1987 WL 8412
United States District Court, E.D. New York.

Lydia LEWIS, etc., Plaintiffs,
v.
William GRINKER, etc., et alia, Defendants.

No. CV–79–1740. | March 6, 1987.

Opinion

MEMORANDUM AND ORDER

SIFTON, District Judge.

***1** This class action is brought by Lydia Lewis and fourteen other named class representatives seeking a permanent injunction and declaratory judgment authorizing the payment of Medicaid to so-called "non-legal permanent resident" ("non-LPR") aliens in New York State.[1] The matter is currently before the Court on plaintiff's motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Plaintiffs commenced this action to challenge a 1973 regulation of the Secretary of Health and Human Services ("Secretary"), 42 C.F.R. § 435.402(b), and a companion New York State regulation, 18 NYCRR § 349.3, denying Medicaid benefits to all aliens except those who are lawfully admitted for permanent residence or permanently residing in the United States under color of law ("PRUCOL"). Plaintiffs challenged the regulations on four grounds: (1) that they were unauthorized by the Medicaid statute, (2) that they violated constitutional principles of equal protection and due process, (3) that the Secretary's definition of PRUCOL under the regulations was impermissibly narrow, and (4) that under the Secretary's own interpretation of the Medicaid statute, pregnant alien women are entitled to benefits according to the eligibility of their unborn children who are presumptively not aliens and that, accordingly, the regulations are misapplied to this class of alien mothers-to-be.

On July 14, 1986, this Court issued a Memorandum and Order which, among other things, determined that the Secretary's regulation establishing alienage requirements for all categories of otherwise eligible Medicaid recipients was not authorized under the Medicaid statute. *Lewis, supra* at 35–56.[2] Having based its decision on these statutory grounds, the Court did not reach any of plaintiffs' additional claims.

Following the decision, the Court directed the parties to settle a form of judgment. However, before a final judgment was entered, Congress passed the Omnibus Budget Reconciliation Act of 1986 ("OBRA"), Pub.L. No. 99–509, *reprinted in* 10 U.S.Code Cong. & Admin.News (100 Stat.) (Dec.1986), and the Immigration Reform and Control Act of 1986 ("ICRA"), Pub.L. No. 99–603, *reprinted in* 10A U.S.Code Cong. & Admin.News (100 Stat.) (Dec.1986), both of which contain provisions affecting the eligibility of aliens for Medicaid benefits. The Court thereafter directed the parties to brief the effects of these enactments on the resolution of this case.

Section 9406 of OBRA has a direct impact on the Court's earlier decision since it provides statutory authority for imposing alienage restrictions on Medicaid eligibility to cover non-emergency medical care. Under the new law, eligibility for Medicaid is restricted to aliens who are either lawful permanent residents or otherwise permanently residing in this country under color of law, except where the alien is otherwise qualified for Medicaid and has an emergency medical condition. The amendment became effective January 1, 1987. § 9406(c).

***2** The ICRA amendments have less of an immediate impact on the Court's decision. Section 203 of the Act changes the requirements for aliens to be eligible for "registry," an immigration status the Secretary considers to qualify an alien for Medicaid eligibility. Previously, registry was available only to aliens who had resided in the United States continuously since June 30, 1948. ICRA changes the relevant date to January 1, 1972.

ICRA will also affect Medicaid eligibility of certain aliens in the future. Section 201 of the Act creates an amnesty in the form of a new immigration status, "lawful temporary residence," which is generally available to aliens who have resided in the United States continuously and unlawfully since before January 1, 1982. Aliens who meet the requirements for lawful temporary residence status will be eligible for Medicaid if they are (1) aged, blind or disabled, (2) pregnant, (3) under 18, or (4) in need of emergency care. Section § 201(h).[3] The INS will not begin accepting applications for temporary residence status until May 5, 1987.

In response to these legislative changes, plaintiffs, joined by the City in its role as plaintiff-intervenor,[4] now seek preliminary relief on two of three grounds asserted in their initial motion papers. Plaintiffs now contend (1) that the Secretary's regulatory definition of the phrase "permanently residing under color of law" as used in the amended statute is impermissibly narrow and (2) that the continued practice of denying pregnant alien mothers prenatal care violates the Medicaid statute.

