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Introduction

Pursuant to Illinois Supreme Court Rule 367, Defendants-Intervenors Gregory Jacaway, *et al.*, and all similarly situated people, respectfully petition this Court for re-hearing of its September 26, 2008, decision affirming the trial court's entry of a preliminary injunction.¹ Unlike plaintiffs' other grounds for challenging the legality of the agency's actions, the ground upon which the trial court ruled and this Court has affirmed – that the Illinois Department of Healthcare and Family Services (DHFS) lacks the statutory authority to provide medical assistance to persons who do not meet the eligibility requirements for the Temporary Assistance for Needy Families (TANF) cash assistance program – has the potentially tragic consequence of jeopardizing the health care coverage of over half a million of Illinois' poorest and most vulnerable residents. This Court should grant this petition and re-hear this matter because, like the lower court, this Court did not consider Federal Medicaid Law that controls the outcome of this case and dictates reversal of the lower court. Section (I) of this Petition explains how Federal Medicaid Law prohibits states from limiting medical assistance to only persons who meet TANF eligibility requirements, putting this Court's construction of 305 ILCS 5/5-2(2)(b) in direct conflict with controlling federal law. Section (II) of this Petition explains how section 5-2(2), properly construed, provides DHFS with the statutory authority to provide

¹ This Court's Opinion states that defendants-intervenors "did not file a brief in this cause." (Op. at 2). Defendant-intervenors did, however, attempt to file a brief in this cause. Their petition to intervene in this case was granted by the trial court after this case was already on appeal to this Court. Defendant-intervenors then moved this Court for leave to file a brief in this Court, plaintiffs objected, and this Court, without explanation, denied defendants-intervenors' motion for leave to file a brief. See App. Ct. Order, July 3, 2008.

medical assistance without requiring that the recipient satisfy TANF eligibility requirements.

Argument

I. Federal Medicaid Law prohibits limiting medical assistance to only persons who meet TANF eligibility requirements.

This case concerns the validity of DHFS' Emergency Rule that sought to preserve FamilyCare program coverage for parents and other caretaker relatives (parents) at the income level then in place (185 percent of the Federal Poverty Level (FPL)), and to expand FamilyCare program coverage to parents with income between 185 and 400 percent FPL, without requiring medical assistance recipients to meet TANF eligibility requirements. DHFS invoked its statutory authority under section 5-2(2) of the Illinois Public Aid Code when it issued the Emergency Rule. 31 Ill. Reg. 15854 (Nov. 26, 2007).² This Court affirmed the trial court's ruling that DHFS had exceeded its statutory authority, holding that "to receive medical assistance under section 5-2(2)(b) (Medicaid), a would-be recipient must qualify under the limited eligibility requirements of TANF." (Op. at 17).

This Court's interpretation of section 5-2(2) puts Illinois law into direct conflict with Federal Medicaid Law, which prohibits states from conditioning a parent's eligibility for Medicaid-funded medical assistance on meeting TANF eligibility requirements. 42 U.S.C. § 1396u-1(b)(1)(A). This prohibition was put in place when the TANF program was created to replace the Aid to Families with Dependent Children (AFDC) program as

² The courts and the other parties have mistakenly assumed that DHFS invoked its statutory authority based on section 5-2(2)(b), a subsection of 5-2(2), when it issued the Emergency Rule. The outcome is the same regardless of whether DHFS' authority is based on section 5-2(2) or section 5-2(2)(b).

part of the historic welfare reforms enacted in 1996 in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996). Congress³ and the President⁴ were concerned that if states applied the new TANF program's work requirements, time limits, and other more stringent eligibility requirements in determining eligibility for medical assistance, a vast number of dependent children and their parents would lose their medical assistance or never qualify for it in the first place. To remove this concern, PRWORA includes a provision that requires States to "delink" Medicaid and TANF eligibility requirements. 42 U.S.C. § 1396u-1(b)(1)(A).

The delinking provision requires states to continue providing Medicaid-funded medical assistance to all persons who satisfy the AFDC program's income, resources and household composition rules (i.e., the requirement that the family include a dependent child being cared for by a specified relative,⁵ and no other AFDC requirements) as in effect under the AFDC program on July 16, 1996, regardless of whether they qualify for TANF. 42 U.S.C. § 1396u-1(b)(1)(A)(i) and (ii) (Section 1931 of the Social Security Act). The delinking provision accomplishes this by redefining what being a "recipient of

³ For example, the House Committee Report declared that PRWORA "severs the link between cash assistance and Medicaid," and that "[b]ecause of the delinking, Medicaid beneficiaries who fail to qualify under the TANF program are not at risk of losing Medicaid coverage." H.R. REP. NO. 104-882, pt. 2, (1997) (Comm. Rep.).

