BEFORE THE
SPECIAL INVESTIGATIVE COMMITTEE
OF THE ILLINOIS HOUSE OF REPRESENTATIVES

MATERIALS IN RESPONSE TO REQUEST TO APPEAR

December 18, 2008

Submitted in Response to Request:
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CARO v. BLAGOJEVICH: CHRONOLOGY OF EVENTS

March 7, 2007	Governor proposes in his budget address an expansion of State-sponsored healthcare programs known as "Illinois Covered". *See* Joint Stipulation, ¶¶8-10.
May 10, 2007	House Resolution to express support for or disapproval of the funding mechanism for the Governor's healthcare initiative, a Gross Receipts Tax, receives not a single vote in support There is no appropriation in the FY08 budget for the Governor's healthcare initiative. *See* Joint Stipulation, ¶11.
November 7, 2007	DHFS files the Emergency Rule and identical Permanent Rule creating a new healthcare program as an expansion of the FamilyCare program ("Program"). The Program (i) established benefits for a never-previously-enrolled group: adult parent/caretakers of children receiving state aid from households with annual incomes of 185% to 400% of the federal poverty level (FPL), and (ii) transferred adult parent/caretakers from households with annual incomes between 133% and 185% of the FPL, who up until then had been covered under the state's Children's Health Care Insurance Program Act (CHIPA), out of CHIPA and into enrollment in the new Program as part of State Medicaid coverage. Section 5-2(2)(b) of State Medicaid, 305 ILCS 5/5-2(2)(b), is cited as authority. *See* Tab 1. Any new plan or program under the Medical Assistance Act must be approved by the Governor. 305 ILCS 5/5-2(b). The Governor agreed to and approved the Program submitted in the Rules. *See* Joint Stipulation, ¶38; *s ee also* 2/1/08 Opposition to First Preliminary Injunction at 6.
November 20, 2007	JCAR objects to and suspends the Emergency Rule after finding it is not in the public interest pursuant to the Illinois Administrative Procedures Act, rendering it invalid. *See* Tab 2.
November 26, 2007	*Caro v. Blagojevich* is filed in Cook County Circuit Court

December 14, 2007 Baise and Gidwitz intervene as Plaintiffs in *Caro v. Blagojevich*

December 21, 2007 Plaintiffs file their first motion for preliminary injunction

January 28, 2008 The parties file their Joint Stipulation of facts and admissibility of exhibits for the first preliminary injunction

February 26, 2008 JCAR votes 8-2 to object to and prohibit the filing of the Permanent Rule. Its Statement of Objection is as follows:

At its meeting of February 26, 2008, the Joint Committee on Administrative Rules voted to object to the above proposed rulemaking and prohibit its filing with the Secretary of State. *The Committee found that the adoption of this rulemaking would constitute a serious threat to the public interest.* The reason for the Objection and Prohibition is as follows:

JCAR objected to and prohibited filing of the Department of Healthcare and Family Services' rulemaking titled Medical Assistance Programs (89 Ill Adm. Code 120; 31 Ill. Reg. 15424) to the extent that it expands medical assistance to persons other than those formerly receiving medical coverage under a federal SCHIP waiver for caretaker relatives of children covered by SCHIP. The budgetary impact on the State is likely to be significant. An expansion of this magnitude should not be initiated without a specific legislative determination that adequate financial resources are, and will continue to be, available. The General Assembly did not include expanded FamilyCare during its formation of the Fiscal Year 2008 Budget. Further the General Assembly did not pass specific statutory authority for such expansion. To enter into this expansion without the assurance of available funding and specific statutory authority is not in the public interest.

The proposed rulemaking may not be filed with the Secretary of State or enforced by the Department of Healthcare and Family Services for any reason following receipt of this certification and statement by the Secretary of State for as long as the Filing Prohibition remains in effect. *See* Tab 3.

April 15, 2008 Circuit Court enters first preliminary injunction order enjoining the Program. *See* Tab 4.

April 21, 2008	DHFS files a Peremptory Rule purporting to "incorporate[] the TANF Employment Requirements" and remedy the deficiencies in the Program noted in the first preliminary injunction.
April 23, 2008	Defendants file Notice of Appeal of first preliminary injunction Circuit Court denies Defendants' request for stay of first injunction
May 1, 2008	Plaintiffs file their second motion for preliminary injunction
May 12, 2008	Circuit Court grants Defendant-Intervenors leave to intervene in *Caro v. Blagojevich*
May 14, 2008	Appellate Court denies Defendants' motion to stay first injunction
May 20, 2008	JCAR objects to and suspends the first Peremptory Rule. Its Statement of Objection to and Suspension of Filing states, in relevant part, that: At its meeting on May 20, 2008, the Joint Committee on Administrative Rules objected to the Department of Healthcare and Family Services' use of peremptory rulemaking to adopt rules titled Medical Assistance Programs (89 Ill. Adm. Code 120; 32 Ill. Reg. 7212) and the rule because that use of peremptory rulemaking violates Section 5-50 of the Illinois Administrative Procedure Act (IAPA). Section 5-50 of the IAPA allows peremptory rulemaking to be used only when the rulemaking is required as a result of federal law, federal rules and regulations, an order of a court or a collective bargaining agreement that precludes the exercise of agency discretion as to the content of the rule and that precludes adoption of rules through regular rulemaking. The analysis portion of the court's Memorandum Opinion and Order entered in Caro vs Blagojevich on 4/15/08, which HFS cites as the reason for this peremptory rulemaking, notes that not all TANF requirements are met by the expanded FamilyCare Program emergency rules, specifically the requirement that the adult be employed or engaged in a job search. However, the judge's specific order on 4/15/08 preliminarily enjoins HFS from "enforcing the Emergency Rules or expending any public funds related to the FamilyCare Program created by the Emergency Rule." The court order does not direct HFS to amend its rules in any way, including insertion of

employment and job search requirements, not does the court set any deadline for action that precludes the use of regular rulemaking procedures. *Therefore, the standards under Section 5-50 of the IAPA for use of peremptory rulemaking are not met, and JCAR finds this violation of the IAPA presents a threat to the public interest.*
The suspended peremptory rules may not be enforced by the Department of Healthcare and Family Services for any reason, nor may the Department file with the Secretary of State any rule having substantially the same purpose and effect as these suspended rules for at least 180 days following receipt of this certification and statement by the Secretary of State.
(emphasis added). See Tab 5.

June 16, 2008	The parties file their Supplemental Joint Stipulation of facts and admissibility of exhibits for the second preliminary injunction
September 26, 2008	Appellate Court affirms the Circuit Court's first preliminary injunction. *See* Tab 6
October 15, 2008	Circuit Court enters second preliminary injunction order, *see* Tab 7, and denies Defendants' motion to stay that injunction Appellate Court denies Defendants' Petition for Rehearing on first injunction
October 17, 2008	Defendants file Notice of Appeal of second preliminary injunction
October 29, 2008	Appellate Court denies Defendants' request to stay second injunction
November 12, 2008	Illinois Supreme Court enters order staying October 15, 2008 order pending disposition of Defendants' Petition for Leave to Appeal.
November 26, 2008	Defendants file Supreme Court Petition for Leave to Appeal (PLA)
December 8, 2008	Defendants' Appellate Brief due in second appeal (NOT FILED)
December 10, 2008	Plaintiffs file their Opposition to Defendants' PLA. *See* Tab 8.

EXHIBIT 1

2007

ILLINOIS REGISTER

RULES OF GOVERNMENTAL AGENCIES

Volume 31, Issue 47
November 26, 2007
Pages 15399-15890

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Administrative Code Division
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TABLE OF CONTENTS

November 26, 2007 Volume 31, Issue 47

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

NOTICE OF PROPOSED AMENDMENTS

1) Heading of the Part: Medical Assistance Programs

2) Code Citation: 89 Ill. Adm. Code 120

3)

Section Numbers:	Proposed Action:
120.32	Amendment
120.33	New Section

4) Statutory Authority: Sections 5/5-2(2) and 12-13 of the Illinois Public Aid Code [305 ILCS 5/5-2(2) and 5/12-13]

5) Complete Description of the Subjects and Issues Involved: This proposed rulemaking preserves FamilyCare benefits for approximately 15,000 to 20,000 parents and other caretaker relatives with income above 133 percent up to and including 185 percent of poverty who were previously covered under 89 Ill. Adm. Code 125. Further, the proposed rulemaking expands FamilyCare to cover an additional 147,000 uninsured parents and other caretaker relatives with income up to and including 400 percent of poverty.

Illinois provides benefits to parents and other caretaker relatives raising dependent children under the authority of the *Public Aid Code* and the *Children's Health Insurance Program Act* (CHIPA). The coverage of adults under CHIPA is contingent upon federal approval of a waiver to permit the State to receive matching funds under the federal State Children's Health Insurance Program (SCHIP) for their costs. As SCHIP has not been reauthorized, Illinois cannot obtain federal matching funds using that statute.

With this rulemaking, the Department will establish eligibility for all parents and other caretaker relatives using its authority under the *Public Aid Code*.

6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None

7) Will this rulemaking replace any emergency rulemaking currently in effect? Yes

8) Does this rulemaking contain an automatic repeal date? No

9) Does this rulemaking contain incorporations by reference? No

10) Are there any other proposed rulemakings pending on this Part? No

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

NOTICE OF PROPOSED AMENDMENTS

11) Statement of Statewide Policy Objectives: This rulemaking does not affect units of local government. This rulemaking preserves FamilyCare coverage at levels in place since January 1, 2006 and further expands coverage to uninsured parents and caretakers with income up to and including 400 percent of poverty.

12) Time, Place, and Manner in Which Interested Persons May Comment on this Proposed Rulemaking: Any interested parties may submit comments, data, views, or arguments concerning this proposed rulemaking. All comments must be in writing and should be addressed to:

Tamara Tanzillo Hoffman
Chief of Staff
Illinois Department of Healthcare and Family Services
201 South Grand Avenue East, 3rd Floor
Springfield IL 62763-0002

217/557-7157

The Department requests the submission of written comments within 30 days after the publication of this Notice. The Department will consider all written comments it receives during the first notice period as required by Section 5-40 of the Illinois Administrative Procedure Act [5 ILCS 100/5-40].

These proposed amendments may have an impact on small businesses, small municipalities, and not-for-profit corporations as defined in Sections 1-75, 1-80 and 1-85 of the Illinois Administrative Procedure Act [5 ILCS 100/1-75, 1-80, 1-85]. These entities may submit comments in writing to the Department at the above address in accordance with the regulatory flexibility provisions in Section 5-30 of the Illinois Administrative Procedure Act [5 ILCS 100/5-30]. These entities shall indicate their status as small businesses, small municipalities, or not-for-profit corporations as part of any written comments they submit to the Department.

13) Initial Regulatory Flexibility Analysis:

A) Types of small businesses, small municipalities and not-for-profit corporations affected: None

B) Reporting, bookkeeping or other procedures required for compliance: None

C) Types of professional skills necessary for compliance: None

14) Regulatory agenda on which this rulemaking was summarized: This rulemaking was not anticipated by the Department when the two most recent regulatory agendas were published.

The full text of the Proposed Amendments is identical to the text of the Emergency Amendments that appears in this issue of the *Illinois Register* on page 15854:

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

NOTICE OF EMERGENCY AMENDMENTS

1) Heading of the Part: Medical Assistance Programs

2) Code Citation: 89 Ill. Adm. Code 120

3)

Section Numbers:	Emergency Action:
120.32	Amendment
120.33	New Section

4) Statutory Authority: Sections 5/5.2(2) and 12-13 of the Illinois Public Aid Code [305 ILCS 5/5.2(2) and 5/12-13]

5) Effective Date: November 7, 2007

6) If this emergency amendment is to expire before the end of the 150-day period, please specify the date on which it is to expire: These emergency amendments will not expire before the end of the 150-day period unless the identical proposed rulemaking is adopted.

7) Date Filed with the Index Department: November 7, 2007

8) A copy of the emergency amendments, including any materials incorporated by reference, is on file in the agency's principal office and is available for public inspection.

9) Reason for Emergency: The emergency amendment is necessary to respond to the President's veto of federal legislation reauthorizing the federal State Children's Health Insurance Program (SCHIP). Just before sunset of SCHIP on September 30, 2007, the U.S. Congress sent the President reauthorizing legislation that the President vetoed on October 3, 2007. On October 18, 2007, the U.S. House of Representatives failed to override the President's veto. This federal action puts the healthcare of between 15,000 and 20,000 parents in jeopardy.

In addition, the Department has determined that FamilyCare coverage must be extended immediately to approximately 147,000 parents and other caretaker relatives with income up to 400 percent of the federal poverty level. Many working families in Illinois lack access to affordable health insurance. Numerous studies show that lack of insurance negatively affects the health status of individuals posing a threat to their health and wellbeing. In addition, worker productivity is affected to the detriment of the economy of Illinois. The health care system shifts the cost of the uninsured to those that pay for insurance, increasing costs to Illinois companies that provide insurance to their

employees and making them non-competitive in the global economy. The lack of access to insurance has reached a crisis level requiring immediate action.

HFS has examined the relationship between enrollment of children and making coverage available to their parents. The Department has identified a close positive correlation between making coverage available to parents and increasing the enrollment of children. One of the themes emerging from the national debate concerning the reauthorization of SCHIP is that, states may be held accountable for very high performance enrollment targets among children. That is, when SCHIP is eventually reauthorized, it is likely to make some portion of funding contingent on states having very low numbers of uninsured children. It is therefore encumbent upon the State to act now to do all it can, including covering more parents, to enroll all eligible children.

10) Complete Description of the Subjects and Issues Involved: This emergency rulemaking preserves FamilyCare benefits for approximately 15,000 to 20,000 parents and other caretaker relatives with income above 133 percent up to and to include 185 percent of poverty who were previously covered under 89 Ill. Adm. Code 125. Further, the emergency rulemaking expands FamilyCare to cover an additional 147,000 uninsured parents and other caretaker relatives with income up to and including 400 percent of poverty.

Illinois provides benefits to parents and other caretaker relatives raising dependent children under the authority of the *Public Aid Code* and the *Children's Health Insurance Program Act* (CHIPA). The coverage of adults under CHIPA is contingent upon federal approval of a waiver to permit the State to receive matching funds under the federal State Children's Health Insurance Program (SCHIP) for their costs. As SCHIP has not been reauthorized, Illinois cannot obtain federal matching funds using that statute.

With this rulemaking, the Department will establish eligibility for all parents and other caretaker relatives using its authority under the *Public Aid Code*.

11) Are there any other proposed rulemakings pending on this Part? No

12) Statement of Statewide Policy Objectives: These emergency amendments neither create nor expand any State mandate affecting units of local government. These emergency amendments preserve FamilyCare coverage at levels in place since January 1, 2006 and further expand coverage to uninsured parents and caretakers with income up to and including 400 percent of poverty.

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

NOTICE OF EMERGENCY AMENDMENTS

13) Information and questions regarding these emergency amendments shall be directed to:

Tamara Tanzillo Hoffman
Chief of Staff
Illinois Department of Healthcare and Family Services
201 South Grand Avenue East, 3rd Floor
Springfield IL 62763-0002

217/557-7157

The full text of the Emergency Amendments begins on the next page:

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

NOTICE OF EMERGENCY AMENDMENTS

TITLE 89: SOCIAL SERVICES
CHAPTER I: DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES
SUBCHAPTER b: ASSISTANCE PROGRAMS

PART 120
MEDICAL ASSISTANCE PROGRAMS

SUBPART A: GENERAL PROVISIONS

Section
120.1 Incorporation by Reference

SUBPART B: ASSISTANCE STANDARDS

Section
120.10 Eligibility For Medical Assistance
120.11 MANG(P) Eligibility
120.12 Healthy Start – Medicaid Presumptive Eligibility Program For Pregnant Women
120.14 Presumptive Eligibility for Children
120.20 MANG(AABD) Income Standard
120.30 MANG(C) Income Standard
120.31 MANG(P) Income Standard
120.32 ~~FamilyCare~~~~KidCare Parent Coverage Waiver~~ Eligibility and Income Standard
EMERGENCY
120.33 FamilyCare Expansion Eligibility
EMERGENCY
120.40 Exceptions To Use Of MANG Income Standard
120.50 AMI Income Standard (Repealed)

SUBPART C: FINANCIAL ELIGIBILITY DETERMINATION

Section
120.60 Cases Other Than Long Term Care, Pregnant Women and Certain Children
120.61 Cases in Intermediate Care, Skilled Nursing Care and DMHDD – MANG(AABD) and All Other Licensed Medical Facilities
120.62 Department of Mental Health and Developmental Disabilities (DMHDD) Approved Home and Community Based Residential Settings Under 89 Ill. Adm. Code 140.643
120.63 Department of Mental Health and Developmental Disabilities (DMHDD)

SUBPART H: MEDICAL ASSISTANCE – NO GRANT

120.316	Living Arrangements
120.317	Supplemental Payments
120.318	Institutional Status
120.319	Assignment of Rights to Medical Support and Collection of Payment
120.320	Cooperation in Establishing Paternity and Obtaining Medical Support
120.321	Good Cause for Failure to Cooperate in Establishing Paternity and Obtaining Medical Support
120.322	Proof of Good Cause for Failure to Cooperate in Establishing Paternity and Obtaining Medical Support
120.323	Suspension of Paternity Establishment and Obtaining Medical Support Upon Finding Good Cause
120.324	Health Insurance Premium Payment (HIPP) Program
120.325	Health Insurance Premium Payment (HIPP) Pilot Program
120.326	Foster Care Program
120.327	Social Security Numbers
120.330	Unearned Income
120.332	Budgeting Unearned Income
120.335	Exempt Unearned Income
120.336	Education Benefits
120.338	Incentive Allowance
120.340	Unearned Income In-Kind
120.342	Child Support and Spousal Maintenance Payments
120.345	Earmarked Income
120.346	Medicaid Qualifying Trusts
120.347	Treatment of Trusts
120.350	Lump Sum Payments and Income Tax Refunds
120.355	Protected Income
120.360	Earned Income
120.361	Budgeting Earned Income
120.362	Exempt Earned Income
120.363	Earned Income Disregard – MANG(C)
120.364	Earned Income Exemption
120.366	Exclusion From Earned Income Exemption
120.370	Recognized Employment Expenses
120.371	Income From Work/Study/Training Programs
120.372	Earned Income From Self-Employment
120.373	Earned Income From Roomer and Boarder
120.375	Earned Income In-Kind
120.376	Payments from the Illinois Department of Children and Family Services

AUTHORITY: Implementing Articles III, IV, V and VI and authorized by Section 12-13 of the Illinois Public Aid Code [305 ILCS 5/Arts. III, IV, V and VI and 12-13].

