

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

RICHARD P. CARO, et al.,

Plaintiffs and Plaintiff-Intervenors,

v.

HON. ROD BLAGOJEVICH, et al.,

Defendants and Defendant-Intervenors.

No. 07 CH 34353

MEMORANDUM OPINION AND ORDER

This matter comes before the court on the plaintiffs’ motion for a preliminary injunction. While the parties have urged the court to reach a number of constitutional issues in deciding this motion, including *inter alia* the alleged unconstitutionality of the Joint Committee on Administrative Rules, the court is bound by Supreme Court Rule 18 to only reach such issues if “the finding of unconstitutionality is necessary to the decision or judgment rendered, and . . . [the] decision or judgment cannot rest upon an alternative ground.” 210 Ill. 2d R. 18(c)(4) (eff. Sept. 1, 2006). As the court finds, as further explained below, that the expanded FamilyCare Program should be preliminarily enjoined on grounds unrelated to the constitutional claims, the court will not reach the constitutional issues raised by the parties.

I. Facts

In 1997, the federal government enacted the State Children’s Health Insurance Program (“SCHIP”) to help children whose families could not afford private health insurance but do not qualify for Medicaid. Illinois participated in SCHIP by enacting the Children’s Health Insurance Program Act (“CHIPA”), 215 ILCS 106/1 *et seq.* (West 2001). The Department of Healthcare and Family Services (“DHFS”) was charged with administering the program. In 2001, the federal

government approved Illinois' KidCare Parent Coverage Waiver, authorizing Illinois to extend health insurance coverage to parents and caretakers of children under CHIPA. Illinois created the FamilyCare Program to implement the waiver, doing so under SCHIP instead of Medicaid. Through SCHIP, Illinois could receive a 65% match in federal funds for the FamilyCare Program versus only a 50% match under Medicaid. The federal matching funds, however, were ~~limited only to parents and caregivers who met an income eligibility requirement of up to and~~ including 185% of the federal poverty limit ("FPL"). Illinois was permitted to expand eligibility beyond the 185% FPL, provided it used other sources of funding, had legislative authority, and appropriated funds.

In the fall of 2007, the future and scope of SCHIP became uncertain as Congress and President Bush disagreed on the breadth of funding and thus the breadth of coverage under state waivers. On September 30, 2007, the KidCare Parent Coverage Waiver expired and was not renewed. On November 7, 2007, pursuant to the Illinois Public Aid Code ("the Code"), 305 ILCS 5/1-1 *et seq.* (West 2001), DHFS promulgated an emergency rule, as well as an identical permanent rule, purporting through Medicaid to preserve the FamilyCare Program at the coverage levels already in place and expand the FamilyCare Program to adults earning up to 400% of the FPL. DHFS relied on Section 5/5-2(2)(b) of the Code as its authority to make these changes. 305 ILCS 5/5-2(2)(b). On December 26, 2007, DHFS submitted a state Medicaid plan amendment transferring all those formerly under CHIPA into Medicaid in order to continue to capture at least 50% federal matching funds. The record is silent, however, as to whether that amendment was approved.

Pursuant to the Illinois Administrative Procedure Act ("IAPA"), 5 ILCS 100/1-1 *et seq.* (West 2001), the permanent and emergency rules were submitted to the Joint Committee on

Administrative Rules (“JCAR”) for approval. After review, JCAR objected to and suspended the emergency rule on the basis that no emergency situation existed warranting the adoption of the proposed rule. In spite of JCAR’s objection, DHFS implemented the Medicaid-based FamilyCare Program and began enrolling adult parents and caretakers with incomes up to 400% of the FPL. The instant lawsuit followed.

In December 2007, plaintiff, Richard P. Caro, an Illinois taxpayer, and plaintiff-intervenors, Ronald Gidwitz and Gregory Baise, (collectively referred to as “plaintiffs”) sought to preliminarily enjoin the defendants from further implementing the FamilyCare Program. On April 15, 2008, this court issued an order (“April Order”) preliminarily enjoining defendants DHFS, its director Barry S. Maram, and nominally Comptroller Daniel Hynes, “from enforcing the Emergency Rule or expending any public funds related to the FamilyCare Program created by the Emergency Rule.”

