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Governor's Budget Cuts Ending Health Care for Immigrant Women and Children Violated Maryland's Equal Protection Guarantee

The Maryland Medical Assistance Program abruptly terminated more than 3,700 immigrant pregnant women and children from its rolls in July 2005—a result of then-Gov. Robert Ehrlich's decision to eliminate funding for this population from the executive budget. Families whose children no longer could get critical medical care sought help from Maryland's Legal Aid Bureau (Maryland's statewide program funded by the Legal Services Corporation (LSC)). With pro bono help from a private law firm, Legal Aid sued the State.¹ In *Ehrlich v. Perez* the plaintiffs ultimately prevailed in the Maryland Court of Appeals, the state's highest court.² In this case note we give the historical backdrop for the lawsuit, summarize the litigation, and offer a few "lessons learned."

The Historical Backdrop: Maryland's Long-Standing Commitment to Health Care Coverage for Immigrants

Before July 2005 indigent documented immigrants in Maryland received the same coverage for their medical needs as indigent citizens. Maryland's commitment to meeting the health care needs of noncitizens goes back to 1945, when Maryland initiated a program to provide medical care to the "medically indigent." At that time the State made no distinction between citizens and noncitizens.³ In 1967 Maryland opted into the federal Medicaid system and continued to provide health care to documented immigrants.

The passage of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the welfare reform law, eliminated federal funding for Medicaid for documented immigrants who had resided in the country for less than five years and left coverage of that population a matter of individual state choice.⁴ Maryland was thus forced to reexamine the scope of state coverage for the health care needs of immigrant residents. Maryland's response was clear. A Governor's

task force recommended that Maryland fill the void that the welfare reform law created and provide state-funded coverage for the "most vulnerable" immigrant residents. In so doing, the task force underscored its concern for the health care of children and prenatal care for pregnant women: "Surely it makes economic sense to pay for prenatal care and delivery, rather than to risk the birth of unhealthy babies which will require far greater entitlement expenditures after birth."⁵

The task force concluded that no policy objective would be fulfilled by excluding documented immigrants in the state from such fundamental health care protections:

It is quite clear that the combined forces of the Welfare Act and the Immigration Act produced a harsh legislative framework as it relates to legal immigrants. The new Act's treatment of legal immigrants is not justified by any legitimately articulated policy goal.... By electing not to abandon some of the most vulnerable segments of its population, Maryland has not only made a wise economic decision, but also has demonstrated that, at least in our state, compassion in government remains a cherished American virtue.⁶

Policymakers concurred with the task force. Responding to the welfare reform law's cuts, the General Assembly expressly continued coverage for documented immigrant children and pregnant women in Maryland's Medical Assistance Program through the use of state funds.⁷ The resulting legislation offered them the same comprehensive scope of benefits available to the state's citizen children and pregnant women.

The Governor's Budgetary Axe

In January 2005 the landscape changed. Governor Ehrlich presented to the General Assembly a budget bill for the 2006 fiscal year that included "cost containment" measures purportedly designed to address growth in the Medical Assistance Program.⁸ Among those measures was the elimination of all funding for documented immigrant pregnant women and children; the elimination was estimated to achieve a savings of approximately \$7 million annually, or a paltry .0875 percent of the overall \$4 billion Medical Assistance budget.⁹

¹The Legal Aid Bureau litigation team consisted of Regan Bailey, Hannah Lieberman, Sabrina Wear, and Megan Sullivan. Douglas M. Bregman, Heather Libman Kafetz, and Catherine Harrington of Bregman, Berbert, Schwartz & Gilday LLC in Bethesda, Maryland, cocounseled the case. On appeal, Dan Friedman of Saul Ewing LLP (and author of the seminal treatise on Maryland constitutional law) entered an appearance as of counsel.

²*Ehrlich v. Perez*, 908 A.2d 1220 (Md. 2006).

³MARYLAND STATE PLANNING COMMISSION, INITIAL REPORT OF THE COMMITTEE ON MEDICAL CARE 6 (1943).

⁴8 U.S.C. § 1613 (1996).

⁵GOVERNOR'S TASK FORCE ON THE LOSS OF SSI BENEFITS FOR LEGAL IMMIGRANTS, REPORT OF THE GOVERNOR'S TASK FORCE ON THE LOSS OF SSI BENEFITS FOR LEGAL IMMIGRANTS IN MARYLAND 11 (1997).

⁶*Id.* at 17.

⁷Md. CODE ANN., HEALTH-GEN. § 15-103(a)(2)(viii) (1997).