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

NOTICE OF EMERGENCY AMENDMENTS

SOURCE: Filed effective December 30, 1977; peremptory amendment at 2 Ill. Reg. 17, p. 117, effective February 1, 1978; amended at 2 Ill. Reg. 31, p. 134, effective August 5, 1978; emergency amendment at 2 Ill. Reg. 37, p. 4, effective August 30, 1978, for a maximum of 150 days; peremptory amendment at 2 Ill. Reg. 46, p. 44, effective November 1, 1978; peremptory amendment at 2 Ill. Reg. 46, p. 56, effective November 1, 1978; emergency amendment at 3 Ill. Reg. 16, p. 41, effective April 9, 1979, for a maximum of 150 days; emergency amendment at 3 Ill. Reg. 28, p. 182, effective July 1, 1979, for a maximum of 150 days; amended at 3 Ill. Reg. 33, p. 399, effective August 18, 1979; amended at 3 Ill. Reg. 33, p. 415, effective August 18, 1979; amended at 3 Ill. Reg. 38, p. 243, effective September 21, 1979; peremptory amendment at 3 Ill. Reg. 38, p. 321, effective September 7, 1979; amended at 3 Ill. Reg. 40, p. 140, effective October 6, 1979; amended at 3 Ill. Reg. 46, p. 36, effective November 2, 1979; amended at 3 Ill. Reg. 47, p. 96, effective November 13, 1979; amended at 3 Ill. Reg. 48, p. 1, effective November 15, 1979; peremptory amendment at 4 Ill. Reg. 9, p. 259, effective February 22, 1980; amended at 4 Ill. Reg. 10, p. 258, effective February 25, 1980; amended at 4 Ill. Reg. 12, p. 551, effective March 10, 1980; amended at 4 Ill. Reg. 27, p. 387, effective June 24, 1980; emergency amendment at 4 Ill. Reg. 29, p. 294, effective July 8, 1980, for a maximum of 150 days; amended at 4 Ill. Reg. 37, p. 797, effective September 2, 1980; amended at 4 Ill. Reg. 37, p. 800, effective September 2, 1980; amended at 4 Ill. Reg. 45, p. 134, effective October 27, 1980; amended at 5 Ill. Reg. 766, effective January 2, 1981; amended at 5 Ill. Reg. 1134, effective January 26, 1981; peremptory amendment at 5 Ill. Reg. 5722, effective June 1, 1981; amended at 5 Ill. Reg. 7071, effective June 23, 1981; amended at 5 Ill. Reg. 7104, effective June 23, 1981; amended at 5 Ill. Reg. 8041, effective July 27, 1981; amended at 5 Ill. Reg. 8052, effective July 24, 1981; peremptory amendment at 5 Ill. Reg. 8106, effective August 1, 1981; peremptory amendment at 5 Ill. Reg. 10062, effective October 1, 1981; peremptory amendment at 5 Ill. Reg. 10079, effective October 1, 1981; peremptory amendment at 5 Ill. Reg. 10095, effective October 1, 1981; peremptory amendment at 5 Ill. Reg. 10113, effective October 1, 1981; peremptory amendment at 5 Ill. Reg. 10124, effective October 1, 1981; peremptory amendment at 5 Ill. Reg. 10131, effective October 1, 1981; amended at 5 Ill. Reg. 10730, effective October 1, 1981; amended at 5 Ill. Reg. 10733, effective October 1, 1981; amended at 5 Ill. Reg. 10760, effective October 1, 1981; amended at 5 Ill. Reg. 10767, effective October 1, 1981; peremptory amendment at 5 Ill. Reg. 11647, effective October 16, 1981; peremptory amendment at 6 Ill. Reg. 611, effective January 1, 1982; amended at 6 Ill. Reg. 1216, effective January 14, 1982; emergency amendment at 6 Ill. Reg. 2447, effective March 1, 1982, for a maximum of 150 days; peremptory amendment at 6 Ill. Reg. 2452, effective February 11, 1982; peremptory amendment at 6 Ill. Reg. 6475, effective May 18, 1982; peremptory amendment at 6 Ill. Reg. 6912, effective May 20, 1982; emergency amendment at 6 Ill. Reg. 7299, effective June 2, 1982, for a maximum of 150 days; amended at 6 Ill. Reg. 8115, effective July 1, 1982; amended at 6 Ill. Reg. 8142, effective July 1, 1982; amended at 6 Ill. Reg. 8159, effective July 1, 1982; amended at 6 Ill. Reg. 10970, effective August 26, 1982; amended at 6 Ill. Reg. 11921, effective September 21, 1982;

amended at 6 Ill. Reg. 12293, effective October 1, 1982; amended at 6 Ill. Reg. 12318, effective October 1, 1982; amended at 6 Ill. Reg. 13754, effective November 1, 1982; amended at 7 Ill. Reg. 394, effective January 1, 1983; codified at 7 Ill. Reg. 6082; amended at 7 Ill. Reg. 8256, effective July 1, 1983; amended at 7 Ill. Reg. 8264, effective July 5, 1983; amended (by adding Section being codified with no substantive change) at 7 Ill. Reg. 14747; amended (by adding Sections being codified with no substantive change) at 7 Ill. Reg. 16108; amended at 8 Ill. Reg. 5253, effective April 9, 1984; amended at 8 Ill. Reg. 6770, effective April 27, 1984; amended at 8 Ill. Reg. 13328, effective July 16, 1984; amended (by adding Sections being codified with no substantive change) at 8 Ill. Reg. 17897; amended at 8 Ill. Reg. 18903, effective September 26, 1984; peremptory amendment at 8 Ill. Reg. 20706, effective October 3, 1984; amended at 8 Ill. Reg. 25053, effective December 12, 1984; emergency amendment at 9 Ill. Reg. 830, effective January 3, 1985, for a maximum of 150 days; amended at 9 Ill. Reg. 4515, effective March 25, 1985; amended at 9 Ill. Reg. 5346, effective April 11, 1985; amended at 9 Ill. Reg. 7153, effective May 6, 1985; amended at 9 Ill. Reg. 11346, effective July 8, 1985; amended at 9 Ill. Reg. 12298, effective July 25, 1985; amended at 9 Ill. Reg. 12823, effective August 9, 1985; amended at 9 Ill. Reg. 15903, effective October 4, 1985; amended at 9 Ill. Reg. 16300, effective October 10, 1985; amended at 9 Ill. Reg. 16906, effective October 18, 1985; amended at 10 Ill. Reg. 1192, effective January 10, 1986; amended at 10 Ill. Reg. 3033, effective January 23, 1986; amended at 10 Ill. Reg. 4907, effective March 7, 1986; amended at 10 Ill. Reg. 6966, effective April 16, 1986; amended at 10 Ill. Reg. 10688, effective June 3, 1986; amended at 10 Ill. Reg. 12672, effective July 14, 1986; amended at 10 Ill. Reg. 15649, effective September 19, 1986; amended at 11 Ill. Reg. 3992, effective February 23, 1987; amended at 11 Ill. Reg. 7652, effective April 15, 1987; amended at 11 Ill. Reg. 8735, effective April 20, 1987; emergency amendment at 11 Ill. Reg. 12458, effective July 10, 1987, for a maximum of 150 days; amended at 11 Ill. Reg. 14034, effective August 14, 1987; amended at 11 Ill. Reg. 14763, effective August 26, 1987; amended at 11 Ill. Reg. 20142, effective January 1, 1988; amended at 11 Ill. Reg. 20898, effective December 14, 1987; amended at 12 Ill. Reg. 904, effective January 1, 1988; amended at 12 Ill. Reg. 3516, effective January 22, 1988; amended at 12 Ill. Reg. 6234, effective March 22, 1988; amended at 12 Ill. Reg. 8672, effective May 13, 1988; amended at 12 Ill. Reg. 9132, effective May 20, 1988; amended at 12 Ill. Reg. 11483, effective June 30, 1988; emergency amendment at 12 Ill. Reg. 11632, effective July 1, 1988, for a maximum of 150 days; emergency amendment at 12 Ill. Reg. 11839, effective July 1, 1988, for a maximum of 150 days; amended at 12 Ill. Reg. 12835, effective July 22, 1988; emergency amendment at 12 Ill. Reg. 13243, effective July 29, 1988, for a maximum of 150 days; amended at 12 Ill. Reg. 17867, effective October 30, 1988; amended at 12 Ill. Reg. 19704, effective November 15, 1988; amended at 12 Ill. Reg. 20188, effective November 23, 1988; amended at 13 Ill. Reg. 116, effective January 1, 1989; amended at 13 Ill. Reg. 2081, effective February 3, 1989; amended at 13 Ill. Reg. 3908, effective March 10, 1989; emergency amendment at 13 Ill. Reg. 11929, effective June 27, 1989, for a maximum of 150 days; emergency expired November 25, 1989;

emergency amendment at 13 Ill. Reg. 12137, effective July 1, 1989, for a maximum of 150 days; amended at 13 Ill. Reg. 15404, effective October 6, 1989; emergency amendment at 13 Ill. Reg. 16586, effective October 2, 1989, for a maximum of 150 days; emergency expired March 1, 1990; amended at 13 Ill. Reg. 17483, effective October 31, 1989; amended at 13 Ill. Reg. 17838, effective November 8, 1989; amended at 13 Ill. Reg. 18872, effective November 17, 1989; amended at 14 Ill. Reg. 760, effective January 1, 1990; emergency amendment at 14 Ill. Reg. 1494, effective January 2, 1990, for a maximum of 150 days; amended at 14 Ill. Reg. 4233, effective March 5, 1990; emergency amendment at 14 Ill. Reg. 5839, effective April 3, 1990, for a maximum of 150 days; amended at 14 Ill. Reg. 6372, effective April 16, 1990; amended at 14 Ill. Reg. 7637, effective May 10, 1990; amended at 14 Ill. Reg. 10396, effective June 20, 1990; amended at 14 Ill. Reg. 13227, effective August 6, 1990; amended at 14 Ill. Reg. 14814, effective September 3, 1990; amended at 14 Ill. Reg. 17004, effective September 30, 1990; emergency amendment at 15 Ill. Reg. 348, effective January 1, 1991, for a maximum of 150 days; amended at 15 Ill. Reg. 5302, effective April 1, 1991; amended at 15 Ill. Reg. 10101, effective June 24, 1991; amended at 15 Ill. Reg. 11973, effective August 12, 1991; amended at 15 Ill. Reg. 12747, effective August 16, 1991; amended at 15 Ill. Reg. 14105, effective September 11, 1991; amended at 15 Ill. Reg. 14240, effective September 23, 1991; amended at 16 Ill. Reg. 139, effective December 24, 1991; amended at 16 Ill. Reg. 1862, effective January 20, 1992; amended at 16 Ill. Reg. 10034, effective June 15, 1992; amended at 16 Ill. Reg. 11582, effective July 15, 1992; amended at 16 Ill. Reg. 17290, effective November 3, 1992; amended at 17 Ill. Reg. 1102, effective January 15, 1993; amended at 17 Ill. Reg. 6827, effective April 21, 1993; amended at 17 Ill. Reg. 10402, effective June 28, 1993; amended at 18 Ill. Reg. 2051, effective January 21, 1994; amended at 18 Ill. Reg. 5934, effective April 1, 1994; amended at 18 Ill. Reg. 8718, effective June 1, 1994; amended at 18 Ill. Reg. 11231, effective July 1, 1994; amended at 19 Ill. Reg. 2905, effective February 27, 1995; emergency amendment at 19 Ill. Reg. 9280, effective July 1, 1995, for a maximum of 150 days; amended at 19 Ill. Reg. 11931, effective August 11, 1995; amended at 19 Ill. Reg. 15079, effective October 17, 1995; amended at 20 Ill. Reg. 5068, effective March 20, 1996; amended at 20 Ill. Reg. 15993, effective December 9, 1996; emergency amendment at 21 Ill. Reg. 692, effective January 1, 1997, for a maximum of 150 days; amended at 21 Ill. Reg. 7423, effective May 31, 1997; amended at 21 Ill. Reg. 7748, effective June 9, 1997; amended at 21 Ill. Reg. 11555, effective August 1, 1997; amended at 21 Ill. Reg. 13638, effective October 1, 1997; emergency amendment at 22 Ill. Reg. 1576, effective January 5, 1998, for a maximum of 150 days; amended at 22 Ill. Reg. 7003, effective April 1, 1998; amended at 22 Ill. Reg. 8503, effective May 1, 1998; amended at 22 Ill. Reg. 16291, effective August 28, 1998; emergency amendment at 22 Ill. Reg. 16640, effective September 1, 1998, for a maximum of 150 days; amended at 22 Ill. Reg. 19875, effective October 30, 1998; amended at 23 Ill. Reg. 2381, effective January 22, 1999; amended at 23 Ill. Reg. 11301, effective August 27, 1999; amended at 24 Ill. Reg. 7361, effective May 1, 2000; emergency amendment at 24 Ill. Reg. 10425, effective July 1, 2000, for a maximum of 150 days;

amended at 24 Ill. Reg. 15075, effective October 1, 2000; amended at 24 Ill. Reg. 18309, effective December 1, 2000; amended at 25 Ill. Reg. 8783, effective July 1, 2001; emergency amendment at 25 Ill. Reg. 10533, effective August 1, 2001, for a maximum of 150 days; amended at 25 Ill. Reg. 16098, effective December 1, 2001; amended at 26 Ill. Reg. 409, effective December 28, 2001; emergency amendment at 26 Ill. Reg. 8583, effective June 1, 2002, for a maximum of 150 days; amended at 26 Ill. Reg. 9843, effective June 26, 2002; emergency amendment at 26 Ill. Reg. 11029, effective July 1, 2002, for a maximum of 150 days; emergency amendment at 26 Ill. Reg. 15051, effective October 1, 2002, for a maximum of 150 days; amended at 26 Ill. Reg. 16288, effective October 25, 2002; amended at 27 Ill. Reg. 4708, effective February 25, 2003; emergency amendment at 27 Ill. Reg. 10793, effective July 1, 2003, for a maximum of 150 days; amended at 27 Ill. Reg. 18609, effective November 26, 2003; amended at 28 Ill. Reg. 4701, effective March 3, 2004; amended at 28 Ill. Reg. 6139, effective April 1, 2004; emergency amendment at 28 Ill. Reg. 6610, effective April 19, 2004, for a maximum of 150 days; emergency amendment at 28 Ill. Reg. 7152, effective May 3, 2004, for a maximum of 150 days; amended at 28 Ill. Reg. 11149, effective August 1, 2004; emergency amendment at 28 Ill. Reg. 12921, effective September 1, 2004, for a maximum of 150 days; amended at 28 Ill. Reg. 13621, effective September 28, 2004; amended at 28 Ill. Reg. 13760, effective October 1, 2004; amended at 28 Ill. Reg. 14541, effective November 1, 2004; amended at 29 Ill. Reg. 820, effective January 1, 2005; amended at 29 Ill. Reg. 10195, effective June 30, 2005; amended at 29 Ill. Reg. 14939, effective September 30, 2005; emergency amendment at 30 Ill. Reg. 521, effective January 1, 2006, for a maximum of 150 days; amended at 30 Ill. Reg. 10314, effective May 26, 2006; emergency amendment at 30 Ill. Reg. 15029, effective September 1, 2006, for a maximum of 150 days; amended at 31 Ill. Reg. 2629, effective January 28, 2007; emergency amendment at 31 Ill. Reg. 7323, effective May 1, 2007, for a maximum of 150 days; amended at 31 Ill. Reg. 11667, effective August 1, 2007; amended at 31 Ill. Reg. 12756, effective August 27, 2007; emergency amendment at 31 Ill. Reg. 15854, effective November 7, 2007, for a maximum of 150 days.

SUBPART B: ASSISTANCE STANDARDS

Section 120.32 FamilyCare~~KidCare Parent Coverage Waiver~~ Eligibility and Income Standard
EMERGENCY

a) A caretaker relative (see Section 120.390) who is 19 years of age or older qualifies for medical assistance when countable income is at or below the appropriate income standard and all MANG(C) eligibility requirements in this Part, with the exception of Sections 120.320 through 120.323, are met.

b) The appropriate income standard is 133 per cent of the Federal Poverty Income Guidelines, as published annually in the Federal Register, for the appropriate family size.

c) If income is greater than this amount, it is compared to the MANG(C) Income Standard in Section 120.30 to determine the spenddown amount.

(Source: Amended by emergency rulemaking at 31 Ill. Reg. 15854, effective November 7, 2007, for a maximum of 150 days)

Section 120.33 FamilyCare Expansion Eligibility
EMERGENCY

a) A caretaker relative (see Section 120.390), including a pregnant woman or her spouse if living together, who is 19 years of age or older qualifies for medical assistance under Section 120.32 if all of the following are met:

1) The individual is not otherwise eligible under this Part or 89 Ill. Adm. Code 123 or 125.200;

2) All MANG(C) eligibility requirements in this Part, with the exception of Sections 120.320 through 120.323, are met, and

3) The individual meets one of the following:

A) Upon initial determination of eligibility:

i) The individual has been without health insurance for at least 12 months prior to the date of application unless the individual is a pregnant woman, in which case the individual was without health insurance when her pregnancy was medically confirmed;

ii) The individual lost employer-sponsored health insurance when their job or their spouse's job ended;

iii) The individual has exhausted the lifetime benefit limit of his or her health insurance;

iv) The individual's health insurance is purchased under the provisions of Consolidated Omnibus Budget Reconciliation Act (COBRA);

v) The individual was disenrolled for medical assistance under the Public Aid Code or benefits, including rebates, under the Children's Health Insurance Program Act or the Covering ALL KIDS Health Insurance Act within one year prior to applying under this Section unless the individual has State-sponsored health insurance;

vi) The individual aged out of coverage under a parent's health insurance; or

vii) The individual's income, as determined for establishing the appropriate premium payment under subsection (g) of this Section, is at or below 200 percent of poverty.

