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COURT OF APPEALS

STATE OF NEW YORK

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BARBARA COLEMAN,  
Respondent,

-against-

No. 152

RICHARD F. DAINES, et al.,  
Appellants.

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20 Eagle Street  
Albany, New York 12207  
September 4, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Penina Wolicki  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Coleman v. Daines.

2 One second, counsel.

3 Counselor, do you want any rebuttal time?

4 MR. DEARING: Yes, Your Honor. I'd like to  
5 reserve one minute for rebuttal.

6 THE COURT: Okay. Go ahead.

7 MR. DEARING: May it please the Court, I'm  
8 Richard Dearing for former Commissioner Daines. The  
9 claims for a declaratory and injunctive relief  
10 against former Commissioner Daines are moot, and  
11 there is no good reason to invoke the exception to  
12 mootness, because the relevant state statute was  
13 amended after Ms. Coleman - - -

14 CHIEF JUDGE LIPPMAN: Why did the  
15 difference in language, why does that make it moot?  
16 You know, are those distinctions so clear now and so  
17 different from what they were before that this is not  
18 going to recur?

19 MR. DEARING: I think they are arguably  
20 different, and that's all that should be required.  
21 And here's the reason.

22 CHIEF JUDGE LIPPMAN: All that should be  
23 required is that they're arguably different even  
24 though they're not - - - maybe, in fact, they're not?

25 MR. DEARING: Well, we will argue that

1 they're different. I can't predict with certainty  
2 what a court will hold. And that's the reason cases  
3 are litigated. But the point I'm making - - -

4 CHIEF JUDGE LIPPMAN: Yeah.

5 MR. DEARING: - - - is that is the case  
6 that should be litigated, the meaning of the new  
7 language in the statute.

8 JUDGE SMITH: If you could give us an idea  
9 of what your argument would be, what's so different?

10 MR. DEARING: I would say two - - - one is  
11 some issues of text and contest. Two textual points.  
12 Two phrases that appear in the current statute that  
13 were never in the 1940 statute, the original statute.  
14 One is the reference specifically to emergency needs  
15 or care - - - emergency needs, assistance, or care.  
16 Ms. Coleman - - -

17 JUDGE SMITH: And it used to say temporary?

18 MR. DEARING: Right. As opposed to  
19 temporary. Ms. Coleman, in her application to HRA  
20 specifically argued that her situation did not have  
21 to be an emergency to get this relief. The statute  
22 now contains text that contradicts that claim.

23 The second is the specific reference - - -  
24 and this, I think has potentially very broad  
25 significance - - - to a monetary grant as the form of

1 relief under Section 133.

2 It's relevant here also because Ms.  
3 Coleman's application to HRA did not ask for a  
4 monetary grant; it asked for the provision of  
5 attendants at her home, which is the way personal  
6 care services are provided under Medicaid. HRA  
7 contracts with agencies and delivers an attendant to  
8 the home. It does not provide monetary grants to  
9 recipients in - - -

10 JUDGE SMITH: So you think it's  
11 conceivable, you're not saying it would happen, but  
12 you think it's conceivable that Ms. Coleman could  
13 lose this case and a similarly situated applicant  
14 under the current statute could win?

15 MR. DEARING: I would put it the other way  
16 around. Ms. Coleman's case is under the old statute.  
17 What I'm saying is the claims she was making under  
18 that old statute are contradicted by language in the  
19 current statute. Which is not - - -

20 JUDGE GRAFFEO: You're saying someone now  
21 would have to claim they fall in the emergency  
22 category?

23 MR. DEARING: Exactly. Someone now would  
24 have to make that claim. And that is the way this  
25 case should be litigated. There are thousands of

1 people who apply for personal care services under  
2 Medicaid each year. The case should be litigated - -  
3 -

4 CHIEF JUDGE LIPPMAN: Is that a more  
5 technical view of this rather than a more practical  
6 view of the person under the old language and the  
7 person under the new language?

8 MR. DEARING: I don't think it's technical.  
9 I think these are the arguments I would make as an  
10 attorney bringing this case - - -

11 CHIEF JUDGE LIPPMAN: Yes, but I'm saying  
12 to you, if you stand back, why won't a person today  
13 seeking the same relief essentially that she sought  
14 be in the same position pretty much in terms of  
15 practical looking at this, you know?

16 MR. DEARING: In the world, they might be  
17 in the same position. But the legal text that  
18 applies to them is significantly different. And  
19 that's the point. The purpose of the mootness  
20 exception is to allow a litigant to go forward with  
21 the case even when it wouldn't affect their  
22 situation, because it could provide guidance for  
23 other people.

