

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

**MICHELLE CASE, NICOLE KELLY,
L.H. and L.J. by their next friend NICOLE KELLY,
KATHLEEN DYGAS, and T.Z. by her next friend
KATHLEEN DYGAS,
on behalf of themselves and
all others similarly situated,**

Plaintiffs,

**Case No. 2:11-CV-14298-PDB-MJH
Hon. Paul D. Borman District Judge**

v.

**MAURA CORRIGAN,
in her official capacity as Director,
Michigan Department of Human Services,**

Defendant.

**Plaintiffs' Motion for Ex Parte Temporary Restraining Order
and Preliminary Injunction
with Supporting Brief**

On September 29, 2011 Plaintiffs' attorney contacted the Defendant, the head of legal services for the Department of Human Services, and the Assistant Attorney General in charge of the Health, Education, and Family Services Division of the Michigan Attorney General's office to inform them that Plaintiffs intended to file this lawsuit and this motion. Plaintiffs' attorney provided written information, in the form of a draft Complaint that included the factual allegations and legal claims of the plaintiffs in this case. Plaintiffs' attorney sought the concurrence of the Defendant in this motion and offered to answer any questions about the request that the Defendant might have. Concurrence was not granted.

Plaintiff moves the Court for a preliminary injunction and temporary restraining order pursuant to Fed. R. Civ. P. 65.

Plaintiff makes this motion on the grounds that:

1. Plaintiff is likely to prevail on the merits of her claim;
2. Plaintiff will suffer irreparable harm if preliminary relief is not granted;
3. Third parties will not be harmed by the relief sought; and
4. The public interest will be served by granting the relief sought.

Plaintiff specifically requests that the Court issue a temporary restraining order and preliminary injunction to:

- A. Enjoin Defendant from terminating Family Independence Program (FIP) benefits pursuant to any notice that cites to BEM 234 before BEM 234 (or whatever policy is relevant) is publicly available for review for at least 10 days after receipt of the notice.
- B. Enjoin Defendant from failing to provide detailed notice of the reasons for FIP denials, including information about the length of the time limit being imposed, the identity of the individual whose receipt of FIP has exceeded the limit, and the number of countable months that individual has received FIP.
- C. Enjoin Defendant from terminating FIP based on the time limits for federal funding to persons who have not violated the 48 month time limits set by the Social Welfare Act, MCLA 400.57.
- D. Grant such other and further relief as may be just and proper.

Brief in Support of Plaintiffs' Motion for Preliminary Injunction

Questions Presented:

1. Whether the Court should temporarily restrain and preliminarily enjoin Defendant from failing to continue Family Independence Program (FIP) assistance to current recipients until the Department sends a timely (10 day) pre-termination notice citing a legal or policy basis that is published and publicly available at the time the notice is sent.
2. Whether the Court should temporarily restrain and preliminarily enjoin Defendant from failing to continue Family Independence Program (FIP) assistance to current recipients until the Department sends a timely (10 days) pre-termination notice that details the legal and factual basis for the termination, including information about the length of the time limit being imposed, the identity of the individual whose receipt of FIP has exceeded the limit, and the number of countable months that individual has received FIP.
3. Whether the Court should temporarily restrain and preliminarily enjoin Defendant from terminating FIP assistance to current recipients based on time limits unless and until the recipients have received FIP for 48 countable months under the Social Welfare Act.

Controlling Authority:

U.S. Const. Amend. 14, § 1

M.C.L.A. 400.57p and .57r

Frisch's Restaurant Inc. v. Shoney's Inc., 759 F.2d 1261 (6th Cir. 1985)

Goldberg v. Kelly, 397 U.S. 254 (1970)

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)

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I. Introduction

The named Plaintiffs and a class that includes over 10,000 families (including more than 20,000 children) will be terminated from the Family Independence Program (“FIP”) on October 1, 2011 unless this motion for a temporary restraining order and preliminary injunction – and accompanying motion for class certification -- is granted. Plaintiffs seek to enforce their federal rights to due process under the Fourteenth Amendment to the Constitution as well as their rights to continued FIP not be terminated from FIP based on time limits unless and until they have received FIP for more than 48 countable months under Michigan’s Social Welfare Act, M.C.L.A. 400.57p and .57r. Plaintiff and members of the class have qualified for FIP because of their financial need and they rely on FIP to meet their basic needs including shelter, utilities, transportation, and clothing.

