

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Case No. _____

**VALENTIN SOSKIN, BEI DEI HOWE, EVA ROSENTHAL, VATCHAGAN
TATEVOSIAN, GINDA K. GELFAND, YAKOV GELFAND, DUBALE SHIBESHI, and
SARIN PERLMAN, on their own Behalf and on Behalf of All others Similarly Situated,**

Plaintiff,

vs.

**KAREN REINERTSON, In her official capacity as
Executive Director of the Colorado
Department of Health Care Policy
And Financing,**

Defendant.

**DECLARATION IN SUPPORT OF A TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION AND CERTIFICATION PURSUANT TO D.C.
COLO.L.CIV.R.1A AND 65.1**

GREGORY R. PICHE declares as true under penalty of perjury, pursuant to 28 U.S.C. §
1746, as follows:

1. I am an attorney duly admitted to the Bars of the State of Colorado, and the
United States District Court for the District of Colorado. I am a partner with Holland & Hart
LLP, and am one of the attorneys for Plaintiffs and the proposed Plaintiff class. I am fully
familiar with the facts herein.

2. I have been involved in the health care field for the past 35 years. After serving
as a hospital administrator during service with the U.S. Army Medical Service Corps, I served as

chairman of the board of a large public hospital for several years. I have undertaken a wide variety of health care legal representation since 1973 in both counseling and litigation for and on behalf of hospitals, physicians, physician networks, limited license providers, nursing homes, durable medical equipment providers and home health agencies, health care service providers and managed care companies.

3. I am a member of the American Health Lawyer's Association, the Medical Group Management Association, the Healthcare Financial Management Association, and the University of Colorado at Denver, School of Hospital and Health Administration Advising Board.

4. I make this declaration in support of Plaintiffs' application for a temporary restraining order, a preliminary injunction and class certification.

5. Plaintiffs bring this motion for a temporary restraining order and a preliminary restraining order because Plaintiffs and members of the proposed Plaintiff class will suffer irreparable harm due to Defendant's implementation of Colorado Senate Bill 03-176 ("SB 03-176") (Exhibit A), which terminates their full-scope Medicaid eligibility solely on the basis of their status as non-citizens without (a) determining whether plaintiffs and the class members remain eligible for Medicaid under an alternative basis of eligibility; and (b) providing plaintiffs and plaintiffs class members adequate and timely pre-termination notice and pre-termination administrative fair hearings.

Senate Bill 03-176

6. Prior to March 31, 2003, all categories of immigrants eligible to receive Medicaid under federal law were eligible for Medicaid on the same terms and conditions as U.S. citizens residing in Colorado. On information and belief, nearly 3,500 lawfully present immigrant

residents of Colorado receive Medicaid benefits.

7. On March 5, 2003, Colorado Governor Owens signed SB 03-176. SB 03-176 provides, *inter alia*, that certain lawfully present immigrants living in Colorado, who satisfy all Medicaid eligibility criteria imposed on citizens, are nevertheless ineligible for Medicaid, based solely on their status as non-citizens, subject to certain exceptions.

8. The federal exceptions require states to provide full-scope Medicaid to otherwise eligible immigrants in the following categories: lawful permanent residents (LPRs) who can be credited with 40 qualifying quarters of work history under the Social Security Act, veterans and active members of the armed forces and their dependents, certain American Indians, and persons who are receiving Supplemental Security Income (SSI) in the states, including Colorado, that link Medicaid eligibility to SSI. States are also required to provide federal Medicaid to otherwise eligible refugees, asylees, persons granted withholding of deportation/removal, and Cuban/Haitian entrants during the first seven years after the individual was granted the specified status, and to Amerasians during the first five years after being admitted with this status. 8 U.S.C. § 1612(b)(2)(A)(i). 8 U.S.C. § 1612(b)(2).

Defendant's Agency Letter HCPF 03-001

9. On February 24, 2003, before SB 03-176 had even been signed into law, Defendant issued Agency Letter HCPF 03-001 ("Defendant's Agency Letter"). This letter provides information and instructions to the county departments of human/social services regarding the agency's plans for implementing SB 03-176. (Exhibit B)

10. According to Defendant's Agency Letter, Defendant distributed a computer generated report to all directors of county departments of human/social services identifying those

individuals with an alien registration number recorded in the state agency's computer system. Starting with the immigrants listed on the computer-generated report, county agencies were directed to pull all associated case files and check for immigration verification. If the case file included current immigration verification (verification received within the past three months) that verified Medicaid ineligibility, the Defendant's Agency Letter directed county technicians to complete an *ex parte* redetermination and terminate the individual's Medicaid coverage without first providing the client any opportunity to provide additional information.

