

# MFTD Waiver Families

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## SB2840 “SMART Act” Violations of Maintenance of Effort Provisions

### **Background:**

The Affordable Care Act and associated legislation mandate that states continue to use most of the eligibility guidelines for Medicaid programs that were in place as of 2010. These guidelines were created to prevent states from shrinking their programs in anticipation of 2014, when most health care reforms go into effect. **States that do not follow Maintenance of Effort rules risk losing all federal matching dollars for their Medicaid programs.**

CMS has interpreted federal Maintenance of Effort rules to allow for HCBS waivers to be terminated or modified at the time of expiration, so long as protections are put in place for those who might lose eligibility. However, these rules do not allow state Medicaid plans to alter their state Medicaid plan in order to reduce eligibility in Medicaid programs for children generally, nor allow reductions in eligibility for HCBS waivers that are not up for renewal.

### **The SMART Act Maintenance of Effort Violation:**

- The SMART Act, passed by the Illinois House and Senate on May 24, 2012 as SB 2840 and awaiting the Governor’s signature, removes a portion of the Illinois Public Aid Code [305 ILCS 5/5-2 part 7] that previously guaranteed Medicaid coverage to any child under age 21 with an intermediate care facility, nursing home, or hospital level of care, for whom a program of coverage existed.
- Because 305 ILCS 5/5-2 part 7 extends Medicaid eligibility to these children as part of the state Medicaid plan and outside of the context of a specific HCBS waiver, it is subject to federal Maintenance of Effort requirements.
- Removal of this section eliminates guaranteed Medicaid eligibility to virtually all classes of children with disabilities—NOT just those in a waiver that expires this year—and therefore would violate Maintenance of Effort requirements.
- While 305 ILCS 5/5-2 part 7 has to be removed in order to place an eligibility-restricting income cap on the MFTD Waiver, it was initially added to the Illinois

Public Aid Code not for this population, but to extend Medicaid eligibility to children with developmental disabilities or autism who meet an intermediate care facility level of care. In addition, another portion of the Illinois Public Aid Code, 305 ILCS 5/5-2.05, allows the state the option of offering home and community based services to children, but only as allowed by 305 ILCS 5/5-2 part 7, which is the section that would be repealed. Repeal of 305 ILCS 5/5-2 part 7 would void 305 ILCS 5/5-2.05. Thus, if this bill is signed by the Governor, with both the guarantee and option to offer Medicaid eligibility repealed and voided, the state would retain no legal basis within the Illinois Public Aid Code to continue to offer Medicaid eligibility to children with disabilities who would not otherwise qualify financially. As such, the state would retain no legal authority to continue the Children's Support Waiver or Children's Residential Waiver. However, neither waiver is currently up for renewal, and if the state is forced to cancel both programs due to a lack of state authority to operate them, it would violate federal Maintenance of Effort rules. These rules do not allow a state to reduce eligibility in an HCBS waiver while it remains in effect.

- If the state does not continue to offer Medicaid to ALL children previously guaranteed eligibility by 305 ILCS 5/5-2 part 7, even those not in an HCBS waiver set to expire, the state will commit a Maintenance of Effort violation and places itself at risk of losing federal matching funds when the legislation is signed.
- If this bill is signed and Illinois continues to offer the Children's Support Waiver and Children's Residential Waiver in violation of its own statutory changes in the SMART Act, then it is selectively violating state law to preserve coverage for one group of children (at the intermediate care facility level of care) while discriminating against medically needy children at nursing home and hospital levels of care who had also previously been guaranteed Medicaid eligibility by the repealed section of this law. This violates the principle of equal protection under the law.
- Repealing this section, 305 ILCS 5/5-2 part 7, restricts Medicaid eligibility for children who otherwise meet the medical eligibility requirements of the MFTD Waiver, and threatens children who receive services through other Medicaid programs, including the Children's Support Waiver and Children's Residential Waiver, as eligibility is no longer guaranteed—or even allowed for the latter two waivers—under the Illinois Public Aid Code.

## Sources:

- 305 ILCS 5/5-2 Classes of Persons Eligible. Medical assistance under this Article shall be available to any of the following classes of persons in respect to whom a plan for coverage has been submitted to the Governor by the Illinois Department and approved by him...
  7. Persons who are under 21 years of age and would qualify as disabled as defined under the Federal Supplemental Security Income Program, provided medical service for such persons would be eligible for Federal Financial Participation, and provided the Illinois Department determines that:
    - the person requires a level of care provided by a hospital, skilled nursing facility, or intermediate care facility, as determined by a physician licensed to practice medicine in all its branches;
    - it is appropriate to provide such care outside of an institution, as determined by a physician licensed to practice medicine in all its branches;
    - the estimated amount which would be expended for care outside the institution is not greater than the estimated amount which would be expended in an institution.
- 305 ILCS 5/5-2.05 Children with disabilities.
  - (a) The Department of Healthcare and Family Services, in conjunction with the Department of Human Services, may offer, to children with developmental disabilities or children with severe mental illness or severe emotional disorders who otherwise would not qualify for medical assistance under this Article due to family income, home-based and community-based services instead of institutional placement, as allowed under paragraph 7 of Section 5-2.