The named Plaintiffs and class members are recipients of FIP cash assistance benefits who have received notices from the Department of Human Services (“the Department”) advising them their FIP will be terminated October 1, 2011 because they or someone in their household exceeded a “Federal Time Limit maximum.” The notices cite “Manual Item(s): BEM 234”. See Ex’s. B, C, and D to the Complaint. The notice does not tell recipients what the alleged “Federal Time Limit maximum” is, and does not specify who has exceeded the limit or how much time they have accumulated.

Furthermore, the cited policy, BEM 234, is not published and is not publicly available. The policy is a secret apparently known only to certain employees of the Defendant. In spite of repeated requests by Plaintiffs’ attorneys since September 2, 2011, BEM 234 has not been published or posted on the Defendant’s website, or otherwise made publicly available. See Ex. K, O, P, and Q to the Complaint. The time for Plaintiffs and class members to request a pre-

termination hearing has expired,¹ and the policy used as a basis for terminating their cash assistance still is not publicly available. The Defendant is deliberately withholding the policy from the public and does not intend to publish and post the policy on its public website until October 1, 2011— after the FIP benefits of over 10,000 families with over 20,000 children have been terminated. See *Ex. L to Complaint*.

The Defendant terminated Plaintiffs' and other class members' FIP assistance based on time limits without determining whether they had received FIP for 48 countable months since October 2007.

As a matter of Constitutional due process, the Defendant does not have the authority to terminate FIP to Plaintiffs and members of the class because Defendant has not given them meaningful notice at a meaningful time, nor has Defendant provided Plaintiffs access, at a meaningful time, to the written policy used as a basis for the termination resulting in their termination.

The Defendant likewise does not have authority to terminate FIP to Plaintiffs and members of the class, based on time limits, unless and until they have received FIP for more than 48 countable months under the Social Welfare Act. Defendant has violated Plaintiffs' and class members' rights under the Social Welfare Act by deciding they are ineligible due to an alleged "Federal Time Limit maximum" that is not required by federal law and is inconsistent with the FIP eligibility time limits set forth in the Social Welfare Act.

Plaintiffs are filing a motion for immediate class certification and they seek temporary and preliminary relief for themselves and all class members.

¹ A pre-termination hearing must be requested within 10 days of the date the notice is mailed in order for benefits to continue pending the outcome of the hearing. For the named Plaintiffs the deadline was 9/21/11. See *Ex's. B - D to Complaint*

II. Named Plaintiffs

A. Michelle Case

Michelle Case is the mother of an 8 year old boy who receives \$674 per month SSI disability benefits because of his severe multiple disabilities. Ms. Case's son is blind and deaf, and must be fed through a tube; he is dependent on Ms. Case to assist with activities of daily living including bathing, dressing, grooming, and feeding. Ms. Case receives \$306 per month in FIP assistance. Ms. Case and her son they receive less than \$165 per month in Food Assistance Program benefits, which cannot be used to purchase items other than food. Ms. Case and her son have no other income and they will be unable to meet their subsistence needs if their FIP is terminated on October 1, 2011.

Since at least October 2007, Ms. Case has been exempted from participation in employment and training activities (now called Jobs Education and Training or "JET") normally required of FIP recipients as a condition of eligibility, because she is needed at home or at school to care for her disabled child on such an extensive basis that it prevents her from participating in employment or training. Because she has been exempt from JET, none of the months Ms. Case has received FIP are counted toward the 48 month time limit on receipt of FIP under the Social Welfare Act, M.C.L.A. 400.57p(1)(a) and BAM 102 p.1. *See Ex. E to Complaint.*

Ms. Case submitted a request for a pre-termination hearing but she has not received any notice telling her whether her benefits will continue pending the outcome of the hearing. The Case family will not be able to make ends meet without FIP, because they will have a monthly income of only \$674 per month for their family of two.

B. Nicole Kelly and her children, L.H. and L.J.

Nicole Kelly is the working mother of two children, ages 9 and 13, who receives about \$360 per month in FIP assistance. Ms. Kelly earns between \$200 and \$400 per month, after expenses, from her self-employment as a hairdresser and receives about \$500 in Food Assistance Program benefits that can only be used to purchase food. The Kelly household has no income other than their FIP and Ms. Kelly's earnings from self-employment, and they will be unable to meet their basic needs when their FIP ends on October 1, 2011.