When Congress legislated a PRUCOL standard for Medicaid recipients in the recent OBRA amendments, it left the phrase undefined. However, the House Budget Committee report expressly stated: "The Committee intends that the Secretary and the States broadly interpret the phrase 'under color of law' to include all of the categories recognized by immigration law, policy and practice." H.R.Rep. No. 727, 99th Cong., 2d Sess. 111, *reprinted in* 1986 U.S.Code Cong. & Admin.News, 3607, 3700–01. In response to this legislative directive, the Secretary has prepared for issuance an update to the Medicaid manual used in New York State, Transmittal No. 24, which adopts the standard currently in effect with respect to Social Security Income ("SSI") benefits, 42 U.S.C. §§ 1381 *et seq.,* as a result of the consent decree approved by the Court of Appeals for this Circuit in *Berger v. Heckler,* 771 F.2d 1556 (2d Cir.1985).[5]

Under the *Berger* standard now applicable to all Medicaid recipients, aliens "who are living in the United States with the knowledge and permission of the INS and whose departure INS does not contemplate enforcing" may be considered PRUCOL. Tracking the *Berger* decree, the transmittal sets forth a non-exclusive list of fifteen immigration categories that will be considered to fall within the PRUCOL requirement for purposes of Medicaid eligibility. In addition, there is an open-ended category by which an alien can establish his or her PRUCOL status, if: (1) it can be shown by the particular alien applying for Medicaid benefits that it is the policy or practice of the INS not to enforce the departure of aliens in such category, or (2) on all the facts and circumstances in that particular case, it appears that INS is otherwise permitting the alien to reside in the United States indefinitely.[6]

***3** Plaintiffs attack the Secretary's guidelines on numerous fronts. On a general level, they argue that the proper definition of PRUCOL would encompass "all aliens residing in New York on a continuing basis with INS acquiescence." Based upon a rather extensive analysis of INS practices in New York, plaintiffs propose a list of twenty-two categories they claim would meet their proposed definition of PRUCOL.

Although many of plaintiffs' categories also fall within the Secretary's definition, plaintiffs' list is more expansive in several significant respects. First, many of plaintiffs' categories include both aliens who have achieved the status indicated and those who have applications pending to be classified as in that category. Plaintiffs contend that these aliens should also be automatically considered PRUCOL since it is not INS policy or practice to deport aliens with pending applications. Second, plaintiffs object to the fact that some of the Secretary's categories require an additional individualized showing that INS does not contemplate enforcing the applicant's departure. Plaintiffs argue that the requirement for individualized determinations is unnecessarily burdensome in light of the fact that INS does not enforce the departure of aliens in these categories. Third, plaintiffs recognize a number of additional categories which they contend represent a more accurate reflection of INS policy and practice in New York than the categories in the Secretary's list. Plaintiffs particularly object to the Secretary's refusal to include children, people over 70, or persons who are seriously ill, disabled or hospitalized. Finally, plaintiffs object to many of the Secretary's documentary requirements, arguing that they are often difficult or impossible to meet due to lengthy delays in the issuance of INS documents or INS unwillingness to provide informal written verification of an applicant's status. Many of plaintiffs' categories would require no documentary proof at all.

Plaintiffs also seek to preliminarily enjoin defendants from denying or terminating Medicaid eligibility for prenatal services provided to any pregnant alien woman whose unborn child would be Medicaid eligible if born at the time of application. According to plaintiffs, the current practice in New York is to provide Medicaid coverage for prenatal care to certain categories of pregnant women who are themselves ineligible for Medicaid. Prenatal care, however, is nevertheless denied to alien women if the basis for their ineligibility is their alien status. Plaintiffs argue that, since the avowed purpose for covering otherwise ineligible pregnant women is to provide care for their unborn children, there is no rational basis for denying care to the unborn children of alien mothers solely due to their mothers' alien status and that in any event the Secretary's interpretation of the Medicaid statute as authorizing eligibility to be determined based on the eligibility of the unborn child is the correct one.

***4** In response, the Secretary rejects plaintiffs' contention that the Medicaid statute encompasses a separate eligibility category for unborn children. Rather, the Secretary argues that unborns are only intended incidentally to benefit from the coverage provided to pregnant mothers. All of the other defendants, however, agree with plaintiffs' position that the statute includes coverage for the unborn. The state defendant, however, asserts that the federal defendant's alienage requirements compel it to deny coverage to the unborn of pregnant alien women.[7]

For the reasons set forth below, plaintiffs' motion for a preliminary injunction is granted in part and denied in part.

What follows sets forth this Court's findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

The general standard in this Circuit for obtaining a

preliminary injunction requires a showing of (a) irreparable harm and (b) either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. *Loveridge v. Pendelton Woolen Mills, Inc.,* 788 F.2d 914, 917 (2d Cir.1986), *quoting Kaplan v. Board of Education of the City School District of the City of New York,* 759 F.2d 256, 259 (2d Cir.1985). The burden is on the moving party to establish entitlement to injunctive relief. *Id.*

The Secretary, however, contends that only the likelihood of success standard should be applied here since Congress' decision to limit Medicaid expenditures to PRUCOL aliens or for emergency care constitutes governmental action in the public interest. The Secretary relies on *Union Carbide Agricultural Products Co., Inc. v. Costle,* 632 F.2d 1014, 1017–18 (2d Cir.1980), *cert. denied,* 450 U.S. 996 (1981), which states:

"When Congress authorizes or mandates governmental action that is in the public interest, more than a 'fair ground for litigation' must be shown before the action will be stopped in its tracks by court order."

Id. at 1018. *See also Medical Society of New York v. Toia,* 560 F.2d 535, 538 (2d Cir.1977).