B) Upon determination of eligibility:

i) The individual's income, as determined for establishing the appropriate premium payment under subsection (g) of this Section, is at or below 200 percent of poverty;

ii) The individual was initially enrolled under subsection (a)(3)(A)(i), (v) or (vi) of this Section; or

iii) Affordable health insurance is not available to the individual. For the purpose of this Section, affordable health insurance for the individual does not exceed four percent of the family's monthly countable income. The amount of income disregarded under subsection (b) of this Section shall not be disregarded when making this determination.

iv) For the purposes of this subsection (a)(3)(B), health insurance shall be considered unavailable to the individual if subsection (a)(3)(A)(iii) or (iv) apply.

267% of fpl = 53K

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

NOTICE OF EMERGENCY AMENDMENTS

400
133
267%

b) For the purpose of determining eligibility under this Section, the Department shall disregard income in an amount equal to the difference between 133 percent and 400 percent of the Federal Poverty Level Guidelines for the appropriate family size.

c) If after the application of subsection (b) of this Section, the caretaker relative is not eligible, total countable income is compared to the MANG(C) Income Standard in Section 120.30 to determine the spenddown amount.

d) Eligibility shall commence as follows:

1) Eligibility determinations for the program made by the 15th day of the month will be effective the first day of the following month. Eligibility determinations for the program made after the 15th day of the month will be effective no later than the first day of the second month following that determination.

2) Individuals with income at or below 200 percent of the Federal Poverty Level Guidelines found eligible under this Section may obtain coverage for a period prior to the date of application for the program subject to the following:

A) The individual must request prior coverage within six months following the initial date of coverage.

B) The prior coverage shall be individual specific and will only be available the first time the individual is enrolled under this Section.

C) The prior coverage shall begin with services rendered during the two weeks prior to the date the individuals application was filed and will continue until the individuals coverage under subsection (d)(1) of this Section is effective.

e) Eligibility shall be reviewed annually.

f) Caretaker relatives enrolled under this Section must pay monthly premiums as follows:

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

NOTICE OF EMERGENCY AMENDMENTS

1) Individuals who are not American Indians or Alaska Natives in families with countable income above 150 percent and at or below 200 percent of poverty shall pay premiums as set forth in 89 Ill. Adm. Code 125.320(b).

2) Individuals in families with countable income above 200 percent but at or below 300 percent of the Federal Poverty Level Guidelines shall pay premiums of $80 per person per month.

3) Individuals in families with countable income above 300 percent but at or below 400 percent of the Federal Poverty Level Guidelines shall pay premiums of $140 per person per month.

g) Individuals who are American Indians or Alaska Natives shall have no co-payments if their family income is at or below 200 percent of the Federal Poverty Level Guidelines.

h) The amount of income disregarded under subsection (b) of this Section shall not be disregarded in determining premium levels, or co-payments or eligibility for prior coverage or rebates.

i) Premiums are billed by and payable to the Department or its authorized agent, on a monthly basis.

j) The premium due date is the last day of the month preceding the month of coverage.

k) Individuals will have a grace period through the month of coverage to pay the premium.

l) Failure to pay the full monthly premium by the last day of the grace period will result in termination of coverage.

m) Partial premium payments will not be refunded.

n) When termination of coverage is recorded by the 15th day of the month, it will be effective the first day of the following month. When termination of coverage is recorded after the 15th day of the month, it will be effective no later than the first day of the second month following that determination.

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

NOTICE OF EMERGENCY AMENDMENTS

o) Following termination of an individual's coverage under this Section, the following action is required before the individual can be re-enrolled:

1) A new application must be completed and the individual must be determined otherwise eligible;

2) There must be full payment of premiums due under this Part or 89 Ill. Adm. Code 123 or 125, for periods in which a premium was owed and not paid for the individual;

3) If the termination was the result of non-payment of premiums, the individual must be out of the program for three months before re-enrollment; and

4) The first month's premium must be paid if there was an unpaid premium on the date the individual's previous coverage was canceled.

p) For the purposes of this Section, "Health Insurance" means any health insurance coverage as defined in 215 ILCS 105/2.

(Source: Added by emergency rulemaking at 31 Ill. Reg. 15854, effective November 7, 2007, for a maximum of 150 days)

EXHIBIT 2

2007

ILLINOIS REGISTER

RULES OF GOVERNMENTAL AGENCIES

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EXHIBIT
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JOINT COMMITTEE ON ADMINISTRATIVE RULES
ILLINOIS GENERAL ASSEMBLY

OBJECTION, RECOMMENDATION AND SUSPENSION OF EMERGENCY RULES

DEPARMENT OF HEALTHCARE AND FAMILY SERVICES

Heading of the Part: Medical Assistance Programs

Code Citation: 89 Ill. Adm. Code 120

Section Numbers: 120.32 120.33

At its meeting on 11/13/07, the Joint Committee on Administrative Rules voted to object to and suspend the Department of Healthcare and Family Services' emergency rule titled Medical Assistance Programs (89 Ill. Adm. Code 120), which became effective 11/7/07, because, contrary to Section 5-45 of the Illinois Administrative Procedure Act, no emergency situation existed that warranted adoption of this entire emergency rule. The agency is maintaining that the loss of the federal SCHIP waiver warrants the adoption of an emergency rule to continue coverage of adults served under that waiver. However, this emergency rule is not limited to that issue. It contains other provisions that this Committee does not recognize as an emergency situation. JCAR recommends that the Department adopt a rule that addresses the loss of the SCHIP waiver. The Committee finds that inclusion of policy within this emergency rule that does not address a valid emergency is not in the public interest.

Under Section 5-125(b) of the Illinois Administrative Procedure Act, the suspended emergency rule may not be enforced by the Department of Healthcare and Family Services for any reason, nor may the Department file with the Secretary of State any rule having substantially the same purpose and effect as the suspended rule for at least 180 days following receipt of this certification and statement by the Secretary of State.

JOINT COMMITTEE ON ADMINISTRATIVE RULES
ILLINOIS GENERAL ASSEMBLY

CO-CHAIR:
SEN. MAGGIE CROTTY

CO-CHAIR:
REP. BRENT HASSERT

EXECUTIVE DIRECTOR:
VICKI THOMAS

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SEN. DAN RUTHERFORD
SEN. IRA SILVERSTEIN
REP. JOHN FRITCHEY
REP. LOU LANG
REP. DAVID R. LEITCH
REP. DAVID MILLER
REP. ROSEMARY MULLIGAN

MINUTES

November 13, 2007

MEETING CALLED TO ORDER

The Joint Committee on Administrative Rules met on November 13, 2007 at 10:30 a.m. in Room 16-503 of the James R. Thompson Center in Chicago IL.

Co-Chair Crotty announced that the policy of the Committee is to allow only representatives of State agencies to testify orally on any rule under consideration at Committee hearings. Other persons are encouraged to submit their comments in writing.

ATTENDANCE ROLL CALL

X	Senator Bradley Burzynski	X	Representative John Fritchey
	Senator James Clayborne, Jr.	X	Representative Brent Hassert
X	Senator Maggie Crotty	X	Representative Lou Lang
X	Senator Randy Hultgren	X	Representative David Leitch
X	Senator Dan Rutherford	X	Representative David Miller
X	Senator Ira Silverstein	X	Representative Rosemary Mulligan

APPROVAL OF THE MINUTES OF THE PREVIOUS JCAR MEETING

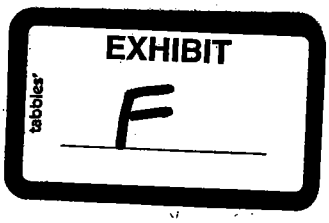
Representative Hassert moved, seconded by Representative Lang, to approve the minutes of the October 10, 2007 meeting. The motion passed unanimously.

REVIEW OF AGENCY RULEMAKINGS

Department of Agriculture – Halal Food Disclosure (8 Ill. Adm. Code 190; 31 Ill. Reg. 2053)

Senator Rutherford, seconded by Representative Miller, moved that JCAR recommend that the Department initiate rulemaking to implement Public Acts in a more timely manner. This rulemaking was proposed in February 2007, more than 5 years after the effective date of the Public Act requiring the rules (PA 92-394). The motion passed unanimously.

State Board of Elections – Miscellaneous (26 Ill. Adm. Code 207; 31 Ill. Reg. 12576)



Senator Hultgren, seconded by Representative Fritchey, moved that JCAR and the State Board agree to extend the rulemaking for an additional 45 days so that the Board can more fully respond to questions from JCAR. The motion passed unanimously.

Department of Human Services – Food Stamps (89 Ill. Adm. Code 121; 31 Ill. Reg. 14372) (Peremptory)

Senator Silverstein, seconded by Senator Burzynski, moved that JCAR object to the Department removing dates of incorporations by reference from Section 121.63(f)(2), (f)(5) and (h) of its rule. Removing the dates from incorporations by reference of USDA regulations contravenes Section 5-75 of the Illinois Administrative Procedure Act. The motion passed unanimously.

Senator Crotty asked if any member desired to discuss any emergency, peremptory or exempt rulemaking. Senator Rutherford responded that he wanted to address an emergency rule of the Department of Healthcare and Family Services.

Department of Healthcare and Family Services – Medical Assistance Programs (89 Ill. Adm. Code 120; effective 11/7/07)

The Department was represented by Tamara Hoffman, Chief of Staff; Jacqui Ellinger, Deputy Administrator, Medical; and Krista Donahue, Deputy Director.

Senator Rutherford, seconded by Representative Lang, moved that JCAR object to and suspend the emergency rule because, contrary to Section 5-45 of the Illinois Administrative Procedure Act (IAPA), no emergency situation existed that warranted adoption of this entire emergency rule. The agency is maintaining that the loss of the federal SCHIP waiver warrants the adoption of an emergency rule to continue coverage of adults served under that waiver. However, this emergency rule is not limited to that issue. It contains other provisions that this Committee does not recognize as an emergency situation. JCAR recommends that the Department adopt a rule that addresses the loss of the SCHIP waiver. The Committee finds that inclusion of policy within this emergency rule that does not address a valid emergency is not in the public interest.

Senator Rutherford explained that, because emergencies are before JCAR during their entire life, the Committee has decided to address this emergency rule at the November meeting. The Senator maintained that the emergency rule adopted by the Department was much broader in scope than the emergency situation warranted. The Committee recommends that the Department come back with a rule that is narrower in scope, dealing specifically with the current situation affecting SCHIP recipients.

Ms Hoffman stated that the Department has determined that the underlying situation is reasonably consistent with the IAPA's threat to public interest, safety or welfare criteria for use of emergency rulemaking. Healthcare is important. Federal matching funds are at risk, and beyond that, HFS had hoped that the federal government would act not only with respect to SCHIP, but with regard to the horrible emergency situation regarding healthcare in this country.

The federal government did not act. This is a crisis, and Illinois cannot fail to act in this critical emergency situation.

Senator Hultgren asked if HFS has filed a State Plan Amendment that would enable it to receive federal match on the current FamilyCare population.

Ms Hoffman responded that HFS is going to file a new State Plan Amendment, but has not yet done so.

Ms Ellinger clarified that the deadline under federal law for filing such an Amendment is not until the end of the quarter. If the Amendment is approved, the federal funding will retroactively cover all persons served under the Amendment during that quarter.

Senator Hultgren asked why the Amendment had not yet been filed if the Department views this as an emergency situation.

Ms Ellinger stated that HFS has been watching federal action very closely. It does not know how SCHIP is going to be addressed on that level. Now that SCHIP has failed in Congress, HFS is proceeding to preserve any Medicaid money it can get.

Senator Burzynski asked how HFS dealt with SCHIP in this year's appropriations, particularly with respect to the relationship between SCHIP funding and Medicaid funding.

Ms Ellinger stated that the federal waiver under which healthcare services were available for caretaker relatives of children served by SCHIP sunset September 30. At that point, there was hope that Congress would reauthorize SCHIP. Since it has not, HFS believes it has to act now to not put these families at risk.

Representative Fritchey asked if the families at risk are the 15,000 to 20,000 families affected by the Congressional failure to reauthorize SCHIP.

Ms Hoffman responded that they were talking about those families, but also all the families that would be affected by this rule.

Representative Fritchey countered that Ms Ellinger was talking about the families affected by the failure to reauthorize SCHIP.

Ms Ellinger agreed that these are the persons who had received services until September 30.

Representative Fritchey agreed that there is an understanding that these families have been put at risk by the federal failure to act. But he asked how HFS got from addressing those 15,000 to 20,000 individuals to proposing a general expansion of FamilyCare to encompass an additional 147,000 persons.

Ms Hoffman interjected that since this emergency rule was adopted, the Department has already enrolled over 500 into FamilyCare under the expanded eligibility guidelines.

Representative Fritchey stated that the Department undertook this enrollment knowing that the emergency rule was still subject to review by the General Assembly. He again asked how HFS got from 15,000 to 20,000 persons left behind by SCHIP to 147,000 new persons covered under a FamilyCare expansion.

Ms Ellinger responded that over the past year there has been repeated recognition that families with incomes up to 400% of the Federal Poverty Level (FPL) have a difficult time financing healthcare.

Representative Fritchey asked what had happened in DC that triggered an emergency situation not just for the 15,000 to 20,000 people, but also for the 147,000 people.

Ms Hoffman replied that federal inaction was not the only trigger. She believed that the path DC was taking made it more critical for HFS to address this ongoing emergency.

Representative Fritchey asked if the "ongoing emergency" existed prior to Washington's actions.

Ms Hoffman stated that it became clear at that point that Washington was not going to act in a way that would have in any way embraced that part of Illinois' Medicaid program that HFS thinks is very important.

Representative Fritchey asked if the federal government action in any way affected the 15,000 to 20,000 Illinoisans.

Ms Hoffman stated that the way the federal government decided to react affected other populations as well because it excluded them.

[Inaudible comments by Ms Donahue.]

Representative Fritchey stated that the emergency rule was filed November 7, and asked if these persons were at risk October 7, July 7, May 7.

[Inaudible response by Ms Donahue. Generally, these comments explained the recent federal actions.]

Representative Fritchey asked what in the federal action taken since the appropriations process of the past spring and summer prompted HFS to expand FamilyCare eligibility to those with 400% FPL.

Ms Hoffman stated that the Congressional action made it clear that those persons who need healthcare were not going to be part of any agreement.

Representative Fritchey asked if HFS knows what Congress is going to do between now and November 16.

Ms Donahue respond that there is a package being considered. A veto override is needed. As recently as the morning of November 13, it appeared there might be a deal.

Ms Hoffman stated that the Illinois populations are already excluded in that iteration.

Representative Fritchey stated that the short answer is no, we do not know what Washington is going to do.

Ms Hoffman stated that the population HFS is hoping to cover is not part of that proposal.

Representative Fritchey asked if HFS believes it can expand FamilyCare by emergency rule.

Ms Hoffman responded in the affirmative.

Representative Fritchey asked Ms Hoffman if she believes she is well-versed in the operations of JCAR.

Ms Hoffman responded in the affirmative.

Representative Fritchey asked if Ms Hoffman believes JCAR has the authority to rule on this emergency rule.

Ms Hoffman stated her belief that JCAR has the authority to consider it.

Representative Fritchey asked if Ms Hoffman believes JCAR has the authority to suspend the emergency rule.

Ms Hoffman stated that she would rather not make a legal determination, but added her belief that it would be inappropriate for JCAR to suspend the rule. A suspension would not be in compliance with the law because HFS has met its burden.

Representative Lang asked for affirmation that the 147,000 were not receiving access to healthcare within the past 3 months.

Ms Ellinger stated that the emergency rule requires the person to be uninsured for a period of time in order to qualify or meet one of the exceptions in the rule.

Representative Lang stated that some of these persons have been without healthcare coverage for years and years.

Ms Ellinger responded that she had not done a statistical analysis.

Representative Lang asked, presuming the answer is yes, why the Administration didn't pursue a legislative expansion of FamilyCare.

Ms Hoffman said there might have been legislation that did touch on this subjection, but this is not something she has looked into or that HFS considered in deciding that this is an emergency.

Representative Lang stated his belief that JCAR needs to get some better answers. He added that the consensus of JCAR might be to deem the portion of the rule dealing with SCHIP an emergency. After the JCAR meeting, HFS could introduce a rule dealing solely with SCHIP and it's likely such a move would meet little opposition. He asked what triggered the filing of the November 7 emergency rule.

Ms Hoffman cited HFS' realization that the population about which it was concerned was not going to be part of a package adopted in Washington. Until that time, it had hoped it would be included.

Representative Lang stated that, if the 147,000 were affected by a real emergency, Illinois wouldn't even wait for the federal government, but would act itself. If this were an emergency on November 7, it was also an emergency on January 7, last year and the day the Governor took office. He asked what made this more of an emergency on November 7.

Ms Hoffman repeated her earlier statements, and pointed out that HFS didn't act earlier because it was trying to stay involved in the discussions on the federal level.

Representative Lang asked why the State Plan Amendment wasn't filed earlier.

Ms Ellinger stated that HFS is trying to keep its options open to take best advantage of any avenues federal action allowed.

Representative Lang asked if waiting to the end of the quarter supports HFS' contention that this is an emergency.

Ms Hoffman responded that it was not only the federal action that made this an emergency. It has been an emergency for a long time. HFS had to make a determination concerning Illinois' other efforts to increase federal match or save federal match or whatever. One of the other things going on is that the federal government has been trying to push Illinois in a certain direction, and HFS didn't want to be the poster child for the United States while there were discussions still going on that could have put Illinois at risk of losing funding. That was not the only issue.

Representative Lang asked if it is true that Illinois is losing about $250 million in federal match when it moves recipients from SCHIP to medical assistance.

Ms Ellinger affirmed that under Medicaid the match is 50%; under SCHIP it is 65%.

Representative Lang asked if this is something into which the General Assembly should have some input.

Ms Hoffman responded that the General Assembly has already given HFS the authority to make this decision.

Ms Ellinger added that the Public Aid Code gives HFS the authority to set eligibility levels.

Representative Lang asked, if this is such an emergency, why no one from the Administration bothered to call and explain to him and other members of JCAR why this is an emergency.

Ms Hoffman explained that, from her own perspective, she did not call members or respond to questions from JCAR Staff because she did not have those answers. She was trying to get accurate information together. Her office's computers were down on Friday. She pointed out that she was in attendance at this meeting to answer questions.