Ms. Kelly has worked and participated in activities assigned to her under the JET employment and training program, and under her Family Self Sufficiency Plan, in all or most of the months she has received FIP since October 2007. To comply with her Family Self Sufficiency Plan or employment and training requirements, Ms. Kelly has participated in community service work, job search activities, and other activities assigned by the JET or Work First program, in addition to her employment as a hairdresser. Because she has been employed and meeting the requirements of her Family Self-Sufficiency Plan, Ms. Kelly has not received FIP in 48 months that would be countable toward the time limit on FIP contained in state law and policy, M.C.L.A. 400.57p and .57r(1)(b), and BAM 102.

Ms. Kelly did not submit a request for a pre-termination hearing because she did not receive adequate notice of the basis for the termination. Therefore, FIP to Ms. Kelly and her children will be terminated unless a temporary restraining order and preliminary injunction are granted by the Court in this case. The Kelly family will not be able to make ends meet without FIP, because they will have an income of only \$200-\$400 per month for their family of three.

C. Kathleen Dygas and her daughter, T.Z.

Kathleen Dygas is the mother of two children, ages 11 and 9. Ms. Dygas receives \$403 per month in FIP for herself and her daughter, T.Z., who suffers from migraines, asthma, chronic sinus

infections with antibiotic resistance, and Attention Deficit Disorder. T.Z. was in special education classes for many years because of developmental delays in speech and language, and now lags behind in her academic achievement. Ms. Dygas's 9 year old son, S.Z., has received \$674 per month in Supplemental Security Income (SSI) disability benefits since birth, due to severe disability. Ms. Dygas and her two children receive about \$300 per month in Food Assistance Program benefits, which can only be used to purchase food items. The Dygas household has no other income and will be unable to meet its subsistence needs if the \$403 per month FIP is terminated.

Since at least January 2008, Ms. Dygas has been exempted from participation in employment and training activities (now called Jobs Education and Training or "JET") normally required of FIP recipients as a condition of eligibility, because she is needed at home or at school to care for her disabled child on such a frequent basis. Because she has been exempt from JET, according to the Department's own records, Ex. J to the Complaint, only three of the months Ms. Dygas has received FIP are counted toward the 48 month time limit on receipt of FIP under the Social Welfare Act.²

Ms. Dygas submitted a timely request for a hearing on the termination of her FIP based on time limits, but the Defendant has not deleted the termination. *See Ex. I to the Complaint.* Therefore, FIP to Ms. Dygas and her daughter will be terminated unless a temporary restraining order and preliminary injunction are granted by the Court in this case. The Dygas family will not be able to make ends meet without FIP, because they will have an income of only \$674 per month for their family of three.

III. Background – The FIP Program, TANF Block Grant Funding, and Time Limits

² The 48 month time limit is further explained in Section III below.

Michigan's Aid to Dependent Children ("ADC") program was renamed the Family Independence Program ("FIP") under 1995 P.A. 223. *M.C.L.A. 400.57(2)*. FIP is a needs-based program that provides cash assistance for low-income parents with minor children. *M.C.L.A. 400.57et seq.* The Department must administer FIP to "[p]rovide financial support to eligible families while they pursue self-improvement activities and engage in efforts to become financially independent." *M.C.L.A. 400.57a*. In general, the Social Welfare Act requires FIP recipients to participate in attendant work and contractual obligations. See generally *MCLA 400.57d, .57e, and .57 g*. Further, as a constraint on the payment of FIP, the legislature has also clearly articulated a public policy concerning time limitations on the payment of assistance to certain individuals, *M.C.L.A. 400.57p and .57r*, as discussed below.

In 1996 the Personal Responsibility and Work Opportunity Reconciliation Act established the Temporary Assistance for Needy Families ("TANF") block grant to replace the Aid to Families with Dependent Children ("AFDC") program as the source of federal funding for family cash assistance programs under Title IV-A of the Social Security Act. *42 U.S.C. 601 et seq.* The AFDC program was jointly administered by the state and federal governments, using eligibility criteria established by federal statute and regulations. Under AFDC, the federal government paid a percentage of the cost of providing cash assistance to eligible families, and a percentage of the state's administrative costs. See generally *Anderson v. Edwards, 514 U.S. 143, 146 (1995)*.

