UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DIANE RIDGELY, ET AL	**CIVIL ACTION**
VERSUS	**NO. 07-2146**
FEDERAL EMERGENCY MANAGEMENT AGENCY, ET AL	**SECTION "C" (4)**

ORDER AND REASONS

This matter comes before the Court on the plaintiffs' motion for class-wide preliminary injunction. Having considered the record, the memoranda and argument of counsel, and the law, the Court has determined that a preliminary injunction is appropriate for the following reasons.

The plaintiffs in this now-certified class action seek declaratory and injunctive relief against the Federal Emergency Management Agency, U. S. Department of Homeland Security, Michael Chertoff, and R. David Paulison (collectively "FEMA") under the Fifth Amendment to the United States Constitution, the Stafford Act, 42 U.S.C. § 5151, *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 552(a)(2) & 706 ("APA"). The class members have applied for and received assistance under Section

408 of the Stafford Act, 42 U.S.C. § 5174, as a result of being displaced by Hurricanes Katrina and Rita. The first "Section 408 Class" concerns, for present purposes, those persons who have been or will be denied continued assistance and who have appealed or will appeal the denial of benefits and three subclasses of those persons who (1) have had benefits terminated without an adequate and/or timely notice of the reasons for termination, (2) have had benefits terminated without an adequate pre-termination hearing, or (3) have had benefits terminated due to efforts by FEMA to recover alleged overpayments. The second, "Repayment Class," consists of persons who received from FEMA a demand for repayment of benefits received. Each of the named plaintiffs have had Section 408 benefits denied. (Rec. Doc. 4, p. 1). Their Complaint sets forth ten claims against the defendants, eight of which allege Fifth Amendment due process violations, one of which alleges an APA violation and one of which alleges violation of the Stafford Act and FEMA's rules. (Rec. Doc. 1, ¶¶ VIII. 93-106).

Preliminary Injunction

A preliminary injunction is an extraordinary and drastic remedy that is granted only when the movers carry the burden of persuasion by a clear showing. Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 11A *Federal Practice & Procedure* § 2948 (West). It is appropriate only when the movers establish: (1) a substantial likelihood

that they will prevail on the merits; (2) a substantial threat that irreparable harm will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the defendants; and (4) the granting of the preliminary injunction will not disserve the public interest. Id.; Kahara Bodas Co., L.L.C. v. PerusahaanPertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 363 (5th Cir. 2003). All four prerequisites must be met. As noted by Judge Duval in McWaters v. FEMA, 408 F.Supp.2d 221, 228 (E.D.La. 2005), however, a sliding scale applies which measures the hardships that issuance or denial would cause balanced against the degree of likelihood of success on the merits. When the other factors weigh in favor of injunctive relief then a showing of *some* likelihood of success on the merits can justifies granting the preliminary injunction. Id. Here, the plaintiffs rely on evidence establishing a history of alleged "chaos and confusion" on the part of the defendants as support for an injunction that requires "constitutionally adequate notice and an opportunity to be heard before subsistence benefits are terminated" or repayment demanded. (Rec. Doc. 11, pp. 2-3).

Hardships

Because it appears that the final three considerations for a preliminary injunction require less discussion than the more substantive challenges to the merit of the plaintiffs' claims, the Court will discuss them first. The plaintiffs claim imminent harm

and irreparable injury in the loss of Section 408 assistance without affording pre-termination hearings or adequate notice because "[h]omelessness is a near certainty for many recipients, and the harm is immeasurable," while others who are not evicted will be forced to move to "less adequate accommodations," despite any monetary award that may be received thereafter. (Rec. Doc. 11, p. 21). The defendants offer three arguments that irreparable harm is lacking. First, they argue that "even if [p]laintiffs prevail in this case, they will be in exactly the same position they are in today. Because plaintiffs do not seek any change whatsoever in their circumstances, denial of a preliminary injunction cannot injure them at all, let alone irreparably." The Court find that the defendants misperceive the nature of the plaintiffs' claims. The plaintiffs allege that FEMA's procedures are so flawed and haphazard that the outcomes are often erroneous and certainly unreliable. While the focus of the lawsuit is on the process, the assumption is that with minimal due process imposed, the outcomes will in fact be more accurate and reliable. For many members of the class, this infusion of due process will likely result in favorable outcomes whereas under the current system, erroneous terminations will not be corrected until appeal and, because of the allegedly flawed processes of appeal, may go uncorrected entirely. Failure to correct these allegedly flawed procedures, therefore, does injure members of the class. Second, they