11. In order to determine if a LPR has credit for 40 quarters of work history, and would thus remain eligible for Medicaid, Defendant's Agency Letter directs counties to request a work history for the individual from the State Verification and Exchange System.

12. Upon information and belief, the State Verification and Exchange System does not contain up-to-date work history data through March 2003.

13. For purposes of determining whether an individual has credit for 40 quarters of work under the Social Security Act, an individual may be credited with quarters of work performed by his or her spouse or by his parents while the individual was a minor. 8 U.S.C. § 1645. Defendant's Agency Letter does not require counties to consult the work histories of the parents or spouses of those immigrants appearing on the state's computer-generated report.

14. According to Defendant's Agency Letter, county agencies are supposed to send "redetermination packets" to all those immigrants "with an unknown immigration status." The redetermination form included in the packet fails to ask whether the immigrant has worked or can be credited with forty quarters of work history. See Attachment B to Exhibit B.

15. According to Defendant's Agency Letter, if the redetermination packet is not

returned to the county agency within ten business days, a state developed Notice of Medicaid Closure must be sent to the immigrant along with a second redetermination form. See Attachment E to Exhibit B. The notice does not provide the legally required detailed explanation of the reason for termination. Further, the form notice fails to provide information about the right to a fair hearing and the circumstances under which Medicaid benefits will be continued pending the result of that hearing.

Lack of Adequate Notice

16. Pursuant to Defendant's Agency Letter, La Plata County has sent a notice to at least one class member to implement SB 03-176. (Exhibit C). The notice is undated, fails to provide an adequate explanation of the basis for the agency's action, and fails to provide any information about hearings rights.

17. Pursuant to Defendant's Agency Letter, Denver County has sent several variations of notices to members of the Plaintiff class to implement SB 03-176. The notices include some generic text and one of several formulations of a reason for the termination, apparently based on whether the agency concluded that a person was ineligible because she was 1) a legal permanent resident without credit for 40 quarters of work history ("40 quarters notice")(Exhibit D); 2) within the group of immigrants limited to five or seven years of Medicaid ("7 year notice")(Exhibit E); or 3) did not provide verification of immigration status on the Redetermination form ("failure to verify")(Exhibit F).

18. These notices do not contain an adequate explanation of proposed action and the basis for the action. The notices fail to provide the immigration status information for the individual that the agency relied for its decision to terminate. Nor do the notices provide

sufficient and accurate information about eligibility categories to enable Plaintiffs to determine whether the agency's decision is correct. For example, the "7 year notice" states that the individual's benefits are being terminated because he or she has lived in the United States for more than seven years. It provides no indication that the seven year time period is relevant because the county believes the individual has refugee, asylee or similar immigration status, and fails to explain that the seven year time period is counted from the time that the individual obtained the status. The notice also fails to invite the individual to demonstrate that he or she has adjusted status to become an LPR or citizen, or that the county's information about his or her current status is otherwise incorrect. It does not inform an individual about other potential bases for eligibility.

19. The notice fails to clearly explain that Medicaid will be terminated. The title only explains that some unspecified action will be taken, and the first sentence states that the action affects "cash assistance and/or medical benefits." The "reason" indicated is that the person "no longer qualif[ies] for Medicaid" but this does not clearly explain to a lay person that Medicaid will stop. The only arguable reference to termination is buried further down in the notice explaining, "Further Appeal of this Notice of Medicaid Closure may be directed to an appropriate state or federal court."

20. The notices provide misleading and confusing information about fair hearing rights. For example, the second sentence and the statement of the reverse side ("Your Right to Appeal") states that the individual can appeal if she disagrees with the decision. However, other text in the "40 quarter notice" provides that the individual can request an administrative appeal only if she or her parents or spouse have 40 quarters (or in the case of the "7 year notice" "only

if you believe that you have been in the United States for less than 7 years.”) (emphasis in original).