Under TANF, the state receives a set annual amount, which varies from state to state, to be used for family cash assistance and other purposes specified in the federal statute. The TANF statute and regulations gives states much broader latitude than the old AFDC statute and regulations to establish eligibility criteria for their family cash assistance program. TANF was

designed “to increase the flexibility of States in operating a program designed to provide assistance to needy families,” 42 U.S.C. § 601(a). The TANF block grant amount available to the state may vary depending on the amount of state funds it spends on activities, programs, or services that count as maintenance of effort (“MOE”) spending. The amount of the state’s federal TANF funding and its required state spending under federal TANF law may vary depending on whether the state has incurred penalties for failing to meet MOE requirements or overall work participation rates for its TANF cash assistance caseload, and whether it has received bonuses for meeting certain other performance measures. *See e.g., 42 U.S.C. 603, 604 and 609.*

FIP is administered using both federal TANF block grant funding and state funds. Some families receive monthly FIP grants that are paid for with state funds only. For example, beginning in 2007, Michigan used state funds, rather than TANF, to pay for FIP grants provided to families receiving FIP who, if they were receiving TANF-funded FIP, would be considered to be two-parent families for purposes of meeting the overall TANF work participation rates established by the federal government. For many years, Michigan has used state funds, rather than TANF, to pay for FIP grants provided to adults on FIP who were considered incapacitated and to families in which the only child on the grant was 19 years old. *See, e.g., Michigan DHS TANF State Plan for January 1, 2010 – December 31, 2011 (Ex. M to the Complaint) at p.9.*

A. 60 Month Time Limit on State’s Use of Federal Funds

In general, the Defendant may not use federal TANF funds for a FIP grant to a family that includes an adult who has received TANF-funded cash assistance for 60 months or more, excluding any months that the individual received cash assistance as a minor child who was not a head of household or married to a head of household. However, the state can provide TANF for

more than 60 months to up to 20% of its average monthly TANF caseload under hardship exemptions defined by the state. *42 U.S.C. 608(a)(7)*.

The Defendant began using TANF funds for all or part of the FIP program in about October 1996, thus starting the 60-month “clock” on the use of TANF funds for certain FIP cases. Since it began administering FIP as its TANF cash assistance program in 1996, Michigan has used the 20% hardship exception to continue using federal TANF funds for families who meet Michigan FIP eligibility requirements but contain an adult who has received 60 months of TANF-funded FIP. *See, e.g., Michigan DHS TANF State Plan for January 1, 2010 – December 31, 2011 (Ex. M to the Complaint) at p.5; see also Michigan TANF State Plan for October 1, 2005 – December 31, 2007 p.1*³ (online at http://www.michigan.gov/documents/2006TANFStatePlan_138729_7.pdf) and for October 1, 2007 – December 31, 2009 p. 5⁴ (online at http://www.michigan.gov/documents/dhs/DHS-2007-09-TANF-StatePlan_206533_7.pdf).

³ “Michigan does not have a time limit on its Family Independence Program. Michigan will seek federal financial participation if the family contains an adult who has received FIP for more than 60 months, subject to the limitation of such funding to 20% of the average monthly number of such families receiving assistance in a fiscal year. Such families in need of assistance beyond the 60-month limit and exceeding the 20% limitation will be state-funded as long as they continue to meet program requirements.”

⁴ Both the current (2010 – 2011) Plan and the 2007-2009 plan state

Michigan defines a family to be exempt by reason of hardship under Section 408(a)(7)(C)(i) for any month that

- a) Is not countable toward the state time limit; or
- b) Qualifies as an extension month for purposes of state time limits; or
- c) The family resides in a county that meets Food and Nutrition Services Time Limited Food Stamps waiver criteria.

Michigan will seek federal financial participation if the family contains an adult who has received FIP for more than 60 months and the family is excluded by reason of hardship, subject to the limitation of such funding to 20 percent of the average monthly number of such families receiving assistance in a fiscal year. Such families in need of assistance

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The federal TANF statute explicitly states the restriction on the use of TANF funds does **not** restrict the state's ability to use state funds to provide FIP to needy families that include an adult who has received TANF-funded assistance for more than 60 months. *42 U.S.C. 608(a)(7)(F)*. Therefore, the federal limit on use of TANF funds is **not** a limit on FIP eligibility. Instead, it is a limit on the funding stream that may be used to pay for FIP assistance for certain families.