DHFS continued to conduct the FamilyCare Program, however, contending that the April Order’s injunction only applied to the emergency rule, which by its own terms expired on April 8, 2008. According to DHFS, it can still conduct the FamilyCare Program pursuant to the permanent rule because that rule was not subject to the April Order. The permanent rule was objected to by JCAR in February 2008, and also prohibited from being filed. The plaintiffs have now moved to enjoin the FamilyCare Program, be it under the permanent rule or otherwise.

II. Analysis

The plaintiffs contend the permanent rule, like the emergency rule, is plagued with a number of infirmities including: (1) the lack of authority to collect premiums under Medicaid; (2) the lack of constitutional authority to raise revenue; (3) the lack of authority to expand coverage for FamilyCare recipients under Medicaid to 400% of the FPL; (4) the lack of an

appropriation for the program; and (5) the rejection of permanent rule by JCAR. As with the emergency rule, the failure of the permanent rule to include all the required TANF eligibility requirements, as further explained below, constitutes a sufficient basis for preliminarily enjoining the FamilyCare Program.

The statutory authority DHFS relied on for its expansion of the FamilyCare Program is Section 5-2(2)(b), which permits the provision of medical assistance to all persons deemed to be eligible for basic maintenance under the Temporary Assistance for Needy Families ("TANF") article of the Code, 305 ILCS 5/4-1 *et seq.*, by disregarding only the federal maximum earned income requirement. 305 ILCS 5/5-2(2)(b). In the April Order, this court interpreted Section 5-2(2)(b) as requiring applicants for aid under that section to meet all the TANF eligibility requirements other than the federal maximum earned income requirement, the only requirement statutorily exempted by Section 5-2(2)(b). While the parties did brief this issue, in what is in essence a motion to reconsider the April Order by the defendants, the court stands on its prior interpretation of Section 5-2(2)(b), recently affirmed by the First District Appellate Court in *Caro v. Blagojevich*, No. 1-08-1061, 2008 Ill. App. LEXIS 939 (1st Dist. Sept. 26, 2008), and that analysis need not be repeated here.

The TANF eligibility requirements are found in Section 5/4-1, which states:

Eligibility requirements. Financial aid in meeting basic maintenance requirements for a livelihood compatible with health and well-being shall be given under this Article to or in behalf of families with dependent children who **meet the eligibility conditions of Sections 4-1.1 through 4-1.11**. Persons who meet the eligibility criteria authorized under this Article shall be treated equally, provided that nothing in this Article shall be construed to create an entitlement to a particular grant or service level or to aid in amounts not authorized under this Code, nor construed to limit the authority of the General Assembly to change the eligibility requirements or provisions respecting assistance amounts.

The Illinois Department shall advise every applicant for and recipient of aid under this Article of (i) the requirement that all recipients move toward self-sufficiency

and (ii) the value and benefits of employment. As a condition of eligibility for that aid, every person who applies for aid under this Article on or after the effective date of this amendatory Act of 1995 shall prepare and submit, as part of the application or subsequent redetermination, a personal plan for achieving employment and self-sufficiency. The plan shall incorporate the individualized assessment and employability plan set out in subsections (d), (f), and (g) of Section 9A-8. The plan may be amended as the recipient's needs change. The assessment process to develop the plan shall include questions that screen for domestic violence issues and steps needed to address these issues may be part of the plan. If the individual indicates that he or she is a victim of domestic violence, he or she may also be referred to an available domestic violence program. Failure of the client to follow through on the personal plan for employment and self-sufficiency may be a basis for sanction under Section 4-21.