21. Plaintiff Vatchagan Tatevosian received a “Notice of Proposed Action” from Denver County Department of Social Services with a March 19, 2003 mail date. (Exhibit G). In addition to the boilerplate language which states, *inter alia*, that “[t]his action affects your cash assistance and/or medical benefits,” the notice provides that the effective date of the proposed action is March 31, 2003 and gives the following reason. “The household member(s) listed above lost their Medicaid because a new state law changed the citizenship requirements for the program. The person (s) listed above do not meet the new citizenship requirements. 8.100.53 10 R- 250510.” Among other defects, this notice fails to identify the immigration status that the agency used to find Mr. Tatevosian ineligible, fails to provide any information about the” new citizenship requirements” that would enable Mr. Tatevosian to test the accuracy of the agency’s decision as applied to his situation, and includes an incorrect effective date, March 31, 2003, instead of April 1, 2003.

22. Because Defendant has failed to insure that complete and proper redeterminations have been conducted, she may not terminate the Medicaid assistance of any member of the plaintiff class. Specifically, Defendant is implementing SB 03-176 in a manner that will terminate the benefits of plaintiff class members, who remain eligible for Medicaid under the terms of SB 03-176. Because of the defects in Defendant’s notice and hearing practices, many of those who will be found ineligible are not likely persons intended to have their Medicaid discontinued as a result of SB 03-176.

23. The redeterminations are flawed in several significant ways. First, although class

members who are LPRs with credit for 40 or more quarters of work history remain eligible for Medicaid, in selecting the individuals who will receive termination notices pursuant to SB 03-176, Defendant relies solely on a government database check of the individual's work history to establish the number of quarters. However, when the check to the database fails to reveal that the individual has credit for 40 quarters of work, defendant does not provide class members an opportunity to demonstrate that they in fact have worked 40 quarters.¹

24. Second, Defendant has instructed the counties to check the database only for the earnings of the individual Medicaid recipient. This practice ignores the fact that the recipient may be entitled to count quarters worked by his or her spouse as well as by his or her parents while the recipient was still a minor. 8 U.S.C. § 1645. Consequently, Defendant will deprive those recipients who have 40 quarters of combined work through the combined earnings of either a spouse or parent of Medicaid coverage for which they remain eligible.

25. Third, recipients may remain eligible for Medicaid if a spouse or parent is a veteran or on active military service. The redetermination process fails to accurately capture all recipients who may meet this eligibility qualification.

26. Finally, there is no evidence that Defendant has taken steps to ensure that the notices of Medicaid termination have been mailed to affected immigrants in a timely way. For example, the notice sent to Ms. Bei-Die Howe was mailed on March 22, 2003 to be effective on April 1, 2003, not giving her the 10 days advance notice of discontinuance to which she is entitled by law. (Exhibit H)

¹ Significantly, the Medicaid Redetermination Requirements Documentation form (Attachment B to Exhibit B) does not provide aliens an opportunity to list quarters of work. Consequently, individuals are deprived of the opportunity to demonstrate that they remain eligible for Medicaid under SB 03-176.

Plaintiffs will Suffer Irreparable Harm

27. Defendant's implementation of SB 03-176, which terminates their full-scope Medicaid eligibility solely on the basis of their status as non-citizens, will cause Plaintiffs and members of the proposed Plaintiffs' class to suffer irreparable harm because they will lose their nursing home care (see Chang (Howe) Decl., Shibeshi Decl., Rosenthal Decl.), home attendant services (see Soskin Decl., G. Gelfand Decl., Perlman Decl.), apartments (see Soskin Decl.), ability to visit their doctor (see Tatevosian Decl., Y. Gelfand Decl.) and their prescription medication (Soskin Decl., Tatevosian Decl., Shibeshi Decl., G. Gelfand Decl., Y. Gelfand Decl.)

28. For example, Mr. Soskin is an immigrant from Belarus who currently lives in the Allied Jewish Apartments in Denver. At the time that he came to the United States, he suffered from angina and arrhythmia. Two thirds of his stomach had been removed because of severe ulceration, and one of his kidneys had been removed because of cancer. In Belarus, Mr. Soskin had lived near Chernobyl and he suspects that his cancer is related to nuclear exposure.

29. Since moving to the United States in 1997, Mr. Soskin has developed severe depression for which he takes medications and sees a psychotherapist. Mr. Soskin has also developed hypertension. As a result of the hypertension, he had a stroke in December 2002. The stroke left him partially paralyzed on his left side and impacted his ability to speak and swallow.

30. Medicaid pays for Mr. Soskin's medications and for his medical and psychological treatment. Medicaid also pays for a nurse to visit him at home to monitor his prescription drugs, and an aide to visit him daily to clean his house, do laundry, take him out in his wheelchair and bathe.