B. 48 Month Time Limit on Receipt of FIP Payments

All FIP cases are governed by the FIP requirements of the Social Welfare Act, regardless of the funding sources used to pay for the FIP. See generally *M.C.L.A. 400.57 et seq.* Since October 1, 2007, the Social Welfare Act has contained a 48-month lifetime limit on payment of FIP to an individual. *M.C.L.A. 400.57r*. Months before October 2007 do not count toward the 48 month time limit. *Id. and BAM 102 (Ex. Q to the Complaint)*. The 48 month time limit applies without regard to the funding source of the individual's FIP. *Id.*

The Social Welfare Act contains certain exemptions or "clock stoppers" that toll the 48 month limit. From October 1, 2007 through September 30, 2011, months in which FIP is paid to an individual do not count toward the 48 month limit if

- (a) the individual was exempted from participation in the employment and training activities known as "Work First" or "Jobs Education Training (JET)";
- (b) the individual was working and meeting the requirements of his or her family self-sufficiency plan;

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beyond the 60-month limit and exceeding the 20 percent limitation will be state-funded as long as they continue to meet program requirements.

Currently, all counties in Michigan meet the FNS Time Limited Food Stamps waiver criteria because of Michigan's high unemployment rate.

(c) the individual was living in a county with unemployment at least 25% higher than the statewide average; or

(d) the individual had certain FIP eligibility requirements waived because of domestic violence.

M.C.L.A. 400.57p(1) and BAM 102 p. 1.

The Michigan legislature recently re-visited the question of time limits for FIP, in part because the time limit and extensions in M.C.L.A. 400.57r, and the “clockstoppers” or exemptions in M.C.L.A. 400.57p, were scheduled to sunset on September 30, 2011. In 2011 Pub.Act 131, the legislature re-enacted the 48 month time limit with the October 1, 2007 start date for the 48 month “clock”. It eliminated any extensions to the 48 month limit. And it narrowed the “clockstoppers” or months that are exempt from being counted toward the 48 months.

Beginning October 1, 2011, the only months do not count toward the individual’s 48 month limit are months in which the individual is exempt from JET because of age⁵, disability lasting 90 days or more, receipt of SSI or Social Security disability benefits, or domestic violence. *Amendment to M.C.L.A. 400.57p and 400.57f effective October 1, 2011; 2011 Pub. Act 131.* Beginning October 1, 2011, the Defendant has the discretion to not count toward the 48 month limit the months in which the individual is exempt from participation in JET because he or she is needed in the home to care for a disabled spouse or child. *Amendment to M.C.L.A. 400.57p and 400.57f effective October 1, 2011. 2011 Pub. Act 131.* Policy is not yet published or publicly available specifying how the Defendant intends to implement the new

⁵ Effective October 1, 2011, individuals are exempt from JET if they are (under age 16, age 16-18 and attending secondary school, age 65 or older).

“clockstoppers” that will become effective on October 1, 2011 and how she intends to exercise her discretion.

IV. Argument

A. Standard for granting preliminary injunction

Plaintiffs and the plaintiff class satisfy the standard for obtaining a temporary restraining order and a preliminary injunction because (1) plaintiffs have a strong likelihood of success on the merits; (2) the plaintiffs will be irreparably harmed if a temporary restraining order and preliminary injunction is not issued; (3) an injunction in favor of plaintiffs class will not cause substantial harm to others; and (4) an injunction in favor of plaintiffs serves the public interest. *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000); *McPherson v. Michigan High Sch. Athletic Ass’n*, 119 F.3d 453, 459 (6th Cir. 1997) (*en banc*) (quoting *Sandison v. Michigan High Sch. Athletic Ass’n*, 64 F.3d 1026, 1030 (6th Cir. 1995)); *Frisch’s Restaurant Inc. v. Shoney’s Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985). “These factors are to be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction.” *Leary*, 228 F.3d at 737, (citing *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg’l Transit Auth.*, 163 F.3d 341, 347 (6th Cir. 1998)).

In the present case, the equities weigh solidly in favor of granting preliminary relief to ensure that Plaintiffs and the Due Process Class members do not lose subsistence cash assistance benefits without timely notice and access to the policy on which the termination is based, and without receiving adequate notice of the factual and legal bases for terminating her benefits, as required by the due process clause of the Fourteenth Amendment to the Constitution. The equities also weigh in favor of granting preliminary relief to Plaintiffs and the Time Limit class,

to ensure they are not denied FIP on the basis of time limits that conflict with state law in the Social Welfare Act, and that have not been authorized by the state legislature.