argue that the plaintiffs "essentially ask for money" in the form of assistance while they appeal adverse eligibility or recoupment determinations. While again, the Court finds that the defendants misperceive the nature of the law suit, even if it was just about "money," for impoverished people, an erroneous denial of Section 408 funding brings the prospect of homelessness immediately to the front. Third, the defendants argue that plaintiffs' delay in seeking injunctive relief weighs against the existence of the required irreparable harm. (Rec. Doc. 51, pp. 21-22). Even if the particular plaintiffs did delay, the delay may well have been the result of the defendants' allegedly byzantine procedures. Furthermore, the class has now been certified and includes recipients of Section 408 housing funds who have not yet been terminated. Court finds no merit in any of the defendants' arguments that the plaintiffs face no irreparable harm if not afforded the injunctive relief providing proper notice and a hearing prior to having the disaster subsidy eliminated.

Turning to two other factors in weighing whether injunctive relief is appropriate, the plaintiffs argue that the injury with which they are threatened substantially outweighs any threatened harm to the defendants and will also serve the public interest. They cite the district court findings in a companion case, Association of Community Organizations for Reforem Now (ACORN) v. Federal Emergency

Managment Agency (FEMA), 463 F.Supp. 2d 26, 37 (D.C.D.C. 2006), stayed in part, 2006 WL 3847842 (D.C. Cir), reconsideration denied, 2007 U.S. App. LEXIS 929 (D.C. Cir.), appeal dismissed and preliminary injunction vacated, 2007 U.S. App. LEXIS 10569 (D.C.Cir.), Association of Community Organizations for Reform Now (ACORN) v. Federal Emergency Management Agency (FEMA), 2007 U.S. App. LEXIS 929 (D.C. Cir.). In the ACORN case, Judge Leon acknowledged that "the public has an interest in the government maintaining procedures that comply with constitutional requirements." ACORN, 463 F.Supp. 2d at 36.[1] The plaintiffs argue that the harm facing the plaintiffs

[1] The Court agrees with much of the opinion of Judge Leon in ACORN. This Court was concerned, however, with the admonition by the D.C. Circuit in denying reconsideration of its partial grant and partial denial of the injunction entered in ACORN. "Insofar as plaintiff-appellees claim a property right in *section 408* benefits, which they have neither received nor shown the eligibility for, we find it likely that Heckler v. Lopez, 463 U.S. 1328 ... (1983), prevents this court from upholding the district court's injunction." ACORN, 2007 U.S.App.LEXIS 929 (D.C.Cir.) (emphasis original). The Heckler case involved the termination of social security benefits and whether a portion of an injunction be stayed. Justice Rehnquist, sitting as a Circuit Justice, stayed that portion of the injunction that required the Secretary to pay benefits to certain recipients who had not been found disabled. Justice Rehnquist found that this "significantly interferes with the distribution between administrative and judicial responsibility for enforcement of the Social Security Act which Congress has established." Heckler, 463 U.S. at 1331. That issue is distinguishable in that this class includes plaintiffs who are currently receiving Section 408 benefits. To the extent the D.C. Circuit found that those who had already been cut off from benefits could not get injunctive relief retroactively, this Court is not bound by that conclusion.

and the public interest renders relatively insignificant the costs of pre-termination hearings that may be incurred by the defendants, which they argue may afford a more efficient method of handling claims and appeals in the end. The plaintiffs also point to FEMA's largesse with regard to the process afforded previous disaster victims, which ensured that due process rights were protected. The plaintiffs argue that the harm of threatened homelessness without proper notice and hearing, and the adverse effects on health, safety and well being on the individual plaintiffs as well as the communities in which they live are extremely serious in comparison to the burden they seek to impose on FEMA, which "is neither new nor undue." (Rec. Doc. 11, p. 24). The Court agrees with the plaintiff.

With regard to the final component for a preliminary injunction, the plaintiffs maintain that the proposed injunction will serve the public interest by continuing to shelter thousands of displaced persons and enhancing the public safety and function of the communities within which they now live. The defendants argue that the proposed injunction would "overwhelm FEMA and prevent it from carrying out the duties Congress has directed that it perform" because it would "prevent FEMA from responding promptly to disasters as they occur ... contrary to the public's interest in obtaining emergency relief when it is need (sic), and would undermine Congress' goal