24 JUDGE GRAFFEO: But is there no one else  
25 that's similarly situated to this petitioner?

1                   MR. DEARING: I think it's doubtful that  
2                   there are many. This is a 2008 application for this  
3                   relief. There is no - - - the amendment is August  
4                   2010. We're talking here about temporary assistance.  
5                   So we stand here - - -

6                   JUDGE GRAFFEO: But the petitioner also  
7                   claims that she didn't have to go through the fair  
8                   hearing process which is normally the way people  
9                   contest a denial of benefits. Is she correct on that  
10                  score - - -

11                  MR. DEARING: I do not believe - - -

12                  JUDGE GRAFFEO: - - - that she did not have  
13                  to exhaust administrative remedies?

14                  MR. DEARING: I do not believe she is  
15                  correct, at least, and in particular - - - although  
16                  this is really more in the domain of the claims  
17                  against Commissioner Doar that the City will address  
18                  - - - particularly the issues related to the so-  
19                  called delay in the determination of her application  
20                  - - -

21                  JUDGE SMITH: But you take the position, as  
22                  I understand it, that there's no such thing as  
23                  emergency Medicaid. Is that right?

24                  MR. DEARING: That is our position and the  
25                  longstanding position of the State.

1                   JUDGE SMITH: Okay. Then as long as you  
2 take that position, there's no point in her  
3 exhausting administrative remedies in the effort to  
4 get emergency Medicaid, is there?

5                   MR. DEARING: I think on those claims  
6 there's a fair argument as to futility. We have not,  
7 I would point out, pressed the exhaustion issue in  
8 this appeal, and that's because we don't think the  
9 court needs to reach it and we don't think the court  
10 should reach it - - -

11                   CHIEF JUDGE LIPPMAN: But if you do reach  
12 it, do you agree it is a pretty good argument?

13                   MR. DEARING: I think there is a fair  
14 dispute on futility, and I'd leave it - - -

15                   CHIEF JUDGE LIPPMAN: Okay.

16                   MR. DEARING: - - - to the City to address  
17 it. I think the claims that go to - - - the first  
18 two claims in the complaint, I do believe there's a  
19 serious exhaustion problem. Those claims are brought  
20 only against the City.

21                   I'd like, though, to return to my point  
22 about mootness, which is the exception exists. And  
23 this court has said it more than once, the exception  
24 exists to provide guidance to litigants in other  
25 cases. That's the reason we allow a case sometimes

1 to go forward when the particular litigant in that  
2 case can no longer obtain relief.

3 And the problem here is that the outcome  
4 very well could be different. There's no guarantee  
5 that it will be - - -

6 JUDGE SMITH: Tell me again, which person  
7 has the better case, Mrs. Coleman or her counterpart  
8 today?

9 MR. DEARING: I think it's - - - Mrs.  
10 Coleman probably has the better case, because the  
11 language of the statute - - - and this is, by the  
12 way, the first time the statute has ever been  
13 amended. It was enacted in 1940. It was a one-  
14 sentence fairly vague statute that lent itself to  
15 many arguments about the ways it should be used.

16 CHIEF JUDGE LIPPMAN: If you continue - - -  
17 let's say whatever the conduct is that's alleged  
18 against the two commissioners, continue to be  
19 followed, in essence - - - and again, I take you back  
20 to what's a technical versus the real world - - - if  
21 you continue to do exactly what you did before, and  
22 you had a litigant out of the old language and one  
23 under the new language, isn't that the kind of  
24 situation that is just the opposite of mootness?

25 MR. DEARING: No, I don't - - - it's not.

1 And the reason is to look at the purpose of the  
2 exception. I'd refer you to the Connecticut case we  
3 cite, State Farm v. Jackson and your own decision in  
4 Hearst Corp. that asks whether the exception - - -  
5 the litigation of the case would serve a sufficiently  
6 useful purpose.

7 And here's the reason why it wouldn't here.  
8 If Ms. Coleman's case continues to be litigated at  
9 Supreme Court, because there's been no determination  
10 on the merits, even at Supreme Court - - - is  
11 litigated there, is appealed and appealed, if it came  
12 to this court and you were addressing the language in  
13 the old statute, that would not answer the questions  
14 people right now in the world need answered about  
15 what the new statute means. And so there is no  
16 reason - - -

17 JUDGE CIPARICK: So how is Ms. Coleman - -  
18 -

19 JUDGE SMITH: Is anybody bringing this  
20 claim under the new statute?

21 MR. DEARING: I'm not aware of such a case.  
22 I think that probably cuts in our favor. Because the  
23 key first threshold point is likelihood of  
24 recurrence. And I'm not aware of a case having been  
25 brought. I think if the issue is out there it should

1 be brought. That case should be litigated.