B. Plaintiffs are likely to prevail on the merits of their claims

1. The Defendant is Violating Plaintiffs' Rights to Due Process

Under the due process clause of the Fourteenth Amendment to the United States Constitution, individuals have the right to a meaningful notice and an opportunity to be heard before their FIP (a need-based governmental benefit program) is terminated. *Goldberg v. Kelly*, 397 U.S. 254 (1970). The Defendant must provide notice and an opportunity to be heard to anyone who wants to challenge the denial, termination or reduction of FIP benefits. U.S. Const., Amend. 14, cl.1; 42 U.S.C. 602(a)(1)(B)(iii); 45 C.F.R. 205.10 *et seq.*; M.C.L.A.400.9 and .37; Mich. Admin. Code R. 400.901 *et seq.*

The individual rights established by the due process clause of the Fourteenth Amendment are enforceable under 42 U.S.C. 1983. The due process clause of the Fourteenth Amendment creates an individual right to due process that is enforceable under 42 U.S.C. 1983. *See Howard v. Bayes*, 457 F.3d 568, 572 (6th Cir. 2006) (right to procedural due process enforceable under section 1983); *see also, Smith v. AuSable Valley Community Mental Health Svcs.*, 431 F. Supp. 2d 743, 751-3 (E.D.Mi. 2006) (substantive due process claim enforceable under section 1983).

Under the due process clause of the Fourteenth Amendment to the Constitution, individuals whose FIP is terminated have the right to a “timely and adequate” pre-termination notice “detailing the reasons for the proposed termination”. *Id.* 397 U.S. at 267-8. Under federal and state regulations that interpret and apply the state and federal statutes governing FIP, and the due process clause of the Fourteenth Amendment to the United States Constitution, individuals have the right to a pre-termination notice that fully explains the factual and legal

basis for the proposed termination, including “ The reasons for the intended action [and] . . . The specific regulations supporting the action.” *45 C.F.R. 205.10(a)(4)(B) and Mich. Admin. Code R. 400.902(1)(b) and (c)*.

“The right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. . . . The notice must be of such nature as reasonably to convey the required information.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306,314 (1950). “The purpose of notice is to ‘clarify what the charges are in a manner adequate to apprise the individual of the basis for the government's proposed action.’” *Moffit v. Austin*, 600 F. Supp 295, 298 (W.D. Ky. 1984), quoting *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S. Ct. 2963, 2978, 41 L. Ed. 2d 935 (1974).

Boilerplate notices that provide only the general reasons for a change in eligibility or benefits do not meet due process standards. Due process requires notice of “individualized reasons for changes”. *Schroeder v. Hegstrom*, 590 F. Supp. 121, 129 (D. Or. 1984).

In the present case, the notices sent by Defendant fail to provide information needed for FIP recipients to make an informed, knowledgeable decision about whether to contest the proposed termination. The notices provide in pertinent part:

Period	Action	Benefit	Who's included
10/1/2011 - Ongoing	Closed	\$0.00	All Persons in the group

Your ongoing benefit has been cancelled but you will continue to receive benefits through the last day before the period listed above. . . .

. . .

10/01/2011 – Ongoing

The reason for this action is:

[Name of parent] – Not Eligible

You or a member of your group has exceeded the Federal Time Limit maximum to receive Family Independence Program benefits.

Manual Item(s): BEM 234.

See Ex's. B, C, D to the Complaint. The notices do not provide an individualized explanation of why the group has become ineligible or exceeded time limits, because it does not specify (a) **what** the "Federal Time Limit maximum" is (how long and for what period of time); (b) **who** has exceeded the time limit; and (c) **how much** time on FIP that individual has used or received.

Furthermore, the Defendant has failed to publish and make available to the public the legal or policy basis cited in the notice – BEM 234. The Defendant has a standard operating procedure of not publishing any policy until the day of implementation, See Ex. L to Complaint. The Defendant's failure and refusal to publish and make the policy publicly available on the Department's website at the time she sent out more than 10,000 notices terminating cash assistance to needy families, violates those families' rights to due process.

The due process requirement that notice include "[t]he specific regulations supporting the action" necessarily supposes either that the content of the regulations will be quoted in the notice or will be published and publicly available so that the recipient of the notice can access and consult them. Providing a citation is meaningless unless it facilitates access to the cited policy.

Furthermore, "the establishment of written, objective, and ascertainable standards is an elementary and intrinsic part of due process. [cites omitted]" Baker-Chaput v. Cammett, 406 F. Supp. 1134, 1140 (D.N.H. 1976). Published, publicly available standards are an essential element of due process. "The [individual] must be afforded the opportunity to know beforehand what substantive criteria she had to meet in order to obtain ... assistance. [cites omitted] Without the issuance of standards, the initial reasons for denial may change and be replaced with new and differing reasons which the [individual] is unable to contest." Id. Not only must state agencies establish and publish standards for determining an individual's entitlement to needs-based assistance, but they must make information about the standards for qualifying for assistance

publicly available to those who may benefit from the rules. See Carey v. Quern, 588 F.2d 230, 232 (7th Cir. Ill. 1978).