... that the Federal Government can respond to emergencies quickly and effectively." (Rec. Doc. 51, p. 24). The Court is dismayed at this response. We are almost two years out from Hurricane Katrina devastating this area. Many people who initially received the needed aid have moved on with their lives and no longer require the assistance. This litigation concerns only those persons who have been approved for Section 408 housing assistance and are either continuing to receive it today or have relatively recently been terminated. While the Court recognizes the urgency of getting aid to people quickly in the aftermath of a catastrophe, it fails to perceive a similar urgency in terminating that aid, particularly when the streamlined procedures allegedly terminate those who are still eligible and desperately in need. The Court is bewildered at how infusing more due process in the termination phase threatens FEMA's ability to respond to future disasters. Indeed, the Stafford Act under which FEMA operates would appear to favor error on the side of the victims of a disaster in a close call. The mandate of the Stafford Act is "to provide an orderly and continuing means of assistance by the Federal Government... to alleviate suffering and damage which result from...disasters." 42 U.S.C. § 5121(b). The statute anticipates that "disasters often cause loss of life, human suffering, loss of income, and property loss and damage." 42 U.S.C. § 5121(a)(1). On the other hand, the Court does recognize the severity of the

threat to the plaintiffs, who may be erroneously terminated because of inadequate procedures and, at a minimum, need adequate notice to begin their lives anew yet again. The Court finds that the proposed injunction does not pose a significant harm to FEMA and actually serves rather than disserves the public's interest.

Likelihood of success on the merits: **due process claims**

The battleground of this motion lies in and around this factor.[2] In order to succeed on the merits of their due process claims, the plaintiffs must establish a property interest in the Section 408 benefits that is protected by the Due Process Clause and that the process used by FEMA was constitutionally deficient. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). In determining whether constitutionally adequate notice has been provided, the Court considers (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used and (3) the probable value, if any, of additional or alternative procedural safeguards, and the government's interest, its function and the fiscal and administrative burdens entailed by the additional or

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[2] The defendants have also filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), based on the arguments presented in opposition to this motion for preliminary injunction. Because the parties are unable to agree as to an alternative scheduling of motions, that motion remains set for hearing at a later date, at which time these issues can be revisited.

substitute procedural requirements. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The plaintiffs first argue that they have a protected property interest in Section 408 benefits. The plaintiffs find constitutional fault with the process used by FEMA in a number of specific ways. First, they argue that FEMA fails to provide a pre-termination hearing and imposes an unfair and extended appeals process; second, that FEMA fails to provide Section 408 recipients with adequate written notice of the reasons for termination of assistance; third, that FEMA fails to provide *any* written notice to Section 408 recipients who FEMA believes has been overpaid by some *other* assistance before terminating their 408 assistance; fourth, that FEMA fails to provide adequate written notice to those from whom it seeks repayment of alleged overpayments, including a failure to inform of the recipient's right to seek a waiver or compromise of the recovery. These arguments are fairly straightforward due process arguments. In opposition, the defendants present challenges to the alleged due process violations on a number of fronts.

Case or controversy/standing/mootness

The defendants first argue that subject matter jurisdiction is lacking because there is no "case or controversy" for purposes of Article III of the Constitution under Allen v. Wright, 468 U.S. 737, 750 (1984) and Bayou Liberty Assn. v. United States Corps

of Engineers, 217 F.3d 393, 397 (5th Cir. 2000). This argument is based on the fact that the plaintiffs do not challenge the substantive determinations made by FEMA, which renders any judicial determination advisory.

FEMA also contends that the plaintiffs' standing is undermined because they cannot articulate an injury that can be addressed by a favorable decision because a change in FEMA procedures will not change their status.[3] Under Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-103 (1998) and Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), the "irreducible constitutional minimum of standing" has three components: that there is an injury-in-fact suffered by the plaintiffs that is concrete and actual or imminent, not conjectural or hypothetical, that there is causation with a fairly traceable connection between the alleged injury and challenged conduct and that there be redressability with a likelihood that the requested relief will redress the alleged injury.

Here the plaintiffs have claimed injury in the process used by the defendants, not

[3] The defendants also argue that the claims of Ridgley and Dickson are moot because FEMA has withdrawn its repayment demand after suit was filed. The plaintiffs argue the claims are not moot because of the existence of the due process claim. The Court agrees that these two plaintiffs representatives do maintain a interest in the due process claims made.

the results reached by the process.[4] For the reasons stated earlier in this opinion, the Court finds that the defendants misperceive the plaintiffs' claims. To repeat, the plaintiffs allege that FEMA's procedures are so flawed and haphazard that the outcomes are often erroneous and certainly unreliable. While the focus of the lawsuit is on the process, the assumption is that with minimal due process imposed, the outcomes will in fact be more accurate and reliable. For many members of the class, this infusion of due process will likely result in favorable outcomes whereas under the current system, erroneous terminations won't be corrected until appeal and, because of the allegedly flawed processes of appeal, may go uncorrected entirely. Failure to correct these allegedly flawed procedures, therefore, does injure members of the class. The Court finds that the plaintiffs have sufficiently established standing for present purposes, and the defendants' argument on this issue is unpersuasive.

