. REP. NO. 109-362, at 341; H.R. REP. NO. 109-276, at 553.

CONCLUSION

Accordingly, for all the foregoing reasons, the Court should recommend denial of plaintiffs’ Motion for Preliminary Injunction.

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