Representative Lang stated that he still doesn't have an answer to why he wasn't called and suggested that someone in the Administration might want to put JCAR members' numbers into his or her cell phone. The fact that HFS comes here pleading an emergency when its own actions weren't reflective of this being an emergency causes problems. He asked how HFS would respond to the Committee's proposed Recommendation that HFS address the issue of coverage of persons left behind by SCHIP in a separate rulemaking.

Ms Hoffman replied that, at this point in time, this is not something HFS is considering.

Representative Lang asked if that means the emergency relative to the SCHIP recipients is not so important.

Ms Hoffman stated that HFS believes it is all an emergency.

Representative Lang responded that he would ask the question again until he got an answer. Would you be interested in filing a separate rule just for SCHIP?

Ms Hoffman answered no, not at this time.

Representative Lang asked how HFS could then deem the SCHIP situation an emergency.

Ms Hoffman reiterated that the entire population is the emergency.

Representative Miller noted that he was just looking at the Webster's definition of an emergency – a serious situation or occurrence that happens unexpectedly and demands immediate action. Of the 147,000 being added to FamilyCare rolls, how many do you think will be seen by a practitioner per year?

Ms Ellinger responded that she did not have that number or proportion at this time.

Representative Miller asked who is going to treat these people and how is Illinois going to pay for this.

Ms Hoffman answered that care will be delivered by the providers who have enrolled with the program. HFS believes it has the money to pay for this program.

Representative Miller responded that Illinois has an access to treatment problem with its already strained system. Again, how are we going to pay for this?

Ms Hoffman replied that HFS will pay these claims in the same way it pays for other claims.

Representative Miller asked if there is any dedicated appropriation for an expansion of FamilyCare. If not, and if you just delay payments to providers, providers are likely to not want to continue to participate.

Ms Hoffman replied that she understood that position. HFS believes it can pay for this program.

Representative Miller asked Ms Hoffman to offer specifics. This is pure mathematics. If you add a significant population to a pool with no additional funding and no additional providers, you're stressing a system that's already stressed. As a practitioner, I am very well aware of the strain on the healthcare delivery system. This needs to be talked through a little bit.

Ms Hoffman stated that the Department has done a very good job of shoring up relationships with providers and paying attention to the payment cycle. State funding is all about priorities, and providing healthcare coverage for low and middle income families is a priority for the people of this State and in HFS' budget.

Representative Miller stated that there is no JCAR member who doesn't think healthcare is important. However, any responsible legislator would ask who is going to care for this expanded population and how is the State going to pay for it. HFS is creating more of an emergency down the road. Has this been thought through?

Ms Hoffman answered yes.

Representative Miller asked how HFS selected the 400% FPL cap.

Ms Donahue responded that this was recommended by the Adequate Healthcare Task Force report.

Representative Miller asked for the estimated cost of the FamilyCare expansion.

Ms Hoffman responded that, for FY08, the cost is approximately $43 million, depending on who signs up. HFS already has over 500 enrollees under the emergency rule. HFS doubts it will be $367 million in the out years, but it will be talking about that when it talks about its FY09 budget and afterwards.

Representative Miller asked if HFS has identified the $43 million?

Ms Hoffman answered that she believed it had.

Representative Miller asked where.

Ms Hoffman stated that HFS believes it can cover the $43 million.

Representative Miller replied that this is part of the frustration. These are legitimate budgetary questions to which JCAR is not receiving any clear answers at this time.

Representative Mulligan asked Ms Hoffman if she had said that, between last Wednesday and the beginning of this week, HFS signed up 500 enrollees.

Ms Ellinger answered yes.

Representative Mulligan asked up to what FPL.

Ms Ellinger said 400% under the emergency rule.

Representative Mulligan asked, if the emergency rule is suspended, what HFS will do with those enrollees.

Ms Hoffman responded that it would be horrible to have to think about that.

Representative Mulligan stated JCAR was thinking about it. Normally when an issue affecting HFS is before JCAR, doesn't the agency call me?

Ms Hoffman replied that she is always available.

Representative Mulligan stated that human services is one of the areas in which she is most involved. HFS was hoping to extend the SCHIP waiver that provided Illinois with a 65% federal match, so it would not have been to the State's benefit to file a State Plan Amendment while it still had hopes for that 65% match. Is that not correct?

Ms Hoffman confirmed that was part of the consideration.

Representative Mulligan added that the point at which HFS finds the 65% will not be forthcoming is when there is no extension of SCHIP or when a compromise plan excludes adult coverage. Her guess is that it may be a year before Illinois finds out whether it can cover adults under SCHIP. Is that accurate?

Ms Hoffman stated that the State should not wait for the federal government to act. This emergency rule is the appropriate action to take.

Representative Mulligan replied that she had not disagreed. As much as she often disagrees with the Administration, in this case she thinks HFS should have waited as long as it could in attempting to preserve the 65% match. Whether Illinois expands FamilyCare is the next question. In most Medicaid issues, it's advisable to get people grandfathered. Do you anticipate that?

Ms Hoffman responded not necessarily. HFS believes it has the authority, that there is an emergency. Ms Hoffman believed Representative Mulligan was asking about the best action for the State of Illinois. HFS believes the best action is to not suspend or object to this rule. With regard to filing the State Plan Amendment, there are lots of instances in which HFS adopted emergency rules and then subsequently adopted the Amendment.

Representative Mulligan stated that Ms Hoffman was missing what she was asking. For the past couple of years ago, the budget enacted by the GA has given the Department authority to use emergency rulemaking to reflect in rule the negotiations with the federal government over the State Plan Amendments. That authority has not been rescinded. Is that what you are doing now with respect to SCHIP?

Ms Hoffman answered that it was part of the factor. HFS believes an emergency exists, and that's why it is going forward, but it would be happy to explain what is happening with SCHIP to Representative Mulligan.

Representative Mulligan replied that Ms Hoffman did not need to explain the whole SCHIP program to her. What she is saying is, HFS has determined that adults are not likely to be covered under SCHIP and will have to move to Medicaid. Then the next step is to expand FamilyCare up to 400% FPL, but HFS won't know what's going to ultimately happen to SCHIP until after the next presidential election. At this point, it can only guess.

Ms Hoffman assented.

Representative Mulligan asked if the HFS plan is to not go forward on State Plan Amendments until it finds out what's happening with SCHIP.

Ms Hoffman agreed that is one of the factors.

Representative Mulligan asked if any other state had gone to 400% FPL, and, if so, under Medicaid or something else.

Ms Hoffman answered that she didn't know.

Representative Mulligan asked if Congress wants to get adults out of SCHIP so it can cover more children.

Ms Hoffman affirmed that's how it's looking.

Representative Mulligan asked if Illionis moves SCHIP adults under Medicaid and raises the FamilyCare cap to 400%, will PCCM (primary care case management) be followed.

Ms Hoffman responded that she would have to get an answer to that.

Representative Mulligan asked whether the federal government tried to force HFS to move the SCHIP adults to Medicaid. What did Ms Hoffman mean when she said the federal government was trying to make Illinois an example?

Ms Hoffman replied that they didn't try to force HFS, but they did suggest that would be the way to go.

Representative Mulligan noted that would save them 15% in federal match. So HFS filed an emergency rule to at least cover the SCHIP group because it was afraid they won't be covered?

Ms Hoffman reiterated that HFS believes there's an emergency for the entire group.

Representative Mulligan stated that JCAR's goal here is to determine what is appropriately included in the emergency rule. If SCHIP falls, Illinois needs to be careful who it grandfathers. Her approach would have been to protect them but to go more slowly than HFS has. If the emergency rule stays in place, HFS files the State Plan Amendment, and the federal government decides to continue SCHIP coverage for adults, can HFS go back?

Ms Hoffman answered that HFS always looks at ways to maximize federal match.

Representative Mulligan asked, therefore, what prompted adoption of this emergency rule.

Ms Hoffman answered that an emergency situation exists, HFS has the authority, and HFS can pay for it.

Representative Mulligan asked if the cost is $43 million for this fiscal year?

Ms Hoffman answered yes, but noted that cost will be based on actual enrollment.

Representative Mulligan asked how HFS plans to get the federal government to agree to 400% FPL. Doesn't it have to get Medicaid approval?

Ms Hoffman replied that HFS will file a State Plan Amendment.

Representative Mulligan asked if HFS has had any indications that CMMS will approve such an Amendment.

Ms Hoffman did not know.

Ms Ellinger stated that, at one time, HFS had a letter in which it considered moving the SCHIP adults to Medicaid.

Representative Mulligan asked whether, under the State of Maine's plan, enrollees pay a portion of costs.

Ms Ellinger answered that she did not know the details of Maine's plan.

Ms Hoffman offered to take a look at that.

Senator Silverstein asked if HFS also filed a proposed permanent rule?

Ms Hoffman answered yes.

Senator Silverstein asked, if the emergency rule is suspended, what HFS planned for the proposed rule. Would it still pursue the proposed rule?

Ms Hoffman answered yes.

Senator Silverstein noted that this issue would still be alive.

Representative Leitch observed that, in his community, there are providers who are owed over $1 million in medical assistance payments. The Comptroller announced the other day that there is over a $1 billion backlog at this time. What is HFS' projection for end-of-year backlog?

Ms Hoffman responded that she didn't have that information with her, but could get it for Representative Leitch.

Representative Leitch asked if the backlog will be as bad as last year or worse.

Ms Hoffman apologized and stated she really couldn't speak to that.

Representative Leitch asked if that would be an important concern in determining whether Illinois has sufficient funds for the expansion created by this emergency rule. How can HFS say Illinois can pay for it when it has at least a $1 billion backlog now and HFS can't tell us the projection for the rest of the year?

Ms Hoffman answered that she could get those numbers. Clearly she wasn't the only one involved in this decision. HFS finance people were consulted.

Representative Leitch asked Ms Hoffman to please share that information with the rest of the Committee. The State's ability to pay bills has an enormous impact on the willingness of providers to work with Medicaid to provide quality care. He also cannot understand why HFS wouldn't file tonight a separate rulemaking extending Medicaid coverage to those at risk of losing SCHIP coverage.

Ms Hoffman replied that HFS is always available to speak to providers.

Representative Fritchey pointed out that the enrollees would not lose coverage if this rule were suspended because, under the rule, coverage would not begin until next month.

The motion to object to and suspend the emergency rule passed on a rollcall vote of 9-2-0 (Hassert and Mulligan – No).

CERTIFICATION OF NO OBJECTION

Senator Hultgren moved, seconded by Representative Leitch, that the Committee inform the agencies to whose rulemakings the Committee did not vote an Objection, or did not remove from the No Objection List, that the Committee considered their respective rulemakings at the monthly meeting and, based on the Agreements for modification of the rulemakings made by the agencies, no Objections will be issued. The motion passed unanimously.

AGENCY RESPONSES

Department of Central Management Services – Pay Plan (80 Ill. Adm. Code 310; 31 Ill. Reg. 12608) (Emergency)

Department of Children and Family Services – Licensing Enforcement (89 Ill. Adm. Code 383; 31 Ill. Reg. 4511)

Based on the appropriateness of the agencies' responses, no further action was taken.

DECEMBER MEETING DATE

Co-Chair Crotty announced that the next meeting was scheduled for Tuesday, December 11, 2007, 10:30 a.m., Room 16-503, James R. Thompson Center, Chicago IL.

ADJOURNMENT

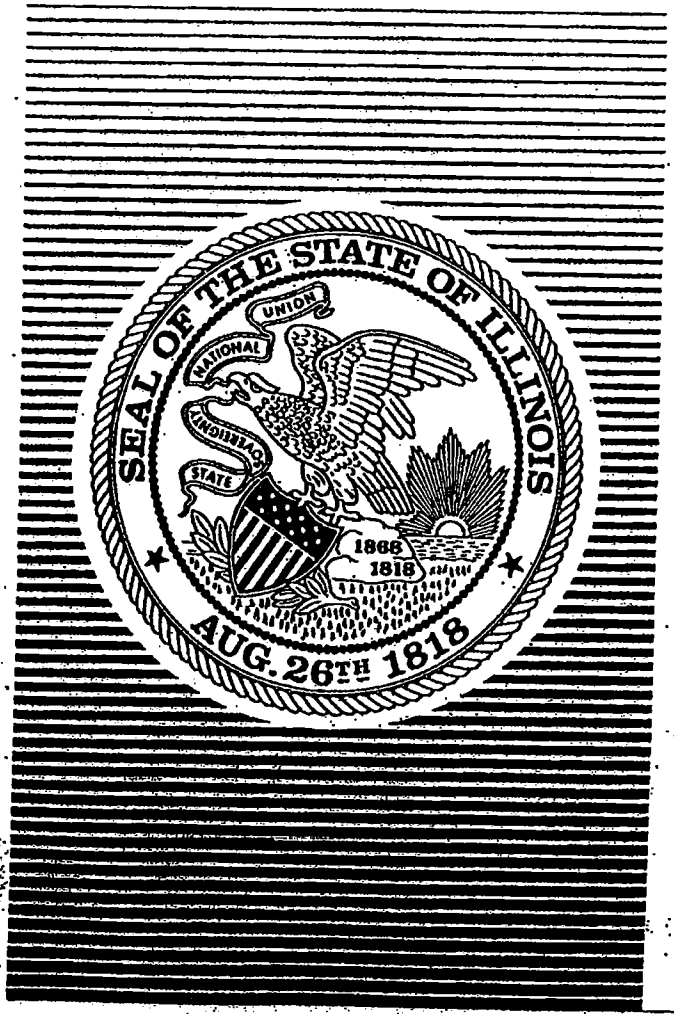
Representative Leitch moved, seconded by Senator Hultgren, to adjourn the meeting. The motion passed unanimously.

Min:0711Nov

EXHIBIT 3

2008 ILLINOIS REGISTER

RULES OF GOVERNMENTAL AGENCIES



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Index Department
Administrative Code Div.
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PUBLISHED BY JESSE WHITE • SECRETARY OF STATE

JOINT COMMITTEE ON ADMINISTRATIVE RULES
ILLINOIS GENERAL ASSEMBLY

STATEMENT OF OBJECTION TO AND FILING PROHIBITION OF PROPOSED RULEMAKING

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

Heading of the Part: Medical Assistance Programs

Code Citation: 89 Ill. Adm. Code 120

Section Numbers: 120.32
120.33

Date Originally Published in the Illinois Register: 11/26/07
31 Ill. Reg. 15424

At its meeting on February 26, 2008, the Joint Committee on Administrative Rules voted to object to the above proposed rulemaking and prohibit its filing with the Secretary of State. The Committee found that the adoption of this rulemaking would constitute a serious threat to the public interest. The reason for the Objection and Prohibition is as follows:

> JCAR objected to and prohibited filing of the Department of Healthcare and Family Services' rulemaking titled Medical Assistance Programs (89 Ill. Adm. Code 120; 31 Ill. Reg. 15424) to the extent that it expands medical assistance to persons other than those formerly receiving medical coverage under a federal SCHIP waiver for caretaker relatives of children covered by SCHIP. The budgetary impact on the State is likely to be significant. An expansion of this magnitude should not be initiated without a specific legislative determination that adequate financial resources are, and will continue to be, available. The General Assembly did not include expanded FamilyCare during its formation of the FY08 budget. Further the General Assembly did not pass specific statutory authority for such expansion. To enter into this expansion without the assurance of available funding and specific statutory authority is not in the public interest.

The proposed rulemaking may not be filed with the Secretary of State or enforced by the Department of Healthcare and Family Services for any reason following receipt of this certification and statement by the Secretary of State for as long as the Filing Prohibition remains in effect.

JOINT COMMITTEE ON ADMINISTRATIVE RULES
ILLINOIS GENERAL ASSEMBLY

SECOND NOTICES RECEIVED

The following second notices were received by the Joint Committee on Administrative Rules during the period of February 26, 2008 through March 3, 2008 and have been scheduled for review by the Committee at its March 11, 2008 of April 15, 2008 meetings. Other items not contained in this published list may also be considered. Members of the public wishing to express their views with respect to a rulemaking should submit written comments to the Committee at the following address: Joint Committee on Administrative Rules, 700 Stratton Bldg., Springfield IL 62706.

Second Notice Expires	Agency and Rule	Start Of First Notice	JCAR Meeting
4/9/08	Department of Natural Resources, Americans With Disabilities Act Grievance Procedure (4 Ill. Adm. Code 1000)	1/4/08 32 Ill. Reg. 20	3/11/08
4/9/08	Department of Financial and Professional Regulation, Real Estate License Act of 2000 (68 Ill. Adm. Code 1450)	1/4/08 32 Ill. Reg. 3	3/11/08
4/10/08	Department of Financial and Professional Regulation, Illinois Health Insurance Portability and Accountability Standards (50 Ill. Adm. Code 2025)	11/26/07 31 Ill. Reg. 15417	3/11/08
4/11/08	Health Facilities Planning Board, Narrative and Planning Policies (77 Ill. Adm. Code 1100)	12/14/07 31 Ill. Reg. 16387	3/11/08
4/13/08	State Board of Education, Secular Textbook Loan (23 Ill. Adm. Code 350)	11/30/07 31 Ill. Reg. 15981	3/11/08
4/13/08	State Board of Education, Dismissal of Tenured Teachers Under Article 24 and Dismissal of Tenured Teachers and Principals Under Article 34 of the School Code (23 Ill. Adm. Code 51)	11/30/07 31 Ill. Reg. 15969	3/11/08

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109 of the Code of Civil Procedure, the undersigned certifies that he/she caused the foregoing Notice of Filing of and Additional Exhibit #147 Admissible By Stipulation to be served on the following on March 25, 2008 by delivering true and correct copies thereof (in the manner indicated) to:

Counsel for the Honorable Governor Rod Blagojevich, Honorable Barry S. Maram and Honorable Damon Arnold; the Illinois Department of Public Health and the Illinois Department of Healthcare and Family Service:

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Floyd D. Perkins

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

Richard P. Caro, a State of Illinois Taxpayer on Behalf of and for the Benefit of the State of Illinois, and Ronald Gidwitz and Gregory Baise,	)	
Plaintiff and Plaintiff-Intervenors,	)	**No. 07 CH 034353**
v.	)	**Honorable James E. Epstein Circuit Judge Courtroom 2405**
Hon. Rod Blagojevich, *et. al*,	)	
Defendants.	)	

NOTICE OF FILING

To: See attached Certificate of Service

PLEASE TAKE NOTICE that, pursuant to the Order of the Court dated March 11, 2008, the attached Additional Exhibit #147 Admissible By Stipulation JCAR's February 26, 2008 objection to and prohibition regarding the filing of DHFS' proposed rule on FamilyCare published in the March 14, 2008 *Illinois Register*, Volume 32, Issue 11, at page 4110, was filed with the Clerk of the Circuit Court of Cook County, Illinois in the above-referenced case this 25th day of March, 2008, a copy of which is attached and hereby served upon you.

