

MAINE  
EQUAL



JUSTICE  
PARTNERS

126 Sewall Street  
Augusta, Maine 04330-6822  
TTY/Voice: (207) 626-7058  
Fax: (207) 621-8148  
www.mejp.org

August 9, 2012

The Honorable Kathleen Sebelius, Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

**Re: State of Maine State Plan Amendments Submitted on August 1, 2012**

Dear Secretary Sebelius:

We write to you in opposition to the State of Maine's proposed State Plan Amendment (SPA) to reduce Medicaid coverage for working parents down to 100% of FPL; to eliminate coverage for most children ages 19 and 20; and to reduce eligibility for the elderly and people with disabilities in the Medicare Savings Program. We believe that these proposals violate the Maintenance of Effort provision of the Affordable Care Act. 42 U.S.C. §1396a(gg). We also oppose DHHS's effort to deny Transitional Medicaid Assistance benefits to those working parents who are losing eligibility due to the proposed changes.

As you know, Maine Equal Justice Partners represents Maine people with low income in areas of economic security, foremost of which is access to health care through the Medicaid program. The proposed cuts will harm many of our clients who will have no other access to affordable and timely care, resulting in poorer health outcomes and, as the recent New England Journal of Medicine article indicated, an increased risk of death.

**The Maintenance of Effort Provision of the ACA Applies to Maine's SPA**

The recent decision of the U.S. Supreme Court in *National Federation of Independent Businesses v. Sebelius*, \_\_\_\_\_ U.S. \_\_\_\_\_, 132 S. Ct. 2556 (2012) is a narrow legal holding. It prohibits the Secretary from using her authority under Section 1396(c) to deny federal matching funds to a state that fails to expand its Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line. 42 U.S.C. §1396a(a)(10)(A)(i)(VIII).

The Supreme Court's decision leaves intact all other provisions of the Medicaid Act and the ACA, including the expansion, itself. 132 S.Ct. at 2607. Thus, the other newly added

Medicaid provisions continue in full force and effect in all states, including requirements for coverage of young adults leaving the foster care system, temporary Medicare-Medicaid rate parity for primary care providers, options for expanding coverage of community-based services and supports for people with disabilities and the elderly, and extending Medicaid coverage to children aged 6-19, with family incomes between 100% and 133% of the FPL.

These provisions are not “part and parcel” of the specific Medicaid Expansion provisions at issue in the NFIB decision. Moreover, the modifications contained in these provisions fit neatly within the alterations and expansions related to low-income children, pregnant women, the elderly and the disabled that Congress has made to the Medicaid program from its inception and which the Supreme Court acknowledged as within Congress’s scope of authority within the Spending Clause. 132 S.Ct. at 2605 (contrasting the Medicaid Expansion with alterations and expansions affecting low-income children).

Likewise, the Supreme Court’s decision does not discuss nor diminish the Maintenance of Effort (MOE) provision. MOE is not an *expansion* of coverage, but rather simply requires states to temporarily maintain (not expand) their Medicaid eligibility “standards, methodologies, [and] procedures” as they stood on March 23, 2010, the date the ACA was enacted. This requirement only lasts until “the State has an exchange approved by the Secretary.” 42 U.S.C. § 1396a(gg). The MOE provision otherwise allows states significant latitude to enact cuts in areas other than eligibility. Accordingly, MOE fits within the periodic Congressional alterations and expansions to the Medicaid program that the Court found to be permissible. 132 S. Ct. at 2605. It is similar to numerous other MOE requirements that previous Congress’s inserted into the Medicaid Act in the past.

The State incorrectly broadens the Supreme Court’s decision that the loss of all Medicaid FFP for failing to expand to non-elderly, childless adults under 133% of FPL a formerly uncovered group “is a gun to the head.” As noted above, the Court pointed out that Congress has made numerous changes in the Medicaid program over the years that have imposed additional responsibilities upon states, many of which were not required at the point when the state decided to join the Medicaid program. The Court was careful to note that the Secretary’s authority to withhold Medicaid FFP under Section 1396(c) remains in force for all provisions of the Medicaid Act other than for the mandatory expansion to adults under 133% of FPL. 132 S. Ct. 2607. The Court’s concern was directed to the expansion of Medicaid to cover a group never before covered through the Medicaid program and, as such, this resulted in Medicaid being “transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level.” 132 S. Ct. 2606. The MOE provision is not directed at the entire nonelderly population, but is, in fact, directed at the traditional Medicaid populations for which the Court specifically found Congress to have wide latitude.

Given that the plain language of the MOE provision is not tied to the expansion, but instead to the initiation of the exchange and that the Court was careful to point out that all the other provisions in the ACA and the Medicaid Act remain fully enforceable under 1396(c), we urge CMS to reject the State of Maine’s State Plan Amendment.