The difficulty with the government's position is that it identifies the public interest solely with the public fisc. The public, however, also has an interest in the proper administration of the Medicaid program and providing necessary medical care to those who are entitled to it. In other situations where neither party has an exclusive claim of the public interest, courts have declined to apply the *Union Carbide* doctrine. *See, e.g., Carey v. Klutznick,* 637 F.2d 834, 839 (2d Cir.1980); *Dixon v. Heckler,* 589 F.Supp. 1494, 1501 (S.D.N.Y.1984), *aff'd,* 785 F.2d 1102 (2d Cir.1986). Accordingly, the Court will apply the broader preliminary injunction standard in evaluating plaintiffs' requested relief.

Irreparable Harm

Irreparable harm means "injury for which a monetary award cannot be adequate compensation." *Loveridge, supra,* 788 F.2d at 914, *quoting Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.,* 596 F.2d 70, 72 (2d Cir.1979). Plaintiffs argue that the denial of medical care to persons who cannot otherwise afford the cost of such services is, by definition, irreparable harm. The Secretary argues in response that the emergency care now available to all otherwise eligible aliens greatly reduces the actual harm that individual class members may suffer as a result of their alien status.

***5** While the Court agrees with the Secretary that the emergency care exception fortunately restricts plaintiffs' ability to prove irreparable harm, by no means does it eliminate it. Medicaid pays for only those services necessary to prevent, diagnose or cure conditions that cause acute suffering, endanger life, result in illness or infirmity, interfere with capacity for normal activity, or threaten some significant handicap. *See* New York Social Services Law § 365–a. Moreover, coverage is available only for those persons who have been determined to be so poor that they cannot afford to pay for the care themselves. Clearly, not all Medicaid services qualify as emergency care, and yet their wrongful deprivation would constitute irreparable harm.

For example, plaintiffs have submitted the affidavit of class member Hilda Rocto. Ms. Rocto is a 77–year-old Jamaican woman who entered the United States in 1970 to visit her brother. A number of years ago, her brother filed a relative petition on her behalf, and, although the petition was approved, her brother died before it could be finally processed. Ms. Rocto has no source of income, no savings, and presently lives with relatives on the lower east side of Manhattan. Although her medical condition is not described in any detail, she states she currently needs treatment for high blood pressure, heart palpitations, and stomach problems. Ms. Rocto walks to Bellevue Geriatric Unit for treatment on an out-patient basis.

Ms. Rocto states that she receives bills for her treatment, including large bills for a one-month hospitalization, which she cannot pay and which have been referred to a collection agency. She is afraid that her services will be cut off if she is unable to procure Medicaid. She states that her relatives no longer provide for her, but without Medicaid she cannot be placed in a proprietary home with meals or in an apartment with home care.

In addition, plaintiffs have submitted affirmations regarding several named plaintiffs who, although currently receiving Medicaid pursuant to an earlier preliminary injunction ordered by this Court, are said to be representative of the situation of many similarly situated class members. For instance, Ada Williams is a 77–year-old native of St. Vincent, British West Indies, who entered the United States on a valid visa in 1979. Apparently with oral assurances from INS that she would not be deported due to her advanced age, Ms. Williams remained in this country. In 1983 Ms. Williams broke her hip, requiring its partial removal. Although Ms. Williams was initially released from the hospital following the operations, she was later readmitted to a chronic care facility due to complications. Although Ms. Williams was allegedly able to be discharged from the chronic care facility by the end of 1983, she was required to remain there for another two years because she could not afford a

nursing home without Medicaid coverage. Only after this Court issued a preliminary injunction[8] was Ms. Williams able to be placed in a nursing home, thereby permitting her to receive long-term "psychosocial" and chronic maintenance care, which an acute care facility is unable to provide.

***6** The care required by both Ms. Williams and Ms. Rocto seems to fall squarely within the area of medical services that would not qualify as emergency care but whose deprivation would result in irreparable harm. Indeed, other courts have found irreparable harm to result from the wrongful deprivation of arguably less critical services such as dental care, prescription drugs, eyeglasses, and certain diagnostic and rehabilitative services. *See Bass v. Richardson,* 338 F.Supp. 478 (S.D.N.Y.1971); *Bass v. Rockefeller,* 331 F.Supp. 945 (S.D.N.Y.),*remanded on other grounds,* 464 F.2d 1300 (1971).

With regard to the claim of irreparable injury to pregnant alien women, plaintiffs have submitted the application of a pregnant alien, known for purposes of this action as Carla Coe, who seeks leave to intervene and to be designated as a class representative pursuant to Rule 24(b)(2). Because Carla Coe's claims share common questions of law with the main action and because she is particularly suited to act as class representative for similarly situated pregnant alien women, her motion to intervene is granted. Furthermore, the Court finds that her circumstances are such that, if she is continued to be denied Medicaid, both she and her unborn child may suffer irreparable harm.[9]

In September 1985, Ms. Coe entered the United States on a B–2 visitor's visa which has since expired. Later that year she suffered a fractured pelvis in an accident, resulting in a three-month stay in a New York City hospital. Because of her alien status, she was denied Medicaid coverage, and she now faces outstanding medical bills of approximately $40,000.