February 29, 2008

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EXHIBIT 4

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

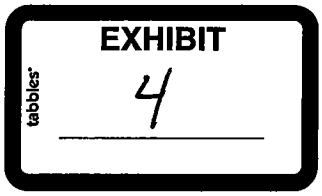
RICHARD P. CARO, *et. al.*,	)	
	)	
Plaintiffs and Plaintiff-Intervenors,	)	
	)	
v.	)	No. 07 CH 34353
	)	
HONORABLE ROD BLAGOJEVICH, *et. al.*,	)	Judge James R. Epstein
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the court on Plaintiff Richard P. Caro ("Caro") and Plaintiff-intervenors' Ronald Gidwitz and Gregory Baise ("Plaintiff-intervenors") motion for preliminary injunction. This lawsuit challenges two health care programs initiated by the executive branch of the State of Illinois. Caro and the Plaintiff-intervenors seek to enjoin the FamilyCare Program and Caro alone seeks to enjoin the Illinois Breast and Cervical Cancer Screening Program.

At the outset it is important to note that the issues to be decided deal only with the legality of the implementation of these programs. The wisdom of seeking increased health care benefits for the citizens of this state is not an issue for this or any court to decide. Under our system of government those policy decisions lie within the ambit of the legislative and executive branches. This court is charged solely with deciding whether the methods used by the executive branch in initiating these programs comport with the requirements of the law.

For the reasons set out fully below the court declines to enjoin the Breast and Cervical Cancer Screening Program and grants the preliminary injunction involving the FamilyCare Program based on the failure to abide by the eligibility criteria required by law.



I. FACTUAL BACKGROUND

The parties jointly submitted a pleading in which they stipulate to the salient facts involved in this litigation.

A. Breast and Cervical Cancer Screening Program

Before the action challenged in this lawsuit the State of Illinois maintained a screening program for breast and cervical cancer ("BCC Program"). That program was funded in large part by federal grants from the Center for Disease Control ("CDC") under the Breast and Cervical Cancer Mortality Act of 1990 ("Screening Act").[1] The Screening Act provides discretion to set eligibility standards for participation in the program to the states but requires that states give low-income women priority in the provision of federally funded screening. 42 U.S.C. 300n(a). The CDC limits use of its federal grant money to people with incomes below 250% of the Federal Poverty Level ("FPL"). States are free to include recipients with higher income, but must use other money for those recipients. The State of Illinois also has available to it two other income sources for the BCC Program: a $5.9 million appropriation from the general revenue fund to the Department of Public Health ("DPH") and a $4 million grant from the Department of Health and Family Services ("DHFS") to DPH through an inter-department agreement.

On May 14, 2006 DPH expanded the BCC Program by increasing income eligibility from 200% of the FPL to 250% of the FPL, pursuant to the powers conferred on it by the Department of Public Health Powers and Duties Law ("Public Health Law"). 20 ILCS 2310/2310-1 et seq. Effective October 1, 2007 DPH again expanded the BCC Program to cover all uninsured women 65 years of age or younger regardless of income. No CDC money will be used to pay for

[1] Although it was discussed in the briefs, the Breast and Cervical Cancer Prevention and Treatment Act of 2000 is not at issue in this case.

screening for recipients with incomes above 250% of the FPL. It is this latest expansion of the BCC program that Caro seeks to enjoin.

B. FamilyCare Program

In 1997, the federal government enacted the State Children's Heath Insurance Program ("SCHIP") to help children whose families could not afford private health insurance but do not qualify for Medicaid. Illinois participated in SCHIP by enacting the Children's Health Insurance Program Act, 215 ILCS 106 ("CHIPA"). Prior to the fall of 2007, the State provided taxpayer-funded medical assistance under Medicaid, Article V of the Public Aid Code, 305 ILCS 5/5-1 and under CHIPA. Medicaid covered persons with annual incomes below 133% of the FPL and CHIPA covered children and their parents/caretakers with annual incomes between 133% and 185% of the FPL. The State received a 50% federal match in funds for Medicaid and a 65% match for CHIPA.

In the fall of 2007, the scope of SCHIP became uncertain as Congress and President Bush disagreed on the breadth of funding, and, thus, the breadth of coverage under state waivers. Unsure of SCHIP's future, on November 7, 2007 DHFS promulgated the emergency rule ("Emergency Rule") giving rise to this case. The Emergency Rule purports to expand Medicaid eligibility for persons earning up to 400% of the FPL.

DHFS determined that an emergency existed warranting the promulgation of the Emergency Rule and submitted the Emergency Rule to the Joint Committee on Administrative Rules ("JCAR") pursuant to Section 5-45 of the Illinois Administrative Procedure Act ("APA"). 5 ILCS 100/5-45. In accordance with emergency rulemaking procedures, DHFS filed a statement with JCAR containing its reasons for finding that an emergency existed. JCAR objected to and suspended the emergency rule finding that "no emergency situation existed that

warranted adoption of the entire emergency rule." Joint Exhibit 3. Although JCAR had suspended the Emergency Rule, DHFS implemented the new FamilyCare Program by enrolling adult parents and caretakers with incomes between 133% and 400% of the FPL into Medicaid. This lawsuit followed.

II. ANALYSIS

In order to grant a motion for preliminary injunction, a court must find that there is an ascertainable right in need of protection, irreparable harm with no adequate legal remedy and a likelihood of success on the merits of the claim. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006).

A. Breast and Cervical Cancer Screening Program

Caro seeks to enjoin the expansion of cancer screening to all uninsured women age 65 or younger claiming that DPH was required to issue a rule under the APA before instituting the expansion of the BCC program, and that it failed to do so. As an alternative theory Caro argues that if DPH was not required to issue a rule prior to expansion of the program, the authority to act without a rule would be an unconstitutional delegation of legislative power. Neither theory has merit.

As purported authority for the requirement of issuance of a rule for this expansion Caro cites the APA. It seems that Caro contends that simply because the APA details the manner in which rules must be promulgated, that the statute also bars expansion of an existing program without issuance of a rule. The APA contains no such requirement.

Defendants Damon Arnold and DPH point to the Public Health Law as authority for their right to fund expansion of the BCC Program. They cite the statutory authority of DPH to approve expenditures of state and federal funds for the development of health programs and services

(Public Health Law Section 2310-25) and the authority to enter into contracts for the purchase of health services (Public Health Law Section 2310-30). Defendants also point out that the state legislature specifically appropriated $6 million for breast and cervical cancer screening without imposing any limitation on the income of recipients.

Under these circumstances it cannot be said that DPH's actions are anything other than an expansion of an existing program within the norms established by the state and national legislatures. To hold that acts of this nature by DPH required issuance of a rule would raise the question of whether any act by a department involving expenditure of funds or formation of a contract could be undertaken without first engaging in the rule making process. By no stretch of the imagination is a department required to engage in rule-making simply to expend monies for a purpose for which it was appropriated by the legislature.

As an alternative claim, Caro argues that should the APA allow funding of this screening without rule-making, that the authority to so act would be an unconstitutional delegation of legislative power. He cites no authority for this claim, and this court can find none. Where the legislature has appropriated funds for cancer screening and the executive branch seeks to do nothing more than to spend that money for the stated purpose of the appropriation no reasonable claim of unconstitutional delegation of power can stand.

For the foregoing reasons Caro has failed to demonstrate that he has a reasonable likelihood of success on the merits of his challenges to the BCC Program and, therefore, his motion for a preliminary injunction is denied.

B. FamilyCare Program

Both Caro and Plaintiff-intervenors Gidwitz and Baise challenge the FamilyCare Program on a number of grounds. They seek an injunction claiming: 1. an absence of authority to

collect premiums under Medicaid; 2. lack of constitutional authority to raise revenue; 3. an absence of authority to cover recipients with income from 133% to 400% of the FPL under Medicaid; 4. the lack of an appropriation for the program; and 5. the rejection of the administrative rule by JCAR. The court's view of the absence of authority to cover recipients with income from 133% to 400% of the FPL without regard to the Medicaid requirements renders consideration of the other claims unnecessary.

The statutory authority DHFS relies on for the expansion of the FamilyCare Program is 305 ILCS 5/5-2(2)(b), which permits the provision of medical assistance for all persons who would be determined eligible for basic maintenance under Article IV of the Public Aid Code, Temporary Assistance for Needy Families ("TANF"), by disregarding the maximum earned income permitted by federal law. TANF lists the eligibility criteria in 305 ILCS 5/4-1. The rules and regulations for implementing the FamilyCare Program are found in the Illinois Administrative Code ("Code") at 89 Ill. Admin. Code 120. The Executive Branch Defendants argue that all of the requirements necessary under 4-1, are provided for under the FamilyCare Program requirements.

The court agrees that many of the TANF requirements are met by the FamilyCare Program. However, not all requirements are met. One mandatory condition under TANF requires that the adult be employed or engaged in a job search. 305 ILCS 5/4-1.8-1.10. The defendants assert that this mandate does not apply to medical programs such as FamilyCare under 89 Ill. Admin. Code 112.79(f) ("Sanctions Provision"). The Sanctions Provision details the sanctions imposed for failing to comply with various TANF requirements. It states:

> f) A sanction under this Section shall not affect receipt of Medical Assistance. Likewise, a sanction for child support enforcement or the school attendance initiative does not affect any instances of non-cooperation under this Section.

Contrary to the defendants' argument, the Sanctions Provision presupposes the continued existence of the eligibility requirement. If the intent was to remove the eligibility requirement, there would be no need for the Sanctions Provision. The regulation only addresses what penalty may be visited on a non-compliant recipient, it does not remove the requirement itself. TANF still requires that adults be employed or engaged in a job search. The FamilyCare Program contains no such requirement and therefore fails to limit itself to recipients eligible under TANF. DHFS' authority does not include waiving the TANF requirements enacted by the state legislature. Therefore, DHFS did not have the authority to move the FamilyCare Program into Medicaid in the manner contemplated by the Emergency Rule. Whether the Emergency Rule was, in any other respects, properly or improperly submitted will not be reached by this court.

C. Preliminary Injunction Findings

There is a clearly ascertainable right in need of protection asserted in Plaintiffs claim, namely the unauthorized expansion of Medicaid improperly using tax dollars. The harm alleged is irreparable and inadequate at law because it would be impracticable for the State to recoup the costs expended for the benefit of the FamilyCare Program. There exists a likelihood of success on the merits of Plaintiffs' claims with respect to the FamilyCare Program for the reasons explained above.

III. ORDER

Plaintiff Caro's motion for preliminary injunction regarding the Breast and Cervical Cancer Screening Program is denied. Plaintiffs' motion for preliminary injunction regarding the FamilyCare Program is granted.. The Department of Health and Family Services and Director Barry S. Maram are preliminarily enjoined from enforcing the Emergency Rule or expending any public funds related to the FamilyCare Program created by the Emergency Rule. Comptroller Daniel W. Hynes is preliminarily enjoined from authorizing payments related to the Emergency Rule. This preliminary injunction will be in full force and effect until a trial on the merits unless sooner modified or dissolved.

ENTERED
JUDGE JAMES R. EPSTEIN-1783
APR 15 2008
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Dated:_____ Entered:_____
Judge James R. Epstein, 1783

EXHIBIT 5

2008

ILLINOIS REGISTER

RULES OF GOVERNMENTAL AGENCIES

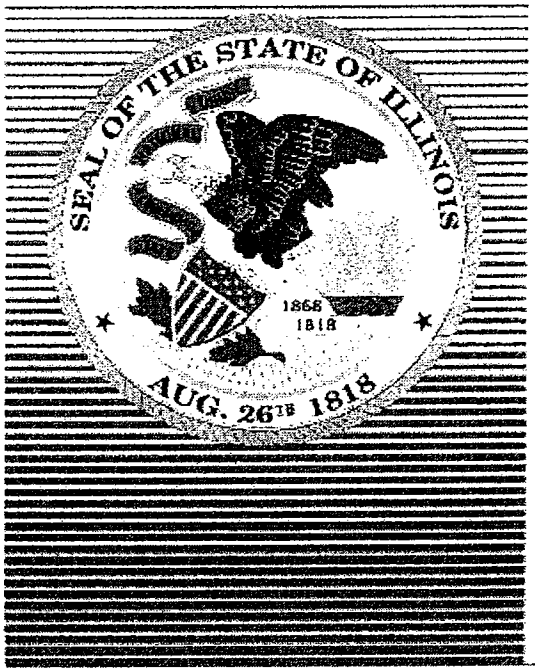


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TABLE OF CONTENTS

October 03, 2008 Volume 32, Issue 40

JOINT COMMITTEE ON ADMINISTRATIVE RULES
ILLINOIS GENERAL ASSEMBLY

NOTICE OF FAILURE TO REMEDY OBJECTION TO
AND SUSPENSION OF PEREMPTORY RULEMAKING

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

1) Heading of Part: Medical Assistance Programs

2) Code Citation: 89 Ill. Adm. Code 120

3) Section Number: 120.328

4) Notice of Proposal Published in Illinois Register: 5/2/08; 32 Ill. Reg. 7212

5) Summary of Rulemaking: The peremptory rule purported to respond to the 4/15/08 Memorandum Opinion and Order issued by the Cook County Circuit Court, Chancery Division in the case of *Caro v. Blagojevich.* Individuals in the FamilyCare expansion program are required to search for work or be in a training/vocational program.

6) JCAR Action: Objection and Suspension; 5/20/08; 32 Ill. Reg. 8450

7) Basis for JCAR Action: JCAR objected to and suspended HFS' peremptory rule because use of peremptory rulemaking violates Section 5-50 of the Illinois Administrative Procedure Act (IAPA). Section 5-50 of the IAPA allows peremptory rulemaking to be used only when the rulemaking is required as a result of federal law, federal rules and regulations, an order of a court or a collective bargaining agreement that precludes the exercise of agency discretion as to the content of the rule and that precludes adoption of rules through regular rulemaking. The analysis portion of the court's Memorandum Opinion and Order entered on 4/15/08, which HFS cites as the reason for this peremptory rulemaking, notes that not all TANF requirements are met by the expanded FamilyCare Program emergency rules, specifically the requirement that the adult be employed or engaged in a job search. The judge's specific order preliminarily enjoins HFS from "enforcing the Emergency Rules or expending any public funds related to the FamilyCare Program created by the Emergency Rule". The court order did not direct HFS to amend its rules in any way, including insertion of employment and job search requirements, nor did the court set any deadline for action that precludes the use of regular rulemaking procedures.

8) Agency Response: None

9) Basis for JCAR Determination of Failure to Remedy: HFS failed to respond to JCAR's

JOINT COMMITTEE ON ADMINISTRATIVE RULES
ILLINOIS GENERAL ASSEMBLY

NOTICE OF FAILURE TO REMEDY OBJECTION TO
AND SUSPENSION OF PEREMPTORY RULEMAKING

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

Objection by the 8/19/08 statutory deadline. JCAR found that the failure to respond did not remedy the cause of the Objection/Suspension.

EXHIBIT 6

Lampen

FIFTH DIVISION
September 26, 2008

No. 1-08-1061

RICHARD P. CARO, a State of Illinois Taxpayer on Behalf of and for the Benefit of the State of Illinois, Plaintiff-Appellee (Ronald Gidwitz and Gregory Baise, Plaintiffs-Intervenors-Appellees), v. HONORABLE ROD BLAGOJEVICH, Governor of the State of Illinois, THE ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES, BARRY S. MARAM, Director of IDHFS, Defendants-Appellants (The Department of Public Health, Damon Arnold, Director, and Daniel W. Hynes, Comptroller, Defendants; Gregory Jacaway *et al.*, Individually and on Behalf of All Similarly Situated People, Defendants-Intervenors; The State of Illinois, Intervenor).	Appeal from the Circuit Court of Cook County. No. 07 CH 34353 The Honorable James R. Epstein, Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the opinion of the court:

Plaintiff-appellee Richard P. Caro, a State of Illinois taxpayer, joined by plaintiffs-intervenors-appellees Ronald Gidwitz and Gregory Baise (collectively, plaintiffs), moved the trial court for a preliminary injunction against defendants-appellants Governor of Illinois Rod Blagojevich, the Illinois Department of Healthcare and Family Services, and Director Barry S. Maram (defendants or as named), as well as defendants the Illinois Department of Public Health, Director Damon Arnold, and Comptroller Daniel W. Hynes,[1] to prohibit them from expanding, funding and operating a healthcare program as violative of statutory law and the Illinois Constitution. The trial court granted plaintiffs' request and imposed the injunction. In this interlocutory appeal, defendants contend that the trial court erred in its decision to grant the injunction and failed to balance equitable factors which support its denial. Defendants ask that we overturn the trial court's issuance of the injunction, uphold the validity of their healthcare program, and grant any other proper relief.

We note for the record that plaintiff Caro filed a *pro se* appellee brief in this matter in addition to joining in the separate brief filed by his coplaintiffs/intervenors Gidwitz and Baise. Gregory Jacaway filed an appearance on his behalf and on that of all others similarly situated as defendants-intervenors, but did not file a brief in this cause. Also, the State of Illinois, via the office of the Attorney General, filed a brief in its capacity as an intervenor, and the National Federation of Independent Business filed an *amicus* brief.

For the following reasons, we affirm.

---

[1]These defendants have not participated in the instant appeal.

BACKGROUND

The principal facts involved in this cause are not in dispute.

In 1997, the federal government enacted the State Children's Health Insurance Program (SCHIP), which sought to provide health insurance to children whose families could not afford private insurance but who likewise did not qualify for Medicaid. Illinois participated in this program by enacting its own version pursuant to a statute entitled the Children's Health Insurance Program Act (CHIPA), to be run by defendant the Department of Healthcare and Family Services (DHFS). In return, Illinois received a 65% federal match in funds expended for CHIPA coverage, compared to only a 50% federal match in funds expended for Medicaid coverage.