305 ILCS 5/4-1 (emphasis added). Thus, to be eligible for TANF one must comply with Sections 4-1.1 through 4-1.11, as well with the second paragraph of Section 5/4-1. The record is silent as to whether, in compliance with the second paragraph in Section 5/4-1, DHFS requires FamilyCare applicants to prepare and submit a personal plan for achieving employment and self-sufficiency. Regardless, it is undisputed that while the FamilyCare Program includes most of the TANF eligibility requirements under Sections 4-1.1 through 4-1.11, the FamilyCare Program fails to require compliance with: (1) Section 4-1.5a, which deems anyone with multiple convictions of Public Assistance Fraud under 305 ILCS 5/8A-1 *et seq.*, ineligible for aid; (2) Section 4-1.7, which requires enforcement of child support obligations; and (3) Sections 4-1.8 through 4-1.10, which encompass several employment-related conditions such as registration for and acceptance of employment. *See* Joint Stip. ¶¶ 52-54. By failing to require compliance with these sections, the FamilyCare Program, be it under the permanent rule or the emergency rule, violates the unambiguous language of Section 5-2(2)(b) which requires all applicants for aid under that section to meet all the TANF eligibility requirements other than the federal maximum earned income requirement.

In response, DHFS contends that 89 Ill. Admin. Code 120.328 (“Rule 120.328”), a “peremptory rule” it issued on April 21, 2008, cures the deficiencies of the permanent rule by incorporating the necessary TANF eligibility requirements. That is not the case. While Rule 120.328 requires those receiving aid under Section 5-2(2)(b) to now meet the employment requirements in Sections 4-1.8 through 4.1-10, it does not require compliance with the non-employment TANF eligibility requirements missing from the permanent rule such as Section 4-1.7, the child support provision.

Moreover, even if Rule 120.328 encompassed all the TANF eligibility requirements it is not a valid “peremptory rule” under the IAPA. When interpreting a statute such as the IAPA, the “goal is to ascertain and give effect to the intent of the legislature. The simplest and surest means of effectuating this goal is to read the statutory language itself and give the words their plain and ordinary meaning.” *MD Elec. Contrs., Inc. v. Abrams*, 228 Ill. 2d 281, 287 (2008) (citation omitted). Under the IAPA,

“Peremptory rulemaking” means any rulemaking that is required as a result of federal law, federal rules and regulations, an order of a court, . . . under conditions that preclude compliance with the general rulemaking requirements imposed by Section 5-40 [5 ILCS 100/5-40] and that preclude the exercise of discretion by the agency as to the content of the rule it is required to adopt.

5 ILCS 100/5-50. Here, issuance of a rule in compliance with the TANF eligibility requirements was not mandated by the April Order. Rather, the court merely determined that the emergency rule was improper because it did not comply with the plain language of Section 5-2(2)(b), the statute DHFS relied on when changing the FamilyCare Program. DHFS, however, was perfectly free to issue no rule at all. The April Order held only that if DHFS chooses to issue a rule under Section 5-2(2)(b), that rule must, at a minimum, satisfy the language of that section.

To interpret the peremptory rulemaking provision in the manner advocated by DHFS would vitiate the general rulemaking requirements imposed by 5 ILCS 100/5-40. Under DHFS's interpretation, the government would be free to implement rules containing glaringly obvious defects, and then once those rules were enjoined, use the peremptory rulemaking process to cure the defects, effectively bypassing the general rulemaking process. That is not the purpose of peremptory rulemaking. Again, a valid peremptory rule is a rule that is required as a result of a court order under conditions precluding the exercise of discretion by the agency as to the content of the rule adopted. 5 ILCS 100/5-50. Following the April Order, the decision regarding whether to amend the emergency and permanent rules and how to amend those rules to comply with Section 5-2(2)(b) was left solely to the discretion of DHFS, and the content of Rule 120.328 was determined entirely by DHFS. Rule 120.328, codified at 89 Ill. Admin. Code 120.328, is therefore not a valid peremptory rule.

