

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

MANUEL D. SOUND and	)	CIVIL NO. 09-00409 JMS/KSC
THOMPSON PHILLIP, each	)	
individually and on behalf of those	)	ORDER GRANTING IN PART AND
persons similarly situated,	)	DENYING IN PART PLAINTIFFS’
	)	MOTION FOR A TEMPORARY
Plaintiffs,	)	RESTRAINING ORDER
	)	
vs.	)	
	)	
LILLIAN B. KOLLER, in her	)	
official capacity as Director of the	)	
State of Hawaii, Department of	)	
Human Services, and KENNETH	)	
FINK, in his official capacity as State	)	
of Hawaii, Department of Human	)	
Services, Med-QUEST Division	)	
Administrator	)	
	)	
Defendants.	)	
	)	

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS’  
MOTION FOR A TEMPORARY RESTRAINING ORDER**

**I. INTRODUCTION**

Plaintiffs bring claims against Defendants for violation of the due process clause and the equal protection clause of the Fourteenth Amendment stemming from Defendants’ decision to decrease the level of medical benefits of certain individuals residing in Hawaii under the Compact of Free Association

(“COFA”) as well as immigrants who have been U.S. residents for less than five years (“New Residents”). These individuals had originally been enrolled in state medical benefit plans including QUEST, QUEST-Net, QUEST-ACE, QexA, SHOTT, or fee-for service programs, but Defendants recently announced that they will be enrolled in a plan that provides less benefits, Basic Health Hawaii, effective September 1, 2009.

Currently before the court is Plaintiff’s Motion for Temporary Restraining Order, which asks the court to order Defendants to maintain the current level of benefits provided to COFA residents and New Residents. Based upon a review of the parties’ submissions and the argument presented at the September 1, 2009 hearing, the court GRANTS in part and DENIES in part Plaintiffs’ Motion for Temporary Restraining Order.

## **II. STANDARD OF REVIEW**

The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction.

“A preliminary injunction is an extraordinary and drastic remedy [that] is never awarded as of right.” *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008) (citation and quotation signals omitted). In *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008), the Supreme Court recently explained

that “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”

### **III. DISCUSSION**

The court addresses and weighs each of the factors for a temporary restraining order.

#### **A. Likelihood of Success on the Merits**

Regarding likelihood of success on the merits, the court finds that Plaintiffs have carried their burden regarding their due process claim.<sup>1</sup>

##### ***1. Deprivation of a Property Interest***

To have a property interest in a benefit, a person must have “a legitimate claim of entitlement to it,” as opposed to a mere “abstract need or desire for it” or “a unilateral expectation of it.” *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Supreme Court has explained:

Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an

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<sup>1</sup> During the hearing, Plaintiffs agreed that limiting the likelihood of success analysis to only one of their claims would not affect the scope of a temporary restraining order. The court therefore does not address the likelihood of success on the merits of Plaintiff’s equal protection claim.

independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

*Id.* at 577. Such “independent sources” may include “statutes, regulations, and ordinances, or express or implied contracts.” *Erickson v. U.S. ex rel. Dept. of Health & Human Servs.*, 67 F.3d 858, 862 (9th Cir. 1995) (citation and quotation signals omitted).

It is well established that “[t]he Fourteenth Amendment’s procedural protection of property is a safeguard of the security interests that a person has already acquired in specific benefits.” *Roth*, 408 U.S. at 576. While Plaintiffs have not identified the specific Hawaii law, regulation, or understanding that creates the right to medical benefits for citizens from COFA countries, the Hawaii Department of Human Services “has been providing State-funded medical assistance to COFA citizens by enrolling them in the QUEST, QUEST-Net, QUEST-ACE, QexA, SHOTT, or fee-for service programs.” Pl.’s Ex. D. Further, the change to Basic Health Hawaii is in fact a *decrease* in the level of benefits. Pl.’s Ex. D (“The Department can no longer afford to sustain the level of services that are being provided with State funds.”).