In July 1986, Ms. Coe suffered a miscarriage, causing her to spend two more days in the hospital. In September 1986, when Ms. Coe became pregnant again, she returned to the OB/GYN outpatient clinic of the same hospital for regular prenatal care. Due to her medical history, she was advised to visit the clinic twice weekly to monitor her condition.

In December 1986, Ms. Coe again returned to the hospital's emergency room because of bleeding. The clinic has billed her for this treatment, but she cannot afford to pay the bill. Moreover, when she returned for a prenatal care visit, the clinic required a fee of seven dollars. Ms. Coe states without contradiction that she cannot afford to pay seven dollars for each visit.

In order to continue her prenatal care, Ms. Coe asked the clinic to make a new application for Medicaid coverage. Although the clinic at first declined to do so because of her prior ineligibility determination, they have now scheduled an appointment to process a new Medicaid application. If she is unable to obtain coverage, Ms. Coe states that she will be unable to afford prenatal care, and she fears that her child will be harmed if she is not constantly monitored by a doctor.

The Secretary argues that Ms. Coe has failed to establish irreparable harm since it is unclear whether Ms. Coe will qualify for coverage under either the emergency care provision or under the PRUCOL standard. Neither of these arguments is persuasive.

***7** First, although Ms. Coe may be experiencing a difficult pregnancy, it seems implausible that the type of monitoring she seeks would constitute an emergency condition within the meaning of § 9406 of OBRA. As a general matter, prenatal care is preventative care, not emergency care. *See generally* Plaintiffs' 3G Statement, Vol. B ¶¶ 85–134. Second, while there is still a possibility that Ms. Coe's pending application will be approved, she has already been denied Medicaid once before due to her alien status, and hospital officials have expressed doubt concerning her current eligibility. Nor has the Secretary offered any suggestion as to what category of the guidelines Ms. Coe might avail herself of to establish her eligibility. If and when her application is approved, her pregnancy may already have come to term, and she will have lost the prenatal care that she and her unborn child need now. The Secretary has offered no suggestion as to how Ms. Coe may expeditiously establish her PRUCOL eligibility. Any damage resulting from the deprivation of such care would, in all probability, be irreparable.

In this regard, plaintiffs have summoned considerable medical evidence indicating the high correlation between poor prenatal care and infant mortality, birth defects, and infant health problems. They point to a study conducted in New York City which found that the neonatal, post-natal, and infant death rates of newborns whose mothers did not receive prenatal care were four times higher than the death rates of newborns whose mothers received some prenatal care. *See* Plaintiffs' 3G Statement, Vol. B ¶ 98. Similar statistics show the correlation between low birth weight, often a result of inadequate prenatal care, and the incidence of mental retardation, birth defects, growth and development problems, blindness, autism, cerebral palsy, and epilepsy. Plaintiffs' 3G Statement, Vol. B ¶ 109.

In light of the above, it is clear that plaintiffs have made a sufficient showing of irreparable harm.

The Merits

1. *Pregnant Women.* There appears to be no dispute that the state defendant obtains federal Medicaid reimbursement for prenatal care provided to certain categories of otherwise ineligible women whose pregnancy has been medically verifiable. *See* 18 NYCRR § 360.11(a)(5). Plaintiffs, joined by the state, argue that the statutory basis for extending such prenatal care is 42 U.S.C. § 1396d(a)(i), which permits states providing care to either the "optional categorically needy,"[10] 42 U.S.C. § 1396a(a)(10)(A)(ii), or the "medically needy," 42 U.S.C. § 1396a(a)(10)(C), to extend coverage to all children under 21 or, at the option of the state, under age 20, 19 or 18 years old.[11] Moreover, both plaintiffs and the state defendant argue that the Secretary has explicitly approved of this interpretation. *See* Letter dated October 23, 1983, from Health Care Financing Administration to Cesar Perales, discussed below.

A 1985 Administrative Directive ("ADM") from the New York State Department of Social Services provides an explanation of the basis and operation of the Commissioner's interpretation of the Medicaid statute. The ADM states that "[p]regnant women ineligible for medical assistance in their own right,[12] due to support and maintenance received form other individuals, shall receive such assistance on behalf of the unborn, if the unborn has been determined eligible for such care." ADM at 3. The ADM also expressly states that the basis for federal financial participation is that the unborn is considered to be a child under age 21. ADM at 2.

***8** An example of a woman who would benefit from this provision is a first-time pregnant teenager with no income of her own who resides with parents whose income is sufficient to provide for her needs, or a pregnant woman sanctioned from receiving public assistance due to her failure to comply with certain regulations such as providing her social security number. In such cases, medical assistance eligibility is determined according to the eligibility of the unborn child. In the case of the pregnant teenager living at home, the eligibility determination for the unborn child would be based only upon the income of the mother and any other legally responsible relatives willing to make their income available to the unborn. The income of the unborn infant's grandparents would not automatically be considered since they are not the unborn's legally responsible relatives. ADM at 5–6.

