

DEPARTMENT OF HEALTH SERVICES

714/744 P STREET
P.O. BOX 942732
SACRAMENTO, CA 94234-7320



March 10, 1993

Letter No. 93-17

TO: All County Welfare Directors
All County Administrative Officers
All County Medi-Cal Program Specialists/Liaisons

SUBJECT: TERMINATION OF REFUGEE MEDICAL ASSISTANCE (RMA)

REFERENCES: EMC2 DHS #93038

The purpose of this letter is to inform you of the outcome of a lawsuit filed by Evergreen Legal Services in Federal District Court in Seattle against the Department of Health and Human Services (DHHS).

A hearing was held on January 8th, and the Court extended the preliminary injunction against DHHS to January 26th, at which time the Judge was to hear testimony and issue an order in the case. On February 12, 1993, the District Court issued an Order on Cross-Motion for Summary Judgment and Injunction. The order states that DHHS, in issuing its grant announcements and request for proposal (RFP), constituted rule-making without compliance with the notice and comment requirements of the Administrative Procedure Act.

Accordingly, the Secretary of DHHS is enjoined from entering or implementing the proposed Private Resettlement Program (PRP) contracts, grants, and policies. The Secretary is further enjoined from terminating the existing cash and medical assistance programs for refugees until a valid new program is in place, or until further order of the Court.

Counties are directed to continue the present RMA program.

If you have any questions, please contact Elena Lara at (916) 657-0712.

Sincerely,

ORIGINAL SIGNED BY

Frank S. Martucci, Chief
Medi-Cal Eligibility Branch

Enclosure

FAX TRANSMITTAL

of pages 3

To: <i>Merlyn</i>	From: <i>B. Chernik</i>
Dept./Agency	Phone #
Fax # <i>916-323-1136</i>	Fax #

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 FEDERAL BUREAU OF INVESTIGATION
 U.S. DEPARTMENT OF JUSTICE

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE

BUC VAN NGUYEN, et al.,
 Plaintiffs,

v.

DORNA E. SHALALA, Secretary of
 Health & Human Services,
 Defendant.

and

SAAD MOSSA, et al.,
 Intervenor
 Defendants.

NO. CSZ-1867WD

ORDER ON CROSS-MOTIONS
 FOR SUMMARY JUDGMENT
 AND INJUNCTION

CV 93-170

I. INTRODUCTION

This case presents the question whether the Secretary of Health and Human Services, in changing benefits programs for newly-arrived refugees, engaged in rule-making without complying with the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553.

In late 1992, former Secretary Louis W. Sullivan set out to revoke the existing cash and medical assistance programs for

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FROM HOPKINS & SUTTER, DC

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refugees and to establish a new program.¹ He published for comment in the Federal Register a proposed rule that would terminate the existing programs. He also issued two grant announcements and a request for proposal (RFP) that described the substance of the proposed new program. The announcements and RFP were not published for notice and comment.

plaintiffs, who are recently-arrived refugees eligible for federally-funded cash and medical assistance, and organizations which help such refugees, brought suit alleging that the grant announcements and RFP were substantive rules that must be published for notice and comment before they can be adopted. The APA requires agencies, in promulgating rules, to provide notice of the proposed rule, an opportunity for public comment, and an explanation of the rule ultimately adopted. 5 U.S.C. § 553(b) and (c).

The intervenor defendants are an Iraqi refugee and ten voluntary nonprofit agencies that help resettle refugees. The intervenors, like the former Secretary, argue that the APA was not violated.

On December 22, 1992, the court issued a temporary restraining order (TRO) enjoining the Secretary from terminating the existing cash and medical assistance programs and from entering or implementing contracts, grants, and policies under the proposed new program. Dkt. # 50. By stipulation of the parties the TRO

¹The named defendant, Donna E. Shalala, succeeded Secretary Sullivan on January 22, 1993. Pursuant to Fed. R. Civ. P. 25(d)(1), Secretary Shalala is now substituted as the defendant in this case.

1 was extended from December 31, 1992, to January 10, 1993. Dkt. 1
 2 99. After further briefing, the court adopted the TRO as a
 3 preliminary injunction. Dkt. 1 99 (January 8, 1993).

4 On an expedited schedule, all parties have moved for summary
 5 judgment pursuant to Fed. R. Civ. P. 56. The issues are whether
 6 the Secretary has engaged in rule-making without complying with
 7 the notice and comment requirements of the APA, and whether a
 8 permanent injunction should be entered. A hearing was held on
 9 January 24, 1993. The arguments of counsel, and all materials
 10 filed, have been fully considered.

