

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

**A.L., by her mother and next friend)
Diane Bauknight, individually and on)
behalf of all similarly situated)
persons,)**

Plaintiffs,)

v.)

**MICHAEL LEAVITT, Secretary of the)
United States Department of Health)
and Human Services,)**

Defendant.)

No. 06 C 3520

Judge Ronald A. Guzmán

Mag. Judge Michael T. Mason

REPORT AND RECOMMENDATION

Michael T. Mason, United States Magistrate Judge:

Plaintiff, A.L., sued on behalf of herself and all other similarly situated persons (“plaintiffs”) to enjoin the Secretary of the United States Department of Health and Human Services (“the Secretary” or “defendant”) from enforcing regulations that require states to obtain proof of citizenship from certain applicants for and recipients of Medicaid benefits. The District Court referred plaintiffs’ motion for preliminary injunction to this Court. For the reasons set forth below, this Court recommends that the District Court DENY plaintiffs’ motion for preliminary injunction without prejudice. Pursuant to Fed.R.Civ.P. 52, we make the following findings of fact and conclusions of law.

BACKGROUND

Under the Medicaid Act, the federal government provides financial assistance to states so that the states may furnish medical services to needy individuals. 42 U.S.C. §§ 1396 *et seq.* State participation in Medicaid is voluntary. However, to receive

federal funding, participating states must comply both with federal requirements imposed by the Act and with regulations promulgated by the Secretary. *Illinois Health Care Association v. Bradley*, 983 F.2d 1460, 1461 (7th Cir. 1993).

Plaintiffs are low income individuals who are applicants for or recipients of health coverage under the Medicaid program. Generally, in order to become eligible and remain eligible for Medicaid benefits, an applicant or recipient must declare that he or she is “a citizen or national of the United States, [or] . . . is in a satisfactory immigration status.” 42 U.S.C. § 1320b-7(d)(1)(A). Until recently, an applicant or recipient could meet that requirement by making “a declaration [of citizenship] in writing, under penalty of perjury.” *Id.* However, Congress amended the Medicaid statute and adopted new requirements effective July 1, 2006. Deficit Reduction Act of 2005, Pub. L. No. 109-171 § 6036, 120 Stat. 4, 81 (2005) (“Section 6036”) (codified in substantial part as 42 U.S.C. §§ 1396b(i)(22) and (x)). Now, under Section 6036, in order to receive reimbursement from the federal government for the services provided to Medicaid beneficiaries, participating states must obtain specific kinds of documentary proof of U.S. citizenship from certain Medicaid applicants and recipients. See 42 U.S.C. §§ 1396b(i)(22) and (x)(1)-(3).¹

The documentation requirement applies to “determinations of initial eligibility for medical assistance made on or after July 1, 2006, and to redeterminations of eligibility

¹ 42 U.S.C. § 1396b(i)(22) provides that payment shall not be made with respect to amounts expended for medical assistance for an individual who declares under section 1137(d)(1)(A) [42 U.S.C. § 1320b-7(d)(1)(A)] to be a citizen or national of the United States for purposes of establishing eligibility for benefits under this title [42 U.S.C. §§ 1396 et seq.], unless the requirement of subsection (x) is met. Subsection (x) sets forth the requirements for satisfactory documentary evidence of citizenship or nationality.

made on or after such date in the case of individuals for whom the [new] requirement” was not previously met. 120 Stat. at 81. However, the documentation requirement does not apply to all applicants for and recipients of Medicaid. The following groups of individuals are exempt from the new requirement: (1) those who are “entitled to or enrolled for [Medicare] benefits”; (2) those who receive Medicaid benefits as a consequence of receiving supplemental security income (“SSI”); and (3) those who, according to the Secretary, have previously provided “satisfactory documentary evidence of citizenship or nationality.” See 42 U.S.C. § 1396b(x)(2).²

On July 12, 2006, the Secretary promulgated “interim final” regulations (“the regulations”) to implement the new documentation requirement set forth in Section 6036. The regulations require applicants and recipients to present original or certified copies of documents establishing U.S. citizenship and identity. 71 Fed. Reg. 39214, 39216 (July 12, 2006). The regulations divide such documents into four categories. The first category, designated as “primary evidence,” consists of: U.S. passports; certificates of naturalization or citizenship; a valid driver’s license issued by a state that conditions receipt of a license on proof of U.S. citizenship or social security number verification; and, for states “that do not provide Medicaid to individuals by virtue of their receiving SSI, a State match with the State Data Exchange for [SSI] recipients.” *Id.* at 39222. Primary evidence “must be accepted as satisfactory documentary evidence of both identity and citizenship.” *Id.*

² See also, 71 Fed. Reg. 39214, 39215-16 (July 12, 2006) (noting that the description of the exemption in the statute contains a “scrivener’s error” and the statute should be interpreted “so that the exemption . . . applies to ‘individuals’ rather than ‘aliens’”).