Eligibility for this type of medical assistance is determined as if the child were born at the time of the Medicaid application. If the child would be eligible when born, prenatal care is provided to the otherwise ineligible mother, despite any incidental benefits which accrue to her. Once the child is born and the medical needs of the mother and child can be separated, the mother's eligibility is terminated.

To support the validity of the state's interpretation, plaintiffs, as well as the State Commissioner, have submitted an October 24, 1983 letter from the Secretary to Commissioner Perales stating that 1982 amendments to the Medicaid Act providing coverage for certain categories of pregnant women would not lead the Secretary to propose any changes that would deny eligibility to individuals based on their unborn status.

Despite this practice, both the federal and state defendants deny Medicaid coverage for the unborn child of a pregnant woman who herself is ineligible for Medicaid because of her immigration status. Plaintiffs as well as the Commissioner contend that the Secretary's rationale for this disparate treatment is contained in a 1979 HHS Regional Office Manual which states that an unborn child has the same immigration status as the mother because it "cannot be assumed that a child will born in the United States, and, therefore, a child cannot gain U.S. citizenship through that means until delivery."

Plaintiffs challenge this rationale on several grounds. First, they argue that speculating on whether the child of an alien mother will be a U.S. citizen when born focuses on the wrong time, since eligibility under the Medicaid statute has consistently been interpreted by the defendants to be appropriately determined at the time of the Medicaid application. Nothing in the statute or common sense dictates that subsequent events such as departure from the country *en ventre de sa mere* or the inheritance of great wealth are to be speculated about in determining whether the unborn child is to receive the statute's benefits.

Second, plaintiffs challenge the rationality of the Secretary's assumption. According to plaintiffs, lengthy delays in deportation proceedings and the appeals process, when coupled with the benefits of United States citizenship, mean that most undocumented pregnant aliens give birth in this country before they are deported. The children of these women are entitled to United States citizenship. 8 U.S.C. § 1401(a)(1). Moreover, even if the child of an ineligible alien is not born in this country, plaintiffs point out that the child may still be a citizen if, for example, the child's father is a citizen and meets the durational residency requirements of 8 U.S.C. § 1401(d), (e) or (g).

***9** Finally, plaintiffs note that excluding pregnant alien women is in conflict with the statute's beneficient purpose of extending prenatal care to other categories of otherwise ineligible women. The children of these poor alien women, plaintiffs forcefully contend, face the same health risks confronted by infants whose mothers were ineligible during pregnancy for reasons other than alienage.

In response to these arguments, the Secretary now disassociates himself from statements contained in the 1979 Regional Manual and instead argues that the

Medicaid statute explicitly and implicitly excludes the unborn, whether of alien or citizen mothers, as a separate category of eligible recipients. First, the Secretary points to the recent OBRA amendments by which Congress provided emergency care during pregnancy,[13] regardless of immigration status. By implication, the Secretary argues, Congress intended to deny Medicaid to aliens for non-emergency aspects of prenatal care, unless the alien mother also met the PRUCOL requirements. By extending coverage to pregnant women in their own right, the Secretary argues that Congress expressed an intent to benefit the unborn only through the care provided to their mothers. Second, the Secretary contends that the plain meaning of the phrase "individuals under the age of 21" excludes the unborn. *Cf. Burns v. Alcala,* 420 U.S. 575 (1975).[14]

Neither of these arguments directly responds to plaintiffs' contention that both the Secretary and the New York State Commissioner have shared a longstanding interpretation of the phrase "individuals under 21" which includes the unborn. In the absence of clear statutory authority to the contrary, such a longstanding interpretation of a statute by the agency charged with its administration must be accorded substantial weight, particularly in the context of statutes as complex as the one involved here. *See Connecticut Department of Income Maintenance v. Heckler,* 105 S.Ct. 2210, 2215 (1985); *DeJesus v. Perales,* 770 F.2d 316 (2d Cir.1985), *cert. denied,* 106 S.Ct. 3301 (1986).

By explicitly providing emergency care for all aliens, it need not be assumed that Congress intended to overrule the longstanding interpretation of § 1396d(a)(i) to include the unborn or intended to create an exception to that interpretation for the unborn children of pregnant alien women. Nothing either in the language of § 1396d(a)(i) or in the legislative history of the statute precludes a determination that Congress intended to extend benefits to the eligible unborn child in situations in which the child's mother was ineligible. The fact that the Medicaid statute, as already noted, does, on occasion, explicitly refer to pregnant women in referring to certain circumstances in which they are eligible for Medicaid in situations in which others are not also does not negate an intent to have the eligibility of the unborn child considered in situations in which the pregnant woman is herself ineligible for assistance.[15] The Secretary's letter to Commissioner Perales, already referred, drafted after Congress had amended the Medicaid statute to include these special provisions relating to the eligibility of pregnant women in fact recognizes that the new provisions should in no way affect the administrative practice of considering the eligibility of the unborn in those circumstances in which consideration of only the eligibility of the mother would deprive both mother and child of Medicaid coverage.