⁴ In his PRWORA signing statement, President Clinton expressed his support of delinking by applauding the law for "preserv[ing] the Federal guarantee of health care for individuals who are currently eligible for Medicaid through the AFDC program..." Statement by President William J. Clinton upon signing H.R. 3734 (Aug. 22, 1996), *as reprinted in* 1996 U.S.C.C.A.N. 2891.

⁵ The "dependent child" requirement means that a child under 18 must live in the household and the "caretaker relative" requirement means that the dependent child's adult caretaker must be a close enough relative of the child. 42 U.S.C. §§ 606(a)-(c), 607(a). (defining the family composition requirements of the AFDC program; these provisions in the current code deal with unrelated topics).

cash assistance” means for purposes of determining Medicaid eligibility. Specifically, the delinking provision directs that “in determining eligibility for medical assistance, an individual shall be treated as receiving aid or assistance under a State Plan approved under Part A of subchapter IV of this chapter (cash assistance for children and specified relatives) only if the individual meets (i) the income and resources standards for determining eligibility under such plan, and (ii) the eligibility requirements of such [AFDC] plan under [the family composition rules] as in effect as of July 16, 1996.” 42 U.S.C. § 1396u-1(b)(1).

In a directive to the States issued after the provision delinking eligibility for medical and cash assistance was enacted, the Centers for Medicare and Medicaid Services (CMS), the federal agency that administers the Medicaid program, reiterated in bold letters that “**Eligibility for Medicaid is Not Limited to TANF**” and instructed states that they “cannot deny a family Medicaid eligibility simply because the family is ineligible for TANF.”⁶ In a guide issued the following year, CMS said PRWORA “created a new Medicaid eligibility category” called “Section 1931,” under which “families who would have qualified for Medicaid under a state’s AFDC program are generally eligible for Medicaid now, regardless of whether they receive TANF assistance.”⁷ CMS further explained, “Because Medicaid eligibility is not based on TANF eligibility, states may not deny Medicaid eligibility to a family or any family

⁶ Letter from Olivia Golden, Assistant Sec’y for Children and Families, Dep’t of Health & Human Servs., to State Medicaid Dirs. & TANF Adm’rs 1 (June 5, 1998), *available at* <http://www.cms.hhs.gov/smdl/downloads/smd060598.pdf>.

⁷ CMS, “Supporting Families in Transition: A Guide to Expanding Health Coverage in the Post-Welfare Reform World (1999), 1, *available at* <http://www.acf.hhs.gov/welfare.pdf>.

member simply because the family is ineligible for TANF due to employment, time limits, sanctions, or any other reason.”^{8,9}

After PRWORA was enacted in 1996, DHFS carefully instructed its staff on the implementation of delinking and, in particular, how to assure that no one was denied medical assistance because they were not meeting a TANF eligibility requirement, such as a work requirement, that did not apply to medical assistance. For example, in one 1999 policy directive, entitled “Eligibility for Medical Assistance and Food Stamps for Clients Who Fail to Cooperate with TANF Cash Requirements,” agency staff is instructed: “When a TANF applicant or client is determined not eligible for cash assistance due to a TANF cash requirement only, you must still determine eligibility for medical assistance...” As an example, cooperation with a TANF responsibility plan (requiring work activities, among other things) is “not an eligibility factor for medical assistance...” Ill. Dep’t of Human Servs., Manual Release 99.99 (Dec. 21, 1999), at 1. In another policy directive, entitled “Delinking TANF Cash from Medicaid,” the agency explains that the “Personal Responsibility and Work Opportunity Reconciliation Act of

⁸ *Id.* at 8. Congress’ and the President’s fear that continuing to link medical and cash assistance eligibility requirements after TANF replaced AFDC would decimate the Medicaid rolls was prescient. Since PRWORA was enacted in 1996, the number of people receiving cash assistance has declined by 85 percent in Illinois. See Indicators of Welfare Dependence: Annual Report to Congress, 2007, app. A at A-19, available at <http://aspe.hhs.gov/hsp/indicators07/apa.pdf>.