Courts have found that individuals have a property interest in the continued level of benefits in similar state-provided health care plans and other

benefits programs. *See Greene v. Babbitt*, 64 F.3d 1266, 1272 (9th Cir. 1995) (“The decisions in both *O’Bannon* and *Punikaia* expressly distinguished an interest in continued treatment at a particular facility, affecting no property interest, from the denial of financial benefits that does affect a property interest.”); *see also Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) (noting that transfers of patients to lower levels of care implicated beneficiaries’ property interests given the concomitant decrease in Medicaid benefits, while transfers to higher levels of care did not); *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970) (recognizing that federal and state regulatory frameworks had created a constitutional property interest in continued receipt of welfare benefits); *Pediatric Specialty Care, Inc. v. Ark. Dep’t of Human Servs.*, 364 F.3d 925, 930 (8th Cir. 2004) (“We find it entirely appropriate for the Plaintiffs to base their procedural due process claim on their clearly established right to have equal access to quality medical care as defined by [42 U.S.C. § 1396a(a)(30)(A)].”); *Reynolds v. Giuliani*, 35 F. Supp. 2d 331, 341 (S.D.N.Y. 1999) (“Plaintiffs also have an overarching property interest in their continued receipt of food stamps, Medicaid and cash assistance.”); *Dodson v. Parham*, 427 F. Supp. 97, 110 (D.C. Ga. 1977) (“[P]laintiffs’ legitimate claim to entitlement under the Medicaid provision extends only to their right to receive continued reimbursement ‘in an amount, duration, and scope reasonably necessary to

achieve' the purposes of the drug component . . . .”).

Accordingly, the court concludes that Plaintiffs have established a likelihood of success on the merits of proving a property interest in the continued level and quality of medical benefits they received under their current medical benefit programs.

## **2. Denial of Adequate Procedural Protections**

Where benefits are taken away, “the right to some kind of prior hearing is paramount.” *Roth*, 408 U.S. at 570; *see also Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). The “right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). Due process includes notice “reasonably calculated, under all the circumstances, to apprise interested parties” of the proceeding, and an opportunity to be heard. *S.E.C. v. McCarthy*, 322 F.3d 650, 659 (9th Cir. 2003) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, (1950)); *see also Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (stating that due process is the opportunity to be heard “at a meaningful time and in a meaningful manner”).

To determine whether Plaintiffs received adequate procedural protections, the court must consider: (1) “the private interest that will be affected by the official action;” (2) “the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards;” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 321, 335.

First, Plaintiffs have a substantial interest in continued receipt of their benefits, especially where the benefits that are no longer covered are critical life-supporting medical procedures such as dialysis and chemotherapy. *See Healey v. Thompson*, 186 F. Supp. 2d 105, 123-24 (D. Conn. 2001) (“For some beneficiaries, a denial in coverage amounts to a denial of services, because they may not have the means to pay for the services, or the wherewithal to secure substitute coverage, rendering them unable to access the appeals process.” (*overruled in other part by Lutwin v. Thompson*, 361 F.3d 146 (2d Cir. 2004))); *Kraemer v. Heckler*, 737 F.2d 214, 222 (2d Cir. 1984) (considering that the cost of medical care “diminishes the probability that a patient could choose to continue receiving medical care” while awaiting review). While the court recognizes that the State has represented that these life-saving procedures will be covered by other programs, such

representations do not diminish that the recipients will no longer receive these benefits through the current channels. Further, the State has admitted that Basic Health Hawaii is a decrease in coverage, and based upon the record presented, it appears that Basic Health Hawaii will not cover components of dialysis treatment such as non-generic prescription drugs or transportation services. Gibbons Decl. ¶ 14.

The second factor -- the risk of erroneous deprivation and the probable value of additional or substitute procedural safeguards -- also weighs in favor of Plaintiffs. As presented by Plaintiffs, it appears that the State made a unilateral decision to decrease health care benefits for COFA residents with little to no notice. The first that COFA residents heard of the changes (to take place on September 1, 2009) was in mid-August. Despite that many COFA residents do not speak English, the notification letter was largely in English and a telephone number provided to receive foreign language assistance was similarly unhelpful because it did not provide assistance for all languages and provided only automated service for periods of time. Additional procedural safeguards would ensure that individuals fully understand the changes to their benefits and allow them to raise and vet concerns before the changes take effect. Given the lack of any meaningful procedural safeguards afforded Plaintiffs, the court finds that the risk of erroneous

deprivation is high.

The third factor also appears to weigh in favor of Plaintiffs.

