STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
BCD-AP-18-02

MAINE EQUAL JUSTICE PARTNERS,
CONSUMERS FOR AFFORDABLE HEALTH
CARE, et al.,

Petitioners,

v.

ORDER ON RESPONDENT'S MOTION FOR CLARIFICATION AND FOR PARTIAL STAY PENDING APPEAL

COMMISSIONER, MAINE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

Background

On November 21, 2018 this Court issued an Order on a M.R. Civ. P. 80C Appeal of Agency Action. On November 26, 2018 the Respondent filed the instant motion. The following day the Court conferred telephonically with counsel for the parties to set a briefing schedule.[1] The Court has reviewed all the prior orders in this case, as well as the parties' filings on this motion. The Court will clarify, as requested, certain aspects of its November 21, 2018 order, and given that some deadlines set in that Order have passed, the Court will extend them. The Court, however, denies the Respondent's request that the November 21, 2018 order be partially stayed pending appeal.

[1] Counsel for the Respondent asked that this Court rule on this motion on an expedited basis which it agreed to do. The Court also suspended any deadlines set in the November 21, 2018 order for the Commissioner to take certain actions in order to give the other parties a shortened but fair time to file their responses to the motion. The matter went under advisement on November 30, 2018.

The Court will address separately the issues raised by the parties.

<u>*Whether the automatic stay provisions of M.R. Civ. P. 62(e) apply to this case.*</u>

The Respondent argues that this Court's November 21, 2018 Order is automatically stayed pending appeal pursuant M. R. Civ. Rule 62(e). Rule 62(e) states that "the taking of an appeal from a judgment shall operate as a stay of execution upon the judgment during the pendency of appeal."

The Court disagrees. In *National Organization for Marriage v. Commission on Governmental Ethics & Election Practices*, the Law Court had this to say about that argument:

> As an initial matter, the term "judgment" is defined in the Rules as "a decree and any order from which an appeal lies…. That definition does not include agency actions, because an appeal to the Law Court does not lie directly from the agency's decision but instead from the Superior Court's review of that decision. *Additionally, the plain language of "execution upon a judgment" in M.R. Civ. P. 62(e) does not include agency actions because they are not judgments upon which an execution may issue.* [emphasis added].

2015 ME 103, ¶ 10, 121 A.3d 792.

The Respondent's argument only quotes the first sentence in the above paragraph, but the Court cannot overlook the "additional" reason the Law Court rejected the argument in *Nat'l Org. for Marriage*, and concludes that Rule 62(e) does not apply to this appeal of an agency action.

<u>*Whether the Respondent can show that it meets all 4 criteria for a discretionary stay.*</u>

The Respondent argues alternatively that should the Court find that Rule 62(e) does not automatically stay the November 21, 2018 order, the Court should nevertheless partially stay it pending appeal under the Court's inherent authority to do so. M.R. Civ. P. 62(g). Respondent argues that it has shown: 1) that it will suffer irreparable injury if the stay is not granted; 2) such injury outweighs any harm which granting the stay would inflict on [any] other party; 3) it has a likelihood of success on the merits (at most, a probability; at least a substantial possibility); and 4) the public interest will not be adversely affected by granting the stay. *Nat'l Org. for Marriage*,

2015 ME 103, ¶ 14, 121 A.3d 792 (citing *Bangor Historic Track, Inc. v Dep't of Agric., Food & Rural Res.*, 2003 ME 140, ¶ 9, 837 A.2d at 132).

In order to obtain a partial or complete stay the Respondent must meet all four criteria. Here, because the Respondent cannot establish irreparable harm to the Department of Health and Human Services (DHHS), a partial stay will not be granted pending appeal.

The Respondent's combined motion requests in part that the Court "clarify the effect of its Order while an appeal is pending…" Because of certain assertions made in the motion and memorandum of law filed in support of the motion, the Court will provide some clarification, as requested. The statements which the Court feels compelled to address have been made throughout this litigation, but they have become more dire in their predictions, and they are central to the Respondent's claim that requiring it to comply with the November 21, 2018 order pending appeal would cause irreparable harm to DHHS and fiscal calamity to Maine government.

As the parties know, the Law Court sent this case back to the Superior Court to resolve certain issues, and the parties seemed to agree what those issues were. They included the effective date of the Expansion Act, and "whether the Act has become operative, with or without any Legislative Action" from the 128th Maine Legislature. *Maine Equal Justice Partners et al. v. Commissioner, Department of Health and Human Services,* 2018 ME 127, ¶ 10, 193 A.3d 796. They also included, the parties agreed, any issue that may have become ripe since the Law Court dismissed the Respondent's last appeal.

After preparation of an extensive record as required by the Law Court, extensive briefing, and oral argument, the Court made certain findings. The Court determined that the Expansion Act became effective and *became law* as of January 3, 2018 (emphasis added); that the 45-day "temporarily inoperative" period referred to in the Maine Constitution had long passed, and that

this 45-day period did not, as a matter of law, change the effective date of the law. From there, the Court determined the dates for the unambiguous deadlines as set by the Expansion Act. It determined that those deadlines had also long passed, including the Respondent's obligation to file a State Plan Amendment[2] (SPA) with the federal authorities, and to adopt rules. The deadline to adopt rules was determined by the Court to be July 2, 2018.

The Court ordered the Respondent to take steps to come into compliance with these deadlines as set by the people of Maine. It was ordered to "adopt rules retroactive to July 2, 2018" and also ordered that "the rules must ensure that persons who meet the criteria for coverage as defined in the Expansion Act are enrolled for and eligible to receive MaineCare services" retroactive to July 2, 2018.[3] In other words, the people of Maine intended, in enacting the Expansion Act, that individual Maine citizens were to be able to apply for those benefits beginning July 2, 2018, and if they were determined by the Respondent to meet the criteria, they would be eligible to receive Medicaid benefits as of that same date.

On page 6 of her motion, the Respondent makes the following statement: "Moreover, the Order specifically requires the Department to spend those funds until the Medicaid account is depleted – which would have a catastrophic effect on the *needier* population of existing Medicaid beneficiaries." This is not close to an accurate statement of what was ordered. The Court did not order or require or command any such spending by the Commissioner. Throughout these proceedings the Court has emphasized that it has no constitutional authority to order an appropriation of funds. It has also emphasized that under the Maine Administrative Procedures Act, it lacks subject matter jurisdiction at this time to order benefits paid to any particular

[2] The Respondent filed a SPA on September 4, 2018 after the Law Court decision. The Respondent and CMS continue to discuss that filing and counsel for the Respondent has informed the Court that the December 4, 2018 deadline for CMS to either approve or deny the SPA has been suspended by these discussions.
[3] The language in the Order regarding what the rules must ensure track exactly the language of the Expansion Act.

individual who may have applied for benefits—and who the Court believes are entitled to *apply for* benefits as of July 2, 2018—given the unambiguous language in the Act. Those cases are still tied up in administrative proceedings, and the November 21, 2018 order simply did not order the Respondent to start spending money from the Medicaid account and pay benefits for those persons. *See Maine Equal Justice Partners et al. v. Commissioner, Department of Health and Human Services*, BCD-AP-18-02, at 8 n.7, (Bus. & Consumer Ct., Nov. 21, 2018, *Murphy, J.*).

The Court trusts that this statement by the Respondent reflects a good faith misunderstanding of what the Court determined and ordered. In case there is any doubt, the Court would reiterate what it has said in its orders and throughout these proceedings: the fiscal challenges presented by the Expansion Act must be resolved by the Maine Legislature.

The Court was also directed by the Law Court to decide if the Expansion Act was "operative" with or without further Legislative action. The Court and the parties interpreted this directive to mean that the Court had to determine if the Act could be enforced in any fashion without the 128th Legislature having made a specific, dedicated appropriation for Medicaid Expansion. The Court was not persuaded by the Commissioner's arguments that the executive branch is constitutionally *prohibited* from faithfully executing any of its clear duties required by the Act in the absence of any such specific, dedicated appropriation. As the Law Court stated in a per curiam decision to the Plaintiffs in *Maine Senate v. Maine Secretary of State*, this Court would say to the Respondent here: It has "provided neither a constitutional basis nor a statutory foundation" for the proposition that a general allocation of funding cannot be used to address new spending needs "absent an explicitly-descriptive allocation of appropriated funds to particular actions . . . ." 2018 ME 52, ¶ 29, 183 A.3d 749. The Court also found the opinion of then-Attorney General Brennan, in a remarkably similar situation to the case at hand, to be sound. Op. Me. Att'y

Gen. (Apr. 21, 1978). These authorities recognize that the Legislature and executive agencies must be given flexibility to adapt to changing circumstances either in the form of newly enacted laws or fiscal challenges presented for any reason. But those challenges do not—except in extreme circumstances completely absent here—excuse executive branch agencies from faithfully executing the laws of Maine.

The Court also rejected the Respondent's position that this Court's order somehow violates the doctrine of separation of powers. The Court believes just the opposite is true. The Legislature must solve the fiscal challenges presented, and a new Legislature will begin its work in less than a month. In their briefs the parties seem to recognize that addressing the fiscal challenges will likely be a priority matter for the incoming Legislature and administration.

In the meantime, in the absence of a constitutional or statutory prohibition that legally prevents the Respondent from using prior appropriations to the general Medicaid account, the Court concluded that the Respondent has a constitutional obligation to begin implementing the Expansion Act. Further, the Court concluded that it has the authority under the Maine Administrative Procedures Act to compel the Respondent to take certain steps which are explicitly defined in the Expansion Act, *in preparation for payment of benefits* to qualified Maine citizens. To be sure, if the November 21, 2018 order becomes final, and the Department loses its argument in the administrative process, benefits will have to be paid, and they may have to be paid back to the date the Expansion Act clearly established: July 2, 2018. But as the Respondent clearly knows, that is something that is weeks, if not months, away from happening.

While the Respondent did file a SPA after its Law Court appeal was dismissed, the Respondent has continued to refuse to adopt rules which would permit persons who are found by the Department to be qualified under the Act to receive retroactive benefits—as the people of

Maine clearly intended—back to July 2, 2018. Instead, the Respondent has persisted in hyperbolic claims of fiscal calamity, despite the uncontested factual record before the Court about the status of appropriations, and the fact that it costs no money to file an amended SPA or to promulgate rules, even retroactive ones.

The fiction of imminent fiscal calamity also completely ignores the reality of what has actually happened since the Expansion Act became the law of Maine. The Respondent has so delayed implementation that hundreds of Maine citizens who have applied for benefits under the Expansion Act—and who may very well meet the statutory criteria for eligibility—are still mired in administrative proceedings where the Respondent's only argument, according to the undisputed record, is that the DHHS does not recognize the existence of the Expansion class. It is also not lost on the Court that the Respondent has, as has recently been acknowledged, failed to hire or even "post" the 100 positions that it claims are needed to implement the Expansion Act.

Compliance with the limited nature of the remedies provided to Petitioners in the November 21, 2018 Order presents zero risk of imminent fiscal calamity, and the Respondent has not come close to establishing irreparable harm.

Conclusion

When the 129th Legislature begins its work, as the parties know, it has a number of options. Those options include but are not limited[4] to preserving the Expansion Act as written and enacted by the people of Maine. It can amend it if it sees fit to do so. And obviously it can also provide, as Mr. Lazure credibly explained, for a supplemental appropriation—just as the Legislature has done repeatedly, even annually, when the Medicaid general account is insufficient to meet the needs of recipients for whom the law requires payment of benefits. *See McGee v. Sec'y of State*, 2006 ME

[4] The Legislature could also, as the parties, know, repeal the Expansion Act or repeal and replace it with an entire new law.

50, ¶ 21, 896 A.2d 933 (concluding that the legislature may not act in a manner which "abridges directly or indirectly the people's right of initiative"); *cf. Bates v. Dir. of the Office of Campaign & Political Fin*., 763 N.E.2d 6, 11 (Mass. 2002).

Because the deadline to comply with certain provisions of the November 21, 2018 order would have expired today,[5] and in recognition of the transition that is occurring in the Legislative and Executive branches of Maine government – or as counsel for the Respondent put it, "the shifting sands beneath our feet" – the Court will extend the deadline for the Respondent to comply with its November 21, 2018 order. The date selected by the Court for compliance by the Respondent is designed to provide the new Legislature with time to address the fiscal challenges presented by the Expansion Act, as well as to provide the Respondent, whoever that might be a month or so from now, a reasonable amount of time to draft appropriate rules that conform with this Court's Order of November 21, 2018.

The Court would emphasize that the extension of the deadline to comply should not be confused with a central holding of the prior Order. The people of Maine enacted a law that requires payment of Medicaid benefits to an expanded class of Maine citizens, and any person who meets the qualifications clearly spelled out in the Expansion Act are entitled to those benefits as of July 2, 2018.

The entry will be: Respondent's Motion for Clarification and/or Partial Stay Pending Appeal is DENIED. The deadline imposed on page 21, paragraph 7, in the Court's November 21, 2018 for the Respondent, is changed from December 5, 2018 to February 1, 2019. The Respondent is otherwise ordered to comply with all other provisions of that paragraph.

[5] On November 27, 2018 the Court temporarily suspended that deadline until further order of court.

This Order may be noted on the docket by reference pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

December 6, 2018	**/ S**
DATE	**SUPERIOR COURT JUSTICE**