⁹ Section 1931 also gives states the option to cover higher income parents by using “income and resource methodologies that are less restrictive than the methodologies” under the State Plan in effect on July 16, 1996. 42 U.S.C. § 1396u-1(b)(2)(C). This is precisely the authority DHFS employed to expand FamilyCare’s income eligibility guidelines from 133 percent FPL to 400 percent FPL by disregarding (not counting) family income between 133 percent and 400 percent. 31 Ill. Reg. 15854, 15855 (Nov. 26, 2007). According to CMS, Section 1931 allows states to “expand coverage of families as far as state budget and policy preferences permit” and “leaves states free to raise their effective income eligibility thresholds for Section 1931 to whatever level they wish.” CMS, *supra* note 7, at 20.

1996 (PRWORA) which implemented TANF, completely ‘delinked’ the receipt of TANF Cash from the receipt of Medicaid.” Ill. Dep’t of Human Servs., Manual Release 00.9 (Jan. 24, 2000), at 1. The directive continues: “For example, if a person fails to cooperate with a work activity, the person is sanctioned for TANF Cash. However, since cooperation with a work activity is not a requirement for Medicaid, the family remains eligible for Medicaid.” *Id.*

Since 1997, DHFS has utilized its statutory authority at 5-2(2) to act in accordance with federal law and provide medical assistance to income-eligible parents without requiring that they meet TANF eligibility requirements. Today more than 500,000 of Illinois’ poorest and most vulnerable parents with income below 133 percent FPL who are not on TANF and are not required to meet TANF work and other TANF requirements receive medical assistance.¹⁰ This Court’s reading of section 5-2(2) could have a devastating impact on these half a million parents. While this case pertains to the eligibility for medical assistance of persons whose income exceeds 133 percent FPL, DHFS’ authority to provide Medicaid-funded medical assistance to non-TANF parents with income below 133 percent FPL is also derived from section 5-2(2) and the logic of this Court’s reading of DHFS’ statutory authority under section 5-2(2) is equally applicable to them. If this Court’s reading of section 5-2(2) is correct, these 500,000

¹⁰ Minutes of DHFS Medicaid Advisory Committee, Jan. 18, 2008, available at <http://www.hfs.illinois.gov/assets/011808minutes.pdf> (511,523 parents with income below 133 percent FPL received medical assistance in November 2007 as part of pre-expansion and FamilyCare phases I-III); Joint Stip. at 19 (parents through FamilyCare phase III had income below 133 percent FPL); “Facts about TANF,” Ill. Dept. of Human Services, June 2008, available at <http://www.dhs.state.il.us/page.aspx?item=31771>. (only 10,540 of these parents received medical assistance because they were receiving TANF in June 2007).

parents also would have to meet TANF work and other eligibility requirements or lose their medical assistance.

For the past 11 years, the Illinois General Assembly has demonstrated that it agrees with DHFS' interpretation of section 5-2(2) by annually appropriating billions of dollars to DHFS to provide medical assistance, pursuant to its authority under section 5-2(2), to parents who are not on TANF and are not required to show that they meet TANF work and other TANF eligibility requirements.¹¹ Indeed, the General Assembly's Joint Committee on Administrative Rules (JCAR), in actions directed at DHFS' FamilyCare rulemaking that is the subject of this case, expressly reaffirmed the General Assembly's longstanding agreement with DHFS' interpretation of its statutory authority under section 5-2(2) to provide Medicaid-funded medical assistance to persons in the FamilyCare preservation group with incomes between 133 and 185 percent FPL.¹² JCAR challenged only the FamilyCare expansion to parents with income between 185 and 400 percent FPL. Even then, JCAR did not challenge DHFS' statutory authority under section 5-2(2) to extend coverage to the expansion group, but rather its authority to do so in the absence of an appropriation of the necessary funds, an issue that this Court did not reach.

¹¹ *The Henry J. Kaiser Family Foundation, Illinois: Federal and State Share of Medicaid Spending, FY2006 (2007)*, <http://www.statehealthfacts.org/profileind.jsp?ind=636&cat=4&rqn=15> (Illinois spent \$5 billion in state funds to match the Federal Medicaid contribution to Illinois in fiscal year 2006).