⁸MARYLAND. GENERAL ASSEMBLY, THE 90-DAY REPORT: REVIEW OF THE 2005 LEGISLATIVE SESSION PART A 17 (2005).

⁹See The Department of Legislative Services Analysis of the FY 2006 Maryland Executive Budget 16 (2005) (on file with Regan Bailey and Hannah Lieberman). Other Medical Assistance Program reductions that the governor heralded as "cost-containment measures" were incremental reductions in services equally affecting all population groups. No other Medical Assistance Program or identifiable category of recipients was targeted for a wholesale elimination of funding. See Fiscal 2006 Savings from New/Expanded Cost Containment Actions, Exhibit 4, http://mlis.state.md.us/2995RS/budget_docs/All.Operating/MooQ-DHMH_Medical_Care_Programs_Administration.pdf.

The Maryland Constitution grants the governor unusual power over the development of the state's budget. Although the legislature has the power to eliminate or reduce items in the governor's proposed budget, the legislature may not otherwise alter (increase or add to) the executive's budget bill.¹⁰ Maryland's constitutional allocation of budgetary authority placed the General Assembly in a bind. Although there was substantial outcry from legislators regarding the elimination of Medical Assistance coverage for documented pregnant women and children immigrants, the unusual constitutional provisions meant that legislators' hands were substantially tied.¹¹

The Resulting Harm to the Health of Children and Pregnant Women

More than 3,700 Maryland residents were affected by the governor's cut.¹² Indeed, there was really no dispute among the parties that county services, hospitals, and community clinics would or could not provide the comprehensive care available under Medical Assistance. Five families, consisting of thirteen children who lost their Medical Assistance coverage because of the governor's budget cut, sought assistance from the Legal Aid Bureau. Several of the children suffered from serious illnesses.

Flor, 17, was experiencing ongoing complications from West Nile virus, including cognitive impairment and seizures that required extensive medical treatment. Brayan, 11, suffered from histiocytosis, an immune system disorder causing the formation of tumors. Doctors suspected that he also suffered from a health condition known as vonWillebrand Disease, a blood-clotting disorder causing excessive bleeding. Brayan needed constant medical monitoring to avoid recurrence of the tumors. After his Medical Assistance coverage was terminated, Brayan's family was unable to continue the tests that he needed. Eelaaf, 5, was born with dislocated hips for which she had a series of surgeries. In 2004 doctors inserted a temporary clip in her hip to improve her ability to walk. Because of the elimination of her Medical Assistance coverage, her family had to discontinue her physical therapy and delay surgery to remove the clip that she had outgrown. Eelaaf's family delayed seeking medical help when Eelaaf developed a breathing disorder until she exhibited serious breathing difficulty. The emergency room diagnosed possible asthma and urged her parents to follow up with a pediatrician—a recourse that the family could not afford. All of the children needed regular checkups, including early screening for illnesses and developmental problems that had been covered by their Medical Assistance.

Coordinated, Multiforum Advocacy Strategies

When the affected families approached the Legal Aid Bureau, we brought to the table not only our expertise but also the

federal restrictions imposed on LSC-funded legal services providers. Such restrictions included bars on class action litigation, collection of attorney fees (a strategic negotiation tool), and representation of most undocumented immigrants. The bar on representing undocumented immigrants was perhaps the most insidious, even though the governmental action was taken against documented immigrants in this case. We discovered that Legal Aid was frequently assumed not to be a resource for any immigrants, even those who are documented. Thus families who needed our services did not come to us because they did not think we could help them.

However, our advocacy demonstrates that the restrictions, while onerous, do not prevent LSC-funded programs from achieving systemic change and broad-based results for their clients as well as other potentially eligible clients who do not find us. We utilized a variety of coordinated strategies and forums to restore benefits for the families who had sought our assistance as well as for all adversely affected terminated immigrant pregnant women and children.

Initially we engaged in extensive community outreach on the issue and sought to inform the communities that we serve about the cuts. We developed relationships with other advocacy and social service agencies that serve immigrants and informed them about the termination of benefits and potential sources of both legal and health care assistance. The outreach not only informed the community of this particular development but educated immigrants and other low-income persons with health care problems about the assistance that Legal Aid can give and how access to health care is a legal as well as a medical issue.

Our community outreach led to invitations to testify before the General Assembly on proposed legislation to restore the benefits. We developed relationships with members of the English and Spanish language press in Washington, D.C., and Baltimore, our two largest urban centers, as well as public and Spanish-language radio and television. Our contacts resulted in extensive coverage of both the issue and the lawsuit that we ultimately filed. In the press coverage we sought to put a human face on the consequences of the budget cuts and tried to counter the increasingly hostile local and national rhetoric regarding immigrants. Our message was that these families were hardworking taxpayers, whose children were suffering as a result of the State's invidious discrimination.