2 CHIEF JUDGE LIPPMAN: Judge Ciparick?

3 JUDGE CIPARICK: Well, I guess going back  
4 several sentences, I guess it would resolve Mrs.  
5 Coleman's issue. It may not resolve the current liti  
6 - - -

7 MR. DEARING: I think that's precisely  
8 right. It would resolve only her issue, and she  
9 could no longer get relief, because she's already  
10 getting these benefits. That's why the case is moot  
11 as to her.

12 The only question is, can this case provide  
13 guidance to the world at large? The answer is, no it  
14 can't.

15 CHIEF JUDGE LIPPMAN: Can it provide any  
16 guidance as to your broad-based policy?

17 MR. DEARING: I don't think it's the - - -

18 CHIEF JUDGE LIPPMAN: The way you handle  
19 these kinds of cases?

20 MR. DEARING: It's a poor vehicle. And the  
21 reason is, why - - -

22 CHIEF JUDGE LIPPMAN: It wouldn't be the  
23 best vehicle. But would it provide some guidance as  
24 to what you're doing, assuming you're continuing to  
25 do the same thing?

1 MR. DEARING: Your Honor, I think your  
2 point that it's not the best vehicle is the key one.  
3 We're looking for an exception to mootness. There  
4 has to be a good reason to ignore the basic,  
5 fundamental doctrine that a concrete stake is needed  
6 to present a case. And the good reason is not  
7 present.

8 CHIEF JUDGE LIPPMAN: Okay. Counsel,  
9 thanks.

10 Counselor?

11 MS. GORDON: May it please the Court, my  
12 name is Jane Gordon.

13 When Ms. Coleman applied for her benefits  
14 she did not indicate any kind of emergency need for  
15 personal care services. It was not until an  
16 appellate division decision much later that she came  
17 forward and, by the way, did not ask for emergency -  
18 - -

19 CHIEF JUDGE LIPPMAN: Again, you're using  
20 a - - - what some might say is a technical term. It  
21 was enough of a terrible situation that she wound up  
22 having to move out of her apartment because she  
23 couldn't get the assistance. Are we just talking  
24 about semantics in terms of emergency versus  
25 temporary?

1 MS. GORDON: If the applicant doesn't ask  
2 for it, Your Honor, how is HRA supposed to know - - -

3 JUDGE PIGOTT: Well, that's half of Ms.  
4 Coleman's point is that you didn't - - - no one knows  
5 that these things are even available because your  
6 office doesn't tell them.

7 MS. GORDON: Well, in the application at  
8 page A-51, she's permitted to apply for temporary  
9 assistance and medical assistance. She didn't - - -

10 JUDGE READ: Are you talking about that box  
11 that talks about is there an immediate need?

12 MS. GORDON: I was actually looking on page  
13 A-51.

14 JUDGE READ: A-51?

15 MS. GORDON: Your Honor, yes. It wasn't  
16 until A-201 that she even sought - - - and this was  
17 in May 2008. Her original application was in 11/07.  
18 So - - -

19 JUDGE PIGOTT: Well, in A-51 it says she  
20 requested medical assistance because she had a  
21 serious medical problem.

22 MS. GORDON: That's right. But not  
23 temporary assistance, not homecare assistance - - -

24 JUDGE PIGOTT: She had a lawyer. So I  
25 suppose maybe he should have had some input.

1 MS. GORDON: It - - -

2 JUDGE PIGOTT: But I think the point is  
3 that some civilian comes in and says I'm in need of  
4 assistance, I got the impression from your opponent's  
5 argument that you don't tell them, and therefore half  
6 the people don't know that they're even entitled to  
7 this type of service. And that ought to be fixed.  
8 And Mr. Dearing's argument is, it has been. It  
9 doesn't solve your problem, because you didn't tell  
10 her, at least that's what they're saying.

11 MS. GORDON: Well, under the state pol - -  
12 - we have to follow state policy on what is - - - on  
13 how this is administered. HRA doesn't create the  
14 policy, so we are - - -

15 JUDGE PIGOTT: Right.

16 JUDGE GRAFFEO: But wasn't there kind of  
17 inadequate information provided to her? I mean, even  
18 when she received the letter, it didn't advise her  
19 how many hours a week she was going to get this  
20 assistance or when it was to start or who was going  
21 to provide the service. I mean, aren't those issues  
22 that could still affect current applicants.