¹² *See Minutes, Illinois Joint Committee on Administrative Rules 15 (Feb. 26, 2008)*, available at <http://www.ilga.gov/commission/jcar/minutes/0208.pdf> (JCAR passes motion to "object to and prohibit filing of the rulemaking to the extent that it expands medical assistance to persons other than those formerly receiving medical coverage under a federal SCHIP waiver for caretaker relatives of children covered by SCHIP," *i.e.*, parents with income below 185 percent FPL). *See also Minutes, Illinois Joint Committee on Administrative Rules (Nov. 13, 2007)* available at <http://www.ilga.gov/commission/jcar/minutes/1107.pdf>.

II. Section 5-2(2), properly interpreted, authorizes DHFS to provide medical assistance to parents who do not meet TANF eligibility requirements.

It is well-settled that states that choose to participate in the Federal Medicaid program must comply with all requirements imposed by the Federal Medicaid Act and its implementing regulations. *Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1981); 42 U.S.C. § 1396a; *See also Gudeman v. Miller*, 142 Ill. App. 3d 865, 869 (4th Dist. 1986). Federal regulations expressly prohibit a state Medicaid agency from imposing any eligibility requirement that is prohibited under the Medicaid Act. 42 C.F.R. § 435.401(a) (2000). States that fail to comply with Federal Medicaid requirements put their receipt of federal matching funds in jeopardy. 42 U.S.C. § 1396c. Illinois receives billions of dollars in federal Medicaid matching funds every year.¹³ It is in Illinois' overriding interest that Article V of the Illinois Public Aid Code, which implements the Federal Medicaid Act of 1965, be read consistently with the Federal Medicaid Law it implements.

This Court found the language of section 5-2(2)(b) "plain and unambiguous" and never considered Federal Medicaid Law. (Op. at 10). While normally a finding of plain and unambiguous language would be dispositive, "the traditional rules of statutory construction are merely aids in determining legislative intent and must yield to such intent." *In re Application of County Treasurer*, 214 Ill. 2d 253, 259 (2005). A court should not construe a statute based solely on its plain language if doing so would interpret a state statute in a manner that would conflict with federal law. *Cushion v.*

¹³ The Henry J. Kaiser Family Foundation, *supra* note 11. (Federal Medicaid contribution to Illinois was \$5 billion in fiscal year 2006).

Dept. of PATH, 174 Vt. 475, 479, 807 A. 2d 425, 430 (2002). Rather, where “Federal and State statutes comprise a single scheme, the construction of the State law should be consistent with that of its Federal counterpart.” *Bethania Ass’n v. Jackson*, 262 Ill. App. 3d 773, 777 (1st Dist. 1994). See also *State Dept. of Human Services v. Hudson County*, 161 N.J.Super. 29, 49, 390 A.2d 720, 730 (1978) (“State statutes and regulations must be construed consistently with the federal law regarding federal funding programs”). Courts must construe the acts to reflect the obvious intent of the legislature even if the words of a particular section must be read as modified or altered so as to comport with the legislative intent. *People v. Ring*, 41 Ill. 2d 305, 313 (1968).

The General Assembly’s obvious intent in 1967, when it enacted Section 5-2(2) and the rest of Article V of the Illinois Public Aid Code, was to implement the Federal Medicaid Law of 1965. The General Assembly has not materially changed section 5-2(2) since it was enacted in 1967, nor has it done anything else over the past 40 years to indicate an intent to mandate state eligibility requirements that conflict with Federal Medicaid Law. To the contrary, after Federal Medicaid Law changed dramatically in 1996 with the delinking of eligibility for medical and cash assistance, the Illinois General Assembly repeatedly manifested its concurrence with DHFS’ interpretation of its authority under section 5-2(2) by appropriating funding for 11 years and providing medical assistance to over half a million income-eligible parents without requiring that they meet TANF eligibility requirements.

An alternative construction of section 5-2(2) is provided by the federal delinking provision itself. This Court has assumed that the term “recipients of cash assistance” used in section 5-2(2) means “recipients of TANF.” However, the delinking provision

expressly provides that parents who meet the 1996 AFDC specified relative requirements must be “treated as receiving cash assistance” for Medicaid eligibility purposes. 42 U.S.C. § 1396u-1(b)(1). This Court should employ this broader definition of “recipients of cash assistance” in construing section 5-2(2), to avoid a conflict with federal law.