In 2001, the federal government permitted Illinois to submit waivers to obtain federal funds and extend health insurance coverage to the parents/caretakers of those children enrolled in CHIPA. Illinois did so, the federal government approved it, and the FamilyCare Program was created pursuant to the Illinois Administrative Code (89 Ill. Adm. Code §120.32, amended at 29 Ill. Reg. 820, eff. January 1, 2005). Under this program, DHFS was able to expand CHIPA-like health insurance coverage to eligible adults--again, those whose family income exceeded the maximum allowed for eligibility under Medicaid but could not afford private health insurance. Initially, Illinois set the eligibility requirement to receive coverage under the FamilyCare Program at 49% of the federal poverty limit (FPL); that is, those adults whose income was at 49% of the FPL were eligible for health insurance under the program. Through the years, this level was increased, reaching 185% of the FPL in January 2006.

By 2007, the scope of the federal SCHIP program became uncertain as the United States

Congress and the President could not agree on funding or the breadth of coverage, and SCHIP and its accompanying state waivers were set to expire (pending extension attempts) in December 2007. This jeopardized the 65% federal funding match for state programs such as Illinois' CHIPA covering children and the FamilyCare Program covering adults. In an effort to preserve at least the 50% federal match Illinois received under Medicaid, DHFS declared on November 7, 2007, that an emergency existed warranting the promulgation of an "Emergency Rule" pursuant to the Public Aid Code, which governs Medicaid in Illinois. The Emergency Rule sought to not only preserve FamilyCare Program coverage at the levels already in place, but also insisted on the further expansion of coverage, via Medicaid, to adults with incomes up to and including 400% of the FPL (*i.e.*, an income of $83,000 per year for a family of four), who would pay varying premiums for coverage received depending on their incomes. For this expansion to Medicaid and increase in percentage, DHFS relied on section 5-2(2)(b) of the Illinois Public Aid Code (305 ILCS 5/5-2(2)(b) (West 2006)), which permits the provision of medical assistance for all people who would be determined eligible for basic maintenance under the "Temporary Assistance for Needy Families" (TANF) article of the Public Aid Code (305 ILCS 5/4-0.5 *et seq.* (West 2006)) by disregarding the maximum earned income permitted by federal law. Defendant Governor Blagojevich approved the expansion, and DHFS submitted the Emergency Rule and supporting documentation, along with a "Permanent Rule" to the same effect, to the Joint Committee on Administrative Rules (JCAR) in accordance with emergency rule-making procedures under the Illinois Administrative Procedure Act (5 ILCS 100/1-1 *et seq.* (West 2006)).

After review, JCAR objected to and suspended DHFS' Emergency Rule, finding that no

emergency situation existed warranting adoption of the proposed rule and that the rule was not in the public's interest; JCAR effectively suspended and invalidated the Emergency Rule and the FamilyCare Program it created. Accordingly, the Illinois Secretary of State issued a filing to this effect, prohibiting implementation of the Emergency Rule. DHFS, however, enacted the Emergency Rule and began enrolling adults with incomes up to 400% of the FPL into Medicaid.

Plaintiffs filed suit against defendants, challenging the expansion of the FamilyCare Program on several grounds, including the lack of authority to collect premiums under Medicaid, the lack of constitutional authority to raise revenue, the lack of authority to expand the FPL eligibility percentage to 400%, the lack of an appropriation for the expansion, and the suspension of the Emergency Rule by JCAR. Plaintiffs sought to enjoin defendants from further implementing the FamilyCare Program.

While plaintiffs' cause was pending, DHFS' Permanent Rule came before JCAR. Again, JCAR found it to be contrary to public interest and prohibited defendants from implementing the FamilyCare Program, and again, the Illinois Secretary of State issued a filing to this effect. However, defendants continued to enroll adults with incomes up to 400% of the FPL into Medicaid.

In April 2008, the trial court held a hearing on plaintiffs' motion for preliminary injunction. In its memorandum opinion and order, the court focused principally on defendants' reliance on section 5-2(2)(b) of the Public Aid Code as the authority for their actions in expanding the FamilyCare Program under Medicaid. The court noted that, as this involves TANF, the FamilyCare Program would need to meet the eligibility requirements TANF places on its

participants. The court examined the FamilyCare Program in light of this and found that, while it meets many of the TANF requirements, it does not meet all of them, particularly that adults be employed or engaged in a job search to be eligible for health insurance coverage. The court then addressed defendants' claim that these requirements do not apply to medical programs such as the FamilyCare Program they had implemented, pursuant to the sanctions provision of the Illinois Administrative Code (89 Ill. Adm. Code §112.79(f), amended at 28 Ill. Reg. 5655, eff. March 22, 2004)). Examining this section, the court noted that the sanctions provision addresses only what penalty may be visited upon a noncompliant recipient of assistance but does not remove the TANF requirements of employment or job search from health care eligibility and, as the FamilyCare Program contains no such requirements, it must fail.

Ultimately, the trial court concluded that "DHFS' authority does not include waiving the TANF requirements enacted by the state legislature" and "[t]herefore, DHFS did not have the authority to move the FamilyCare Program into Medicaid in the manner contemplated by the Emergency Rule." Because the court found this fact to be dispositive, it did not address the other challenges raised by plaintiffs. Accordingly, the trial court granted plaintiffs' motion, finding that they had met the necessary elements for a preliminary injunction against the FamilyCare Program and holding that defendants "are preliminarily enjoined from enforcing the Emergency Rule or expending any public funds related to the FamilyCare Program created by the Emergency Rule."

Following the entry of the injunction, defendants continued to operate the FamilyCare Program. Plaintiffs moved the trial court to issue an order of compliance, and a hearing was held. At this hearing, defendants told the trial court that they could not provide notice of the injunction

to participants or service providers, could not monitor or refund premium payments, could not provide plaintiffs with information regarding where the monies from premium payments were kept and how much remained, could not identify or dis-enroll adult participants, could not send notice to the participants or providers in the program to stop payments and, ultimately, did not know which of the millions of adults enrolled in medical assistance programs were receiving benefits specifically under the FamilyCare Program. Defendants then filed their notice of appeal.

ANALYSIS

To establish entitlement to preliminary injunctive relief, a plaintiff must show (1) a clearly ascertainable right in need of protection, (2) that he will suffer irreparable harm without protection of that right, (3) that there is no adequate remedy at law, and (4) that there is a substantial likelihood of success on the merits of the underlying action. See Mohanty v. St. John Heart Clinic, S.C., 225 Ill. 2d 52, 62 (2006); accord Virendra S. Bisla, M.D., Ltd. v. Parvaiz, 379 Ill. App. 3d 567, 572 (2008). On appeal from the grant of a preliminary injunction, a reviewing court is to " 'examine only whether [the plaintiff] demonstrated a *prima facie* case that there is a fair question concerning the existence of the claimed rights.' " Mohanty, 225 Ill. 2d at 62, quoting People *ex rel.* Klaeren v. Village of Lisle, 202 Ill. 2d 164, 177 (2002). Generally, an abuse of discretion standard of review applies (see Mohanty, 225 Ill. 2d at 63), but where, as here, the trial court's determination regarding the grant of a preliminary injunction involves the interpretation of statutory law, the appropriate standard of review is *de novo*. See Magee v. Huppin-Fleck, 279 Ill. App. 3d 81, 85 (1996); accord ACME-Wiley Holdings, Inc. v. Buck, 343 Ill. App. 3d 1098, 1103 (2003) (where interlocutory appeal presents question of law, *de novo* standard is applied). As the

parties agree that this is proper standard, we employ it herein.

As a threshold matter, we wish to address a running comment throughout defendants' brief on appeal. Defendants assert that plaintiffs did not attack the validity of the FamilyCare Program as a whole, "but merely challenged [d]efendants' ability to expand the program to the population with family incomes from 200% to 400% of the FPL" and, thus, the trial court's order enjoining the entire program was beyond the scope of the underlying lawsuit. We find this to be an incorreot mischaracterization of plaintiffs' consistent position in this matter. From a review of plaintiffs' second amended complaint for injunction, it is clear to us that plaintiffs challenged, and continue to challenge, the entire FamilyCare Program as a whole. For example, plaintiffs state therein that they are challenging on constitutional and statutory grounds defendants' implementation of the program. More clearly, though, the trial court's order states that plaintiffs "seek to enjoin the FamilyCare Program," not just a portion of it.

We now turn to the primary issue on appeal, namely, did the trial court err in granting the preliminary injunction on the ground that the FamilyCare Program fails to comply with all of the TANF requirements? It is our view that it did not.

Defendants begin their challenge in this vein by asserting that the FamilyCare Program's connection to TANF requirements "was at most a peripheral issue that was not developed in briefing or oral argument," was "abandoned" by plaintiffs, and resulted in an "unsustainable" and "misguided" basis for the trial court's decision. Defendants argue that it should not have even played a role in the decision, let alone become the sole basis for the grant of the injunction, because plaintiffs "merely devoted two sentences to the advancement of" the argument regarding

TANF requirements, because defendants refuted the argument by pointing to the sanctions provision, and because plaintiffs "did not pursue the issue in their reply brief," so defendants thought it had been conceded. However, plaintiffs discussed the TANF requirements argument at length before the trial court, as exhibited by their second amended complaint and in their opening trial brief. Regardless, by their very assertions here, defendants concede that plaintiffs raised this argument before the trial court--even if it may have only been argued in "two sentences." Contrary to defendants' intimations, plaintiffs were not required to write a dissertation on the issue in their brief before the trial court, nor were they required to mention the issue for a second time in their reply brief, for that court to address the matter or eventually find it to be dispositive. Defendants cite no law, and we find absolutely none, to the effect that plaintiffs' actions constituted an "abandonment" of the issue. Rather, it is clear that plaintiffs adequately raised the issue at the outset of this cause and argued it before the trial court to that court's satisfaction, and defendants' assertions otherwise are wasted words. And, ultimately, we may affirm the judgment of the trial court on any basis appearing in the record. See White v. DaimerChrysler Corp., 368 Ill. App. 3d 278, 282 (2006).

Section 5-2 of the Illinois Public Aid Code (Code) dealing with medical assistance (Illinois' version of Medicaid) states:

> "Classes of Persons Eligible. Medical assistance under this Article [Article V of the Code] shall be available to any of the following classes of persons ***:
>
> ***
>
> 2. Persons otherwise eligible for basic maintenance under Articles

> III [Aid to the Aged, Blind or Disabled] and IV [Temporary Assistance for Needy Families (TANF)] but who fail to qualify thereunder on the basis of need, and who have insufficient income and resources to meet the costs of necessary medical care, including but not limited to the following:
>
> ***
>
> (b) All persons who would be determined eligible for such basic maintenance under Article IV [TANF] by disregarding the maximum earned income permitted by federal law." 305 ILCS 5/5-2(2)(b) (West 2006).

Admittedly and undisputedly, defendants hung the authority for their actions in implementing and operating the FamilyCare Program upon section 5-2(2)(b). As noted, that section states that medical assistance is to be made available to all those otherwise eligible for basic maintenance under TANF, disregarding the maximum earned income permitted by federal law. See 305 ILCS 5/5-2(2)(b) (West 2006). The language of section 5-2(2)(b) is plain and unambiguous. See Household Bank, FSB v. Lewis, 229 Ill. 2d 173, 182 (2008); In re Estate of Ellis, 381 Ill. App. 3d 427, 430 (2008) (primary goal of statutory construction is to follow legislature's intent, which is best exhibited by statute's plain language; when this is clear, courts must give effect to it and not depart from it nor read into it limitations or exceptions not expressed therein). Would-be recipients of medical assistance under this section must be eligible for basic maintenance under the requirements of TANF, with the only exception being their "earned income," which is not to be considered.

Turning, then, to TANF, that article begins by describing its purpose: "to allow the family to become self-sufficient or employed as quickly as possible through *** the provision of transitional assistance to families." 305 ILCS 5/4-0.5 (West 2006). It then describes who is eligible:

> "§ 4-1. Eligibility requirements. Financial aid in meeting basic maintenance requirements for a livelihood compatible with health and well-being shall be given under this Article to or in behalf of families with dependent children who meet the eligibility conditions of Sections 4-1.1 through 4-1.11." 305 ILCS 5/4-1 (West 2006).

Reviewing the eligibility conditions of sections 4.1-4.11 of TANF, and disregarding those that focus on "earned income" as prescribed in section 5-2(2)(b) of the Code, several conditions that must be complied with to receive assistance under TANF still remain, including registration for and acceptance of employment (305 ILCS 5/4-1.8 (West 2006)), participation in educational and vocational training programs (305 ILCS 5/4-1.9 (West 2006)), and acceptance of assignment to job search, training and work programs (305 ILCS 5/4-1.10 (West 2006)). In addition to these, other noneconomic conditions that need to be met before one is eligible to receive assistance under TANF are the enforcement of parental child support obligation if such an obligation exists (305 ILCS 5/4-1.7 (West 2006)), and that a would-be recipient has not been convicted two or more times of public aid fraud (305 ILCS 5/4-1.5a (West 2006)).

According their own stipulations, defendants concede that the FamilyCare Program does not require its participants to comply with these noneconomic requirements necessary to receive

assistance under TANF. As the trial court found, while the FamilyCare Program meets some of the TANF eligibility requirements, it does not meet all of them. The FamilyCare Program, then, is in direct contradiction to the unambiguous language of the Code defendants rely upon to operate it. Essentially, section 5-2(2)(b) extends medical assistance in the name of the FamilyCare Program to those who would otherwise receive assistance under TANF, disregarding only those TANF requirements dealing with earned income. TANF, however, is further limited pursuant to the statute that created it. As we have discussed, to receive assistance under TANF, section 4-1 prescribes that certain requirements must be met. Of these, the requirements listed in sections 4-1.7 through 4-1.10, as well as section 4-1.5a, are noneconomic. According to section 5-2(2)(b), it is clear that FamilyCare Program participants must meet these noneconomic TANF requirements. Yet, as defendants readily admit that the FamilyCare Program does not require this of their participants, an undeniable discrepancy in authority is evident: defendants are operating the FamilyCare Program under the auspices of TANF pursuant to that statute, but are declaring that certain otherwise mandatory TANF eligibility requirements may fall by the wayside. This cannot stand in light of sections 5-2(2)(b) and 4-1 of the Code.

Overall, defendants' reliance on section 5-2(2)(b) for authority to operate the FamilyCare Program suffers from several flaws, primarily that the language of this statutory section in no way supports defendants' operation of their program. Nothing in the wording of section 5-2(2)(b) authorizes defendants to ignore the TANF requirements, save one: "earned income." This is the only TANF eligibility requirement section 5-2(2)(b) specifically states may be disregarded in extending assistance to those who would otherwise qualify for such under TANF. Plainly and

simply, section 5-2(2)(b), which seeks to bring medical assistance under the guise of Medicaid through TANF, does not allow for the waiver of any other TANF eligibility requirement. Nor does this section, or section 4-1 for that matter, discuss any other aspect of the FamilyCare Program defendants have heretofore implemented, including the charging of premiums to those receiving medical assistance under Medicaid or TANF, or anything similar to a 400% of the FPL "cap" as a permissible or appropriate standard to determine eligibility for medical assistance.

Defendants again assert on appeal, as they did before the trial court, that the otherwise mandatory TANF requirements are not required of those receiving medical assistance under the FamilyCare Program pursuant to 112.79 (f) of Title 89 of the Illinois Administrative Code ("sanctions provision") (89 Ill. Adm. Code §112.79(f), amended at 28 Ill. Reg. 5655, eff. March 22, 2004). As did the trial court, we disagree with this argument.

The sanctions provision outlines the sanction or penalties that may be imposed upon participants of TANF who fail to meet TANF's work and employment requirements. See 89 Ill. Adm. Code §112.79(a), amended at 28 Ill. Reg. 5655, eff. March 22, 2004. It describes, for example, what actions merit a sanction (subsection (b)), what type of sanction will be imposed (subsection (a)), notice requirements (subsections (c) and (e)), and the ability to rectify a sanction (subsection (h)). The subsection relied upon by defendants here states, in pertinent part:

"(f) A sanction under this Section shall not affect receipt of Medical Assistance."

89 Ill. Adm. Code §112.79(f), amended at 28 Ill. Reg. 5655, eff. March 22, 2004.

While defendants are correct that subsection (f) expressly prohibits a sanction to interfere with medical assistance received, they ignore the fact that this section applies to those already receiving

assistance under TANF. The sanctions provision specifically covers what penalties will be imposed upon recipients of TANF aid who fail to satisfy the TANF requirements outlined in Article IV of the Code, namely, a reduction in the percentage of benefits received for each violation save any benefit involving medical assistance. See 89 Ill. Adm. Code §§112.79(a), (f), amended at 28 Ill. Reg. 5655, eff. March 22, 2004. Neither the sanctions provision nor its subsection (f) applies to anyone other than TANF participants. That is, it does not apply to those attempting to become eligible to receive TANF, but only to those who already receive TANF aid; as the trial court determined, subsection (f) "presupposes" that the one to whom the sanction provision applies has already been declared eligible for and has been receiving TANF assistance, but has become a noncompliant recipient. It is only then--when the TANF recipient has become noncompliant--that the sanctions provision comes into play. It does not, as defendants argue, somehow remove the TANF requirements of job search and employment from TANF eligibility or preserve the receipt of medical assistance for those who otherwise do not meet the initial requirements to receive TANF in the first instance. Were this so, there would be no need for any sort of sanctions provision because there would be no limits upon receiving TANF assistance. Accordingly, we find that defendants' reliance on subsection (f) of the sanctions provision does not support their cause here.

Finally, defendants argue that the preliminary injunction issued by the trial court must be reversed because the court did not balance the equitable factors raised in this cause which, in defendants' opinion, "overwhelmingly weigh in favor of denial" of the injunction. Again, we disagree.