23 MS. GORDON: I don't understand that that's  
24 one of the claims that she's raising, Your Honor.

25 JUDGE GRAFFEO: Well, I thought notice was.

1 Doesn't that fall under - - -

2 MS. GORDON: Notice of the availability.

3 JUDGE GRAFFEO: - - - the umbrella of  
4 notice? I mean, notice of availability is not just a  
5 "yes", is it?

6 MS. GORDON: I think - - - as I understand  
7 her claims, Your Honor, it was whether or not HRA  
8 gave her a quick enough indication of whether or not  
9 she was going to get the services, not the nature of  
10 the services. My understanding is she is getting all  
11 the services that she asked for.

12 JUDGE CIPARICK: Well, she's getting them  
13 now, but - - -

14 MS. GORDON: And she was getting them as of  
15 June 30th. By the time this - - - you know, the  
16 beginning of this Article 78 proceeding.

17 JUDGE PIGOTT: Well, she started - - - she  
18 applied in November, right?

19 MS. GORDON: She didn't ask for homecare  
20 services.

21 JUDGE PIGOTT: Well, that's the point. I  
22 mean, did she know that she could? Did she know she  
23 had to? She put down - - - you know, she checked  
24 certain boxes. And it's, if I understand the  
25 argument is, somebody in your department files them.

1 And whether they need that service or not is sort of  
2 the issue. I mean, you can have very old people who  
3 may be in need of this type of assistance, but don't  
4 know enough to ask. And somebody ought to at least  
5 say, you know, you can get a personal care aide for  
6 four hours or - - - to help you with your bills, or  
7 whatever the deal is. And that was never made clear.

8 MS. GORDON: Well, I would say, Your Honor,  
9 that that's a good reason why there should be  
10 exhaustion of administrative remedies here, so we  
11 have a record of exactly what was done and what  
12 wasn't done. Because we don't have that record here.

13 CHIEF JUDGE LIPPMAN: Okay, counsel.  
14 Thanks.

15 Counselor?

16 MR. BELLIN: Good afternoon Your Honors.  
17 May it please the Court, my name is Aytan Bellin.

18 JUDGE GRAFFEO: Your client's been  
19 receiving benefits for four years, correct?

20 MR. BELLIN: That's correct, Your Honor.

21 JUDGE GRAFFEO: So can you tell us what's  
22 left that you want us to determine?

23 MR. BELLIN: Here's what's left. First of  
24 all, on both the federal and state claims, there are  
25 requests for nominal damages. Those claims are still

1 very much alive and have not been determined. So  
2 that's the first thing.

3 But second of all - - -

4 JUDGE READ: Those are nominal damages for  
5 what, delay?

6 MR. BELLIN: For - - - well, there are two  
7 claims Your Honor. And I think this is something  
8 that's been ignored by the other side. There's one  
9 claim regarding temporary Medicaid, and there's also  
10 a claim regarding the failure of Respondent Doar to  
11 make a determination on the application within forty-  
12 five days, as he's required to. They've barely  
13 addressed that issue.

14 That issue is something that is capable of  
15 repetition in evading review, number one. Because by  
16 the time Doar actually makes a determination, a final  
17 determination on the number of hours of care that  
18 somebody makes, there will not be sufficient time to  
19 bring - - -

20 JUDGE SMITH: Wait. What's the issue  
21 that's going to repeat itself? I mean, he took more  
22 than forty-five - - - whether he took more than  
23 forty-five days? That's going to be a different  
24 issue in every case, isn't it?

25 MR. BELLIN: No, it isn't, Your Honor.

1 They have a policy - - - and this is something we  
2 weren't able to even bring forth and prove, because  
3 the case was dismissed, and they haven't denied it.  
4 They have a policy where they take more than forty-  
5 five to make the final determination.

6 CHIEF JUDGE LIPPMAN: Is your belief  
7 whatever they were doing before, they're doing now?

8 MR. BELLIN: I'm sorry?

9 CHIEF JUDGE LIPPMAN: Is your argument that  
10 whatever they were doing before, they're doing now -  
11 - -

12 MR. BELLIN: It has - - -

13 CHIEF JUDGE LIPPMAN: - - - and that  
14 nothing has changed? And if that is your argument,  
15 how does that play with the change in language, in  
16 terms of emergency versus temporary?

17 MR. BELLIN: Okay. There are two different  
18 issues. First, there's the underlying ultimate  
19 application. That they have to do within forty-five  
20 days. And they didn't do it.