Defendants could have easily provided better notice to Plaintiffs by fully explaining the differences between the two programs in a manner ensuring that all COFA residents could understand, and most importantly, by providing Plaintiffs a meaningful opportunity to be heard.

The court therefore concludes that Plaintiffs have shown a likelihood of success in proving that they have been denied adequate procedural safeguards in Defendants' decision to reduce the level of their health care benefits. This factor weighs in favor of granting Plaintiffs' Motion for Temporary Restraining Order.

## **B. Irreparable Harm**

The court further finds that Plaintiffs have shown a likelihood of irreparable harm if a temporary restraining order is not granted.<sup>2</sup> While Defendants

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<sup>2</sup> The court is aware that Plaintiffs are seeking class certification. For purposes of this motion only, the court evaluates irreparable harm as to the class. *Compare Dixon v. Love*, 431 U.S. 105, 111 & 111 n.9 (1977) (stating the district court granted temporary restraining order and that the class was never certified); *Roe v. Anderson*, 134 F.3d 1400, 1403 (9th Cir. 1998) (stating that district court issued temporary restraining order and later allowed the action to be maintained as a class action); *Bowlin v. Montanez*, 2005 WL 1389182 (D. Neb. June 13, 2005) (stating that court granted motion for temporary restraining order prior to certifying the class); *Pollar v. Judson Steel Corp.*, 1984 WL 161273 (N.D. Cal. Feb. 3, 1984) (granting a temporary restraining order prior to class certification); *with Nat'l Ctr. for Immigrants Rights, Inc. v. Immigration & Naturalization Serv.*, 743 F.2d 1365, 1371 (9th Cir. 1984) (asserting "that in the absence of class certification, [a] preliminary injunction may properly cover only the named plaintiffs.") (citations omitted); *Zepeda v. U.S. Immigration & Naturalization Serv.*, 753 F.2d 719 (9th Cir. 1983) (same).

have publicly asserted that chemotherapy and dialysis treatments will continue, the Basic Health Hawaii program is nonetheless a decrease in medical benefits previously provided to COFA residents. A denial in coverage can oftentimes amount to a denial of services, because individuals may not have the means to pay for the services or the ability to secure substitute coverage. Such lack of treatment clearly supports a finding of irreparable harm. Accordingly, this factor also weighs in favor of granting a temporary restraining order.

**C. Balance of the Equities**

This factor favors Plaintiffs. A temporary restraining order will effectively maintain the current status quo. Without a temporary restraining order, however, Plaintiffs are left unsure of what medical coverage they have, may now have to pay for medical procedures previously covered, and may even forego medical treatment altogether. In contrast, Defendants will incur the same costs and lose only the “cost savings” that they intended to receive as a result of switching COFA residents over to Basic Health Hawaii. Accordingly, this factor also weighs in favor of Plaintiffs.

**D. Public Interest**

Finally, the court finds that a temporary restraining order is in the public interest, but even it were neutral, the other factors clearly weigh in favor of

granting the temporary restraining order.

**E. Weighing the Factors**

Because all of the factors weigh in favor of granting Plaintiff's Motion for Temporary Restraining Order, the court finds that Plaintiffs are entitled to relief.

**IV. CONCLUSION**

The court therefore GRANTS in part and DENIES in part Plaintiffs' Motion for a Temporary Restraining Order. Specifically, the court orders Defendants to:

1. Stop disenrolling COFA residents and New Residents from the State-funded health programs in which they were participating prior to August 1, 2009; and
2. re-enroll all COFA residents and New Residents who were disenrolled based on their status as COFA residents and/or New Residents in the applicable QUEST, QUEST-Net, QUEST-ACE, QexA, SHOTT, or fee-for service programs.

The court does not, however, grant Plaintiff's request for an order requiring Defendants to continue to enroll all COFA residents and New Residents in the applicable old programs for which they would have been eligible prior to Defendants' change in policy because Plaintiffs have not established any irreparable

harm to individuals who were not receiving benefits in the old program.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September 1, 2009.



          /s/ J. Michael Seabright            
J. Michael Seabright  
United States District Judge

*Sound et al. v. Koller et al.*, Civ. No. 09-00409, Order Granting in Part and Denying in Part  
Plaintiffs' Motion for Temporary Restraining Order