Since Rule 120.328 is not a peremptory rule, the deficiencies of the permanent rule remain. The court therefore finds that the FamilyCare Program may not be operated under Section 5-2(2)(b) because the program fails to require its participants to meet all the TANF eligibility requirements other than the federal maximum earned income requirement, the only requirement statutorily exempted. As the First District Appellate Court recently affirmed, "section 5-2(2)(b) extends medical assistance in the name of the FamilyCare Program to those who would otherwise receive assistance under TANF, disregarding only those TANF requirements dealing with earned income." *Caro*, 2008 Ill. App. LEXIS 939, slip op. at 12. To the extent DHFS has expanded the FamilyCare Program beyond those bounds, it has done so impermissibly.

The granting or denying of a preliminary injunction lies within the sound discretion of the trial court. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 80 (2006) (citation omitted).

The purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits of a cause. It is an extraordinary remedy which should apply only in situations where an extreme emergency exists and serious harm would result if the injunction is not issued. A party seeking a preliminary injunction must establish that: (1) a clearly ascertained right in need of protection exists; (2) irreparable harm will occur without the injunction; (3) there is no adequate remedy at law for the injury; and (4) there is a likelihood of success on the merits.

Beahringer v. Page, 204 Ill. 2d 363, 379 (2003) (citations omitted). The ascertainable right in need of protection here is the plaintiffs' assertion that the unauthorized expansion of the FamilyCare Program through Medicaid improperly uses tax dollars. This alleged harm is irreparable and thus there is no adequate remedy at law because it would be impracticable for the state to recoup the costs expended for the benefit of the FamilyCare Program. For the reasons explained above, as well as in this court's April Order, there exists a strong likelihood that the plaintiffs will succeed on their claims regarding the FamilyCare Program.

In addition to the criteria above, prior to issuing a preliminary injunction the "court must conclude that the benefits of granting the injunction outweigh the possible injury that the opposing party might suffer as a result thereof." *H.T.A., Ltd. v. Luxion*, 211 Ill. App. 3d 739, 744 (1st Dist. 1991) (citation omitted). While no considerable harm would be occasioned on the government defendants by an injunction, the defendant-intervenors, who are current recipients of aid under the Medicaid-based FamilyCare Program, contend they will be irreparably harmed by an injunction for they will lose their health insurance, insurance that is otherwise unaffordable and unavailable to them. Defendant-Intervenors' Resp. 12. In addition, they will have paid insurance premiums for services they will no longer have, and there is no guarantee of a refund of those premiums. *Id.* While the court sympathizes with and understands the plight of the

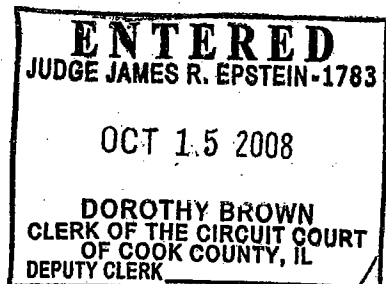
uninsured in our state and elsewhere, the equities in the particular case militate in favor of granting the preliminary injunction. The current FamilyCare Program may not be operated under Section 5-2(2)(b). The defendant-intervenors do not have a right to continue to receive insurance benefits under this improperly promulgated program. The remedy for recovering the defendant-intervenors' unused premiums is a refund of those premiums, not the continuation of an invalid program. The plaintiffs' motion for a preliminary injunction regarding the FamilyCare Program is therefore granted.

III. Order

Director Barry S. Maram and the Department of Healthcare and Family Services are preliminarily enjoined from expending any public funds in the name of the FamilyCare Program, be it under the permanent rule, 89 Ill. Adm. Code 120.33, or the purported preemptory rule, 89 Ill. Admin. Code 120.328, for the purpose of providing medical assistance pursuant to 305 ILCS 5/5-2(2)(b) to any individuals who fail to meet all the eligibility requirements under Article IV of the Illinois Public Aid Code, 305 ILCS 5/4-1 *et seq.*, other than the federal maximum earned income requirement. Comptroller Daniel W. Hynes is preliminarily enjoined from authorizing payments related to the current 305 ILCS 5/5-2(2)(b)-based FamilyCare Program. This preliminary injunction will remain in effect until a trial on the merits unless sooner modified or dissolved.

Dated: _____

Entered: _____



James R. Epstein, Judge 1783