11 **II. FACTUAL BACKGROUND**

12 The Refugee Act of 1980, 8 U.S.C. §§1521-1525, authorized the
 13 Office of Refugee Resettlement (ORR) within the Department of
 14 Health and Human Services (HHS) to provide cash and medical
 15 assistance for up to thirty-six months after a refugee enters the
 16 United States. 8 U.S.C. § 1522(a)(1). The length of time for
 17 which a refugee is eligible for such benefits has been reduced by
 18 HHS from thirty-six to eighteen months in 1982, from eighteen to
 19 twelve months in 1988, and from twelve to eight months in 1992.
 20 The first two reductions were preceded by notice and comment. 46
 21 Fed. Reg. 60,629 (Dec. 11 1981) (notice of reduction to eighteen
 22 months); 47 Fed. Reg. 10,841 (Mar. 12, 1982) (interim final rule
 23 codifying reduction to eighteen months); 52 Fed. Reg. 38,795 (Oct.
 24 19, 1987) (notice of reduction to twelve months); 53 Fed. Reg.
 25 12,222 (Aug. 24, 1988) (final rule codifying reduction to twelve
 26 months). The agency used emergency procedures under the APA's

1 was extended from December 11, 1992, to January 10, 1993. Dkt. 4
2 99. After further briefing, the court adopted the TRO as a
3 preliminary injunction. Dkt. 3 99 (January 2, 1993).

4 On an expedited schedule, all parties have moved for summary
5 judgment pursuant to Fed. R. Civ. P. 56. The issues are whether
6 the Secretary has engaged in rule-making without complying with
7 the notice and comment requirements of the APA, and whether a
8 permanent injunction should be entered. A hearing was held on
9 January 26, 1993. The arguments of counsel, and all materials
10 filed, have been fully considered.

11 II. FACTUAL BACKGROUND

12 The Refugee Act of 1980, 8 U.S.C. §§1521-1525, authorized the
13 Office of Refugee Resettlement (ORR) within the Department of
14 Health and Human Services (HHS) to provide cash and medical
15 assistance for up to thirty-six months after a refugee enters the
16 United States. 8 U.S.C. § 1522(e)(1). The length of time for
17 which a refugee is eligible for such benefits has been reduced by
18 HHS from thirty-six to eighteen months in 1982, from eighteen to
19 twelve months in 1988, and from twelve to eight months in 1992.
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25 17,222 (Aug. 24, 1988) (final rule codifying reduction to twelve
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1 good cause exception, 5 U.S.C. § 553(b)(B), to reduce the eligi-
2 bility period to eight months. See 57 Fed. Reg. 1115 (Jan. 10
3 1992).

4 On November 2, 1992, former Secretary Sullivan published in
5 the Federal Register, for comment, a notice of a proposed rule
6 that would terminate the existing state-administered cash and
7 medical assistance programs. 57 Fed. Reg. 49419 (1992). The
8 November 2 notice announced that the current programs would be
9 replaced by a new private resettlement and medical program (PRP).
10 Under the PRP, cash and medical assistance would be administered
11 through grants and contracts with private nonprofit agencies.

12 On October 19, 1992, the Secretary published an announcement
13 soliciting grant applications from private organizations operating
14 refugee assistance programs. 57 Fed. Reg. 47718 (1992). The
15 announcement stated that refugees enrolled in the new program
16 "will be eligible for a specified number of months of transitional
17 cash assistance." 57 Fed. Reg. 47718, 47723. "This eligibility
18 period will be specified in the Supplemental Notice." *Id.* at
19 47718. The supplemental notice, published on November 17, 1992,
20 set the eligibility period at seven months. 57 Fed. Reg. 54243,
21 54244 (1992) ("the [proposed program's] eligibility period is
22 seven months"). Refugees are presently eligible for eight months
23 of cash assistance. See 57 Fed. Reg. 42897 (Sept. 17 1992) (rule
24 continuing eight-month eligibility period for FY 1993).

25 On November 5, 1992, ORR issued a Request for Proposal No.
26 105-93-6205 entitled "Administrative Services for the Refugee

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1 Benefit Plan." The RFP solicited proposals for administration of
 2 the private medical program. Currently, refugees receive medical
 3 coverage through Medicaid. The RFP announced a shift from Medic-
 4 aid to "managed care." Under the managed care system, a refugee
 5 would have to select as his or her primary care physician a
 6 physician listed by a "preferred provider organization" (PPO),
 7 where such PPO networks are in place. Currently, refugees receiv-
 8 ing medical assistance may select their physicians. The RFP also
 9 omitted any provision for various treatment and services available
 10 under the current program, including interpreters for non-English
 11 speaking patients, family planning services, and non-emergency
 12 dental care. See Declaration of Janet Varon (Dkt. # 5 at 2-3);
 13 Brief of Amicus Curiae, Exh. A and B (Dkt. # 98). The RFP also
 14 would initiate co-payments for visits to doctor's offices and
 15 emergency rooms, mental health counseling, and prescription drugs.
 16 Id.