21 CHIEF JUDGE LIPPMAN: And let's say that's  
22 their policy? Go ahead.

23 MR. BELLIN: If that's their policy, the  
24 amendment to Section 133 has nothing to do with that.  
25 Those claims are under 42 U.S.C. 13 - - -

1 CHIEF JUDGE LIPPMAN: I see. So that's a  
2 separate issue to the temporary versus - - -

3 MR. BELLIN: Correct.

4 CHIEF JUDGE LIPPMAN: - - - the emergency.

5 MR. BELLIN: Correct.

6 CHIEF JUDGE LIPPMAN: And what about the  
7 temporary versus the emergency.

8 MR. BELLIN: Okay. Here's the first thing.  
9 I agree with you, Your Honor, that there has not been  
10 any substantive change in the statute. Here's why.  
11 The standard for deter - - - under both statutes, the  
12 respondents are required to make a determination upon  
13 receiving a Medicaid application for public  
14 assistance or care - - - by the way, that's the same  
15 language used in the 2008 statute under which we  
16 sued, and the 2010 amendment - - - to determine  
17 whether the applicant is in immediate need. That's  
18 the standard: immediate need. That's the same  
19 standard as there was in 2008. That's the same  
20 standard - - -

21 CHIEF JUDGE LIPPMAN: Whether it's  
22 emergency or temporary, it's immediate need?

23 MR. BELLIN: That's correct. That is the  
24 standard in the statute. If you read the language of  
25 the statute - - -

1 JUDGE SMITH: Why did the legislature  
2 change the word?

3 MR. BELLIN: Well, here's the thing, Your  
4 Honor. If you look at the legislative history that's  
5 been provided by the amici in this case, it shows  
6 that the sole reason that the legislature passed this  
7 statute was to implement the Second Department  
8 decision from twenty years earlier.

9 JUDGE SMITH: Which they thought was  
10 recent?

11 MR. BELLIN: Which they thought was recent.  
12 And I may not agree with that. But in any event,  
13 that is the stated reason for the change. And in  
14 fact, OTDA itself said putting this language in there  
15 is going to confuse things. Things haven't changed.  
16 We're already doing what you're asking us to do, so  
17 they said.

18 JUDGE SMITH: You may be right. But isn't  
19 this an important enough issue that it should be  
20 decided in the context of a client to whom the  
21 current statute actually applies?

22 MR. BELLIN: Judge, first - - -

23 JUDGE SMITH: And then - - - and what's so  
24 hard about getting somebody in there who has the same  
25 claim under the current statute?

1 MR. BELLIN: Well, Your Honor, that's not  
2 really the standard. If all they had to do was make  
3 a miniscule change, as the U.S. Supreme Court has  
4 recognized, in the statute to moot out a case, then  
5 that's all that - - -

6 JUDGE SMITH: But you're not really saying  
7 that's what happened?

8 MR. BELLIN: I am saying that's what  
9 happened.

10 JUDGE SMITH: They didn't make a miniscule  
11 change; they rewrote it. You're saying the rewriting  
12 has nothing to do with anything.

13 MR. BELLIN: I'm saying that the portions  
14 that they rewrote - - - the portions that remained  
15 the same were assistance or care and immediate need.  
16 The exact same standards as before. Not only that,  
17 Your Honors, but they admit in their arguments before  
18 the Appellate Division First Department, that the  
19 standard under Section 133 is someone whose needs are  
20 urgent and if they're not taken care of, may very  
21 well possibly suffer harm.

22 JUDGE GRAFFEO: You want us to say that the  
23 standard we decide in this case applies to claimants  
24 under the new statute?

25 MR. BELLIN: That's correct, Your Honor.

1           Because the standard that is required is the same:  
2           immediate need for - - -

3                         JUDGE PIGOTT:   Yes, but you've got - - -

4                         MR. BELLIN:   - - - public assistance or  
5                         care.

6                         JUDGE PIGOTT:   - - - you've got a client  
7                         here who made a mistake in the first instance with  
8                         respect to her house, if I remember right; explained  
9                         in an IRA, and then said, but I don't want the  
10                        services to start until December 1st, and then all of  
11                        this stuff went on.   In other words, it's not a  
12                        situation that seems to lend itself to determining  
13                        people who are in need of either emergency or  
14                        immediate - - - are of immediate need.

15                        MR. BELLIN:   I disagree, Your Honor, for a  
16                        number of reasons.   First of all, I think the  
17                        respondents - - - the appellants are speaking out of  
18                        both sides of their mouth.   They're saying, on the  
19                        one hand, it's our policy - - - it was our policy and  
20                        still is our policy not to provide this type of care.  
21                        On the other hand, she should have applied for it on  
22                        the Medicaid application?   Which is it?

23                        It was well known - - - and I was the  
24                        attorney on the initial application, so I will take  
25                        full responsibility for that, Your Honor - - - it was

1 known to me at that time, what their standard was.

2 And there's - - -

3 JUDGE READ: Well, I'm still confused, or I  
4 guess I'm trying - - - what are the issues that  
5 should be - - - you say should be decided by the  
6 court?