In the present case, Plaintiffs and class members have no opportunity to know what time limit standards were being applied to them when they received the notice, and when their assistance is being terminated, because the Defendant has not published the policy and made it publicly available. Therefore, they have been denied due process of law. By refusing to publish and post the policy until October 1, 2011, when Plaintiffs and members of the class will already have been cut off, the Defendant is violating their rights to due process under the Fourteenth Amendment.

2. The Defendant does not have authority to terminate FIP assistance to recipients who have not been paid FIP for 48 countable months since October 1, 2007

An administrative agency's powers are defined and delimited by statute. See York v. Detroit, 438 Mich. 744, 767 (Mich. 1991)(citing Coffman v State Bd of Optometry Examiners, 331 Mich 582, 589; 50 NW2d 322 (1951)). However, when the Social Welfare Act confers broad, general powers but also contains specific provisions addressing a particular issue, the specific provisions will control. Detroit Base Coalition v. Director, Mich. Dept. of Social Services, 431 Mich. 172, 188 (1988); (Grantham) Loy v. Grantham, 117 Mich App 678, 682 (1982). Thus, in Detroit Base Coalition, the broad statutory grant of authority to adopt plans to participate in the distribution of federal money, to enter agreements with the federal government, and to distribute federal funds under section 10 and 14 of the Social Welfare Act, M.C.L.A. 400.10 and .14, did not empower the Department to issue a policy for holding administrative hearings by telephone, because "[t]he only relevant statutory provision *mandates* that the department conduct hearing pursuant to promulgated rules [which did not provide for telephone hearings]." Id. 431 Mich at 188. Similarly, in Grantham, the broad statutory grant of authority

to “assist other departments, agencies and institutions..., when so requested, in conformity with the purposes of this act” under section 14 of the Social Welfare Act, M.C.L.A. 400.14(1)(g), did not empower the agency to take custody of a child under a Circuit Court custody order in a divorce case, because other sections of the Social Welfare Act, M.C.L.A. 400.115b, specifically provided for the Department to take custody of children through specified Probate Court proceedings.

In the present case, sections 57r and 57p of the Social Welfare Act, M.C.L.A. 400.57r and .57p, specifically set forth the statutory authority for the Department to impose time limits on the payment of FIP assistance. Therefore, other sections of the Act that grant broad, general powers to the Department, cannot be interpreted as authorizing the Defendant to adopt or implement time limits policies on the payment of FIP assistance that are inconsistent with the specific statutory time limits. There are a number of significant differences and inconsistencies between the state FIP time limit in the Social Welfare Act and the federal TANF funding limit in Title IVA of the Social Security Act. Therefore, the Defendant cannot adopt the federal scheme for time limiting expenditures of federal TANF funds as a basis for termination of FIP to individuals who have not accumulated the maximum number of countable months under the specific Social Welfare Act provisions.

First, as discussed above, the federal time limit on **use of federal TANF funds** is not a time limit on the **payment of FIP benefits** to parents or children in Michigan, both because the state can and does use state funds to pay for some families on FIP and because the state can and does use federal TANF funds to provide cash assistance for more than 60 months for up to 20% of the average monthly FIP caseload. *42 U.S.C. 608(a)(7)(C) and (F)*. Second, the 60 month “clock” on use of federal TANF funds began to run in 1996 under 42 U.S.C. 608(a)(1), but the

48 month clock on payment of FIP assistance started to tick on October 1, 2007 under M.C.L.A. 400.57r. Third, there are significant differences in the “clockstoppers” or exclusions. The only clockstopper on counting months toward the time limit on use of TANF funds is for months in which an individual lives in Indian country or an Alaskan Native village with an adult unemployment rate over 50%, 42 U.S.C. 608(a)(7)(D). The Social Welfare Act, on the other hand, contains several clockstoppers (some of which will not apply to FIP paid in months after September 30, 2011) related to exemptions from JET requirements, employment and compliance with a Family Self Sufficiency Plan, waivers based on domestic violence, and high local unemployment rates. See M.C.L.A. 400.57p and amendment to 400.57p under 2011 Pub. Act 131.

Accordingly, Plaintiffs are likely to prevail on their claim that the Defendant does not have authority to terminate their FIP under a time limit policy when they have not reached the time limit specified in the Social Welfare Act.