If primary evidence is not available, the regulations permit applicants and recipients to rely on secondary evidence to prove citizenship. Secondary evidence includes: a U.S. public birth certificate; State Department-issued reports and certificates of the births of U.S. citizens abroad; U.S. citizen, Northern Mariana and American Indian identification cards; final adoption decrees and U.S. Military records showing a U.S. place of birth; and evidence of U.S. Civil Service employment before June 1, 1976. *Id.* at 39222-23.

If secondary evidence is used, the applicant or recipient must also present one of the following documents to verify his identity: a driver's license with a photograph or other identifying information; a school identification card with a photograph; a U.S. military card or draft record; an identification card issued by federal, state, or local government with the same information included on driver's licenses; a military dependent's identification card; a Native American Tribal document; a U.S. Coast Guard Merchant Mariner card; a Certificate of Degree of Indian Blood or other U.S. American Indian/Alaska Native Tribal document with a photograph or other identifying information; or "a cross match with a Federal or State governmental, public assistance, law enforcement or corrections agency's data system to establish identity if the agency establishes and certifies true identity of individuals." *Id.* at 39222-25.

If neither primary nor secondary evidence is available, applicants and recipients can rely on third level evidence. Such evidence includes: extracts of hospital records on hospital letterhead established at the time of the person's birth and life, health, or other insurance records that were created five years before the initial application date and show a U.S. birthplace. *Id.* at 39223-24. If third level evidence is used, however, the

applicant or recipient must also present one of the identity documents listed above. *Id.*

If no evidence from the first three categories is available, an applicant or recipient may use fourth level evidence. *Id.* at 39224. Such evidence “should only be used in the rarest of circumstances” and must be accompanied by one of the identity documents listed above. *Id.* Fourth level evidence includes: census records showing U.S. citizenship or a U.S. birthplace; certain tribal census records, U.S. State Vital Statistics official notifications of birth registration, U.S. public birth records that were amended more than five years after the person’s birth and medical records, if those documents were created at least five years before the initial Medicaid application date and show a U.S. birthplace; statements signed by the physician or midwife who was in attendance at the time of birth; and institutional admission papers from a nursing facility, skilled care facility or other institution that show a U.S. birthplace. *Id.* If none of those documents is available, an applicant or recipient may submit two affidavits by two individuals, at least one of whom is not related to the applicant or recipient, who provide proof of their own citizenship and identity and have personal knowledge of the events establishing the applicant or recipient’s claim of citizenship. *Id.*

Additionally, there are special rules that apply to children for purposes of establishing identity. *Id.* at 39228. For children under 16, school records may include nursery or daycare records. *Id.* Furthermore, if none of the identity documents listed above are available, an affidavit may be used. *Id.* An affidavit is only acceptable if it is signed under penalty of perjury by a parent or guardian stating the date and place of the birth of the child. *Id.* However, an affidavit cannot be used for purposes of establishing a child’s identity if an affidavit for citizenship was provided. *Id.*

The regulations require states to give applicants and recipients a “reasonable opportunity” to comply with the documentation requirement that is “consistent with the time allowed to submit documentation to establish other facets of eligibility,” generally forty-five or ninety days. *Id.* at 39225; see 42 C.F.R. § 435.911(a) (stating that agencies must determine an applicant’s eligibility for Medicaid on the basis of disability within ninety days from the application date and must make eligibility determinations as to all other applicants within forty-five days). If an applicant or recipient makes a good faith attempt to present the required documents but cannot do so within the “reasonable opportunity” period because the documents are unavailable, the regulations require the state to help the applicant or recipient “secur[e] evidence of citizenship.” 71 Fed. Reg. at 39216.

PROCEDURAL HISTORY

On September 14, 2006, Judge Guzman issued an opinion on plaintiffs’ amended motion for a temporary restraining order (“TRO”) and preliminary injunction and plaintiffs’ amended motion for class certification. Judge Guzman denied the TRO and referred the motion for preliminary injunction to this Court. He also granted in part plaintiffs’ motion for class certification and certified the following class (“Class C” or “plaintiffs”):

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.