***10** Finally, there can be no dispute that employing § 1396d(a)(i) to extend coverage to the unborn is consistent with the purposes and policies of the Medicaid program. The undisputed medical evidence shows the overwhelming importance of proper prenatal care to the future health of the infant.

In light of the above, the Court finds that plaintiffs have shown a likelihood of success on their claims that § 1396d(a)(i) includes the unborn. At the least, they have shown a fair ground for litigation. In the absence of any statutory basis for distinguishing between the unborn children of alien mothers and the unborn children of mothers who are otherwise ineligible, plaintiffs are entitled to preliminary injunctive relief on their claim for Medicaid coverage for prenatal care for pregnant alien women.

2. *PRUCOL.* In the second aspect of their claim, plaintiffs contend that the Secretary's guidelines contravenes both Congressional intent and the case law in this Circuit regarding the proper interpretation of PRUCOL. *See Berger, supra,* 771 F.2d at 1556; *Holley v. Lavine,* 553 F.2d 845 (2d Cir.1977), *cert. denied sub nom. Shang v. Holley,* 435 U.S. 947 (1978). In defense of its transmittal, the Secretary argues that the large list of *per se* categories borrowed from the *Berger* consent decree, coupled with an open-ended category for establishing eligibility on a case-by-case basis, fully complies with congressional directives and decisional authority and, therefore, should be left undisturbed by this Court.

The thrust of plaintiffs' statutory argument relies heavily upon the statement in the House Budget Committee report directing the Secretary and the states to interpret PRUCOL "broadly" and "to include all of the categories recognized by immigration law, policy and practice."[16] As discussed above, plaintiffs contend that the Secretary's general definition of PRUCOL, namely, all aliens who are living in the United States with the knowledge and permission of the INS and whose departure INS does not contemplate enforcing, contravenes Congress' intent since it excludes certain categories of aliens who are in fact residing in New York pursuant to immigration law policy and practice.

When a court reviews an agency's construction of a statute that it administers, the Supreme Court has instructed that the following questions must be confronted:

"First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court as well as the agency must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute as would be

necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issues, the question for the Court is whether an agency's answer is based on a permissible construction of the statute."

***11** *Young v. Community Nutrition Institution,* 54 U.S.L.W. 4682, 4683–84 (Jan. 17, 1986), *quoting Chevron USA, Inc. v. NRDC,* 467 U.S. 837, 842–43 (1984).

Of course, plaintiffs do not contend that the precise contours of the phrase "permanently residing under color of law" as it appears in § 9406 is clear. Indeed, as the legislative history indicates, see discussion *supra,* and plaintiffs themselves argue, Congress intentionally declined to specify the types of aliens it deems appropriate to receive Medicaid. Instead, it selected an inherently broad phrase and left to the Secretary the obligation of giving it meaning in light of INS law policy and practice.

In this regard, Congress had delegated to the Secretary authority to "make and publish such rules and regulations, not inconsistent with" the Act "as may be necessary [for its] efficient administration." 42 U.S.C. § 1302. The Secretary has found it appropriate to adopt the categories contained in the *Berger* consent decree. To uphold this interpretation, the Court need not find that it is the only permissible one the agency could have adopted, or even the construction that the Court would have adopted if the question had originally arisen in a judicial proceeding; rather, it need only determine whether the Secretary's interpretation is sufficiently rational to preclude a court from substituting its judgment for that of the Secretary's. *See Young, supra* at 4684; *Chevron, supra* at 843 n. 11.

It is clear to this Court that the fifteen categories contained in the transmittal, plus the general catch-all category for those who fall between the *per se* categories are sufficiently consistent with both the statutory language and legislative history of section 9406 to preclude this Court from substituting a different interpretation as requested by plaintiffs.

With respect to the Secretary's general standard, plaintiffs in essence urge this Court to drop both the knowledge and intent prongs of the *Berger* test. Neither of these criteria, however, is inherently at odds with the statutory language. Requiring at least some degree of INS awareness of a claimant's presence reflects and enforces the "under color of law" element of the statute. Similarly, requiring a claimant to show that the INS does not contemplate his or her deportation reflects and enforces the "permanently residing" element of the statute. *See Berger, supra,* 771 F.2d at 1577 n. 34.

Nor are the Secretary's enumerated *per se* categories in conflict with either the statutory language or the general *Berger* standard itself. Although decided in the context of a consent decree, the Second Circuit in *Berger* approved the list of enumerated categories despite challenges by the Secretary that they were inconsistent with both the statutory language and the court's prior decision in *Holley.* For obvious reasons, plaintiffs would like this Court to expand upon the number of *per se* categories. The Secretary has, however, chosen to create a general catch-all category enabling claimants to establish their PRUCOL status on a case-by-case basis. In the absence of evidence indicating that this open-ended category is in practice unworkable, the Secretary's approach should be accorded appropriate deference and left intact.