7 MR. BELLIN: The first issue that should be  
8 decided is that it is not moot, the issue of whether  
9 they decide - - -

10 JUDGE READ: Well, let's assume it's not  
11 moot. What are the substantive issues that you're  
12 asking to be decided in this litigation?

13 MR. BELLIN: There are two issues. One,  
14 that Respondent Doar is violating the time frames  
15 within which the underlying applications for Medicaid  
16 personal care assistance must be decided.

17 JUDGE READ: Because he has a forty-five  
18 day policy.

19 MR. BELLIN: Correct. That's one. And the  
20 second issue - - - and that's wholly separate from  
21 the temporary Medicaid issue, by the way. And the  
22 second issue is to determine whether under the  
23 statute my client was entitled to temporary Medicaid,  
24 whether temporary Medicaid applied - - - I'm sorry -  
25 - - whether Section 133 applies to Medicaid at all.

1                   Now, the Appellate Division First  
2 Department has held that it does. This court has  
3 never ruled on it. And notwithstanding two decisions  
4 by the First Department, the State still maintains  
5 that Section 133 does not apply to Medicaid.

6                   JUDGE READ: So you - - -

7                   MR. BELLIN: It doesn't matter - - - I'm  
8 sorry.

9                   JUDGE READ: So whether she was entitled to  
10 temporary Medicaid under 133. That's the second  
11 issue?

12                   MR. BELLIN: Well, whether she was entitled  
13 to notice of the availability. Whether they had to  
14 consider her application, which they didn't do. Both  
15 of those failures violated her due process - - -

16                   JUDGE PIGOTT: But notice is taken care of  
17 in the new statute, right?

18                   MR. BELLIN: No. It's not. Their  
19 position, Your Honor, is that Medicaid still doesn't  
20 apply to the new statute. That's their position.  
21 They're consistent throughout. They say assistance  
22 or - - -

23                   JUDGE SMITH: But the new - - - the new  
24 statute at least changes the argument about notice,  
25 doesn't it, and the new statute actually talks about

1 notice. The old one didn't.

2 MR. BELLIN: Well, but their position is  
3 that Medicaid isn't even covered under the terms  
4 "assistance or care", which are the same terms in  
5 both - - -

6 JUDGE SMITH: Well, I understand. But if  
7 you're going to argue a notice issue, wouldn't you  
8 rather argue it with a client to whom the statute  
9 that says "notice" in it applies?

10 MR. BELLIN: No, Your Honor. This case - -  
11 - under the case of McCain v. Koch, which this court  
12 decided in 1987, the petitioners were looking for an  
13 injunction vis-a-vis certain housing standards. In  
14 the middle of the litigation, the City changed that  
15 and came out with regulations that specifically,  
16 supposedly satisfied the requests of the petitioners.

17 This court held that the fact that you come  
18 out with a statute, even assuming that it applied,  
19 which they still say it does not, is not sufficient.  
20 The question is whether the people are getting the -  
21 - - whether they're actually abiding by that statute,  
22 whether they're getting the benefits.

23 They are not getting it. They're con - - -  
24 I would ask you to ask the other side - - -

25 JUDGE SMITH: But he's not - - - as I

1 understand it, he's not just saying the new statute  
2 moots the case. The case is moot. The case is moot,  
3 old statute or new statute, apart from your nominal  
4 damages issue. But he's saying that it's a bad idea  
5 to invoke the mootness exception where the statute  
6 has changed in the interim.

7 MR. BELLIN: But, Your Honor, it's our  
8 position that the statute has not changed  
9 significantly. The standard is immediate need.  
10 The - - -

11 JUDGE GRAFFEO: Do you know if there are  
12 any claimants that are still out there under the 2008  
13 statute?

14 MR. BELLIN: Yes. I have a case in the  
15 Appellate Division First Department that I'm  
16 litigating against the AG as well. And if this - - -  
17 so there is a claimant out there. We won  
18 substantively in front of Supreme Court New York  
19 County. And the State was ordered to issue  
20 regulations.

21 JUDGE LIPPMAN: Are there a lot of  
22 claimants out there under the old or just - - -  
23 that's the only one you know of?

24 MR. BELLIN: Your Honor, I have to say that  
25 I was the first attorney to bring the - - - one of

1 the first attorneys, although over the years, there  
2 have been. There was a case Pastore v. Sabol, which  
3 was in front of the Second Department in 1996.

4 JUDGE GRAFFEO: So if we agree with you  
5 that it's not moot, why couldn't we just limit our  
6 review to what should be provided to claimants under  
7 the 2008 statute, and not get involved with the 2010  
8 statute, because we don't have a record in front of  
9 us that tells us how they're handling those current  
10 claims?