C. Plaintiffs will suffer irreparable injury if a preliminary injunction is not granted in this case

The facts in the Plaintiffs’ Verified Class Action Complaint, together with the decisional law, establish that the Plaintiffs and class members will suffer irreparable harm unless a temporary restraining order and a preliminary injunction are issued. FIP is one of several needs-based programs that comprise the federal “safety net” for low-income persons. Federal courts consistently have held that the loss of even a few dollars of needs-based assistance under needs-based financial assistance programs constitutes irreparable harm. See, e.g. Soave v. Milliken, 497 F.Supp. 254, 262 (W.D.Mi. 1980) (preliminary injunction against reduction of General Assistance payments), Yates v. Buscaglia, 87 F.R.D. 139, 143 (W.D.N.Y 1980) (preliminary injunction against reduction of plaintiff’s AFDC benefits from \$94 to \$75 per month).

Loss of needs-based public assistance such as FIP constitutes irreparable harm because recipients are “completely reliant upon the continued receipt [of the assistance] for their very survival.” *Bizjak v. Blum*, 490 F.Supp. 1297, 1303 (N.D.N.Y 1980). In the present case, Michigan’s high unemployment rate is an obvious and overwhelming obstacle to replacing FIP with earnings. Furthermore, Ms. Case and Ms. Dygas (and thousands of other parents being cut off FIP based on time limits) are unemployable because they must attend to the overwhelming needs of their severely disabled children, and thus cannot make up for the loss of FIP through work. Ms. Kelly does not have a disabled child and through her hard work, she has been able to generate some earnings as a hairdresser, but she has not been able to find enough clients or additional job(s) to support herself and her two children without FIP.

In this case, if their FIP is terminated, all of the named Plaintiffs and class members will be left with insufficient monthly income to meet their basic, subsistence needs for shelter, utilities, clothing, transportation, etc., as reflected in the circumstances of the named Plaintiffs, summarized in the table below:

Family name/size	Monthly Income <u>without</u> FIP	Monthly FIP	Monthly Total <u>with</u> FIP	Poverty level for family of their size (monthly)
Case – 2 people	\$674 (child’s SSI)	\$306	\$980	\$1,226
Kelly – 3 people	\$200 - \$400 (net earnings)	\$360	\$600-700 (estimated average)	\$1,545
Dygas – 3 people	\$674 (child’s SSI)	\$403	\$1,077	\$1,545

Properly stated, the definition of irreparable harm is whether there is or will be a “wrong which cannot be adequately redressed by relief on the merits.” *N.Y. Pathological and X-Ray Laboratories, Inc., v. Immigration and Naturalization Service*, 523 F. 2d 79, 81 (2d Cir. 1975).

The state’s Eleventh Amendment immunity bars a retroactive award of damages or FIP against the Defendant. See generally, *Edelman v. Jordan*, 415 U.S. 651 (1974). Thus, Plaintiffs and the

members of the class have no method for obtaining adequate compensation for their inability to meet basic needs when FIP is terminated, which may result in homelessness, utility shutoffs, etc., in the meantime. Accordingly, Plaintiffs and class members have shown they will suffer irreparable harm unless the Court grants temporary and preliminary relief requiring Defendant to continue their FIP.

D. Granting temporary and preliminary relief is in the public interest

Where, as here, meeting the subsistence needs of families with children is at stake, the public's interest is large. *See Soave*, 497 F. Supp. at 262 (W.D. Mich. 1980) (“[T]here are important societal interests values which we seek to recognize and protect by providing public assistance. Maintaining the personal dignity and stability of persons on the edge of poverty serves not only their personal interests, but the interests of the society in which they live.”).

The harm suffered by the Plaintiffs and class members may not be remedied by any but the most immediate and comprehensive action by this Court. Each day that plaintiffs and members of the plaintiff class are forced to go without needed assistance is another day during which their well-being and that of their families is threatened. Therefore, an order protecting Plaintiffs and members of the class from Defendant's unlawful termination of their FIP and violations of their right to due process is clearly in the public interest. *See Markva v. Haveman*, 168 F. Supp. 2d 695, 720 (E.D. Mich. 2001)

V. Conclusion

For the foregoing reasons, the prerequisites to issuance of a preliminary injunction are met in this case and the preliminary injunctive relief specifically set forth at the beginning of this document should be granted.

Respectfully submitted,

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s/Jacqueline Doig
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