***12** Accordingly, the Court concludes that plaintiffs have established neither a likelihood of success on the merits nor a fair ground for litigation on the issue of whether the Secretary's PRUCOL guidelines contravene congressional intent.[17]

Having said that, the Court must express its concern over whether state and city Medicaid officials will, in fact, be able to implement the Secretary's guidelines, given that they presume the availability of INS cooperation. While plaintiffs have not, as of this stage, made claims that their statutory or constitutional rights to due process have been violated by the new regulatory scheme, several of the named plaintiffs' requests for individual preliminary injunctions contained serious allegations regarding INS' capacity to verify an alien's status with any modicum of speed or accuracy.

For instance, plaintiffs recount several instances where Medicaid applicants were able to secure verbal assurances that INS was not contemplating their departure, but INS refused to give written confirmation of its position so as to enable the alien to secure Medicaid. *See, e.g.,* Keily Affidavit. There are also allegations that many verification requests from city hospital officials are returned months later simply marked "No Record," although patients had provided copies of INS documents required to be maintained by the agency. *See* McLaughlin and McCorry Affidavits.

In response to these allegations, the Secretary suggests that New York State may adopt the verification system used by the Social Security Administration to effectuate the *Berger* categories with regard to SSI claimants. According to the Secretary, it has been SSA's experience since July 1986, when the program was implemented, that a response from INS will generally be received within sixty days from the date it is received by INS, and in many cases a response may be received in thirty days or less. In instances where a response takes longer than sixty days, the Secretary states it is usually due to INS difficulty in locating a folder.

If delays and inaccuracies are as endemic as plaintiffs allege, they raise serious questions as to whether claimants can realistically make use of the Secretary's open-ended category. Such delays in effect may deprive eligible applicants of medical services since, without verification, local officials will no doubt be reluctant to provide coverage without assurance of federal reimbursement. Plaintiffs thus may have grounds for either a statutory or constitutional due process claim. *See, e.g., Barnett v. Bowen,* 794 F.2d 17 (2d Cir.1986); *Chegnon v. Bowen,* 792 F.2d 299 (2d Cir.1986); *cf. Heckler v. Day,* 467 U.S. 104 (1984). However, since the parties have not joined issue on the legal questions raised in these conflicting factual claims, the Court will not attempt to resolve them at this time.[18]

Accordingly, defendants, their agents, employees and all those in active concert and participation with them are hereby enjoined pending a final determination of this matter from denying Medicaid coverage for prenatal care to alien women residing in New York State with a medically verifiable pregnancy if her unborn child would be eligible for Medicaid if born at the time of the application. Except as indicated, plaintiffs' request for preliminary injunctive relief is denied.

***13** The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

1 In a Memorandum and Order dated July 14, 1986, this Court granted plaintiffs' motion to amend the class definition to include "all aliens residing in New York State who have applied or attempted to apply for Medicaid but have been or would be denied on the basis of their alienage." *Lewis v. Gross,* No. 79–1740, slip op. (E.D.N.Y. July 14, 1986).

2 The decision also partially invalidated the comparable New York regulation. *See Lewis, supra* at 36 n. 8. Contrary to plaintiffs' urgings, the Court's ruling did not reach the legality of alienage restrictions for the portion of New York State's Medicaid program for which the state does not receive federal financial participation.

3 After a five-year period commencing upon the date the alien was granted lawful temporary residence status, aliens who have adjusted their status to lawful permanent residence will be eligible for full Medicaid coverage. *See* §§ 201(h), 201(b)(2)(C).

4 Throughout this Memorandum, "plaintiffs" shall refer to both the plaintiff class and the City, as plaintiff-intervenor.

5 The Secretary's latest standard is not entirely new since the Health Care Financing Administration ("HCFA") has been applying it to SSI-related Medicaid applicants since July 1986, when the *Berger* decree was put into effect. HCFA, however, continued to apply a narrower definition of PRUCOL for aliens who were eligible for Aid to Families with Dependent Children ("AFDC"), 42 U.S.C. §§ 601 *et seq.,* or who qualified as AFDC-related individuals. There is now a single standard for all Medicaid applicants.

6 In determining whether INS is permitting an alien to reside in this country indefinitely, the transmittal instructs that, when an applicant presents INS documents with an expiration date of one year from their issuance, the state may conclude in the absence of evidence to the contrary that INS does not contemplate enforcing the departure of the individual. If the expiration date is less than one year, then the opposite presumption applies.

7 In support of plaintiffs' outstanding motion for summary judgment, the state defendant has argued that the exclusion of pregnant alien women from Medicaid coverage is unconstitutional since it is based upon an irrebuttable presumption that their unborn children will not be born as United States citizens. *See* discussion below. Since the Court's decision is based solely on the Medicaid statute, it is unnecessary to reach this or any other constitutional issue.