11 MR. BELLIN: Well, I believe that there is  
12 a record. I believe that - - - I believe that  
13 they've admitted that that - - -

14 CHIEF JUDGE LIPPMAN: What's the answer to  
15 Judge Graffeo's question? Why couldn't you just look  
16 at it in terms of whosoever out there under the old  
17 statute, and that that's going to come up again?

18 MR. BELLIN: I mean, theoretically, you  
19 could do that. But what you're requiring then, is  
20 you - - - this case has taken four years to litigate,  
21 Your Honor. It's going to take another four years  
22 for another case to come up.

23 CHIEF JUDGE LIPPMAN: So you're saying,  
24 counter to what your opponent said, that this is a  
25 good case - - -

1 MR. BELLIN: This is a good case - - -

2 CHIEF JUDGE LIPPMAN: - - - to determine  
3 under the new statute?

4 MR. BELLIN: Correct. Because the standard  
5 "assistance or care" and "immediate need" are  
6 identical under both of them.

7 CHIEF JUDGE LIPPMAN: And the other,  
8 temporary or emergency, doesn't mean anything?

9 MR. BELLIN: That doesn't mean anything.  
10 When you - - - if you look at the - - -

11 CHIEF JUDGE LIPPMAN: That's not the  
12 issue - - - in answer to what Judge Read asked you,  
13 that's not the issue you want us to look at?

14 MR. BELLIN: You can look at that, if - - -

15 CHIEF JUDGE LIPPMAN: The temporary versus  
16 emergency, that's - - -

17 MR. BELLIN: That is one - - -

18 CHIEF JUDGE LIPPMAN: That's not really - -  
19 - doesn't really matter in your mind?

20 MR. BELLIN: It doesn't matter because it's  
21 the same thing. It doesn't matter, because there's  
22 no evidence that there was - - -

23 CHIEF JUDGE LIPPMAN: But the other  
24 standard remains the same, and that's what we should  
25 look at?

1 MR. BELLIN: Correct. May I just continue  
2 for one moment, Your Honor?

3 CHIEF JUDGE LIPPMAN: For one moment. Go  
4 ahead.

5 MR. BELLIN: The problem is that you can't  
6 just change something in nomenclature and then say  
7 everything is moot when there's substantial  
8 similarity between the two statutes.

9 JUDGE SMITH: If I could - - -

10 JUDGE READ: Do you know of any time we've  
11 ever done that, when we've interpreted a statute  
12 that's been superseded in that way?

13 MR. BELLIN: The Supreme - - - I don't know  
14 of any case that this court has done it, but the U.S.  
15 Supreme Court has done it numerous times, and I cite  
16 those cases in the brief, where they say that a  
17 change in the statute that does not substantially  
18 change the issue that is before the court does not  
19 moot the issue.

20 CHIEF JUDGE LIPPMAN: Okay. Judge Smith?

21 JUDGE SMITH: If I could just ask you  
22 briefly about your nominal damages claims. Do they  
23 relate to the forty-five days or the emergency  
24 Medicaid, or both?

25 MR. BELLIN: I believe they're related to

1 both, Your Honor, under federal and state law.

2 JUDGE SMITH: So there's a federal law that  
3 you say entitles you to emergency Medicaid and gives  
4 you a 1983 action?

5 MR. BELLIN: No, the federal claim is lack  
6 of notice and the failure to - - - the due process  
7 claim under Section 1983 and under Article 78 for  
8 failure to provide notice of an available benefit and  
9 also failure to provide - - - to consider the  
10 application.

11 JUDGE SMITH: This is taking longer than I  
12 hoped it would. But let me try to articulate what's  
13 worrying me. You're saying that if the - - - what  
14 you have basically is a substantive difference  
15 between you and the State. They say you have no  
16 claim to these benefits, you say you do. You say  
17 that if you're right, you get a federal due process  
18 claim, because they didn't give you notice.

19 MR. BELLIN: That's correct.

20 JUDGE SMITH: They weren't going to give  
21 you notice, because they didn't think you didn't have  
22 it. But is that the law, that it violates due  
23 process every time they reject a claim for benefit  
24 because they didn't give you notice of it?

25 MR. BELLIN: Well, I'm happy to go into the

1 details of it, Your Honor, but the bottom line is  
2 that I believe that is the case. And number two,  
3 there are state laws that require it under Article  
4 78.

5 JUDGE SMITH: What's your best case on  
6 that, on a due process violation based on that kind  
7 of substantive dispute?