**The State's Interpretation of the Transitional Medicaid Assistance Statute is Not Consistent with the Statutory Language or History**

We also oppose the State of Maine's proposed SPA to deny Transitional Medicaid Assistance to working parents whose incomes exceed the new income eligibility standards.

The State of Maine's interpretation of the Transitional Medicaid Assistance law is inconsistent with the plain language of the statute and its legislative history. Nothing in the words of the law requires that there be an *increase* in earned income. Furthermore the legislative history demonstrates that Congress's intent was to not require an increase in earned income.

The governing statutory language for Transitional Medicaid Assistance, is found at 42 U.S.C. § 1396r-6, which provides in part:

“[e]ach State plan approved under this subchapter must provide that each family which was receiving aid pursuant to a plan of the State approved under part A of subchapter IV of this chapter in at least 3 of the 6 months immediately preceding the month in which such family becomes ineligible for such aid, because of hours of, or income from, employment of the caretaker relative . . . .”<sup>1</sup>

The express language of the operative law does not require an “increase” in earnings or hours. This is significant because prior to the enactment of § 1396r-6 Congress had expressly required that TMA was contingent upon an *increase* in earned income or hours of employment. *Compare* 42 U.S.C. 1396a(e)(1). Congress could have included a requirement for an “increase” when it enacted 1396r-6 and suspended the application of 1396a (e). *See* 1396a(e)(1)(B). Accordingly, we can infer from this language and legislative history that Congress's intent is to not require an “increase” in earned income or hours of employment for TMA to apply.

Additionally, CMS did not promulgate regulations following the enactment of § 1396r-6. Instead, the only regulation addressing this issue predates the enactment of 1396r-6 and tracks language in 42 U.S.C. § 1396a(e), which is currently not in effect. Although CMS has indicated since the enactment of 1396r-6 that an increase in earnings or employment is required, we do not believe that this is a correct reading of the text of the law that Congress passed. Court's looking at this issue have agreed that the operative law, 1396r-6, does not require an “increase” in hours of employment or earnings. *Rabin v. Wilson-Coker*, 362 F. 3d 190 (2d Cir. 2004); *Kai v. Ross*, 336 F. 3d 650 (8th Cir. 2003) (holding that State's reduction in income eligibility limits triggers application of TMA.)

---

<sup>1</sup> While Congress in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 repealed the old AFDC program, i.e. Part A of subchapter IV, referenced in §1396r-6, thus apparently undercutting the applicability of §1396r-6, Congress later enacted 42 U.S.C. §1396u-1 which made clear that for purposes of Transitional Medicaid Assistance a person will be treated as receiving aid or assistance under AFDC, the repealed program, if she meets income and resource standards and other eligibility requirements in effect in 1996. *Rabin et. al. v. Wilson-Coker*, 362 F. 3d 190, 192-193 (2d. Cir. 2004)

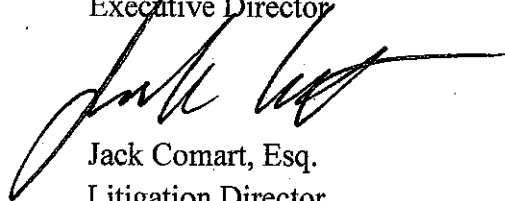
For the above reasons, we believe that Maine is required to provide TMA to eligible families, i.e. those with earned income losing coverage as of October 1, 2012.

Thank you for considering our views as you weigh your response to the State's SPA submission.

Sincerely,



Sara Gagné-Holmes, Esq.  
Executive Director



Jack Comart, Esq.  
Litigation Director

JC/jc

cc: Senator Susan Collins  
Senator Olympia Snowe  
Representative Michael Michaud  
Representative Chellie Pingree  
Kevin Raye, President of the Senate  
Jon Courtney, Senate Majority Leader  
Barry Hobbins, Senate Minority Leader  
Robert Nutting, Speaker of the House  
Philip Curtis, House Majority Leader  
Emily Cain, House Minority Leader  
Commissioner Mary C. Mayhew  
Cindy Mann, Director, Center for Medicaid and CHIP Services  
Richard McGreal, Associate Regional Administrator  
Earle McCormick, Co-chair, Committee on Health and Human Services  
Meredith Strang Burgess, Co-Chair, Committee on Health and Human Services  
Margaret Craven, Committee on Health and Human services  
Mark Eves, Committee on Health and Human Services  
Richard Rosen, Co-Chair, Committee on Appropriations and Financial Affairs  
Patrick Flood, Co-Chair, Committee on Appropriations and Financial Affairs  
Dawn Hill, Committee on Appropriations and Financial Affairs  
Margaret Rotundo, Committee on Appropriations and Financial Affairs