8 Plaintiffs state that in October 1985 Ms. Williams requested deferred action from INS. Apparently, despite INS' assurances that deferred action would be granted, the Secretary refused to consider Ms. Williams PRUCOL without a confirming letter from INS.

9 Ms. Coe is currently receiving prenatal care pursuant to this Court's temporary restraining order dated February 3, 1987, and extended on February 17, 1987.

10 For a detailed discussion of the Medicaid Statutory Scheme, *see Lewis, supra* at 28–35.

11 For states providing coverage of this group pursuant to the optional categorically needy standards, states may

choose to cover "reasonable categories" of such children. This is an exception to the general rule which requires states choosing to extend coverage to groups listed in § 1396d(a) to cover all or none of the groups' members. States that provide coverage to the medically needy must extend coverage to all children under the age of 18 who, but for income and resource requirements, would be eligible for medical assistance as an AFDC or SSI recipient under the categorically needy program. § 1396a(a)(10)(C)(ii)(I).

12 The Medicaid statute extends coverage to several categories of pregnant women. First, a pregnant woman who would be eligible for AFDC if her child had been born and was living with her in the month such aid would be paid is considered to be categorically needy. § 1396a(a)(10)(A)(i)(III); 1396d(n)(1)(A). Second, pregnant women may be included in a state program under either the optional categorically needy or medically needy criteria. § 1396a(a)(10)(A)(ii); § 1396a(a)(10)(C); § 1396d(a)(viii). Finally, states that choose to cover the medically needy must cover pregnant women who, but for income or resources, would be eligible for AFDC or SSI. § 1396a(a)(10)(C)(ii).

13 The OBRA amendments explicitly mention emergency labor and delivery as types of emergency care for which no alienage restrictions apply. § 9406(a).

14 At one point, the Secretary also argued that, when Congress added the various provisions extending coverage to pregnant women, it intended to incorporate into the Medicaid statute Section 406(g)(1) of the AFDC Act, 42 U.S.C. § 606(g)(1), which expressly excludes AFDC coverage for the unborn. This view cannot be sustained for several reasons. First, there is no express statement that such was Congress' intent. *Cf. Quern v. Mandley,* 436 U.S. 725, 741–43 (1978). Second, not all of the categories of pregnant women covered by the Medicaid statute make reference to the AFDC program. *See* § 1396a(a)(10)(C), § 1396d(a)(viii). Third, the conclusion that Congress did not intend to incorporate an exclusion for the unborn is fully consistent with the purposes of each program. AFDC is intended primarily to encourage the care of a dependent in a private home environment by providing cash assistance for food, shelter and clothing. Medicaid, on the other hand, is intended to provide for essential medical needs, of which prenatal care clearly ranks high.

15 The Secretary relies on *Burns v. Alcala, supra,* 420 U.S. 575, in which the Supreme Court held that unborn children were not dependent children within the meaning of the AFDC program. In reaching this result, the Court relied in part on the fact that Congress had provided for the medical needs of pregnant women elsewhere in the Social Security Act. 420 U.S. at 583 & n. 10. The Court reasoned that, by providing medical care for expectant mothers, Congress probably did not also intend to provide welfare payments on behalf of an unborn child with which its mother would be able to purchase prenatal medical care. *Id.* Here, however, both provisions are within the same program and simply provide complementary means of ensuring adequate medical care for unborn children where *either* the mother or the child is eligible.

16 Plaintiffs also rely on the fact that, when the bill was reported by the House Budget Committee, it did not include an amendment proposed by Congressman Rinaldo that would have limited PRUCOL to the following five categories of aliens: (1) aliens eligible for registry, (2) aliens admitted as refugees or on a refugee-conditional basis or granted asylum, (3) parolees, (4) aliens whose deportation has been withheld, and (5) aliens granted deferred action status. A similar provision was proposed by Congressman Lungren as an amendment to the ICRA. The restrictive definition, however, was deleted prior to the bill's enactment.

17 There being no fair ground for litigation on this issue, the Court need not address the balance of hardship question. The Court does note, however, that the balance tips decidedly in favor of the plaintiff class since the only showing of hardship that the defendants can make is that they would be relegated to seeking recoupment for services provided during the pendency of the litigation. *See Caldwall v. Blum,* 621 F.2d 491, 498 (2d Cir.1980), *cert. denied,* 452 U.S. 909 (1981); *Massachusetts Ass'n of Older Americans v. Sharp,* 700 F.2d 749, 753 (1st Cir.1983).

18 Possible remedies to rectify unreasonable verification delays might include an expansion of the *per se* categories as requested by plaintiffs. Another solution may be to provide Medicaid coverage for aliens with a likelihood of success in their claims for PRUCOL status who can demonstrate irreparable injury if coverage is denied, subject to recoupment if it is ultimately determined that the claimant is not entitled to coverage.

Parallel Citations

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