Plaintiffs ask the Court to enjoin the Secretary from applying the regulations to

them. Plaintiffs contend that the Secretary has violated the Administrative Procedures Act (“APA”) by applying the regulations to them because they are exempt under the Medicaid statute. In particular, plaintiffs argue that the new documentation requirement set forth in Section 6036 does not apply to them. According to plaintiffs, the new documentation requirement only applies to individuals who declare their citizenship or nationality for purposes of establishing eligibility for Medicaid benefits pursuant to 42 U.S.C. § 1320b-7. See 42 U.S.C. § 1396b(i)(22), (x)(1). Under the Medicaid statute, plaintiffs are eligible for Medicaid benefits automatically as a result of the determination of their eligibility for Foster Care and Adoption Assistance under Title IV-E of the Social Security Act. See 42 U.S.C. §§ 1396a(a)(10)(A)(i)(I) (requiring states to provide Medicaid to all individuals who are receiving aid or assistance under Title IV-E).³ Thus, because the regulations require the members of Class C to comply with the new documentation requirement, plaintiffs argue that the regulations violate Section 6036 and other provisions of the Medicaid Act.

LEGAL ANALYSIS

In order to obtain a preliminary injunction, plaintiffs must satisfy five criteria. First, they must show: (1) some likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) that they will suffer irreparable harm if the injunction is not granted. See *Ty, Inc. v. The Jones Group*, 237 F.3d 891, 895 (7th Cir. 2001) (citing *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)). “If

³ 42 U.S.C. § 1396a(a)(10)(A)(i)(I) provides that: “a State plan for medical assistance must provide for making medical assistance available to all individuals who are receiving aid or assistance under any plan of the State approved under title I, X, XIV, or XVI , or part A or part E of title IV.”

the court is satisfied that these three conditions have been met, then it must consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied. *Ty, Inc.*, 237 F.3d at 895. Finally, the court must consider whether and how the public interest will be affected if the injunction is granted or denied. *Id.* “This process involves engaging in what we term the sliding scale approach; the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff’s position.” *Id.*

Likelihood of Success, Inadequate Remedy at Law

Based on the reasoning set forth by Judge Guzman in his September 14, 2006 Memorandum Opinion and Order, this Court finds that plaintiffs have demonstrated that no adequate remedy at law exists and that they have a substantial likelihood of success on the merits of their APA claim. Despite the Secretary’s arguments to the contrary, we see no reason to depart from Judge Guzman’s well-reasoned decision.

Irreparable Harm

Thus, the central issue before this Court is whether plaintiffs have demonstrated that they will suffer irreparable harm if an injunction is not granted. In the proceedings before Judge Guzman, the named plaintiff, A.L., argued that she would be irreparably harmed in two ways if the TRO was not issued. She claimed that: (1) she would suffer emotional distress from trying to comply with the documentation requirement; and (2) she would suffer distress from anticipating that her benefits and, thus, her medical care, would be terminated. With respect to the first type of harm alleged by A.L., Judge Guzman found that while “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.”

With respect to the second type of harm alleged by A.L., Judge Guzman stated:

Stress caused by anticipating the loss of benefits and necessary medical care may, however, be irreparable. But A.L. has not demonstrated that she is likely to suffer that harm. As discussed above, 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.

Judge Guzman denied plaintiffs’ motion for a TRO because he found that A.L. had failed to show irreparable harm. However, he certified Class C and referred plaintiffs’ motion for preliminary injunction to this Court. Here, rather than looking solely to A.L., we must determine whether the plaintiffs as a class have demonstrated irreparable harm.

Plaintiffs make several arguments in support of their claim that they will suffer irreparable harm if an injunction is not issued. First, they contend that all plaintiffs will be subject to the new documentation rules between July 1, 2006 and July 1, 2007. In particular, plaintiffs argue that “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.” According to plaintiffs, they have a valuable right that they should not be subject to the Section 6036 documentation requirement and if the regulation is ultimately adjudged invalid, the children will be left with no remedy against the Secretary for violation of that right.

In support of this argument, plaintiffs rely on *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929) and *Cooper v. Salazar*, 196 F.3d 809, 816-17 (7th Cir. 1999). In *Ohio Oil*,

the claimant brought an action challenging the constitutionality of a state statute imposing a severance tax on the production of oil as a natural product of the soil. 279 U.S. at 813. The claimant sought a preliminary injunction enjoining payment of the tax while the action was pending. *Id.* at 814. The district court denied the motion. *Id.* The Supreme Court reversed, finding that if the tax was paid during the pendency of the suit and the statute was adjudged invalid, plaintiffs would have no remedy because the state law did not provide for restitution of money already paid. *Id.* at 815. Therefore, the Court found that the claimant would suffer irreparable injury absent an injunction. *Id.*

In *Cooper*, plaintiffs were a class of individuals who had discrimination actions pending before the Illinois Department of Human Rights (“IDHR”). They had obtained a preliminary injunction against the agency’s director, preventing him from implementing new procedures for investigating and resolving statutory discrimination claims. *Cooper*, 196 F.3d at 813. The Court of Appeals for the Seventh Circuit affirmed. *Id.* at 818. The Court found that plaintiffs demonstrated irreparable harm because they would have no redress if their meritorious discrimination claims were erroneously dismissed during the pendency of the litigation as a result of new administrative procedures that were later found to be constitutionally inadequate. *Id.* at 817.

We find that plaintiffs’ reliance on *Ohio Oil* and *Cooper* is misplaced. In both cases, the plaintiffs demonstrated irreparable harm by showing that absent an injunction, they would lose something in addition to their right not to be subject to the potentially invalid statute or new procedures. In *Ohio Oil*, plaintiffs would have lost the tax money they had already paid. 279 U.S. at 815. In *Cooper*, plaintiffs could have lost their meritorious civil rights claims as a result of the new administrative procedures. 196

F.3d at 817. Here, however, the only thing plaintiffs stand to lose is their right not to be subject to the documentation requirement.⁴ Judge Guzman already found that the stress associated with complying with the new requirement does not constitute irreparable harm. Consequently, we are not persuaded by plaintiffs' argument that they will suffer irreparable harm as a result of losing their right not to be subject to the documentation requirement.

Next, plaintiffs argue that without an injunction, irreparable harm will result because they will suffer stress from anticipating the loss of their benefits and medical care. As plaintiffs concede, this is the same type of harm Judge Guzman already analyzed. Judge Guzman refused to grant the TRO because A.L. had not demonstrated irreparable harm. Indeed, she failed to show that she was in danger of losing her benefits if an injunction was not issued because her mother's affidavit did not allege that she could not meet the documentation requirement. Accordingly, Judge Guzman found that absent evidence that the regulation was likely to cause her to lose her benefits, A.L. failed to demonstrate that she had any reason to anticipate, or suffer any harm from anticipating, that loss.

Here, plaintiffs contend that the majority of states have written policies implementing the new documentation requirement. According to plaintiffs, these state policies make it clear that benefits will be terminated if class members cannot provide the required documentation within a certain time period. However, after reviewing all of

⁴ In a separate argument, plaintiffs also claim that they stand to lose their Medicaid benefits. However, as discussed more fully below, plaintiffs failed to demonstrate that they are likely to lose their benefits absent an injunction.

the evidence and briefs in support of their motion for a preliminary injunction, this Court finds that plaintiffs have not demonstrated that any class member is in danger of losing his or her benefits if an injunction is not issued. The mere fact that the states have implemented the documentation requirement does not suffice. Plaintiffs have not produced a shred of evidence showing that any class member cannot provide the required documentation.

It appears that plaintiffs are asking this Court to assume that certain members of Class C will be unable to meet the new documentation requirement. We decline to make such an assumption absent any evidence in support of it. The fact that the class members are vulnerable and possibly abused and neglected children does not necessarily mean that they will be unable to comply with the documentation requirement. Plaintiffs submitted FAMIS figures demonstrating a significant drop in enrollment of children in Virginia's Medicaid program since July 2006.⁵ However, because Title IV-E children are not included in the FAMIS figures, these figures are not persuasive. This evidence simply does not support a finding that class members cannot meet the documentation requirement and thus, are in danger of losing their benefits.

Plaintiffs also argue that some of the class members are suffering the far greater harm of actual loss of health coverage and medical care. This Court agrees with plaintiffs that wrongful termination of benefits constitutes irreparable harm. However, plaintiffs have not presented any evidence showing that any member of the class has actually lost their Medicaid benefits. Moreover, unlike here, in the cases plaintiffs rely

⁵ FAMIS, or Family Access to Medical Insurance Security, is the program that covers children's Medicaid services in Virginia.

on, the plaintiffs' benefits had been terminated or reduced as a result of a statutory amendment. See *Moore v. Miller*, 579 F. Supp. 1188, 1191 (N.D. Ill. 1983) (plaintiffs' benefits under the Illinois Aid to Families with Dependent Children Program ("AFDC") were reduced); see *Massachusetts Asso. of Older Americans v. Sharp*, 700 F.2d 749 (1st Cir. 1983) (plaintiffs' AFDC benefits were terminated as a result of the stepparent liability provision recently added to the AFDC program); see also, *Kai v. Ross*, 336 F.3d 650, 653 (8th Cir. 2003) (change in the Medicaid statute had the effect of making plaintiffs and the members of their class ineligible for Medicaid); *Sockwell v. Maloney*, 431 F. Supp. 1006, 1009 (D. Conn. 1976) (named plaintiffs' federally-funded social services and state-funded foster care benefits were terminated without prior written notice or explanation of the grounds for termination, or an opportunity for a hearing), *aff'd Sockwell v. Maloney*, 554 F.2d 1236, 1237 (2d Cir. 1977).

Finally, plaintiffs contend that the mere threat the regulations pose to the availability of health care for class members constitutes a substantial risk of irreparable harm. In support of this argument, plaintiffs rely on *American Medical Asso. v. Weinberger*, 522 F.2d 921 (7th Cir. 1975). The *Weinberger* case involved Medicaid regulations that required, within 24-hours of a patient's admission to a hospital, a determination of whether the admission was medically necessary. *Id.* at 923. The Secretary would reimburse the hospital if the admission was found to be necessary. *Id.* "The trial court issued a preliminary injunction enjoining the enforcement of the regulations on the ground that the regulations may be in excess of the Secretary's statutory authority and may unlawfully interfere with the doctor-patient relationship." *Id.* at 924. The Court of Appeals for the Seventh Circuit affirmed, finding that the record

revealed “that a decision not to issue a preliminary injunction may have resulted in irreparable injury to patients and physicians.” *Id.* at 926. The Court noted that the challenged regulations may cause physicians to refrain from hospitalizing patients who they believe should be hospitalized, to the detriment of the health of such patients. *Id.* The Court also recognized harm to the physicians, whose ability to provide effective treatment would be severely hampered by the regulations. *Id.*

We are not persuaded that *Weinberger* supports entry of a preliminary injunction simply because there is a threat to the availability of health care for the class members. Nor does this Court equate the potential for harm in *Weinberger* to the potential for harm in this case. There, the regulations clearly would have affected the way physicians practiced medicine and the treatment patients received. Here, however, plaintiffs will not suffer any harm from anticipating the loss of their benefits unless they are unable to meet the new documentation requirement. This Court recognizes that, due to the nature of who these children are, it is possible that certain class members might not be able to comply with the new documentation requirement. However, as stated above, plaintiffs have failed to demonstrate that any class members cannot meet the requirement.

When Judge Guzman referred the motion for preliminary injunction to this Court, he gave plaintiffs an opportunity to show that there are class members in danger of losing their benefits. He denied the TRO because the affidavit submitted by A.L.’s mother failed to show that A.L. could not comply with the documentation requirement. As a result, the affidavit was insufficient to demonstrate that she was in danger of losing her benefits. What this Court needed, and what plaintiffs failed to present, was

evidence that certain class members are in danger of losing their benefits because they cannot provide the required documentation. Absent any evidence that the regulations are likely to cause class members to lose their benefits, we cannot conclude that they will suffer irreparable harm from anticipating that loss.

Balance of Harms, Public Interest

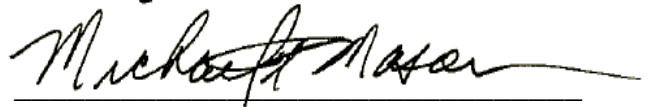
Once again, plaintiffs' failure to show irreparable harm dooms their request for injunctive relief. Because plaintiffs have failed to demonstrate irreparable harm, there is no need to balance the potential harm to the Secretary or consider how the public interest will be affected. See *Abbott Labs.*, 971 F.2d at 11 (recognizing that if the moving party cannot establish any one of the elements needed to obtain a preliminary injunction, the court's inquiry is over and the injunction must be denied).

CONCLUSION

For the reasons stated above, we recommend that the District Court DENY plaintiffs' motion for a preliminary injunction without prejudice. However, if plaintiffs are able to come forward with evidence demonstrating that certain class members cannot comply with the documentation requirement, this Court recommends that the District Court allow plaintiffs to file an amended motion for preliminary injunction. Specific written objections to this report and recommendation may be served and filed within 10 business days from the date that this order is served. Fed. R. Civ. P. 72(a). Failure to file objections with the District Court within the specified time will result in a waiver of the rights to appeal all findings, factual and legal, made by this Court in the report and

recommendation. *Lorentzen v. Anderson Pest Control*, 64 F.3d 327, 330 (7th Cir. 1995).

ENTER:

A handwritten signature in black ink, appearing to read "Michael T. Mason", written over a horizontal line.

MICHAEL T. MASON
United States Magistrate Judge

Dated: December 8, 2006