8 MR. BELLIN: There are - - - there was a  
9 case in the Second Department where they said that -  
10 - - I don't remember the name off the top of my head;  
11 I apologize, Your Honor - - - where they had to  
12 provide notice of the availability of legal aid  
13 attorneys in appeals from civil cases - - - in  
14 appeals from, I believe it was a Medicaid case.

15 But, Your Honor, also, there's the federal  
16 claim under federal statute with the forty-five days.  
17 We can't ignore that. The other side has. It's a  
18 completely different issue. And it satisfies the  
19 mootness requirement. There has been no amendment.

20 CHIEF JUDGE LIPPMAN: Thank you.

21 MR. BELLIN: Thank you.

22 CHIEF JUDGE LIPPMAN: Thanks, counsel.

23 MR. BELLIN: Thank you very much.

24 CHIEF JUDGE LIPPMAN: Appreciate it.

25 Counselor, go ahead.

1 MR. DEARING: Just to clarify a few points.  
2 The forty-five day claim is against Doar only, not  
3 against the State. No such claim is made against the  
4 State, nor could it be.

5 Your answer - - - the answer to your  
6 question on notice and due process, there is no such  
7 case. There are cases that will say going forward  
8 you have to give notice once the availability of the  
9 benefit is determined. What he's asking for is  
10 damages for a past act, for failing to give notice  
11 when the existence of the benefit was in serious  
12 dispute.

13 I'd also say, the claim for nominal  
14 damage - - - there has been no showing of personal  
15 involvement of the former Commissioner Daines in any  
16 policy about such notice.

17 The key point, though, I think, is the  
18 point you made, Judge Smith. There are new arguments  
19 to be made under the new statute. And that should  
20 mean - - -

21 CHIEF JUDGE LIPPMAN: What about his  
22 precedent that he's saying at the Supreme Court  
23 level?

24 MR. DEARING: That's a different situation.  
25 That's when the question is whether the amendment

1 moots the case. It is correct here that that is not  
2 what moots the case. What moots the case is the fact  
3 she is now getting benefits. The question we're  
4 asking is, is there a good reason to invoke this  
5 exception to mootness to allow this case to go  
6 forward to provide guidance to other people. And  
7 there isn't, because the statute is now different.

8 JUDGE GRAFFEO: And you know there's - - -  
9 your position is there's no other claimants under the  
10 2008 statute that are still - - -

11 MR. DEARING: I'm aware of the case to  
12 which - - -

13 JUDGE GRAFFEO: - - - going through the  
14 process?

15 MR. DEARING: - - - I'm aware of the case  
16 to which Mr. Bellin refers. That claimant is also  
17 now receiving benefits. There is no claimant I'm  
18 aware of under the old statute that is not already  
19 receiving benefits.

20 There are new arguments to be made under  
21 the new statute. If you read the statute it - - -

22 CHIEF JUDGE LIPPMAN: Are there a lot cases  
23 where people are receiving benefits?

24 MR. DEARING: There are many cases - - -

25 CHIEF JUDGE LIPPMAN: Or is that the only

1 one you know - - -

2 MR. DEARING: That's the only case I

3 know - - -

4 CHIEF JUDGE LIPPMAN: - - - that's active?

5 MR. DEARING: That is active under the old

6 version of the statute, it's the only one I know.

7 But again, it's a case where the litigant is

8 receiving benefits.

9 The statute has been substantially

10 rewritten. If you look - - - compare the old one, it

11 was one sentence; the new one is four or five. Many

12 new substantive terms that are - - -

13 JUDGE PIGOTT: Well, the other thing, it

14 says "must notify the person in writing of

15 availability of monetary grant to meet emergency

16 needs, and shall, at the same time, determine whether

17 such person is in immediate need." And I think Mr.

18 Bellin's argument is, take out the "emergency" stuff;

19 we're not fighting over that. We're arguing over the

20 fact that you should have told us about immediate

21 need, and that both those elements are still there

22 and therefore this is not moot.

23 MR. DEARING: And what we would say, and

24 this will be our argument, that the inclusion of the

25 language "emergency needs" sheds light upon what

1 immediate need standard means. Mr. Bellin argued if  
2 you look at Appendix page 201-202 - - - this is  
3 critical; this is the request to HRA for these  
4 benefits - - - he argues specifically that immediate  
5 need does not mean emergency, and cites an Appellate  
6 Division case from 1975 that so held. That argument  
7 is unavailable to a litigant now.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MR. DEARING: He also makes the argument  
10 that he wants the services not the money. These  
11 changes yield new arguments on the issues, and there  
12 should be a mootness.

13 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
14 you. Thank you all. Appreciate it.

15 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Barbara Coleman v. Richard F. Daines, No. 152 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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