Sovereign immunity

Next, the defendants argue that any due process claims are barred by sovereign

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[4] The Bayou Liberty court dismissed as moot a request for injunctive relief because the event sought to be enjoined has occurred and meaningful relief is not available. Id., 217 F.3d at 396. The Fifth Circuit did recognize, however, that the capable-of-repetition doctrine applies in exceptional situations where the challenged action is too short in duration to be litigated prior to cessation and there is a reasonable expectation that the same complaining party will be the subject of the same action again. Id., 217 F.3d at 398.

immunity, which has not been waived, and that the challenged conduct falls within the discretionary function exception afforded by the Stafford Act because it involves a significant degree of judgment and choice not statutorily prescribed and grounded in social, economic and political policy as required by Berkovitz v. United States, 486 U.S 531 (1988). (Rec. Doc. 51, pp. 9-12). If judgment is involved, it must be "of the kind that the discretionary exception was designed to shield." Berkovitz, 486 U.S. at 536-537. "In sum, the discretionary exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." Id.

The Court respectfully disagrees with the defendants' position on sovereign immunity, and adopts Judge Duval's reasoning on this serious issue. "[T]his Court find that its authority to review FEMA's actions clearly exists as to any actions that are mandated by statute, and more importantly, any actions that may rise to the level of a constitutional violation by the agency." McWaters v. Federal Emergency Management Agency (FEMA), 436 F.Supp.2d 802, 812 (E.D.La. 2006).

> [T]he Court's understanding remains that FEMA is not immune from all judicial review, but rather only from review of those acts that are discretionary in nature. Section 5148 of the Stafford Act and other door-closing statutes "do not, unless Congress expressly provides, close the door to constitutional claims, provided that the claim is colorable and the claimant is seeking only a new hearing or other process rather than a direct award of money." ... Notably, FEMA has still cited no factually analogous authority to demonstrate that Congress intended FEMA to be

> completely immune from judicial review for mandatory acts. "Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear ... in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." ... The Stafford Act's non-liability provision" states that FEMA will face no liability for discretionary actions; it does *not* say FEMA will face no liability for constitutional violations. The Court finds that Section 5148 does not constitute the kind of express waiver contemplated by the Supreme Court ... First, the statute itself contains no explicit language barring judicial consideration of constitutional challenges. ... Secondly, ... the Court agrees theat FEMA is not competent to decide constitutional questions as to the validity of its regulations, policies and procedures. ... Finally, so that the Stafford Act's non-liability provision remains constitutional, the Court will construe it in such a way as to leave open review of constitutional questions.

McWaters, 436 F.Supp.2d at 813(citations omitted)(emphasis original).

Property interest

The defendants also argue that the plaintiffs have failed to state a due process claim because they do not possess a protectable property interest in "continuing" Section 408 benefits because, in the end, FEMA retains absolute discretion as to the initial receipt and termination of Section 408 benefits. (Rec. Doc. 51, p. 15). The plaintiffs have all been deemed eligible to receive Section 408 benefits. The Court finds that the fact that the eligibility must be continuing does not deprive the plaintiffs of the property right incurred with their "legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The Court sees no relevant difference

between the plaintiffs' property rights to Section 408 benefits and those rights belonging to the plaintiffs in Mathews, supra (social security benefits), Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare), Thompson v. Washington, 497 F.2d 626 (D.C.Cir. 1973)(public housing) and Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970) (public housing).

Adequacy of process

The plaintiffs are seeking a "meaningful pre-termination process." (Rec. Doc. 63, p. 16). The defendants argue that the notice provided by FEMA is constitutionally adequate under Mathews, supra. Notably, the defendants do not attempt to defend any of the incomprehensible hieroglyphic abbreviations that riddle their so-called "notice" letters. Nor do the defendants address the claims of systematic misapplication of its own standards and procedures in dealing with questions about the termination notices. The plaintiffs have provided a litany of 'horror stories' of individuals who have already suffered grievous loss and trauma, trying to navigate through a bureaucracy that responds, at best, erratically and often in cross purposes with itself. Instead of confronting these allegations, the defendants suggest, in a cavalier fashion, that if the plaintiffs do not understand FEMA's codes and procedures, they can appeal. The Court finds this abdication of responsibility incomprehensible. This is an agency