First and foremost, it is clear to us that the trial court did indeed weigh the equitable factors presented in this cause. In fact, the court went so far as to make note of them in its memorandum opinion and order granting the preliminary injunction. As we too set forth earlier, the trial court commented in the first sentence of the analysis portion of its decision that, in order to grant plaintiffs' motion for preliminary injunction against defendants, it was required to find that plaintiffs have an ascertainable right in need of protection, that this right is being irreparably harmed with no adequate legal remedy, and that there is a likelihood of success on the merits of plaintiffs' claim. Therefore, the trial court recognized at the outset that a balance of factors was necessary to reach its decision. Moreover, after discussing its decision to grant the injunction, the court thoroughly explained in a concluding paragraph to its order that:

> "There is a clearly ascertainable right in need of protection asserted in Plaintiffs' claim, namely the unauthorized expansion of Medicaid improperly using tax dollars. The harm alleged is irreparable and inadequate at law because it would be impracticable for the State to recoup the costs expended for the benefit of the FamilyCare Program. There exists a likelihood of success on the merits of Plaintiff's claims with respect to the FamilyCare Program for the reasons explained above."

While the trial court may not have listed in written form all the potential equitable factors present in this cause, it is obvious, from its memorandum opinion and order, that it inherently conducted a balancing of these factors in arriving at its ultimate decision. See, *e.g.*, Stacke v. Bates, 138 Ill. 2d 295, 308-09 (1990) (in reaching decision whether to grant stay pending appeal, trial court "of

necessity" was engaged in balancing process as to rights of parties and consideration of equitable factors).

Second, we note again that we as a reviewing court are, on appeal from the grant of a preliminary injunction, to examine only whether plaintiffs demonstrated a *prima facie* case that there is a fair question concerning the existence of the right they claim is being irreparable harmed. See Mohanty, 225 Ill. 2d at 62; accord Village of Lisle, 202 Ill. 2d at 177. Based on the record before us, we are convinced that plaintiffs have done so here. Defendants have attempted to move a group of people formerly covered under the Illinois SCHIP program (those with incomes under 185% of the FPL) and a group of people never covered under any Illinois assistance program (those with incomes up to 400% of the FPL) into Medicaid via the auspices of TANF. Yet, receipt of Medicaid, and in particular assistance received through TANF, has always been intended to be temporary and transitional, *i.e.*, to aid families in becoming self-sufficient. See 305 ILCS 5/5-1, 4-0.5 (West 2006). We find nothing temporary about the FamilyCare Program, which currently seeks to extend Medicaid coverage to people with incomes up to $83,000 a year. If the situation were to continue as defendants hope, there is no telling what percentage this will reach, as defendants would be able to continue to ignore the limiting TANF eligibility requirements and extend coverage via their program to ultimately anyone at any level of income. Such a decision is for the legislature, who forms statutory laws like Medicaid and TANF and sets eligibility requirements therefor, not for the executive defendants. Moreover, defendants admitted to the trial court that, even at this early point in the creation of their FamilyCare Program, they already cannot identify program participants, provide them with notice, or monitor payments; they

do not even know (or at least have refused to reveal) where the premiums they have collected are kept and how much remains. This, in addition to the fact that both JCAR and the Illinois Secretary of State have already twice suspended and prohibited defendants' Emergency and Permanent Rules creating the FamilyCare Program, raises severe concerns--ones we find are more than sufficient to demonstrate, on a *prima facie* basis, that plaintiffs have raised a fair question concerning their rights as state taxpayers and the existence of an irreparable harm to their rights promulgated by defendants' continued operation of the FamilyCare Program.

CONCLUSION

Ultimately, we hold, in accordance with the trial court, that, to receive medical assistance under section 5-2(2)(b) (Medicaid), a would-be recipient must qualify under the limited eligibility requirements of TANF. As the FamilyCare Program admittedly does not limit itself in this regard, defendants' operation of it is not proper under the statutory law upon which it relies. Finding this to be dispositive, we need not address any further arguments on appeal. See White, 368 Ill. App. 3d at 282.

We wish to note here that defendants state in their appellate brief that they issued a "Peremptory Rule" on April 21, 2008, which incorporates the TANF requirements at issue into the FamilyCare Program "if and to the extent required by the trial court's order." They further state that this "remedies the deficiency found by the trial court." However, this is incorrect. As this "Peremptory Rule" was "issued" after the trial court's decision in this cause, it was never presented to that court. As such, it, and any discussion regarding it, is waived for our review. See, *e.g.*, In re O.R., 328 Ill. App. 3d 955, 959 (2002).

Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court granting plaintiffs' motion for preliminary injunction.

Affirmed.

O'MARA FROSSARD and TOOMIN, JJ., concur.

EXHIBIT 7

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

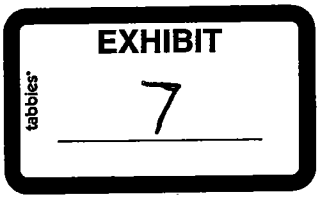
RICHARD P. CARO, et al.,	)	
	)	
Plaintiffs and Plaintiff-Intervenors,	)	
v.	)	
	)	No. 07 CH 34353
HON. ROD BLAGOJEVICH, et al.,	)	
	)	
Defendants and Defendant-Intervenors.	)	
	)	

MEMORANDUM OPINION AND ORDER

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

I. Facts

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



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

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

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

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

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

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

II. Analysis

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

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

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

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

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

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

305 ILCS 5/4-1 (emphasis added). Thus, to be eligible for TANF one must comply with Sections 4-1.1 through 4-1.11, as well with the second paragraph of Section 5/4-1. The record is silent as to whether, in compliance with the second paragraph in Section 5/4-1, DHFS requires FamilyCare applicants to prepare and submit a personal plan for achieving employment and self-sufficiency. Regardless, it is undisputed that while the FamilyCare Program includes most of the TANF eligibility requirements under Sections 4-1.1 through 4-1.11, the FamilyCare Program fails to require compliance with: (1) Section 4-1.5a, which deems anyone with multiple convictions of Public Assistance Fraud under 305 ILCS 5/8A-1 *et seq.*, ineligible for aid; (2) Section 4-1.7, which requires enforcement of child support obligations; and (3) Sections 4-1.8 through 4.1-10, which encompass several employment-related conditions such as registration for and acceptance of employment. *See* Joint Stip. ¶¶ 52-54. By failing to require compliance with these sections, the FamilyCare Program, be it under the permanent rule or the emergency rule, violates the unambiguous language of Section 5-2(2)(b) which requires all applicants for aid under that section to meet all the TANF eligibility requirements other than the federal maximum earned income requirement.

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

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

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

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

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

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

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

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

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

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

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

III. Order

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

ENTERED
JUDGE JAMES R. EPSTEIN-1783
OCT 15 2008
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Dated:_____ Entered: _____
James R. Epstein, Judge 1783

EXHIBIT 8

NO. 107-633
IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

RICHARD P. CARO, a State of Illinois Taxpayer on Behalf of and for the Benefit of the State of Illinois, Plaintiff-Respondent, RONALD GIDWITZ and GREGORY BAISE, Plaintiff-Intervenors-Respondents, v. HONORABLE. ROD BLAGOJEVICH, Governor of the State of Illinois, THE ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES, BARRY S. MARAM, Director of IDHFS, Defendant-Petitioners, THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH, DAMON ARNOLD, Director of IDPH and DANIEL W. HYNES, Comptroller of the State of Illinois, Defendants, GREGORY JACAWAY, *et al.*, Individually and on Behalf of All Similarly Situated People, Defendant-Intervenors; THE STATE OF ILLINOIS, Intervenor.	)	Pending in the Circuit Court of Cook County, No. 07 CH 34353. The Honorable James R. Epstein, Judge Presiding.

PLAINTIFFS-RESPONDENTS' JOINT ANSWER IN OPPOSITION
TO DEFENDANTS' PETITION FOR LEAVE TO APPEAL

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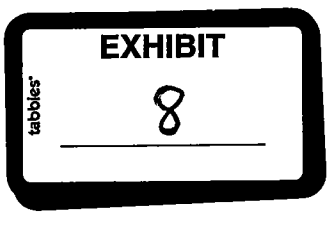

ARGUMENT

I. Introduction

In November of 2007, after the effort to get the General Assembly to pass the Governor's sweeping healthcare initiatives failed, Defendants, the Governor and the Department of Family and Health Services (DHFS) and its Director, disregarded the Illinois Constitution and the rule of law and without statutory authority, issued an Emergency Rule and mirror Permanent Rule to create a new taxpayer-funded state health care insurance program. The new program (i) established benefits for a never-previously-enrolled group, namely adult, parent/caretakers of children receiving state aid from households with annual incomes of 185% to 400% of the federal poverty level (FPL), and (ii) transferred adult parent/caretakers from households with annual incomes between 133% and 185% of the FPL, who up until then had been covered under the state's Children's Health Care Insurance Program Act (CHIPA), out of CHIPA and into enrollment in the new Program as part of State Medicaid coverage. As authority for their rules, Defendants cited Section 5-2(2)(b), a section of Article V, the Medical Assistance Act, of the Public Aid Code (State Medicaid), 305 ILCS 5/5-1, *et. seq.*

Plaintiff-Respondent *pro se* Richard Caro and Plaintiff-Intervenors-Respondents Ronald Gidwitz and Gregory Baise, on behalf of the taxpayers (collectively, "Plaintiffs"), brought this action complaining that Defendants' new Program was unlawful and unconstitutional for myriad reasons, including that:

- Section 5-2(2)(b) does not authorize a health insurance plan such as the Program and does not allow enrollment in State Medicaid absent the application of certain Article IV TANF requirements that the Program admittedly does not impose,
- There was no other statute authorizing the Program,

- The Program as applied in effect gave Defendants unfettered discretion to set earned income limits for new enrollees and as a result violated the separation of powers and constituted an improper delegation,

- the Program imposed premiums when no statute authorized premiums and violated the Illinois Constitution, which forbids the raising of revenue in the absence of statutory authorization,

- there was no appropriation for the Program,

- because the Joint Committee on Administrative Rules (JCAR) had found the rules to be a threat to the public interest and suspended them, the rules creating the Program were as a matter of law invalid and of no effect under the Illinois Administrative Procedures Act ("APA")

On April 15, 2008, based on a stipulated record, Judge James Epstein, mindful of this Court's admonition to avoid reaching constitutional issues where possible, relied on one of the deficiencies with the Program argued by Plaintiffs and found that Section 5-2(2)(b) imposed the eligibility requirements of Article IV TANF (Temporary Assistance for Needy Families) of the Public Aid Code, including requiring recipient enrollment in job search, job training, and education programs and compliance with child support orders. The court further found that Plaintiffs had established a *prima facie* case entitling them to preliminary injunctive relief because the new Program did not require enrollees to meet the TANF requirements and therefore was not authorized by Section 5-2(2)(b). On September 26, 2008, the Appellate Court affirmed the preliminary injunction order.

Defendants ask this Court to review that decision. This Court should decline. As this Court repeatedly has held, a decision below can be affirmed on any grounds that appear in the record, notwithstanding the basis for any decision below. There are, as noted above, and discussed at greater length below, multiple problems with the Program at issue here, in addition to and apart from the TANF issue.

II. The Petition Does Not Merit The Extraordinary Relief Sought

A. The Order Defendants Would Appeal Is An Interim Preliminary Injunction Order Applicable Only To The Program At Issue Here

To date, JCAR twice, the Circuit Court three times and the Appellate Court once have recognized that the Program is unlawful. Now Defendants make an emotional appeal to this Court to let them continue to operate the Program, claiming dramatically that some 500,000 people will lose their benefits unless this Court grants their Petition and reverses the Appellate Court's order. It is simply not true.

Defendants' argument is that if it ultimately, in future, becomes part of a final order, the lower courts' preliminary injunction finding that Section 5-2(2)(b) incorporates and imposes Article IV TANF job and training program requirements, etc., might require Defendants to impose those same requirements on other recipients receiving benefits under Section 5-2(2)(b) in programs beyond the Program at issue here.

This argument has obvious flaws. First, this Court should not be called upon to offer an advisory opinion or a result-oriented adjudication of what might be. Second, the lower courts' finding is an interim finding in support of a preliminary injunction order. As such, as a matter of law, it does not impact the entire State Medicaid program. Defendants repeated use of qualifiers such as "may," "could be," and "potential" betrays their awareness that the Appellate Court's and Circuit Court's interpretations of Section 5-2(2)(b) are interim, not final and binding, and have no impact beyond the new Program. Indeed, Defendants have argued – in pleadings filed with the Circuit Court – that the finding is not even the law of the case or binding on the lower courts with respect to the Program that is actually at issue. *See* Defendants' October 8, 2008 Objection to Plaintiffs' Renewed Motion for Entry of Compliance Order at 3, 7. Appendix, Exhibit 1.

B. Defendants Argue Facts Not Of Record

Defendants' claims about the widespread impact of the lower court's interpretation of Section 5-2(2)(b) is without basis in the record, inaccurate and incomplete and not the proper basis for determining whether there was constitutional and statutory authority for the new Program.

Defendants do not and cannot point to anything in the record that shows that Section 5-2(2)(b) is the authority for enrolling the 500,000 in FamilyCare. In addition to (2)(b), Section 5-2 of the Medical Assistance Act (State Medicaid) has multiple sections providing authority for Medicaid enrollment. Nothing in the record shows that prior to November 2007 Section 5-2(2)(b) of State Medicaid was the authority for adult enrollees in FamilyCare. To the contrary, in their February 8, 2008 Opposition to Plaintiffs' Motion for Preliminary Injunction, Defendants argued that Section 40 of CHIPA was used for prior expansions of FamilyCare. *See id.* at 3 and 5. Appendix, Exhibit 4.

The record does show that Defendants' notices and rules for the new Program cite Section 5-2(2)(b) as authority for the move of former CHIPA adults into State Medicaid. The Rules state that between 15,000 and 20,000 adults with incomes from 133% to 185% moved from CHIPA to Medicaid. The Rules also state that there are 147,000 new adult enrollees with incomes from 185% to 400%. *See* Rules, Appendix, Exhibit 5. That number fell to 5,000 in papers Defendants filed with the Circuit Court on October 29,

2008. *See* Defendants' Response to Plaintiff and Plaintiff-Intervenors' Renewed Motion for Entry of Compliance And Enforcement Order, Appendix, Exhibit 6.[1]

Thus, according to the facts of record, the new Program here affects approximately 5,000 adults with household annual incomes between 185% and 400% and approximately 20,000 adults with household annual incomes 133% to 185% of FPL Defendants moved from CHIPA to Medicaid. The number is nowhere near 500,000.

C. This Matter Should Be Returned To Circuit Court

This Court should deny the Petition and return this matter to the Circuit Court to proceed to a final adjudication. That way, the facts on 5-2(2)(b) enrollment can be developed as needed and actual binding findings on a fully developed record can be entered. If, at that point, there is a finding made that purportedly adversely impacts the benefits of those outside of the Program, the reviewing court will have before it a full and proper record, final findings and issues ripe for review. This Court need not and ought not have to speculate on or work with unproven facts not in the record.

By contrast, taking the Petition may strand and delay the adjudication and resolution of the other problems with the Program that could serve as the basis for enjoining it, making resolution of this appeal moot and a wasting judicial and litigation resources on the piecemeal resolution of issues. Unless this Court converts the current preliminary injunction to a permanent injunction and takes for decision all the many deficiencies with the Program that Plaintiffs urged to the courts below on the stipulated

[1] FamilyCare is not, contrary to the description in their Petition, funded by name by state mandate. The name FamilyCare did not appear in a statute or rule until Defendants issued the November 2007 rules for the new Program.

record, and resolves to decides the injunction on the merits, its consideration of the current appeal is likely to cause unfair and wasteful delay.

Defendants' claim that the preliminary finding here will strip 500,000 people of benefits is a stalking horse. They merely seek to buy time. Plaintiffs have sought and obtained two preliminary injunctions, yet after a year of litigation, their efforts to stop the waste of taxpayer money have been stalled by procedural roadblocks. Defendants continued to operate the Program despite the lower courts' injunctions and denial of their motions to stay. Proceedings below have ground to a halt,[2] and Defendants still, relying on this Court's November 12, 2008 Order, continue to operate the Program. If they convince this Court to take the Petition it effectively negates the preliminary injunctions and will almost certainly delay for a year or more any resolution of this matter.

Plaintiffs respectfully request that this Court deny the Petition and return the case to the Circuit Court for development of a full record and adjudication on the merits. If, however, the Court chooses to take the appeal, Plaintiffs urge it to consider all of the infirmities of the Program raised by Plaintiffs and resolve whether a permanent injunction should issue. Should the Court decide to take the appeal on only the narrow TANF compliance issue, Plaintiffs request that this Court enter an order lifting the stay in its November 12, 2008 order and admitting the Circuit Court at minimum to proceed to

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[2] The Circuit Court interprets this Court's 11/12/08 Order as enjoining it from proceeding on any other matters. *See* 11/25/08 Transcript, Appendix, Exhibit 2. Defendants also have moved the Appellate Court for a minimum two month extension of time to file briefs pending this Court's disposition of their Petition. *See* Defendants' Joint Motion for An Extension of Time to File Opening Briefs. *Id.*, Exhibit 3 (sans exhibits).

reach all the non-TANF Constitutional and statutory issues in the case so that these issues are not held hostage while this appeal is pending.

III. Defendants Are Wrong On The Merits

The Program has multiple deficiencies, any one of which is sufficient for a determination that it is unlawful.

A. There Is No Authority In Medicaid For Expending Funds To Cover Adults With Incomes Between 133% And 400% of the FPL

Section 5-2(2)(b) provides, in relevant part, that:

> §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 of coverage has been submitted to the Governor by the Illinois Department and approved by him:
>
> * * *
>
> 2. Persons otherwise eligible for basic maintenance under Articles III and IV but who fail to qualify thereunder on the basis of need, and who have insufficient income and resources to meet the costs of necessary medical care, including but not limited to the following:
>
> * * *
>
> (b) All persons who would be determined eligible for such basic maintenance under Article IV by disregarding the maximum earned income permitted by federal law.

305 ILCS 5/5-2(2)(b).

Section 5-2(2)(b) is very limited in scope and purpose. Its reference to Article IV incorporates TANF, which provides for temporally-limited (six months) transitional medical assistance to families moving from welfare to work.

Defendants now claim that Section 5-2(2)(b) is ambiguous. Petition at 11. Thus, this court may consider the legislative debates on Section 5-2(2)(b) to resolve the ambiguity. *See, e.g., People v. Collins*, 214 Ill. 2d 206, 214 (2005). They confirm the modest scope of the statute:

Senator Smith: [§5-2] is a small change in the State Medicaid Program to extend the length of time that former AFDC families can receive healthcare once they have secured employment . . . The only persons eligible are working parents and their children who were once AFDC recipients and whose income is extremely low.