17 The grant announcements and the medical RFP were not pub-
 18 lished for notice and comment. The Secretary thus sought to
 19 reduce the eligibility period for emergency cash assistance, and
 20 to decrease the scope of medical assistance in certain respects,
 21 without complying with APA rule-making procedures.

xxx. DISCUSSION

22 The "principal purpose" of section 553 of the APA is "to
 23 provide that the legislative functions of administrative agencies
 24 shall so far as possible be exercised only upon public participa-
 25 tion." 5, DOG. No. 243, 78TH Cong., 2d Sess. 257 (1946). That

FEB-17-1993 17:35 FROM DHHS/ACF/DRR
FROM HOPKINS & SUTTER, DC

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At issue here is whether the grant announcements and RFP were substantive rules requiring notice and comment, or whether they fell within one of the exceptions. "The exceptions to (the notice and comment requirements of) section 551 will be 'narrowly construed and only reluctantly countenanced.'" San Diego Air Sports Center, Inc., 887 F.2d at 969 (quoting Alexander v. Block, 746 F.2d 393, 612 (9th Cir. 1984)).

Defendant and intervenors contend that the challenged provisions were general statements of policy or interpretive and procedural rules. An agency action must satisfy two requirements to qualify as a general statement of policy: (1) it "must operate only prospectively," and (2), it "must not establish a 'binding horn' or be finally determinative of the issues or rights" to which it is addressed. Kada-Lana v. Zifopatriok, 813 F.2d 1066, 1014 (9th Cir. 1987) (citations omitted). "The critical factor to determine whether a directive announcing a new policy constitutes a rule or a general statement of policy is 'the extent to which the challenged [directive] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case.'" Id. at 1013 (citations omitted).

The announcements and RFP in this case were more than mere general statements of policy or interpretive or procedural rules. The grant announcements, for example, did not suggest that the grantees would be free to alter the period of eligibility for cash

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1 keeping measures; they represent significant changes in the
2 benefits available to refugees.

3 The former Secretary's argument that he would be free, under
4 the statute, to proceed with or without rules, is unavailing when
5 he has in fact engaged in rule-making. See Linoz v. Heckler, 800
6 F.2d 871 (9th Cir. 1986).

7 As noted in an earlier order, "[h]ad the Secretary chosen to
8 publish for notice and comment the proposed changes affecting
9 benefits, the parties could now be on the verge of implementing a
10 timely change based upon full information." Order on Plaintiff's
11 Motion for Temporary Restraining Order at 5 (Dkt. # 50) (December
12 22, 1992). But that procedure was not followed.

13 For the reasons stated, the former Secretary's issuance of
14 the grant announcements and RFP constituted rule-making without
15 compliance with the notice and comment requirements of the Admin-
16 istrative Procedure Act. Accordingly, plaintiffs' motion for
17 partial summary judgment is granted, and the motions of defendant
18 and the intervenors are denied.

19
20 **V. PLAINTIFFS' CLAIM RE ALLEGED FAILURE
21 TO CERTIFY AND PROVIDE A COMPARABLE MEDICAL PROGRAM**

22 Plaintiffs also seek judgment on the ground that the Secre-
23 tary has violated Pub. L. No. 102-39, 106 Stat. 1792, by failing
24 to certify and provide a private medical program that is compara-
25 ble to the existing program. Because the APA issue is decisive,
26 this claim need not be reached.

VI. INJUNCTION

A court "shall" set aside agency action found to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Accordingly, the Secretary must be and is hereby enjoined from entering or implementing the proposed FRY contracts, grants, and policies.

The Secretary has also proposed to terminate the existing cash and medical assistance programs for refugees. The Refugee Act of 1980 states that the Director of ORR "shall, to the extent of available appropriations . . . insure that cash assistance is made available to refugees . . ." 8 U.S.C. § 1521(a)(1)(A) (emphasis added). A termination of the existing programs, in the absence of a valid replacement program, would violate the statute. Accordingly, the Secretary is further enjoined from terminating the existing cash and medical assistance programs for refugees until a valid new program is in place, or until further order of the court.

The clerk is directed to send copies of this order to all counsel of record.

Dated: February 12, 1993.

William L. Dwyer
William L. Dwyer
United States District Judge

State of California

Health and Welfare Agency

FAX COVERSHEET

Date: 2-18-93

To: ELAINA LARA

Fax #: () 657-3224

Subject: **Telefax Verify Phone Number: (916) 324-1576.**

From: **California Department of Social Services**

Sender: Ellen Horton

Bureau: Refugee and Immigration Programs Bureau

Section: Policy

Sender's Phone #: () 323-2094

This coversheet and 9 page(s) were sent. Time 2:00 AM PST

WE ARE SENDING ON A CANNON FAXPHONE 24. THE TELEPHONE NUMBER FOR THE FAX MACHINE IS (916) 323-1136.

COMMENTS:

Please review & update if necessary - Thanks!