31. If Mr. Soskin loses his Medicaid coverage, he will no longer be able to receive the

extensive treatment and aid on which he now relies. He would also lose his apartment because his complex normally does not accept people with a high level of disability and has permitted him to remain in his unit only because of the in-home care that he receives. Most significantly, Mr. Soskin fears that without the medications covered by Medicaid, he will suffer a heart attack, have another stroke and/or suffer from severe and potentially life-threatening depression.

32. Ms. Sarin Perlman is an immigrant from South Africa who is disabled as a result of a closed head injury she sustained when hit by a car in 1996. She has received Medicaid since 1997 and receives Home and Community Based Services (HCBS) through Medicaid.

33. The closed head injury causes the equivalent of a “short” in her electrical current. She experiences, as a result, frequent seizure-like spasms which cause temporary partial to complete paralysis. The spasms vary in intensity and frequency and can last several hours, with numerous interruptions in her breathing. She also experiences extreme fatigue which confines her to a wheel chair at times. It impossible for her to perform the basic activities of daily living on her own, without the assistance of a caregiver who intervenes when she has a spasm and helps her when she needs oxygen. Ms. Perlman’s medical condition is such tht she needs someone available to her 24 hours a day. HCBS services are a critical part of her treatment plan. The HCBS caregiver also provides her with assistance with bathing, hair care and hygiene, dressing when she needs help, bladder care, transferring, house cleaning and cooking, laundry and shopping.

34. In late March, Ms. Perlman received an undated notice of termination of Medicaid benefits from La Plata County. (See Exhibit C). The notice states that she is no longer eligible for Medicaid under a new state law because of her immigration status and that her benefits would

terminate March 30, 2003. The notice also says that she did not provide the required verification of her immigration status to complete the redetermination of eligibility, though she never received a request for such information. The notice failed to inform Ms. Perlman of whether or how she could appeal the agency's decision.

35. Since 2002, Mr. Shibeshi has resided in the Briarwood Care Facility as a result of suffering a stroke while at work. The stroke resulted in Mr. Shibeshi's being in a coma and near death for fifteen days. Even after a month long stay at a rehabilitation center prior to his stay at Briarwood, Mr. Shibeshi remains paralyzed on his left side. He cannot walk, operate his wheelchair, cook or care for himself. He needs help using the bathroom and bathing. He also has speech problems as a result of the stroke. He takes eight to ten medications per day.

36. On March 12, 2003, Mr. Shibeshi received a notice of eviction from Briarwood, informing him that we will have to leave Briarwood due to SB 03-176, unless he can pay Briarwood \$8,420 per month. Mr. Shibeshi has no money or resources to pay for his care, nor does he have any place to go if Briarwood evicts him.

37. According to the Briarwood Health Center, earlier this month, they received a call from Defendant's agency, informing them that a new law had passed that would terminate Medicaid coverage for some immigrants. Once Mr. Shibeshi received a notice informing him that he was such an immigrant, Briarwood was forced to notify Mr. Shibeshi that he must pay for the cost of his care, over \$8,000 per month, or vacate his room. The Briarwood Health Center knows of no other services or organizations that could provide financial assistance to Mr. Shibeshi, or of any other health care facility that would take him in without the promise of payment. This leaves Briarwood with the distinct possibility of discharging Mr. Shibeshi to the

street. (Nyquist Decl.)

38. No prior application has been made for this relief.

39. I hereby certify pursuant to D.C. Colo.LCivR. 7.1A and 65.1 that I contacted the office of the Attorney General of the State of Colorado and determined that the Defendant is represented by Anne Hause, Esq. and Rennie Fagan, Esq. of that office. On March 26, 2003, I spoke to both of them over the telephone and advised them of the general nature of the Complaint that we would be filing on March 27, 2003 in the United States District Court, against Karen Reinertson, in her official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing. I told them that we would be challenging the Constitutionality and the propriety of the procedural implementation of Colo. SB03-176 and that we would be seeking a Temporary Restraining Order and a Preliminary Injunction. I agreed to send them a copy of all of our pleadings via email as soon contemporaneous with our filing with the Court.

40. I declare under the penalty of perjury that the foregoing is true and correct.

WHEREFORE, it is respectfully requested that this Court grant the relief requested on this motion.

Dated on March 27, 2003.

Gregory R. Piche'