***

Currently, our program provides for nine months of Medicaid after the maximum time for receiving AFDC to supplement extremely low paying jobs have been exhausted. Congress was provided an option for states to extend this limit ... by six months which is what this bill does.

See legislative history, Appendix, Exhibit 7.

Rep. Dunn: As I indicated earlier, it doesn't effect a lot of people. About $240,000 is the expected cost statewide.

Rep. McCracken: Okay. Under current law, aren't there some people getting nine months worth of benefits, or is that not correct?

Rep. Dunn: Yes, they are, and this would extend those benefits another six months on top of that.

See id. (comments of Representatives Dunn and McCracken).

The new Program is wholly at odds with the statutory purposes expressed in the language and legislative history of Section 5-2(2)(b). As noted by the Appellate Court, the Program is not temporary and is not need-based. While Section 5-2(2)(b) on its face excepts TANF's earned income limits, the TANF cash grant assistance limits are well below 65% of the FPL. *See* TANF cash grant schedules, Appendix, Exhibit 8. The new Program, however, purports to cover adults with earned annual incomes up to 400% of the FPL (roughly $82,000 in annual income for a family of four).

DHFS claims that Section 5-2(2)(b) gives it authority to set the income level limits. If so construed, the statute would provide authority to extend Medicaid coverage to persons of any income level whatsoever, even those with substantial wealth. DHFS

would have *carte blanche* to fashion whatever type of program for whatever level of income it wishes. This would be an impermissible and invalid delegation of legislative authority. *See, e.g., Thygesen v. Callahan*, 74 Ill. 2d 404, 411 (1979) (delegation to the Department of Financial Institutions of authority to set schedules of interest rates "as the Director deems appropriate" was unconstitutional as it amounted to "uncabined" discretion to determine "appropriate" interest rates).

The primary purpose of Medicaid is to help the poor. The benefits awarded to recipients under Medicaid are based upon their income and needs. Section 5-2(2)(b) must be read with the purpose of Medicaid in mind. To construe it as an uncabined delegation of authority allowing DHFS to provide assistance without any income limitation to populations with relatively substantial incomes is an unreasonable and unconstitutional interpretation of the statute. CHIPA, which authorizes healthcare assistance in the form of taxpayer-funded health insurance for eligible children and their parents/caretakers starting at 133% of the FPL, provides legislative guidance for the ceiling for Medicaid. To be enrolled in CHIPA, a child cannot be eligible for enrollment in state Medicaid. *See* 215 ILCS 106/20(a).

Creating a taxpayer funded multi-million dollar program is quintessentially legislative work. Defendants' conduct here in operating the Program by executive fiat usurps the legislative function and violates the Illinois Constitution's separation of powers provisions. *See, e.g., Best v. Taylor Machine Works*, 179 Ill. 2d 376, 410 (1997); *People ex rel. Chicago Dryer Co. v. City of Chicago*, 413 Ill. 315, 320 (1952).

B. Federal Medicaid "De-Linking" Changes Nothing

Defendants claim that federal law requires "de-linking" Medicaid payments and therefore that the absence of TANF limitations does not defeat the Program. Petition at 12. This argument failed to persuade the lower courts. It should not persuade this Court, either.

In their June 23, 2008 brief to the Appellate Court, Defendants argued that "[w]hile the eligibility for cash grants is subject to the TANF requirements of federal law, the receipt of Medicaid is based on complying with the requirements for AFDC as they existed on July 16, 1996. 42 U.S.C 1396u-1." *See id.* at 21. The federal law to which Defendants refer is the Congressional effort to move from the old welfare program under AFDC to the newer block grant regime of TANF. The change was made in order to give the states greater flexibility. In this process it was clear that Medicaid decisions should be made independently from cash welfare decisions *so long as* Medicaid requirements were no more restrictive than the TANF requirements of 1996. The "de-linking" pressure arose from fears that states would cut Medicaid even below income eligibility of TANF.

The AFDC standards in place in Illinois with respect to Medicaid payments in July of 1996 embraced the TANF job related employment limitations.

> The Illinois Department shall advise every applicant .. (i) the requirement that all recipients move towards self-sufficiency and (ii) the value and benefits of employment... As a condition of eligibility for that aid, every person who is a recipient of aid under this Article on the effective date of this amendatory Act of 1995 shall, within six months of that date, prepare a personal plan for achieving employment.

305 ILCS 5/4-1.

The Illinois General Assembly made clear in 1995 not only that the TANF employment requirements were firmly in place, but also that upon a determination of eligibility, DHFS could impose sanctions for violations of those provisions – expressly

acknowledging the difference between eligibility determinations and sanctions that is at the core of Judge Epstein's analysis.

> An individual for whom the job search, training, and work programs established under Article IXA are applicable, must accept assignment to such programs. . . . The Illinois Department and the local government shall determine, pursuant to rules and regulations, sanctions for persons failing to comply with the requirements of this Article.

305 ILCS 5/4-1.10.

Defendants' "de-linking" argument attempts to demonstrate that a federal law eliminated all TANF requirements when, in fact, the federal law was a relatively modest effort to make sure that Medicaid eligibility determinations by the states did not dip below July 1996 standards. It provides no support for their critique of the lower courts' decisions. Federal law does not require elimination of TANF requirements for Medicaid as those in place prior to July 1996 and Section 5-2(2)(b) plainly requires compliance.

C. Defendants' Article 9A Argument Is Meritless

Defendants argue also that Article IV TANF requirements need not be imposed, claiming that when these provisions are examined each such TANF provision references that, to be eligible, individual grant aid recipients must meet the respective TANF provision requirement by complying with the provisions of Article IXA of the Public Aid Code, 305 ILCS 5/9A-1, *et seq.* ("Article 9A"). Petition at 9. They say that Article 9A provides programs in coordination with Article IV TANF requirements, and that its programs are restricted to Article IV TANF cash grant recipients only. Defendants further argue that, as Article 9A is expressly limited to cash grant recipients, Article V, Medicaid enrollees under Section 5-2(2)(b) cannot enroll in Article 9A programs and that

with Article 9A programs unavailable to them, there would be no method for Section 5-2(2)(b) enrollees to meet TANF requirements of program participation.

Defendants fail to cite or factor in Article IX of the Public Aid Code, 305 ILCS 5/9 *et seq*, ("Article 9"). Article 9 expressly makes DHFS' programs for guidance counseling, educational programs, vocational training programs, job search, training and work programs available to Article V Medicaid enrollees, including 5-2(2)(b) enrollees. It does so by setting forth programs virtually the same as those set forth in Article 9A. *See* 305 ILCS 5/9-1 and 5/9-8.

Article 9 authorizes the State to provide Section 5-2(2)(b) enrollees access to eligibility programs like those under Article 9A. Thus, Defendants are wrong in arguing that there are no statutorily authorized programs in which Section 5-2(2)(b) enrollees may enroll or participate to meet Article IV mandates that they attend such programs.

D. There Is No Authority In Medicaid To Cover Adults Who Do Not Meet the Article IV Non-Income TANF Requirements

The express language of Section 5-2(2)(b) prevents its use as authority for the new Program. It requires that an enrollee meet every non-income eligibility requirement of Article IV. As Defendants have conceded, the Program does not do so. Defendants have stipulated that DHFS does not require persons enrolled in the Program to comply with the Article IV requirements that a TANF recipient engage in job registration and employment acceptance (305 ILCS 5/4-1.8), in vocational training (305 ILCS 5/4-1.9), and Job Search participation (305 ILCS 5/4-1.10). Stip. Fact 54(j). The Program does not require enrollees to cooperate with child support enforcement (305 ILCS 5/4-1.7). Stip. Fact 54(i). With regard to the requirement in Section 4-1.5(a) that a person with multiple convictions for public aid fraud be ineligible for TANF, Defendants' response is

to state that "this requirement has only been applied to cash assistance programs and not to medical programs". Joint Stipulation, Exhibit 9, Facts 54(g), (i) and (j).

E. <u>There Is No Coverage Plan As Required By The Act</u>

Section 5-2 states in its introduction that medical assistance under the statute is contingent upon a coverage plan, providing, in relevant part, that "Medical assistance under this Article shall be available to any of the following classes of persons *in respect to whom a plan of coverage has been submitted to the Governor by the Illinois Department and approved by him ...*" *See supra* (emphasis added). A coverage plan thus is a precondition of Section 5-2(2)(b), yet there is no evidence in the record that such a coverage plan exists or was submitted to the Governor by DHFS. Defendants have pointed to the stipulated fact that the Governor approved the expansion submitted in the Emergency Rule and claimed that the rule and the coverage plan are "one and the same," but have never offered any support for this proposition. Without evidence of a coverage plan, Defendants cannot rely on Section 5-2(2)(b) as authority for the Program.

F. <u>There Is No Authority For Premiums</u>

The Program purports to create a new taxpayer-funded healthcare insurance coverage plan operated and paid under state Medicaid for enrollees who are adult parents/caretakers with household annual incomes between 133% and 400% of the FPL. It also imposes premiums on enrollees with incomes above 150% of the FPL. There is no authority under the state Medicaid Act to impose and collect such premiums. Authority to charge and collect revenues must come from a law enacted by the General Assembly, and the General Assembly has not enacted any such law.

Early on, Defendants had argued – without offering any authority -- that they had the inherent authority to charge premiums because Medicaid *does not prohibit* them from doing so. They were wrong. Under Illinois law, it is well-established that administrative agencies may exercise only those powers expressly delegated to them by the legislature. *See, e.g., Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 551 (1977) ("...inasmuch as an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created ..."). Defendants since have conceded that this is the law. *See* July 15, 2008 Defendants' Response to Plaintiffs' Motion for Preliminary Injunction with Regard to the Permanent and Peremptory Rules at 14 *citing Granite City Division of Nat'l Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 171 (1993) ("any power or authority claimed by [an agency] must find its source within the provision of its enabling statute.").

Unlike Medicaid, CHIPA expressly provides for premiums to be charged. That families with income between 150-185% of the FPL may have participated in a health services assistance program under CHIPA where premiums were charged, however, does not mean that the same program is sustainable or authorized under state Medicaid. Indeed, as noted above, CHIPA expressly provides that enrollees cannot be eligible for State Medicaid benefits. See 215 ILCS 106/20(a).

Defendants, in failing to seek to renew the CHIPA waiver for adults, chose to allow their enrollment in CHIPA to terminate. Defendants also chose to create the Program as part of State Medicaid and then purport to enroll adult parent/caretakers with annual household incomes between 133% and 400% in the Program. CHIPA cannot and does not authorize premiums outside of CHIPA enrollment; State Medicaid does not

authorize premiums at all. And while in CHIPA the General Assembly expressly authorized DHFS to use the powers accorded it under Medicaid for the management of CHIPA, *see* 215 ILCS 106/15, there is no corresponding Medicaid provision authorizing the use of CHIPA powers in the administration of Medicaid. Thus, any premiums being collected for the Program are being collected without statutory authority

G. The Constitution Does Not Authorize DHFS To Raise Revenue

The parties have stipulated that premiums are being charged to and collected from Program enrollees. *See* Joint Stipulation Facts ¶¶45 and 46, Appendix, Exhibit 9. DHFS' imposition of premiums amounts to raising revenue for the State. The Illinois Constitution at Article IX, Section 1, however, gives the General Assembly the "exclusive power to raise revenue by law except as limited or otherwise provided in this Constitution". *See, e.g., Hoffman v. Clark*, 69 Ill. 2d 402, 423 (1977) ("The power to raise revenue through taxation is firmly vested in the General Assembly both through the inherent power of that body, and by the specific grant of the Constitution.") Accordingly, by imposing and charging premiums on adult enrollees the Program is raising revenue for the State, which is not authorized by state statutes and is therefore unlawful. This Court should find the collections of premiums to be unauthorized acts raising revenues without required legislated authority, and order that the Program be permanently enjoined.

H. There Is No Appropriation for The Program

"[O]nly the Legislature may appropriate revenues for state expenditures". *Bridges v. State Board of Elections*, 222 Ill. 2d 482, 491 (2006). Defendants have conceded that there is no appropriation for the Program covering adults with incomes of

185% to 400% of FPL. *See* Defendants' Verified Answer to the Verified Second Amended Complaint and Stipulated Facts at ¶¶10 and 11, Appendix, Exhibit 9.

Furthermore, agencies are required to submit to the appropriations committees of the General Assembly the programs and projects on which the agency intends to spend. Ill. Const. Art. VII, Sec. 2(b). This provides constitutional control over taxpayer funds. In the materials it submitted to the legislative appropriations committee, DHFS noted that the entire $17.05 billion ($7 billion of which was for medical services) allocated to it was for program maintenance -- not expansion. Stipulation at 14-15, Appendix, Exhibit 9. The new Program did not exist at the time and was not and is not included in DHFS' appropriation submission, evidencing the absence of allocated funds for it.

Defendants have argued that there are funds for the expansion of the new Program because they have access to and can dip into a number of funds appropriated for other identified existing medical assistance programs. This is simply not the case.

That DHFS has authority to spend almost $7 billion dollars for medical services is not the relevant concern. The Illinois Constitution places two important budget responsibilities in the legislative branch. *One*, Article VIII, Section 1(b) of the Illinois Constitution requires authorization in substantive law before any obligation to be paid from public funds may be incurred. Without such authorization no appropriation is possible and there is no such authorization here. It is black letter law that appropriations bills fund existing programs and cannot contain substantive law creating new programs. *See, e.g., People v. Young Women's Christian Ass'n*, 86 Ill. 2d 219, 238 (1981); *Granberg v. Didrickson*, 279 Ill. App. 3d. 886, 892 (1st Dist. 1996). *Two*, Article VIII, Section 2(a) of the Illinois Constitution requires the Governor to submit a balanced

budget that "sets forth the estimated balance of funds available for appropriation at the beginning of the fiscal year, the estimated receipts, and a plan for expenditures and obligations during the fiscal year" for every state agency. It then, at Section 2(b), requires the legislature to make appropriations and limits such appropriations to funds estimated by it to be available. The Governor performed his 2(a) function by declaring that the Program would be funded in a separate appropriation bill by an identifiable line item, Stipulations, Appendix, Exhibit 9 at ¶¶11, 146, but that bill never passed.

When DHFS filed their required appropriation forms with the legislative appropriations committees, the documents described how they planned to spend the money requested. DHFS stated that the entire amount requested was required for program maintenance – not program expansion. It did not address the expansion proposed by the Governor. *See* Stipulations, Appendix, Exhibit 9, ¶98. Ultimately, the amount appropriated to DHFS was less than the amount requested for program maintenance. *Compare* $7.1 billion requested, *id.*, ¶98 to $6.9 billion approved. *Id.* at ¶57. No separate amendment to the Appropriations Act was adopted with a legislative discussion or designation relating to funding the Program.

I. Defendants' Disregard of JCAR Is Unlawful

JCAR on multiple occasions found that Defendants' rules were a threat to the public interest and suspended them. Defendants never pursued direct and lawful appeals of JCAR's rulings, choosing instead simply to ignore JCAR's findings and the APA. Defendants have not brought a direct attack against any JCAR ruling. Instead, they mount an indirect collateral attack seeking an after-the-fact declaration that the JCAR statute is unconstitutional and that they were free to disregard JCAR's rulings. They

have not even joined JCAR as a party. This approach is unlawful. JCAR's actions have not been challenged properly or legally. "Administrative agencies ... have no authority to declare a statute unconstitutional or even to question its validity." *Bryant v. Bd. of Election Commissioners*, 224 Ill. 2d 473, 476 (2007).

J. Under Illinois Law, The Rules Are Ineffective and Invalid

Defendants have yet to issue a rule related to the Program that is subject to the normal public notice and comment periods envisioned by the APA and the attendant transparency required by the APA. Further, the Emergency and Permanent Rules that they have promulgated are now, as a matter of law, invalid and ineffective under the APA because JCAR objected to both of them and made findings that they were a threat to the public interest. *See* 5 ILCS 100/5-10(c) (rules which are not filed are ineffective and invalid); 5 ILCS 100/5-115(b) (providing that if JCAR has issued a statement that a rule is a serious threat to the public interest then the agency may not invoke or enforce the rule and the Secretary cannot accept the rule for filing), 5 ILCS 100/5-125 (when an emergency rule has been suspended, for the 180 days following the suspension the agency is barred from filing and the Secretary is prohibited from accepting for or filing a permanent rule similar to the suspended emergency rule). Moreover, the Peremptory Rules Defendants issued in the wake of the Circuit Court's injunction also are invalid and ineffective due to JCAR's suspension and findings, and resulting APA filing prohibition.

The Program is still being operated by Defendants, purportedly under rules cited here. However, at this juncture all the rules for the Program are ineffective and invalid. Defendants neither appealed JCAR's findings nor sought review under writ of certiorari. Their collateral attacks on JCAR and the APA are not properly considered here.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Petition for Leave to Appeal and grant such other and further relief as the Court deems just and proper.

Dated: December 10, 2008

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CERTIFICATE OF COMPLIANCE

The undersigned, an attorney, certifies that the foregoing document conforms to the requirements of Rules 341(a) and (b) and Rule 315. The length of this brief, excluding the appendix, is 19 pages.

Dated: December 10, 2008

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies and states that three (3) true and correct copies of the foregoing ***Plaintiff-Respondents' Joint Answer in Opposition to Defendants' Petition for Leave to Appeal*** were served on each of the following counsel of record by electronic mail and by placing the same in sealed envelopes, postage pre-paid, and depositing them in the United States mail at the United States Post Office on 433 West Harrison Street, Chicago, Illinois 60604 on December 10, 2008:

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Supreme Court of Illinois

Office of the Clerk of the Supreme Court
Supreme Court Building
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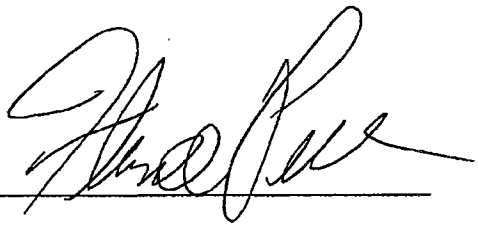
Dated: December 10, 2008



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