charged with "alleviat(ing) the suffering and damage" which result from a disaster. 42 U.S.C. § 5121(b). These class members have been found to be entitled to receive Section 408 assistance, meaning they are in dire need, through no fault of their own, unable to return to their own homes or find shelter elsewhere. The FEMA appellate process, if it can be navigated at all, takes months. In the meantime, the defendants appear to treat the plaintiffs' and their prospects of homelessness and the despair and stress of such added worries as if it were gnats to be brushed away while the defendants busy themselves with creating more bureaucratic regulations. To brush off the correction of errors to the appellate process under these circumstances of real human suffering is simply unacceptable.

FEMA argues that, unlike the welfare benefits requiring a pre-termination hearing in Goldberg, supra, Section 408 recipients have access to other government benefit programs to provide "the means by which to live," and the government has discretion in determining the duration of the benefits. (Rec. Doc. 51, pp. 18-19). The defendants also argue that Section 408 benefits do not warrant the pre-deprivation hearing afforded public housing beneficiaries in Thompson, supra, or Caulder, supra, because they are temporary in nature. For purposes of the first Mathews factor, the Court rejects the defendants' argument entirely and finds that the benefits at issue are

equally substantial and worthy of due process protection.

The second Mathews factor focuses on the risk of erroneous determination of the plaintiffs' interests. Examples of the depth and scope of those errors are established by the plaintiffs. The Court unhesitantly finds that FEMA's notice and appeals process is fraught with the potential for mistaken determinations.

Finally, the defendants argue that the third Mathews element weighs in their favor because of the "extreme impracticalities of requiring quasi-judicial evidentiary hearings," which would take years for FEMA to complete and its current system "clearly serves [p]laintiffs' interest without crippling FEMA." (Rec. Doc. 51, p. 21). The plaintiffs disclaim the need for full-blown hearings. Indeed, their request is relatively modest - a notice that is comprehensible, an opportunity to respond in a meaningful way and an appellate process that is navigable. Court finds that the current process is woefully inadequate even by these modest standards.

Relief

As noted, the plaintiffs seek an "adequate pre-termination process." (Rec. Doc. 63, p. 26). The plaintiffs argue that mandatory relief on a preliminary basis has been granted where the circumstances demand that extraordinary relief and ask that any pre-termination process include a description of the process, review by an independent

decision-maker, reasoned decision making and a written explanation of the decision for purposes of appeal. (Rec. Doc. 63, p. 28). "The same governmental interests that mandate meeting of the emergency housing needs of Katrina and Rita evacuees, also compel sufficient pre-termination process to ensure that those eligible to receive continuing assistance actually get it." Id.

> The relief [p]laintiffs seek is an injunction *prohibiting* FEMA from discontinuing, terminating or withholding payments of continuing Section 408 Assistance to recipients who do not receive appropriate notice and opportunity for a pre-termination hearing. The fundamental nature of the relief is prohibitory and its intent is to preserve the status quo, not change it, because the [p]laintiffs in this case all are recipients of, not mere applicants for, Section 408 Assistance.

(Rec. Doc. 63, p. 30). With respect to repayment demands, adequate notice and a pre-termination hearing are sought as prohibitory relief to preserve the status quo. Although the request to reinstate Section 408 benefits to those on appeal who did not receive notice and hearing may be mandatory in nature, the plaintiffs argue that FEMA has the "unilateral ability to end that obligation by providing the required pre-termination process." Id.

The modest requested injunctive relief can not be characterized as unreasonable, especially to those who may have lost everything they owned in these unprecedented disasters. FEMA has been created by Congress and the President to serve the needs of

citizens at their darkest hours, which for some citizens are being now measured in terms of years. The Court urges the defendants to return to their original mandate of alleviating their suffering and focus its substantial powers on continuing to help those entitled to relief, including affording them the minimal due process needed to assure that they do.

Conclusion

This matter is before the Court on preliminary injunction and the plaintiffs need only establish the likelihood of success on the merits with regard to this motion. The Court finds that they have. Again, certain of the issues presented in conjunction with this motion can be revisited with regard to the pending motion to dismiss.

Accordingly,

IT IS ORDERED that the plaintiffs' motion for class-wide preliminary injunction is **GRANTED**. (Rec. Doc. 11). The Court will sign the order proposed by the plaintiffs, and will consider any amendment upon motion. (Rec. Doc. 11-28).

New Orleans, Louisiana, this 13th day of June, 2007.

HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE