STATE OF VERMONT
WASHINGTON COUNTY, SS

SUSANN HUNTER, ROBIN GAGNE, and JANE DOE, on behalf of themselves and all others similarly situated, Plaintiffs, v. STATE OF VERMONT, M. JANE KITCHEL, Secretary of the Agency of Human Services, and EILEEN ELLIOTT, Commissioner of the Department of Prevention, Assistance, Transition and Health Access, Defendants;	)	Docket No. 687-11-02 Wncv
VERMONT CHIROPRACTIC ASSOCIATION, INC., SHAWN JAMES McDERMOTT, Chiropractic Physician, and DEE KALEA, Plaintiffs, v. STATE OF VERMONT, HOWARD DEAN, M.D., Governor, M. JANE KITCHEL, Secretary of the Agency of Human Services, and EILEEN ELLIOTT, Commissioner of the Department of Prevention, Assistance, Transition and Health Access, Defendants.	)	Docket No. 693-11-02 Wncv

Decision and Order
Plaintiffs' Motions for Preliminary Injunction

These two consolidated cases came before the court for hearing on November 15, 2002

on Motions of all Plaintiffs for a Preliminary Injunction to enjoin Defendants from eliminating benefits programs for dentures through Medicaid, chiropractic services for adults through Medicaid and VHAP, and scheduled hospitalizations through VHAP. Plaintiffs Hunter, Gagne, and Doe are represented by John J. McCullough III, Esq. and Mark Loevy-Reyes, Esq. Plaintiffs Vermont Chiropractic Association, McDermott, and Kalea are represented by Joshua R. Diamond, Esq. Defendants State of Vermont, Secretary Kitchel, Commissioner Elliott, and Governor Dean are represented by Susan R. Harritt, Assistant Attorney General. William P. Russell, Esq., Chief Legislative Counsel for the Legislative Council of the General Assembly, filed an amicus curiae brief and presented oral argument by permission.

Facts

The facts are established by affidavits filed on behalf of all parties, and no facts are contested.

Susann Hunter is a 51 year old woman who is a self-employed cleaning woman and gardener who works four hours a day. Her health insurance is through the Vermont Health Access Plan (VHAP). She has progressive osteoarthritis which is severe in her right hip, causing pain which is getting steadily worse. She needs a hip replacement for her right hip to relieve chronic pain and allow her to work and do other normal daily activities. She received a notice on October 11, 2002 that VHAP would no longer cover inpatient elective hospitalization effective November 1, 2002. She tried to schedule surgery for her right hip before November 1, 2002, but was unable to do so.

Robin Gagne is a 43 year old man whose only health insurance is through VHAP. He worked as a truck driver until he injured his back approximately one year ago. He undergoes physical therapy, and has added chiropractic treatment as well. He intends to pursue treatment so that he can return to work. He has made more gains in mobility and flexibility while receiving both chiropractic treatment and physical therapy than he did with physical therapy alone. VHAP coverage for chiropractic treatment has been terminated, so he will have to discontinue chiropractic treatment.

Jane Doe is an 85 year old woman who lives alone in subsidized housing. Her only income is from social security benefits, and her health insurance is through Vermont Medicaid and Medicare. She has worn partial dentures for years, but cannot wear them any more due to a pulled tooth and receded gum which causes the lower denture to rub against her bone. She cannot chew food properly without dentures, and she is concerned about infection from the rubbing. Her dentist has not yet been able to fix her lower partial dentures. She received notice from PATH that Medicaid would no longer cover dentures effective November 1, 2002. She had an appointment to see her dentist scheduled for November 11, 2002.

The Vermont Chiropractic Association, Inc. (VCA) is a Vermont nonprofit corporation representing the interests of its practitioner members and serving as a spokesperson for the

chiropractic profession in Vermont. Currently, VCA members number 70 in relation to the 192 licensed chiropractic practitioners actively practicing in Vermont. The VCA itemizes four harmful effects from the elimination of chiropractic coverage under Medicaid and VHAP: 1) patients in the greatest financial need will forego the most appropriate treatment; 2) patients not receiving this most appropriate treatment will suffer physically, emotionally, and financially as a result; 3) the change in benefits interferes with practitioner and patient rights to carry on a physician-patient relationship by stopping it precipitously; and 4) practitioners will suffer immediate economic harm.

Shawn James McDermott has been a licensed chiropractic physician in Vermont since February, 1998. He is the vice president of the Vermont Chiropractic Association, Inc., and an authorized participating provider for the Medicaid Program. Thirty five of 381 new patients he has seen since he opened his practice had Medicaid as their major medical coverage. He states that eliminating chiropractic coverage puts him in the unconscionable position of having to treat his patients without reimbursement or turn them away knowing that they are the patients least financially able to seek comparable treatment elsewhere.

R. Dee Kalea is a 51 year old woman largely incapacitated and unemployable after suffering debilitating injuries in a car accident. Her only income is approximately $400 per month from an inheritance; she is enrolled in VHAP. She had received treatment by medical doctors, homeopathic practitioners, an osteopathic physician, physical therapists, and a chiropractic physician. As of the end of October, 2002, the only treatment she required that was covered by VHAP was chiropractic spinal manipulation, which she considers crucial to her continued mobility and functioning. The cessation of chiropractic treatment might mean that she needs more expensive and less effective treatment by other health care providers.

All of these Plaintiffs have been affected by the termination of coverage, effective November 1, 2002, in three programs: dentures (Medicaid), chiropractic services for adults (Medicaid and VHAP), and inpatient elective (scheduled) hospitalizations (VHAP). Termination of these programs occurred when rescissions were made to the appropriations in the State of Vermont budget for the fiscal year ending June 30, 2003, as described more fully below, and the Department promulgated an Emergency Rule effective November 1, 2002.

All Defendants are members of the executive branch of the State of Vermont. Secretary Kitchel is the Secretary of the Agency of Human Services, which includes the Department of Prevention, Assistance, Transition and Health Access (PATH). Commissioner Elliott is the commissioner of PATH, which administers the VHAP and Medicaid programs. Governor Dean is the chief executive officer of the State.

On June 21, 2002, the General Assembly passed Act 142, the Budget Act, for the fiscal year from July 1, 2002 to June 30, 2003. It was based on revenue projections from January 2002, although there was general awareness that actual revenues would probably be less. Revised estimates would not be available until July, after the Legislature was to adjourn. The Budget Act

is 94 pages long, and begins with an expressed intent to operate under a balanced budget for the year. There are two sections particularly pertinent to this case.

Section 148 concerns the Department of Prevention, Assistance, Transition and Health Access (PATH) and Medicaid. Subsection (g) states: "The department is not authorized to amend the rules for the Medicaid program to eliminate coverage for dentures for adults, nor to modify the scope of coverage for dental services." Subsection (i) states: "The department is not authorized to amend the rules for the Medicaid and VHAP programs to eliminate coverage for chiropractic services for adults."

Section 324 is the last section of the bill and is entitled "Fiscal Year 2003 Deficit Prevention." It authorizes a process for reducing the amounts appropriated in the event that three conditions are met: (1) Emergency Board revenue estimates are reduced by more than 2% from the estimates adopted on January 15, 2002, (2) the General Assembly is not in session, and (3) a Deficit Prevention Plan is needed to balance the budget.

Section 324 authorized the Secretary of Administration to consult with legislative leadership and committee chairs and develop a Deficit Prevention Plan reducing appropriations passed by the Legislature. The Plan authorization allowed reductions in force, program and funding reductions, and specified transfers of funds. Authority to file such a plan was limited to approximately three months and expired on September 30, 2002. Once a plan was filed, the Joint Fiscal Committee (five members from the House and five from the Senate) was authorized to review the plan and accept it as presented, or adopt alternative reductions reflecting priorities in the Budget Act. If the Joint Fiscal Committee failed to meet or to adopt the original or a modified plan, or in the event of adoption, the Secretary was authorized to proceed to implement it "forthwith" and was required to file a detailed report with the General Assembly by November 15, 2002. The General Assembly is scheduled to reconvene in early January 2003.

On June 29, 2002, shortly after passage of the Budget Act, the General Assembly adjourned.

On July 10, 2002, updated revenue forecasts were presented that revised revenue expectations from those of January, 2002. They showed that during the previous year, the State had experienced the largest decline in General Fund revenue on record, and that a $38.6 million deficit was expected in fiscal year 2003, representing a 4.3% shortfall in revenues from those previously expected.

Two days later, on July 12, 2002, the Joint Fiscal Office attached a Statement of Intent to the Budget Act, stating that § 324 in the Budget Act was intended to provide temporary rescission authority to address shortfalls. It further stated the "intent of conferees" that PATH may invoke emergency rulemaking to apply program changes "where it is necessitated by the imminent peril to public welfare posed by the revenue shortfall and the need through prompt exercise of rescission authority to avert or mitigate a state budget deficit." This was signed by

the Chairs of the House and Senate Appropriations Committees. It had not been drafted or presented to the General Assembly at the time of passage on the Budget Act.

Secretary of Administration Kathleen Hoyt developed a Deficit Prevention Plan, which she filed and presented at the August 12, 2002 meeting of the Joint Fiscal Committee, recommending reductions in spending authority of $23.34 million. It included many pages of specific proposed reductions to a wide variety of programs and services. The three entries relevant to these cases appear within a list of several other cuts to the PATH budget totaling $3,937,390, and read as follows: ". . .Eliminates chiropractic coverage ($43,636); Eliminates adult denture benefits ($168,868); Eliminates coverage for elective inpatient stays for VHAP and Caretaker relatives ($383,158). . . ." At the meeting, a member of the Committee asked for a list of the elective surgeries affected. The Joint Fiscal Committee met again on August 15th. On August 22, 2002, some form of the Deficit Prevention Plan was presented to the Medicaid Advisory Board, which comprises consumers, providers, and advocates.

The Joint Fiscal Committee met a third time on August 23rd to complete discussion. While some revisions were made to the Plan, none affected these three programs. At the August 23rd meeting, the Deficit Prevention Plan was adopted by a vote of 7-2.

On August 26, 2002, Secretary Kitchel and Commissioner Elliott met with the Health Access Oversight Committee to review a wide range of the deficit prevention cuts. All three of these programs were discussed briefly. A question was raised about the cost effectiveness of eliminating preventive elective care only to pay for more expensive emergency care later. Secretary Kitchel responded that "we'll be looking at that," and also predicted a consequence that some physicians would upgrade hospital admissions from elective to "urgent" or "emergency," for which benefits would still be paid.

On September 3, 2002, the Department published a small notice in the Burlington Free Press entitled "Notice of Emergency Rule-Making." After a brief introduction, it stated:

> This rule proposes to eliminate coverage of chiropractic services for VHAP and traditional Medicaid adults, limit VHAP coverage of inpatient hospital care to urgent and emergency admissions only, and suspend coverage of denture and implant services for adults from 10/1/02 to 6/30/03.
>
> Comments cannot be taken for this emergency rule, which the department intends to file on or before 9/5/02. An identical, non-emergency, proposed rule will be filed at the same time. The public will have an opportunity to submit comments at that time.

Two days later, on September 5, 2002, the Department filed both a Proposed Rule subject to regular rulemaking procedures, and the Emergency Rule at issue.

The Emergency Rule, which became effective upon filing, stated that it suspended coverage of chiropractic services for VHAP and Medicaid adults; suspended indefinitely coverage of dentures for adults as of October 1, 2002, effectively eliminating the benefit; and limited VHAP coverage of inpatient hospital care to urgent and emergency admissions, eliminating scheduled hospitalizations.

The cover sheet required for the Emergency Rule was completed by Secretary Kitchel. In it she states that no hearing would be scheduled, and that the rule should not be published in the weekly advertisements of proposed rules. Under the item labeled "Deadline for public comments, if applicable" appears "N/A."

To support her certification that emergency rulemaking was required by "an imminent peril to public health, safety or welfare," Secretary Kitchel attached a 1 ½ page Statement of Emergency explaining the reduced appropriation of $595,662 for these programs under the Deficit Prevention Plan. She explained that these services were chosen for reduction, "after careful analysis, to avoid reductions in services required by the most needy Vermonters." She stated that the rule was needed by October 1, 2002 to avert irretrievable economic loss, to ensure the overall integrity of health care, and maintain the well-being of the public at large. She also referred to the July 12th Statement of Intent attached to the Budget Act.

In the attached Economic Impact Statement, she referenced a July 2002 decision of the Vermont Supreme Court, Cushion v. Dep't of PATH, requiring the State to fund partial dentures in its dentures program. The impact of that decision would have doubled the cost of the dentures program during the remainder of the fiscal year.

Another attached form, entitled Public Input Statement, is required for rules that are not pre-filed. The language of the form states: "In completing the public input statement, an agency shall demonstrate a plan on how to maximize the involvement of the public in the development of the rule." Directive #3 states: "Please list the steps that will be taken to maximize public involvement in the development of the rule." The response lists the meetings of the Joint Fiscal Committee and the presentation to the Medicaid Advisory Board. It also references the notice published in the Burlington Free Press, and states that the rule would be on the PATH website and would be provided to parties on request.

Thus, in filing the Emergency Rule, the Agency acknowledged that it had no plans for a hearing or other public input beyond the meetings of official bodies that had been held prior to the notice published in the Burlington Free Press. Public input had not been permitted at the meetings of the Joint Fiscal Committee. At the time of the meetings of the Medicaid Advisory Board and the Health Access Oversight Committee, there had been no public notice, and no notice to program participants or providers.

Vermont Legal Aid attorneys, on behalf of Plaintiffs in the Hunter case, contacted the Department at some point and noted that the projected savings for the three programs had been

calculated as of November 1, not October 1. As a consequence, the Department delayed the effective date of termination of benefits to November 1, 2002.

A meeting of the Legislative Committee on Administrative Rules (LCAR) was scheduled to take place on September 25, 2002. Under the Administrative Procedures Act (APA), the LCAR is required to receive notice of an emergency rule and may object if it is "(1) beyond the authority of the agency, (2) contrary to the intent of the Legislature, (3) arbitrary, or (4) not necessitated by an imminent peril to public health, safety or welfare sufficient to justify adoption of an emergency rule." 3 V.S.A. § 844(e).

On September 23, 2002, the Chair of the Joint Fiscal Committee wrote to the LCAR urging implementation of the Emergency Rule. In it, he noted that the language of § 324 of the Budget Act "was designed to create a rapid process that could develop reductions early in the year."

The LCAR met on September 25, 2002 to consider this as well as other rules. Members of the public, including representatives of Plaintiffs, were permitted to speak, and discussion was held on the Emergency Rule. A motion to take no action failed 3-5. A motion to disapprove the Emergency Rule on grounds that there was no emergency failed 4-4. A motion to approve the Emergency Rule failed 4-4. Consequently, pursuant to 3 V.S.A. § 844(e), the Emergency Rule remained in effect, with an effective date for termination of the programs of November 1, 2002.

Between October 8 and October 11, 2002, PATH notified providers and participants of the termination of programs by letter. On October 16, 2002, the Department refiled Bulletin 02-35, a proposed "regular" rule with parallel provisions to the Emergency Rule, with a proposed effective date of February 1, 2003. Regular rulemaking is proceeding under that process.

On October 31, 2002, the Hunter suit was filed, and on November 4, 2002, the Vermont Chiropractic suit was filed. Plaintiffs in both cases moved for a Temporary Restraining Order and Preliminary Injunction. A hearing commenced on November 13th and continued on November 15th addressing the motions for a Preliminary Injunction. The parties stipulated to the use of the affidavits as the evidentiary basis for a decision.

Conclusions

In considering Plaintiffs' request for a Preliminary Injunction, the court reviews four factors: (1) irreparable harm to the moving parties, (2) potential harm to others, (3) likelihood of success on the merits, and (4) the public interest.

Irreparable harm to Plaintiffs

Each of the Hunter plaintiffs has shown irreparable harm in that each will not receive medical treatments to alleviate a painful condition and prevent further physical deterioration.

Without VHAP coverage, Ms. Hunter will not be able to schedule a hip replacement surgery to cure an inability to walk and work, and Mr. Gagne will not be able to obtain relief from a pain through chiropractic treatments. Without existing Medicaid coverage, Jane Doe will suffer from a painful mouth condition that affects her ability to eat, and will not be able to obtain dentures to remedy the problem. Ms. Kalea in the Vt. Chiropractic case has shown irreparable harm in that without VHAP, she will not be able to continue rehabilitative care and may need to seek other care at higher cost. The other Vt. Chiropractic plaintiffs have not shown irreparable harm in that loss of a patient-client relationship due to changes in coverage under health insurance programs and economic loss do not qualify as irreparable harm. See Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) ("it has always been true that irreparable injury means injury for which a monetary award cannot be adequate compensation and that where money damages is adequate compensation a preliminary injunction will not issue").

The State argues that none of the plaintiffs has shown irreparable harm in that none has an entitlement interest in the continuation of VHAP and Medicaid programs that are optional programs which the State can legally discontinue. While this is true, Plaintiffs do have an enforceable interest in having those programs not discontinued in an invalid or illegal manner. Thus, if Plaintiffs show a likelihood of success on their claim that the termination of the programs was conducted contrary to law, they can show irreparable harm. For the reasons set forth below, Plaintiffs have made such a showing, and therefore they have also shown irreparable harm.

Potential harm to other parties

There will be harm to other citizens of Vermont if a preliminary injunction is granted, in that the Department of PATH will continue spending at least $74,000 per month on chiropractic treatments, dentures, and scheduled hospitalizations. This will result in a deficit of approximately $600,000 by the end of the fiscal year. As a consequence, other programs will have to be cut or reduced during this fiscal year which will affect others who benefit from such programs, or the State will overspend, affecting all taxpayers in the next fiscal year. The Legislature has declared a strong intent to prevent deficit spending and instead to adjust appropriations during the current year to match updated revenue projections. Thus, the harm to others throughout the State, who benefit in a variety of ways from State expenditures, cannot be ignored, even though the impact on individual persons may seem undefined at this time.

All four of the elements for a preliminary injunction need to be viewed in relation to each other. See Serono Laboratories, Inc. v. Shalala, 158 F.3d 1313, 1318 (D.C.Cir. 1998) ("These factors interrelate on a sliding scale and must be balanced against each other. 'If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.'" (quoting CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C.Cir.1995)). Review of all factors is needed before balancing the respective strengths of each.

Likelihood of success on the merits

Plaintiffs argue likelihood of success on several legal grounds: (A) that the Budget Act provisions providing for rescissions violate constitutional requirements of separation of powers between the branches, and improperly delegate legislative authority; (B) that the cuts in chiropractic treatments and dentures violate specific provisions of the Budget Act, while the cut in scheduled hospitalizations is arbitrary and capricious in relation to legislative intent; (C) that the Emergency Rule under which the cuts became effective on November 1, 2002 is invalid under APA emergency rulemaking requirements, (D) that Medicaid and VHAP must provide chiropractic care under other statutes which are not repealed by the Budget Act; and (E) that Medicaid must provide coverage for dentures under federal Medicaid law.

A. Separation of Powers; Improper Delegation

Plaintiffs argue that § 324 of the Budget Act, which contains the terms of the deficit prevention mechanism, unconstitutionally gives the executive branch the power to undo action that only the Legislature can take. See Vt. Const. ch. II, § 5 ("The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."). Plaintiffs also argue that § 324 unconstitutionally delegates to a small subgroup, the Joint Fiscal Committee, power to undo legislation adopted by the entire General Assembly.

The starting point for any constitutional analysis is that the challenged legislation is presumed to be constitutional. See Benning v. State, 161 Vt. 472, 481 (1994) (citations omitted) ("The statute is entitled to a presumption of constitutionality. Plaintiffs are not entitled to have the courts act as a super-legislature and retry legislative judgments based on evidence presented to the court.").

Plaintiffs base their challenge substantially on three cases from the South Carolina Supreme Court, which are not controlling law in an analysis under the Vermont constitution. To the extent that the South Carolina Supreme Court relies upon general constitutional jurisprudence, the decisions have limited applicability because the facts differ significantly from those in this case. The basis of the holding in State ex rel. McLeod v. McInnis, 295 S.E.2d 633, 639 (S.C. 1982) is that the Legislature usurped executive branch expenditure power by creating a legislative committee to do executive branch work. The predominant issue in Gilstrap v. South Carolina Budget and Control Bd., 423 S.E.2d 101, 104 (S.C. 1992) is whether the Board was authorized to dispense with the Legislature's requirement under the appropriations act that cuts be made "across the board," and to decide instead to make cuts based on growth. The holding was based on statutory interpretation. The issue in State ex rel. Condon v. Hodges, 562 S.E.2d 623, 631 (S.C. 2002) was whether the governor violated separation of powers by first making a "concerted effort" to not spend specifically appropriated monies and then returning them to an appropriation fund other than the one from which they came. At issue was the Governor's conduct, not the constitutionality of legislation delegating authority. These cases do not provide

sufficient grounds to overcome the presumption of constitutionality attaching to § 324 of the Budget Act.

More extensive delegations of authority from the legislative to the executive branches have been upheld against challenges based on separation of powers claims. See, e.g., New England Div. of the American Cancer Soc. v. Commissioner of Administration, 769 N.E. 2d 1248, 1257 (Mass. 2002) (upholding limited delegation to Governor to "reduce public expenditures in a time of true financial emergency").

The terms of § 324 of the Budget Act provide for limited delegation of power for a narrowly delineated purpose. Authority is granted to the Secretary of Administration to rewrite the budget to scale down spending when revenue projections show that spending at the previously approved level cannot be sustained without deficit spending. While § 324 also provides a role for the Joint Fiscal Committee, that role is supplementary to that of the Secretary of Administration. Her job is to work with revised revenue projections, consult with legislative leaders, propose a new spending plan that avoids deficit spending but maintains legislative priorities, review it with the Joint Fiscal Committee (if the Committee chooses to meet), modify it with the Committee's input, and proceed to implement it "forthwith" to prevent deficit spending during the fiscal year. It is consistent with the more general administrative authority granted by the Legislature to the executive branch in 32 V.S.A. § 704a, and with routine executive responsibilities.

If the Committee wanted to participate in that process, it had the authority to do so, including adopting alternative reductions to those proposed by the Secretary, but it was not delegated any specific responsibility to act on behalf of the full Legislature. If it did nothing, or could not agree, the Secretary of Administration had the authority under § 324 to proceed on her own, an authority that had been granted by the full General Assembly on June 21st. The power given to the Committee was to maintain oversight on an optional basis during the summer months, thereby ensuring that legislative rather than executive priorities were maintained. The dynamic between the executive and legislative branches built into the process reflects their joint involvement during the budget development process generally. This limited delegation to the Committee neither compromises nor inhibits the ability of the full Legislature to exercise its powers, and is consistent with the concept that the branches should work together cooperatively in the exercise of their respective functions.

The primary delegation of authority in § 324 is to the executive branch, and specifically the Secretary of Administration. "The focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may in some way pertain to another branch, but whether the power exercised so encroaches upon another branch's power as to usurp from that branch its constitutionally defined function." In re D.L., 164 Vt. 223, 229 (1995) (citing United States v. Smith, 686 F. Supp. 847, 854 (D. Colo. 1988)). "Accordingly, we apply a relatively forgiving standard to separation-of-power claims, tolerant of such overlapping institutional arrangements short of one branch virtually 'usurping' from another its

constitutionally defined function." State v. Nelson, 170 Vt. 125, 128 (1999) (relying on Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977)). The "Constitution 'enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'" State v. Nelson, 170 Vt. at 127 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

The delegation to the Secretary of Administration was narrow in both scope and time. It could not be invoked unless three conditions were present: (1) Emergency Board revenue estimates were more than 2% lower than on January 15, 2002, (2) the General Assembly was not in session, and (3) a plan was needed to balance the budget. Any plan could only be implemented within the limitations set forth in § 324 (b) and (c). The Secretary could only invoke the use of the mechanism by filing a plan within the three months between adjournment and September 30, 2002. The Secretary was required to file a detailed report with the General Assembly by November 15, 2002. These limitations ensure that the delegated power would be used only for its narrow, intended purpose, and results could be adjusted by the full Legislature when it reconvened.

The mechanism is a practical one by which a part-time legislature can avoid paralysis when facing a serious decline in projected revenues that may develop when it is not in session. It also allows the branches to flexibly and cooperatively share responsibilities, with each acting within the limits of its authority to the maximum extent possible. See Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989) ("of necessity, there is a certain amount of overlap of the powers exercised by the different branches") (citing Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1, 6 (1941)).

Taking into account the limited nature of the delegations to the Secretary of Administration and Joint Fiscal Committee, and considering the intent to maximize the ability and responsibility of each branch to exercise its core function, the court cannot conclude that Plaintiffs have shown grounds for overcoming the presumption of constitutionality of § 324 of the Budget Act based on claims of separation of powers and improper delegation of authority. Therefore, Plaintiffs have not shown a likelihood of succeeding on their claim that § 324 of the Budget Act is unconstitutional.

B. Legislative Intent

Plaintiffs argue that specific provisions of the Budget Act, § 148(g) and § 148(i), preclude the Department from eliminating chiropractic treatment and dentures through rulemaking as a matter of law, and that elimination of scheduled hospitalizations is arbitrary and capricious and contrary to legislative priorities and legislative intent. With respect to chiropractic treatment and dentures, Plaintiffs rely on the plain language: "The department is not authorized to amend the rules for the Medicaid program to eliminate coverage for dentures for adults, nor to modify the scope of coverage for dental services." § 148(g). "The department is not authorized to amend the rules for the Medicaid and VHAP programs to eliminate coverage for chiropractic services

for adults." § 148(i). Without considering the terms and structure of the Budget Act as a whole, including all its parts, such language appears to express a mandate.

"In construing a statute, our objective is to implement the intent of the Legislature. We look to the 'whole of the statute and every part of it, its subject matter, the effect and consequences, and the reason and spirit of the law.'" Sagar v. Warren Selectboard, 170 Vt. 167, 171 (1999) (quoting In re P.S., 167 Vt. 63, 70 (1997)). In so doing, the court "harmonize[s] whenever possible apparently conflicting sections of the same act of the Legislature," Gelais v. Walton, 150 Vt. 245, 248 (1988).

There are clear statements of legislative purpose and intent at the beginning and end of the Budget Act which, when read together and with the sections from § 148 quoted above, undermine Plaintiffs' argument that the Department was precluded from attempting to eliminate denture and chiropractic programs through rulemaking. First is the "Statement of Purpose" in § 2:

> The purpose of this act is to provide appropriations for the operations of state government during fiscal year 2003. It is the express intent of the legislature that activities of the various agencies, departments, divisions, boards, and commissions be limited to those which can be supported by funds appropriated in this act or other acts passed prior to June 30, 2002. Agency and department heads are directed to implement staffing and service levels at the beginning of fiscal year 2003 so as to meet this condition, unless otherwise directed by specific language in this act.

Act 142, Fiscal Year 2003 Appropriations Act, § 2 (emphasis added). This constitutes the entire section on Purpose, and clearly states the legislative intent to spend only in accordance with appropriations.

This has to be read in conjunction with § 324 ("Fiscal Year 2003 Deficit Prevention"), which comes at the end and provides for rescissions according to a Deficit Prevention Plan adopted under specified, circumscribed conditions following specific procedures. These two sections frame the Budget Act as a whole, and show legislative purpose to avoid deficit spending, and to do so through mid-year cuts in appropriations. Within this clear framework, and as § 2 states, specific language in the Act is required to show that any particular program was intended to be insulated from rescission.

The language Plaintiffs rely on from § 148 is not specific enough to show legislative intent to exempt the denture and chiropractic programs from § 324 rescissions, even though it indicates a clear legislative priority that the programs are to remain in effect as long as § 324 cuts are not made. For example, if revenue shortfalls were projected to occur but under the 2% threshold, no deficit prevention rescissions could be made under § 324. Under those circumstances, PATH would be precluded by § 148 from eliminating the two specified programs

to save costs or to fully fund other programs instead, even in the event of a shortfall in revenues. The same would be true if revised revenue projections exceeded 2%, but the Secretary of Administration did not invoke the Deficit Prevention Plan mechanism of § 324, and the Legislature made no appropriations adjustments during the fiscal year. Under those circumstances, the mandatory language is meaningful: the Department could not, on its own, eliminate the programs through rulemaking. This reading of § 148 is consistent with its language, and harmonizes this section with the other sections of the Budget Act, as well as with the Act's expressly stated purpose.

The language of §148(g) and (i) prohibits the Department from eliminating the specified programs through rulemaking; but it does not prohibit rescissions from taking place through the Deficit Prevention Plan provisions of § 324. In § 324(b), the Legislature reminded both the Secretary of Administration and the Joint Fiscal Committee to create a plan for deficit prevention that would "reflect the priorities established by the general assembly" in the Budget Act, but this is general language that makes sense in context: neither the Secretary nor the ten individual members of the Committee were authorized to use the opportunity to reinstate their favored programs that might have been eliminated or reduced in the budget process. The general language of admonition to reflect legislative priorities does not support a conclusion that the phrase manifested legislative intent to elevate the §148(g) and §148(i) priorities over approximately 90 pages of other appropriations provisions.

In § 324, the Legislature did not, through specific language, show that in delegating limited authority to the JFC, it intended any particular programs, such as chiropractic care or dentures, to be exempt from rescission. Similarly, no specific language anywhere in the Budget Act suggests that VHAP coverage for scheduled hospitalizations is exempt from rescission. Section 324 only calls for a Deficit Prevention Plan to "minimize" negative effects on services. § 324(b). Once the Joint Fiscal Committee adopted the Deficit Prevention Plan on August 23, 2002, the Department was duly authorized–indeed, required–to proceed to eliminate the specified programs.

Plaintiffs have not shown a likelihood of success on their argument that the terms of the Budget Act prohibited the Department from undertaking rulemaking to eliminate the specified programs. On the contrary, the cuts made under § 324 compelled the Department to take the appropriate procedural steps to terminate the programs, which it could only do through rulemaking.

C. Validity of Emergency Rulemaking

Plaintiffs claim that the Emergency Rule is invalid under the APA. Specifically, they argue that the facts do not meet the statutory standard for an emergency, and that the Emergency Rule was adopted without sufficient notice to persons interested and without opportunity for hearing or public input.

The Administrative Procedures Act is found in Title 3, Chapter 25, and governs rulemaking by administrative agencies. Section 836 sets forth the sequential steps required for rulemaking. These include, as essential elements, advance publication of a proposed rule, and a public hearing and receipt of comments prior to the final formulation and adoption of a rule. These steps are required for all rules, "[e]xcept for emergency rules." 3 V.S.A. § 836. The § 836 requirements provide for advance notice and a meaningful opportunity for public input before a rule is adopted so that a variety of issues related to a proposed rule may be sorted out before the rule takes effect, maximizing the soundness of the rule. In short, the notice and comment requirement "enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." American Iron and Steel Institute v. Envtl. Prot. Agency, 568 F.2d 284, 291 (3d Cir. 1977) (construing § 553 of the federal APA) (quoting Texaco, Inc. v. FPC, 412 F.2d 740, 744 (1969).

Emergency rulemaking is the exception, and is governed by 3 V.S.A. § 844, which reads in part as follows:

> (a) Where an agency believes that there exists an imminent peril to public health, safety or welfare, it may adopt an emergency rule. The rule may be adopted without having been prefiled or filed in proposed or final proposed form, and may be adopted after whatever notice and hearing that the agency finds to be practicable under the circumstances. . .

3 V.S.A. § 844(a). An emergency rule becomes effective immediately upon filing, and may remain in effect for no more than 120 days. 3 V.S.A. § 844(b). A check on improper use of emergency rulemaking is set forth in § 844(e), which provides that a majority of the Legislative Committee on Administrative Rules may object to an emergency rule for several reasons, including that it is "not necessitated by an imminent peril to public health, safety, or welfare sufficient to justify adoption of an emergency rule." 3 V.S.A. § 844(e)(4). If the Committee makes such an objection, the agency has the burden of proving that the rule is valid. 3 V.S.A. § 844(e). Additional accountability for compliance is available through judicial review and remedies. 3 V.S.A. § 846.

In this case, Plaintiffs claim that the Legislature could have anticipated a drop in revenue projections when it adopted § 324 on June 21, 2002, and in fact did so, as the terms of § 324 show. They further argue that the fact that revenues anticipated for the full fiscal year of 2003 (ending June 30, 2003), would not be realized is not a sufficient ground for the Agency to conclude in September, 2002 (9 months in advance of the end of the fiscal year) that this anticipated shortfall is "an imminent peril to public health, safety or welfare." They argue that under this statutory standard, only an event of unexpected, startling significance seriously threatening individuals can justify the use of emergency rulemaking. They argue that an expected downturn in revenues cannot qualify as "an imminent peril to public health, safety or welfare" as a matter of law because any harm is deferred and generalized.

The Department argues that the figures did not become available until after the General Assembly had adjourned, and that they revealed a serious drop in revenue beyond acceptable levels. Indeed, the Department argues that the Legislature defined in advance that an emergency would exist if revenue projections showed a shortfall greater than 2%, and that an imminent peril to public health, safety, and welfare existed because if the Department did not seek to curb spending immediately, the health and welfare of the most needy Vermonters would be compromised before the end of the fiscal year.

There is no Vermont case law to assist the court in interpreting the "imminent peril to public health, safety, or welfare" language, and § 844 differs materially from parallel provisions in the federal APA. Case law from other states shows that other courts have concluded that a fiscal crisis can be the basis for emergency rulemaking. In Melton v. Rowe, 619 A.2d 483, 486 (Conn. Super. 1992), for example, the court deconstructed the phrase "imminent peril to the public health, safety or welfare" to reveal, among other things, that the contemporary meaning of the expression elevates the well-being of the whole community over that of the individual, embraces society's economic interests, and brings "within its purview regulations for the promotion of economic welfare and public convenience." Massachusetts has concluded that threatened revenue loss affecting welfare justified an emergency rule. See Robinson v. Secretary of Administration, 425 N.E.2d 772 (Mass. App. 1981).

Nothing in 3 V.S.A. § 844 prohibits the use of emergency rulemaking in a fiscal crisis. The limitation is whether there will be an impact on public health, safety, or welfare, and the facts in this case show there is. The more difficult question is how to apply the standard of "imminence" in the statutory standard in evaluating the impact. With respect to what qualifies as an "imminent" peril, the legislative purpose underlying § 844 is instructive and can be gleaned by viewing that section in relation to other provisions of the APA, as well as its underlying purpose and principles. Most important is a comparative analysis with § 839 et seq., the "regular" rulemaking provisions.

An emergency rule can only be in effect for 120 days, and four months is a reasonable length of time for completing regular rulemaking. This time span helps to inform the concept of "imminence" in context: if the circumstances of the need for a rule require one sooner than four months, then a threat to health, safety, or welfare can be deemed "imminent." Otherwise, regular rulemaking could be used.

In this case, the circumstances calling for rulemaking arose on August 23, 2002 when the Deficit Prevention Plan was adopted by the JFC. At that point, the Agency knew that its duty was to proceed to terminate the programs. If Secretary Kitchel were to have used regular rulemaking, a rule would not be able to be in place until approximately January 1, 2003 (the effective date chosen for the first Proposed Rule filed for regular rulemaking). This would mean that savings could only be achieved for six months, whereas at least eight months of savings needed to be realized to prevent the $600,000 deficit spending intended under the Plan. Approximately $150,000 in reduced spending would be lost by using regular rulemaking, with

the effect that by the latter part of the fiscal year, there would be insufficient funds to pay for important healthcare services to even needier Vermonters.

Under these circumstances, "imminent" means "cannot wait for four months, based on the nature of the need." Using this standard, the court concludes that Secretary Kitchel had a valid basis for invoking emergency rulemaking to protect the health, safety, and welfare of those who would need health care services from other programs during the remainder of the fiscal year.

This does not end the analysis, however. The second part of Plaintiffs' claim, and a chief reason for objecting to the use of emergency as opposed to regular rulemaking, is that the Department used emergency rulemaking in a manner that minimized public notice and eliminated any opportunity for hearing or public comment. Regular rulemaking calls for advance public notice in two forms: two formal publications, and weekly abbreviated ones. It also requires one or more public hearings, and at least 7 days for public comment. See 3 V.S.A. § 840. By contrast, § 844 calls for "whatever notice and hearing that the agency finds to be practicable under the circumstances." 3 V.S.A. § 844(a). In this case, there was only one brief notice in one newspaper, no hearing, and no acceptance of public comments. The cover sheet shows that the Secretary considered public comment 'not applicable.' The Secretary made an intentional decision to not obtain public input in any manner after the Health Access Oversight Committee meeting on August 26, 2002, even though at that meeting she acknowledged that there were practical eligibility issues that her Agency would be "looking at."

The State argues that once emergency rulemaking is justified, the extent of notice, hearing, and public input is entirely within the discretion of the agency, and that the Secretary was therefore authorized to curtail notice, hearing, and public input. It further argues that public input occurred at the August JFC meetings, the Medicaid Advisory Board meeting on August 22nd, the Health Access Oversight Committee on August 26th, and the September 25th LCAR meeting. Plaintiffs counter that the public was not allowed to speak at any meeting of the JFC prior to adoption of the Emergency Rule. The sequence shows that all meetings occurring before September 5th involved oversight review of the fact that a number of different programs would be terminated, with discussion at a general informational level. There were no meetings at which the public was invited to comment on the specifics of these program rules except at the LCAR meeting, which took place weeks after the rule was written and was not convened to gather information for the development of the rule. The plaintiffs argue that after-the-fact notice and hearing is contrary to the fundamental principles and purposes of the hallmark features of administrative rulemaking: notice and hearing with an opportunity for public input prior to adoption of a rule.

The court agrees with Plaintiffs that an administrator is not authorized to eliminate or minimize notice and public input at any time emergency rulemaking is used just because there are grounds for using it. A body of case law from other jurisdictions confines emergency rulemaking to narrow circumstances precisely to prevent agencies from routinely bypassing notice and comment requirements. "[A]gencies' use of their emergency rulemaking authority,

pursuant to which the notice and comment procedures are curtailed or by-passed, should be limited to those situations where it is clearly necessary so that the notice and comment procedures are not diluted." Senn Park Nursing Center v. Miller, 455 N.E.2d 162, 170 (Ill.App. 1983) (holding that the circumstances resulting in promulgation of an emergency rule were inadequate to justify circumvention of the APA's "core" notice and comment procedures). See also Law Enforcement Officers Union v. State, 643 N.Y.S.2d 301, 303 (N.Y. Sup. Ct. 1995), in which the court describes the purpose of standards for emergency rulemaking in the State Administrative Procedures Act as "attempting to stop the practice of using emergency rule making to avoid the notice and comment period otherwise required by the SAPA."

In this case, the Secretary knew as of August 26, 2002 that there was a need to proceed with rulemaking, and that grounds existed for emergency rulemaking. She also knew that the earliest effective date was October 1st, later delayed to November 1st. Thus, there was over a month, or even two, before the first possible effective date. There was time for notice and hearing with public input, at least in abbreviated form. Even if only the time before the LCAR meeting on September 25th is counted, there was a full month, yet the Secretary apparently concluded that it was not "practicable under the circumstances" to give more than one brief newspaper notice, or to take any public input.

To adopt the position asserted by the State, that the agency has complete discretion to bypass meaningful notice and public input and can do so without being subject to judicial review, would seriously undermine the principles of notice and public input in rulemaking generally. Agencies would not be constrained from eliminating notice and public input at the emergency stage. While public comment could occur in regular rulemaking later, given the dynamics of decision making, the public would suffer greater difficulty persuading an agency to change a rule already in place for a few weeks or months. Such a practical result conflicts with the legislative goals of maximizing public notice and input prior to the adoption of a rule, during the development stage. As observed by the court in Washington:

> When courts have found that such "good cause" to adopt a permanent rule in this manner did not exist, the agency at fault has then argued that "despite its lack of literal compliance with [pre-promulgation notice and comment requirements] the [agency] satisfied the intent of [those requirements] by accepting post-promulgation comments and keeping an open mind about revision." United States Steel Corp. v. United States Envtl. Protec. Agency, 595 F.2d 207, 214 (5th Cir. 1979). However, the notice and comment requirements of the federal APA were "designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." United States Steel Corp., 595 F. 2d at 214. These courts have therefore concluded that such opportunity for comment after promulgation must be a violation of the federal APA.

Mauzy v. Gibbs, 723 P.2d 458, 463 (Wash. App. 1986).

The court concludes that the purposes and principles of the Vermont APA as a whole, and the specific language of the second sentence of 3 V.S.A. § 844(a), require the Agency to provide as much public notice, hearing, and opportunity for public input as is practicable, given the available time as dictated by the nature of the facts giving rise to emergency rulemaking. While the statute provides for a broad availability of emergency rulemaking, it requires maximum observance of notice and public input procedures. Section 844(a) specifically incorporates "hearing" as a step in emergency rulemaking: "after whatever notice and hearing. . ." (emphasis added). Use of emergency rulemaking cannot be held, as a matter of law, to absolve an agency of the responsibility to comply with notice and hearing requirements when there is time.

While an agency administrator has to make some practical discretionary choices in the manner of notice, timing of a hearing, and deadline for acceptance of public input, there is still a statutory requirement to do what is practicable under the circumstances. To the extent the administrator has discretion, it cannot be used to eliminate minimum statutory requirements. In this case there was a failure to provide any hearing or other opportunity for public input, even though there was available time for more notice, through greater publication, and there was time for the Department to have a hearing and take public comment before the emergency rule needed to go into effect, and even before it needed to go to the LCAR. The degree of "imminence" present in the case is the appropriate standard for determining the extent of notice and hearing required. If a sudden disaster occurs, requiring immediate changes in an administrative system, there clearly is no time for extensive notice or much public input, but the time available in this case was greater, so the degree of notice and hearing practicable – and therefore required – is greater. Thus, § 844 does not allow discretion to eliminate notice and hearing, but places a duty on the agency to provide notice and a hearing to the extent they are practicable, given the nature of the facts. That was not done here.

The State argues that the Legislature intended emergency rulemaking to be used, as indicated by the terms and time frames in § 324, as well as the after-the-fact Statement of Intent prepared on July 12th by the Joint Fiscal Office and signed by two legislative leaders. Even assuming this to be true, there is no expression of legislative intent for emergency rulemaking to take place in a manner that entirely deprives the public of input. Since notice and hearing with public comment were "practicable," they were required. Nothing in § 324 authorizes the Agency to use a foreshortened form of rulemaking that minimizes notice and eliminates a hearing.

By contrast, the Legislature did specify, in § 152 of the same Budget Act, "expeditious rulemaking procedures provided in this section" when the Legislature intended the Department to implement other rules quickly. It specified its intention that the expedited procedure should result in rules effective on July 1, 2002, and it referenced the APA, yet it still required "publication, in three daily newspapers with the highest average circulation in the state, of a notice that lists all rules to be adopted by this process, and that provides for a seven-day public comment period." Budget Act, § 152(b). This demonstrates a strong legislative purpose that

even during an expedited implementation of rules, the important steps of public notice and input are not to be sacrificed. This is the same legislative intent as is manifested in 3 V.S.A. § 844(a).

It is noteworthy that under the circumstances in Garrett v. Dean, the Department of Social Welfare completed emergency rulemaking, including notice, a hearing, and public comment, in less than a month. Public notice of rulemaking was given on August 18 and 19, 1993; draft rules were available August 20th; a public hearing was held on August 26th; and the Emergency Rule was promulgated September 15th in preparation for a rule with an effective date of October 1, 1993. Garrett v. Dean, Superior Court Docket No. S-539-93, Opinion and Order, September 30, 1993, Findings of Fact Nos. 3 and 4.

The State argues that there was no reason for public input because the Deficit Prevention Plan process had already resulted in a requirement that the Department proceed to terminate the programs, and rulemaking was used because it had to be as the mechanism for providing notice to persons affected.[1] That is the case, but it does not render rulemaking meaningless. Rather, the effect is to define the scope of issues in the rulemaking process. The question was not whether the programs would be terminated, because that decision was already made, but how, and on what terms. These are not academic issues, but have serious and significant impact on the persons affected.

For example, with respect to the dentures program, persons affected would have a significant interest in how the cut-off date is interpreted for those in the middle of a series of appointments. Plaintiffs interested in chiropractic care have argued that the rule is penny-wise and pound-foolish, and will drive patients to obtain the same services from physicians, rather than chiropractors, at greater cost to the State. This is a point that may or may not have come to the attention of the Agency before September 5th. Dialogue could lead to consideration of a solution that is beneficial for the State as well as the patients affected; the example illustrates the reason for obtaining as much advance input as practicable, even when rulemaking is done in a shortened time frame. Similarly, the emergency rule on scheduled hospitalizations contains pages of implementation provisions. Issues concerning classifying urgent, emergent, and elective hospitalizations, as well as other transition and implementation issues, could be resolved with the benefit of contributions from those who work with persons most affected, including providers as well as patients. The affidavit of Paul Wallace-Brodeur dated November 12, 2002 demonstrates that such issues will require administrative line-drawing: "In order to effect a smooth transition to no coverage . . . OVHA will pay . . . as long as [a declared standard is met]. OVHA may accommodate a few exceptions to coverage in this area . . . ." It appears that decisions have been and will be made without input from those affected. The need for such decisions with respect to all three programs makes meaningful rulemaking highly appropriate.

In sum, there was time for meaningful and effective rulemaking on how the termination

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[1]The State also inconsistently argues that public comment can be provided through the regular rulemaking process.

of the programs would occur, even with the use of emergency rulemaking, and even assuming that termination was required. The court concludes that under the circumstances the Department faced after August 23, 2002, although there was a sound basis for the use of emergency rulemaking, the process used by the Department failed to provide persons affected with as much notice and hearing for public input as was practicable under the circumstances, and thus was contrary to the requirements of the APA and 3 V.S.A. § 844(a). Plaintiffs have shown a likelihood of success on the issue of invalidity of the emergency rule under the APA.

D. Medicaid and VHAP as "health insurers" mandated to provide chiropractic care

Plaintiffs argue that the Emergency Rule violates 8 V.S.A. § 4088a which requires the extension of chiropractic benefits by applicable "health insurance plans." The parties dispute whether Medicaid and VHAP are health insurance plans subject to 8 V.S.A. § 4088a.

In Vermont, a "health insurance plan shall provide coverage for clinically necessary health care services provided by a chiropractic physician . . . ." 8 V.S.A. § 4088a(a). "Health insurance plan"

> means any individual or group health insurance policy, any hospital or medical service corporation or health maintenance organization subscriber contract or any other health benefit plan offered, issued or renewed for any person in this state by a health insurer, as defined by 18 V.S.A. § 9402(7). The term shall not include benefit plans providing coverage for specific disease or other limited benefit coverage.

8 V.S.A. § 4088a(b). A "health insurer" under 18 V.S.A. § 9402(7) is "any health insurance company, nonprofit hospital and medical service corporation, managed care organizations, and, to the extent permitted under federal law, any administrator of an insured, self-insured, or publicly funded health care benefit plan offered by public and private entities." Plaintiffs argue that the plain language of these sections includes Medicaid and VHAP within "publicly funded health care benefit plan offered by public . . . entities." Plaintiffs urge the court to conclude on this basis that the Emergency Rule conflicts with statutory law and thus is invalid.

The State first argues that Medicaid and VHAP are 18 V.S.A. § 9402(14) "state health plan[s]" rather than 18 V.S.A. § 9402(7) "publicly funded health care benefit" plans. Under 18 V.S.A. § 9402(14) a state health plan "means the plan developed under section 9405 of this title." Section 9405 requires the creation of a state health plan "that sets forth the health goals and values for the state." The state health plan supports the creation of the 18 V.S.A. § 9405(b) "state health action plan that outlines the priorities and concerns for that year." The State's argument that VHAP and Medicaid are 18 V.S.A. § 9402(14) state health plans ignores the plain language of 18 V.S.A. § 9405.

However, the court is persuaded by the State's second argument, based on the affidavit of

the Commissioner of the Department of Banking, Insurance, Securities and Health Care Administration and a harmonious reading of 8 V.S.A. § 4088a with other sections of Title 8, Chapter 107 (Health Insurance). According to the Commissioner of BISHCA,

> BISHCA does not exert authority over the Medicaid program or services provided to Medicaid recipients, except as otherwise explicitly provided by Vermont law, such as in 8 V.S.A. § 4088b(d) regarding coverage for clinical trials for cancer patients.
>
> BISHCA does not consider the Vermont Medicaid program to be a health insurer offering health insurance as defined in 8 V.S.A. § 3301(a)(2) or within the meaning of 18 V.S.A. § 9402(7), or as referred to in 8 V.S.A. § 4088a.

Affidavit of Elizabeth R. Costle (filed Nov. 13, 2002). "[T]he interpretation of a statute by the administrative body responsible for its execution will be sustained on appeal absent compelling indication of error." Mountain Cable Co. v. State Dep't of Taxes, 168 Vt. 454, 458 (1998) (citing Burlington Elec. Dep't v. Dep't of Taxes, 154 Vt. 332, 337 (1990)).

BISHCA's interpretation of 8 V.S.A. § 4088a to not include Medicaid and VHAP is consistent with other sections of Title 8, Chapter 107 which treat Medicaid and VHAP separately. For instance, 8 V.S.A. § 4089j, which creates the office of health care ombudsman, defines a "health insurance plan" as follows:

> As used in this section, "health insurance plan" means a policy, service contract or other health benefit plan offered or issued by a health insurer, as defined by section 9402(7) of Title 18, and includes the Vermont health access plan and beneficiaries covered by the Medicaid program unless such beneficiaries are otherwise provided ombudsman services.

8 V.S.A. § 4089j(h). Additionally, 8 V.S.A. § 4088b (clinical trials for cancer patients) applies to "health benefit plans." In this section, "'health benefit plan' means any health insurance policy or health benefit plan offered by a health insurer as defined in 18 V.S.A. § 9402(7)." 8 V.S.A. § 4088b(c). Additionally, the "Vermont agency of human services through its Vermont Medicaid program shall participate in the provisions of this section in the same manner as insurers as defined in 18 V.S.A. § 9402(7)." 8 V.S.A. § 4088b(d).

The separate treatment for VHAP and Medicaid in these statutes would be largely unnecessary if they were 8 V.S.A. § 4088a health insurance plans by operation of 18 V.S.A. § 9402(7) as Plaintiffs urge. There is no compelling indication of error in BISHCA's interpretation of these statutes. Therefore, the court cannot conclude that the Emergency Rule violates an applicable statutory mandate to provide chiropractic services.

E. Mandate for Medicaid to provide dentures under federal law

Plaintiffs argue that federal Medicaid law, as it applies to Vermont, requires coverage for dentures. Essentially, Plaintiffs argue that Vermont has elected to provide "dental services" through Medicaid. "Dental services" is a category of services that participating states may choose to provide. See 42 U.S.C. § 1396d(a)(10). Even though optional, once Vermont has chosen to offer dental services, coverage "must be sufficient in amount, duration, and scope to reasonably achieve its purpose." Cushion v. Dep't of PATH, 13 Vt. L. W. 180, 181 (2002) (quoting 42 C.F.R. § 440.230(b)). Plaintiffs argue that because Vermont has chosen to provide dental services it is required to provide coverage for dentures.

The State argues that dentures are not dental services under federal Medicaid law. "Dental services" are optional services. 42 U.S.C. § 1396d(a)(10). Dentures also are optional, but appear in a separate subsection including "prescribed drugs, dentures, and prosthetic devices; and eyeglasses prescribed by a physician skilled in diseases of the eye or by an optometrist, whichever the individual may select." 42 U.S.C. § 1396d(a)(12). The distinction between dental services and dentures is carried forward in federal regulations. Dental services are defined as follows:

> (a) "Dental services" means diagnostic, preventive, or corrective procedures provided by or under the supervision of a dentist in the practice of his profession, including treatment of--
>
> (1) The teeth and associated structures of the oral cavity; and
>
> (2) Disease, injury, or impairment that may affect the oral or general health of the recipient.

42 C.F.R. § 440.100. Dentures "are artificial structures made by or under the direction of a dentist to replace a full or partial set of teeth." 42 C.F.R. § 440.120(b). The distinction between dental services and dentures is neither mysterious nor irrational: dental services are services or, as 42 C.F.R. § 440.100(a) describes, "procedures," while dentures are "structures," as 42 C.F.R. § 440.120(b) states, like all items, in one way or another, listed in 42 U.S.C. § 1396d(a)(12). According to the Director of the Office of Vermont Health Access, this distinction has long been made by the Dep't of PATH, which began its dental services program in January, 1989 and only began denture coverage in July, 1998. See Affidavit of Paul Wallace-Brodeur (Nov. 13, 2002). In short, the State maintains that the distinction between dental services and dentures means that the State may opt to provide dental services and not thereby provide denture coverage.

In light of this legal framework, Plaintiffs argue that dentures nonetheless are subsumed by dental services for two reasons: 1) denture coverage falls under both 42 U.S.C. § 1396d(a)(10) and (12); and 2) the conclusion is required, or at least strongly implied, by Cushion v. Dep't of PATH, 13 Vt. L. W. 180 (2002). In support of the former argument, Plaintiffs cite to several

cases which demonstrate two points: a) some courts find coverage simultaneously for the same treatment in multiple coverage categories; and b) some courts disagree with other courts as to the proper classification of some treatments. While these cases provide some support for the conclusion that Plaintiffs urge – "particular medical devices and services may fall under different Medicaid coverage categories," Plaintiffs' Response to Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction at 14 – that conclusion is overbroad in these circumstances. None of the cited cases suggest that one coverage category should be subsumed by another. The cited cases deal with abortion and a particular electronic speech device, neither of which are specifically listed in separate coverage categories like dental services and dentures.

Plaintiffs' second argument is that a recent Vermont Supreme Court decision, Cushion v. Dep't of PATH, 13 Vt. L. W. 180 (2002), requires or strongly implies that dentures must fall under dental services to comply with federal purposes. In Cushion, the Court addressed whether the State could choose to not provide coverage for partial dentures while choosing to provide coverage for full dentures. The Court essentially concluded that partial dentures were at least as medically necessary as full dentures and therefore the State had to provide coverage for partial dentures. See id. at 182. While some language in Cushion suggests that dentures serve federal purposes inhering specifically to dental service coverage, the issue in Cushion substantially differs from this case. In Cushion the Court addressed whether the State could avoid partial denture coverage while providing full denture coverage. The Court's analysis relied on the lack of difference in medical need between the two. Here, the Emergency Rule dispenses with all coverage for all dentures while retaining coverage for dental services. Because dentures and dental services are separate coverage categories, the Rule violates neither federal Medicaid law nor the thrust of Cushion.

The court therefore concludes that dental services and denture coverage are separate optional coverage categories. While the State is required to meet certain goals and standards when it opts to provide optional coverages, as in Cushion, the choice to provide optional coverage remains at the outset optional. Denture coverage is optional and separate from dental services coverage. The State therefore may choose to eliminate denture coverage entirely while retaining dental services coverage.

The public interest

Public interest dictates that the laws enacted by the Legislature be implemented consistent with legislative purpose, and that the Executive Branch be unimpeded in carrying out its function. Although Plaintiffs have shown that the emergency rulemaking process was used in a manner that marginalized public notice and input in the development of implementation rules, § 324 of the Budget Act, resulted in a decision to terminate the three programs. The decision to terminate occurred prior to the rulemaking and was the reason for undertaking it. This disfavors enjoining the termination of the programs, as that would contravene decisions made through the combined functioning of the legislative and executive branches.

The public interest would be served, however, by requiring public input into the rulemaking process in the manner consistently required by the Legislature. It is not in the public interest for an administrative agency to unnecessarily shortcut the rulemaking process. Moreover, in this case time remains for public input to have constructive effect in the development of rules to maximize fairness and minimize the unfortunate effect on individuals of the termination of these programs. Public interest calls for meaningful rulemaking to take place, but without undermining the legitimacy of decisions made by the legislative and executive branches in carrying out their core functions.

Summary

Plaintiffs have established the presence of each of the four elements necessary for a preliminary injunction, yet the strengths and weaknesses of each of the elements must be viewed in relation to each other in order to determine whether collectively they support the issuance of a preliminary injunction. See Serono Laboratories, Inc. v. Shalala, 158 F.3d at 1318.

Plaintiffs Hunter, Gagne, Doe, and Kalea have established irreparable harm by showing that an Emergency Rule adopted with procedural infirmities will cause them to lose the ability to obtain medical care for relief from ongoing physical suffering and/or deterioration of physical health. The nature of the harm to each individual plaintiff is serious. The prejudice to them is that neither they, nor their advocates or providers, nor any person affected or interested in the programs had sufficient notice or opportunity to have input on the development of the administrative rules by which the programs were terminated, including rules for transition, implementation, and (with respect to scheduled hospitalizations) eligibility or non-eligibility. On the other hand, Plaintiffs have no right to the continuation of these benefits programs if such termination takes place according to law. The seriousness of the legal infirmities is an important factor to be considered: the more egregious the infirmity, the greater Plaintiffs' claim to relief, whereas the less severe the infirmity, the less compelling is their claim to relief.

Defendants have shown that there will be significant harm to others throughout the State if a preliminary injunction is granted. This includes loss to even more needy recipients of other benefits programs whose benefits would have to be cut later in the year, as well as a burden on all taxpayers in Vermont, upon whom the consequences of deficit spending of $600,000 or more would fall. While this harm is presently less easy to describe in particular terms than the harm to Plaintiffs, it is no less real.

Plaintiffs have established a likelihood of success on their claim that the Emergency Rule was adopted by the Department without compliance with statutorily mandated requirements under 3 V.S.A. §844(a) for as much notice and hearing and public input as was practicable in the month (later two months) that was available.

Two features of the failure to fully comply with §844(a) provide guidance in analyzing the strength of Plaintiffs' claim to injunctive relief. First, emergency rulemaking was not being

invoked by the Department on its own initiative to terminate a program at the administrative level. Rather, the decision to rescind the appropriations for the programs, thereby eliminating them for fiscal year 2003, had been made by the legislative and executive branches through the deficit prevention procedure adopted in § 324 of the Budget Act. The role of the Department was to implement a termination that had already been mandated at a higher level of decision making. The purpose of rulemaking was to establish how and on what terms such terminations could best take place, and not whether.

Second, the noncompliance was a failure to follow procedural steps that are required to incorporate public input into the decision-making process and result in the best possible rule for all involved. The Department did not totally fail to engage in rulemaking, but it proceeded in a manner that rendered ineffective the requirement that those affected have input in the process. In doing so, it marginalized the value of the input that persons affected can contribute. On the other hand, if the Department had provided meaningful notice, hearing, and input opportunities at a practicable level given the time constraints, the programs still would have been terminated. The difference is that there would have been an opportunity for a collaborative process that could improve the terms of implementation during the first four months of termination, when the effect on the program beneficiaries might be felt most harshly. There would also have been an opportunity to address newly discovered consequences, such as whether saving money in one program would result in spending more in another. Even so, the essential fact that the programs had to end as soon as implemented would not change.

The final factor is the public interest. In view of the fact that the programs would be terminated in any event, the essential nature of the harm to Plaintiffs is that they were deprived of the opportunity to contribute to an improved implementation of the termination process, and deprived of the benefits that an improved implementation process would have yielded. That does not, however, mean that the harm to Plaintiffs, and the public interest, is insignificant. If relief is denied altogether, the message to agencies is that they can ignore the requirements of notice and public input in emergency rulemaking. That would eliminate the benefits flowing from the maximum practicable input that the Legislature intended in § 844(a) of the APA and most recently recognized in the enactment of § 152 of the Budget Act. Meaningful enforcement calls for the Department to be enjoined from implementing its invalid Emergency Rule.

The court is mindful that regular rulemaking is proceeding, and an implementation rule is expected to be in place by February 1, 2003. An injunction based on the infirmity of the Emergency Rule at this time would enjoin only the Emergency Rule. The result would be to delay termination of the programs, but termination, if implemented lawfully through regular rulemaking, would still occur as of February 1, 2003, unless a final order in this case results in a different outcome.

A further factor in considering the public interest is the provision in the Administrative Procedures Act, at § 846, for remedies for procedural failures. This section specifies types of failures that prevent a rule from taking effect as well as a number of failures that shall not affect

the validity of a rule. Failure to comply with minimum notice and hearing requirements is not on either list. The applicable provision is § 846(c): "For other violations of this chapter, the court may fashion appropriate relief."

The court concludes that appropriate relief is to provide an opportunity for the Department to redo the emergency rulemaking process with the essential elements that were practicable to have been completed between August 23rd (adoption of Deficit Prevention Plan by JFC) and September 25th (LCAR meeting). Within that time period, the following notice, hearing, and public input steps could practicably have been completed: publication in three daily newspapers with the highest average circulation in the state of a notice that lists the proposed rules and where the draft text is available, states the time and place of a hearing to be held no sooner than 10 days after the published notice, and provides for acceptance of public comments for seven days after the hearing date. These provide an amount of notice and hearing and follow-up input that satisfies legislative intent for a meaningful rulemaking process within a short time frame, and can reasonably and practically be accomplished within one month.

For the foregoing reasons, pursuant to V.R.C.P. 65(b) and 3 V.S.A. § 846(c), the court grants the preliminary injunction but stays the injunction to December 31, 2002. This provides approximately the same amount of time that was available for emergency rulemaking in September. It allows the Department to complete requirements of notice and hearing as set forth above to comply with § 844(a), and restores to Plaintiffs the opportunity that was previously lost to engage in the rulemaking process in a meaningful way consistent with legislative intent. In the event of compliance, Defendants may move to vacate the order granting the preliminary injunction. A hearing shall be scheduled to address issues under V.R.C.P. 65(c) and (d).

Order

For the foregoing reasons, the court grants Plaintiffs' motions for a preliminary injunction, but stays the issuance of a preliminary injunction until December 31, 2002.

Dated at Montpelier this 22nd day of November, 2002.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Court Judge