

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

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MILAGROS MARTINEZ	:	
	:	Civil Action
	:	No. 13-3119
Plaintiff,	:	
v.	:	
	:	
UNITED STATES DEPARTMENT OF HEALTH	:	
& HUMAN SERVICES; KATHLEEN SEBELIUS,	:	
	:	
Defendant.	:	

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**ORDER**

The Plaintiff in this matter has moved on an emergency basis under Rule 65(b), Fed. R. Civ. P., for a temporary restraining order to prevent the Secretary of the United States Department of Health and Human Services (the “Secretary”) from applying that aspect of Policy 3.7 of the Organ Procurement and Transplantation Network (the “OPTN”) that discriminates against children under 12 in the system established by law for allocating donated lungs (the “Under 12 Rule”) on the grounds that her 11-year-old son Javier may soon die if he does not receive new lungs and that every hour that he can participate in the OPTN’s system for allocating lungs without being forced to stand at the back of the line for the much larger pool of lungs donated from adults (more than 50 times greater than the pool of lungs donated from children under 12) could save her life. The Plaintiff contends, *inter alia*, that the Under 12 Rule violates the command of the National Organ Transplant Act of 1984, 42 U.S.C. § 274(b)(2) that the system for allocating donated organs be “equitable” and address “the unique health care needs of children” as well as the Secretary’s own regulation, 42 C.F.R. § 121.8(b), which requires OPTN’s policies to give greatest consideration to allocating organs based on medical urgency,

and that the Secretary's refusal to set aside the Under 12 Rule to protect the very few children nationally who are subject to it, despite evidence showing that the Rule discriminates against children and serves no purpose, is arbitrary, capricious, and an abuse of discretion.

**AND NOW**, this 6<sup>th</sup> day of June, 2013, having considered the matter, including the Declarations of Sharon Ruddock, Arthur Baines and Milagros Martinez, it is hereby **ORDERD** that the motion for a TRO is granted and that the Secretary shall direct the OPTN to immediately cease application of the Under 12 Rule as to Javier Martinez so that he can be considered for receipt of donated lungs from adults based on the medical severity of his condition as compared to the medical severity of persons over 12 in the OPTN system. This Order shall remain in effect unless and until the Court orders otherwise at the conclusion of the hearing on a preliminary injunction.

A hearing on the preliminary injunction will be held **June 14, 2013, at 10 a.m.** in Courtroom 3A, U.S. Courthouse, 601 Market Street, Philadelphia.

**BY THE COURT:**

**/s/ Michael M. Baylson**

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**MICHAEL M. BAYLSON, U.S.D.J.**