In addition to these alternative readings under federal law, section 5-2(2) is subject to a different reading under state law. A statute is considered ambiguous if “it is capable of being understood by reasonably well-informed persons in two or more different senses.” *People v. Jameson*, 162 Ill. 2d 282, 288 (1994). Section 5-2(2) is ambiguous because it has been understood in different ways by reasonably well-informed persons. *See People v. Cherry Valley Public Library Dist.*, 356 Ill.App.3d 893, 896 (2d Dist. 2005). Here, the General Assembly and DHFS have read section 5-2(2) one way and the courts have read it another way. Moreover, the trial court’s reading of the statute does not effectuate every word the legislature chose and it should therefore be rejected as a mistaken reading of the plain language. *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990).

Section 5-2(2), in its title and again in its introductory text, authorizes health coverage for “classes of persons.” 305 ILCS 5/5-2. The term “classes of persons” connotes broad, general categories of eligible groups, not specific eligibility requirements. The introductory text further provides that a class of persons shall be eligible when a “plan for coverage has been submitted to the Governor...and approved by him.” *Id.* The “plan for coverage” requirement indicates that there are additional, specific factors of eligibility separate from the definition of the general “classes” of persons eligible. If the legislature had wanted the specific eligibility requirements for

medical and cash assistance to be identical, it would not have called for a separate “plan for coverage” for the medical assistance program.

If a statute is ambiguous, courts should give substantial weight to an interpretation by the agency that is charged with administration and enforcement of the statute.

Abrahamson v. Ill. Dept. of Prof'l Regulation, 153 Ill. 2d 76, 97-98 (1992). *See also* *People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 53 (2002) (deferring to an agency’s interpretation of a statute and reading the lack of intervention by the General Assembly to change the statute for 17 years as evidence of the General Assembly’s acquiescence in the agency’s construction). DHFS’ longstanding interpretation of its authority under section 5-2(2) should be given deference, especially in this complex area of law. *See Schweiker*, 453 U.S. at 43 (noting the “Byzantine” nature of the program and cautioning that it is not for the “uninitiated”). As detailed above, ever since DHFS began implementing PRWORA’s Medicaid and TANF delinking provision in 1997, DHFS has interpreted section 5-2(2) to provide it with the authority to extend medical assistance to parents regardless of whether they meet TANF eligibility requirements.

Finally, this Court’s interpretation of DHFS’ authority under section 5-2(2) can not be reconciled with Illinois law governing the TANF program’s work and job search requirements. This Court identified several specific TANF eligibility requirements that it said parents must comply with to qualify for medical assistance, “including registration for and acceptance of employment (305 ILCS 5/4-1.8), participation in educational and vocational training programs (305 ILCS 5/4-1.9), and acceptance of assignment to job search, training and work programs (305 ILCS 5/4-1.10).” (Op. at 11). All three of these subsections require recipients to comply with the requirements of Article IXA of the

Public Aid Code, “Education, Training and Employment Program for Recipients under Article IV.” However, Illinois statute expressly restricts participation in these programs, and hence satisfaction of the TANF eligibility requirements at 5/4-1.8 to 1.10, to persons who receive TANF. 305 ILCS 5/9A-1 and 9A-2 . This Court’s reading of section 5-2(2) as conditioning non-TANF recipients’ eligibility for medical assistance on their participation in these programs thus imposes an impossible to meet requirement on every non-TANF recipient. Hence, the court’s reading of section 5-2(2) renders that provision meaningless since it would not authorize medical assistance coverage for anyone. This is a result that the legislature could not possibly have intended. Courts assume that the legislature intended to enact an effective law and “if reasonably possible to do so without violence to the spirit and language of an act,” should interpret the statute so as to give it “efficient operation and effect as a whole.” *Pliakos v. Illinois Liquor Control Commission*, 11 Ill. 2d 456, 459-60 (1957). If two interpretations of a statute are possible, the court assumes the legislature intended to enact an effective law and therefore discards an interpretation that would render the statute ineffective. *In re Annexation of Territory to City of Park Ridge*, 260 Ill. App. 3d 384, 389 (1st Dist. 1994).

CONCLUSION

For the foregoing reasons, defendants-intervenors respectfully request that this Court grant their petition to re-hear this matter.

Respectfully submitted,

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situated people**

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Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 13 pages.

Attorney for Defendants-Intervenors