To deal with the critical needs and immediate suffering of the children, we actively sought out health care programs that could meet at least some of their needs. While these stopgap measures provided far less coverage than Medical Assistance, they did give the children some critical care before and during litigation of the case.

When we determined that filing the lawsuit challenging the budget cuts was the only remaining option, we acted on a

¹⁰Md. CONST., art. III, § 52. The General Assembly may restrict funds for specified purposes, *id.*, and did so with respect to \$1.5 million that it restricted for limited prenatal care for legal immigrant pregnant women who were already enrolled in the Medical Assistance Program as of July 1, 2005.

¹¹Before the close of the legislative session, the outlook for revenue substantially improved, resulting in an expected surplus to the state budget of approximately \$1 billion. Despite this unexpected improvement, the governor remained committed to eliminating Medical Assistance coverage for these pregnant women and children.

¹²Enrolled in the Medical Assistance Program as of May 2005 were 3,718 children and pregnant women. See Medical Assistance Eligibility, 32 Md. Reg. 1526 (Sept. 2, 2005).

deliberate litigation strategy.¹³ We needed to obtain a decision on the merits as quickly as possible, and we wanted to avoid potentially inhospitable federal courts. We believed that local courts would have a stronger feel for the plight of local residents and would be concerned with the impact of the State cuts on local county resources. We believed that we were likely to get at least as expansive a reading of equal protection under state law (which incorporates federal law as a threshold but not a ceiling) as we could on a federal constitutional claim in federal court (and the Fourth Circuit).¹⁴ Therefore we included only an equal protection claim, based exclusively on Maryland's Declaration of Rights.¹⁵ Relying on the Maryland Constitution also gave us an opportunity to build on state constitutional law since no state cases directly addressed the application of the guarantee of equal protection to immigrants.

The Lawsuit

On behalf of thirteen children, Legal Aid and pro bono counsel filed a single-count complaint against Governor Ehrlich and the Department of Health and Mental Hygiene in state court.¹⁶ The complaint alleged that the governor's budget cut targeting documented immigrants violated the guarantee of equal protection under Article 24 of the Maryland Declaration of Rights. The children sought preliminary injunctive relief to reinstate their Medical Assistance coverage pending resolution on the merits.

The State's response was two-pronged. First, the State contended that the termination did not violate equal protection guarantees because the termination embodied congressional immigration policy. The termination should therefore be judged by the same test applicable when Congress draws distinctions between immigrants and citizens—the highly deferential “rational basis” test. The State tacitly conceded that its articulated reason for the cut—cost savings—would not satisfy the more searching “strict scrutiny” standard of review. Second, the State asserted that the governor's budget authority under the Maryland Constitution was not subject to the provisions of the Declaration of Rights, and, even if it were, the court could not order the executive to appropriate funds to pay for plaintiffs' Medical Assistance.

The case thus squarely raised two critically important and, in Maryland, novel issues: (1) whether a “strict scrutiny” or a deferential “rational basis” standard of review governed Maryland's decision to deny immigrants state benefits based on their status as immigrants and (2) whether the Executive's budgetary power is subject to the protections, including the guarantee of equal protection, found in the Maryland Declaration of Rights. The case was briefed and argued.¹⁷

The trial court found that the defendants' decision to terminate funding for Medical Assistance on the basis of plaintiffs' status as legal immigrants (a classification based on “alienage”) violated Maryland's guarantee of equal protection under the law.¹⁸ The trial court ordered, inter alia, restoration of their Medical Assistance coverage pending resolution of the merits.

The State defendants sought a stay and appealed the decision to the Maryland Court of Special Appeals, the intermediate appellate court. However, in the middle of briefing, Maryland's highest court—the Court of Appeals—issued a writ of certiorari on its own initiative to review the trial court's issuance of the preliminary injunction.

Maryland Court of Appeals Ruling in Favor of the Children

On October 12, 2006, the Maryland Court of Appeals issued its unanimous ruling that the State violated the constitutional right to equal protection guaranteed by Article 24 of Maryland's Declaration of Rights when it terminated plaintiffs' Medical Assistance coverage based on their status as immigrants.¹⁹ Following well-established U.S. Supreme Court precedent, the Maryland Court of Appeals reviewed the vast difference between congressional and state power to regulate immigration and therefore discriminate between immigrants and citizens. Congressional distinctions between citizens and aliens are judged according to a relaxed, “rational basis” standard of review because they reflect the exercise of Congress' plenary power to regulate naturalization and immigration.²⁰ Thus federal laws that deny benefits on the basis of alienage generally withstand constitutional scrutiny as long as there is a rational basis (including fiscal concerns or pro-

¹³Before we filed the lawsuit, we attempted, unsuccessfully, to negotiate a solution with the State. Our efforts satisfied us that we had not rushed to litigation, had given the State the opportunity to give a legitimate reason for the cuts, and had exhausted other options.

¹⁴E.g., the Maryland Constitution allows for a broader use of an intermediate “heightened” scrutiny standard, which could have become a factor if the Court of Appeals had not found that strict scrutiny applied. *Frankel v. Board of Regents of University of Maryland System*, 761 A.2d 324, 332 (Md. 2000).

¹⁵The Declaration of Rights was adopted by the Constitutional Convention as an enumeration of the principles underlying Maryland's Constitution, which applies those principles, and upon which the new state government was to be based. See, e.g., *Mayor and City Council of Baltimore v. State*, 15 Md. 376, 459 (1860); *Anderson v. Baker*, 23 Md. 531, 628 (1865). The Declaration of Rights provides a guide in “questions of doubt as to the meaning of the Constitution,” *Commission on Medical Discipline v. Stillman*, 291 Md. 390, 411 (1981).

¹⁶The initial lawsuit was brought on behalf of eight and amended thereafter to add five children. *Perez*, 908 A.2d 1220 (Md. 2006).

¹⁷The parties agreed to proceed on the basis of affidavits rather than live testimony. Reasonable because the key facts were not seriously disputed, this strategy was partially to save time and to avoid subjecting the children's parents to the process (most would have required interpreters, and, for some, the process itself was foreign and intimidating).

¹⁸*Perez*, No. 265850-V (Md. Cir. Ct. Montgomery County Jan. 12, 2006).

¹⁹*Perez*, 908 A.2d 1220 (Md. 2006). Two judges joined in the judgment only. They did not write a concurrence or otherwise indicate what, if any, reservations they had with the opinion.

²⁰*Perez*, 908 A.2d at 1237 (citing *Mathews v. Diaz*, 426 U.S.67, 84 (1976)).

moting immigrant “self-sufficiency”) articulated for the distinction. By contrast, state laws that attempt to discriminate between citizens and legal immigrants are inherently suspect and therefore subject to strict judicial scrutiny because states do not have similar authority to regulate immigration.²¹ State laws that discriminate on the basis of alienage are therefore subject to a rigorous “strict scrutiny” analysis.²²

However, the distinction between congressional and state powers tends to blur when Congress applies a national, uniform rule for the treatment of aliens, and states adhere to that rule. In such a case, the state’s action is afforded the same deference that congressional actions enjoy and is reviewed under a “rational basis” standard.²³ The question then becomes, when the welfare reform law authorized states to determine for themselves whether to use state funds to serve documented immigrants no longer eligible for federally funded Medicaid, did Congress issue a “uniform rule” that would permit a state’s decision to be reviewed under a deferential “rational review” test? The State defendants contended that it did and emphasized that the termination of benefits to immigrants furthered Congress’ policy of encouraging immigrant self-sufficiency. The plaintiffs stressed that the welfare reform law explicitly conferred complete discretion to the states as to whether they should include coverage for legal immigrants in their state-funded programs.²⁴ In conferring discretion without articulating any standards at all, Congress failed to enunciate a uniform “federal rule”; Congress was therefore not exercising its plenary power to regulate immigration, and the welfare reform law did not insulate Maryland’s decision to discriminate against legal immigrants from strict scrutiny review.

The Maryland Court of Appeals adopted plaintiffs’ position. The court noted that, despite Congress’ broad power to regulate immigration, there are significant limitations on Congress’ ability to delegate that authority to the states:

[The Personal Responsibility and Work Opportunity Reconciliation Act of 1996] prescribes no uniform

rule.... Rather, Congress has provided discretion to the States with regard to their decisions whether to provide State-funded medical benefits, on the basis of alienage, to those residents who do not meet the requirements for federal medical assistance. The grant of discretion, without more, is not a uniform rule for purposes of imposing only a rational basis test. The unbridled discretion afforded by Congress prevents us from characterizing the material provisions of [the Personal Responsibility and Work Opportunity Reconciliation Act of 1996] as ‘uniform’.²⁵

Absent a uniform rule, strict scrutiny review applies to state action.²⁶ The Maryland Court of Appeals reached the critical conclusion that no uniform rule insulated Maryland’s action from strict scrutiny review: “This laissez faire federal approach to granting discretionary authority ... does not prescribe a single uniform or comprehensive approach.”²⁷ Thus the court was left with the question whether the State’s discrimination against documented immigrants was narrowly tailored to serve a compelling state interest and the court answered the question in the negative. The court found that neither of the purported justifications for denying federal benefit eligibility (the promotion of self-sufficiency and the discouragement of illegal aliens) constituted a sufficiently compelling state interest to justify the State’s action.²⁸

The court summarily rejected the State’s arguments regarding the unassailable primacy of the executive’s budgetary authority. The court categorically rejected the argument that equal protection guarantees of Article 24 do not apply to the budget appropriation process “because the executive and legislative budget authority is subject to the constitutional limitations of the Declaration of Rights”.²⁹

Indeed, to hold otherwise would create a “legal” means for State government to employ invidious classifications that violate the equal protection guarantees of the Maryland Declaration of Rights (as

²¹*Id.* at 1236 (citing *Graham v. Richardson*, 403 U.S. 365, 376 (1971); *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992)). Undocumented immigrants are generally afforded less protection under both state and federal laws, and neither the case nor this case note addresses their situation.

²²Under a “strict scrutiny” standard, the statutory classification at issue must be narrowly tailored to serve a compelling state interest. *Perez*, 908 A.2d at 1235. See also *Graham*, 403 U.S. at 372 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). The U.S. Supreme Court has consistently held that cost savings is not a sufficiently compelling state interest to justify such an invidious distinction.

²³*Perez*, 908 A.2d at 1237. See also *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982).

²⁴8 U.S.C. § 1622. With certain exceptions not relevant here, “a State is authorized to determine the eligibility for any State public benefits of an alien who is a qualified alien....”

²⁵*Perez*, 908 A.2d at 1241.

²⁶*Id.*

²⁷*Id.* at 1241. The Maryland Court of Appeals relied heavily on a similar successful challenge to elimination of state-only medical assistance for legal immigrants in New York. See *Aliessa v. Novello*, 754 N.E. 2d 1085 (N.Y. 2001) (Clearinghouse No. 52,429).

²⁸*Perez*, 908 A.2d at 1244 n. 23. Since the issue on appeal was technically whether the trial court erred in issuing a preliminary injunction, the Maryland Court of Appeals concluded that its legal analysis meant that the plaintiffs were likely to succeed on the merits of their claim. The Court of Appeals also found that plaintiffs satisfied the remaining prongs of the preliminary injunction analysis—the balance of hardship tipped decisively in plaintiffs’ favor.

²⁹*Id.* at 1247.

well as other constitutional guarantees) by adopting budgets rather than by enacting laws, which we have long recognized is subject to constitutional constraints.³⁰

The Aftermath

After the court issued its decision, the State agreed to reinstate all of the terminated families' Medical Assistance, to conduct outreach to ensure that other potentially eligible immigrant women and children would know that Medical Assistance is available, and to instruct the local offices of its Department of Social Services that they should not turn away documented immigrants. Thus, although the case was not a class action, it secured classwide relief. This lawsuit, we hope, raised Legal Aid's profile in immigrant communities and informed potentially eligible clients that access to health care may be a legal right. This case may help advocates in other states faced with similar cuts or decisions to limit services on the basis of immigration status. In developing our theories, we learned how much this case was based on the work of a variety of legal aid providers and how our work continues to build critically important legal doctrine for poor people across the country.³¹ In undertaking such litigation, we urge advocates to consider seriously their own state constitutions and whether their state courts are likely to respond favorably to

the claim. We also encourage LSC-funded programs to take on these types of challenges and not view the restrictions as a barrier. We remain able to effectuate broad-based change for clients and their communities, and we owe it to them to try to do so.

[Editor's Note: Case documents in *Ehrlich v. Perez* (Clearinghouse No. 55,993), are available in our Poverty Law Library at www.povertylaw.org.]

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³⁰*Id.*

³¹E.g., plaintiffs and the Maryland Court of Appeals relied on *Aliessa*, 754 N.E.2d at 1085. Plaintiffs' counsel in *Aliessa* consisted of a number of legal aid providers in New York. In bringing the *Perez* case, counsel not only relied on law developed by other programs but received invaluable guidance from others in the field, particularly the National Immigration Law Center, to whom we are indebted for its assistance and encouragement

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