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Joint Committee on Administrative Rules  
700 Stratton Building  
Springfield, IL 62706

Re: The Department of Health Care & Family Services'  
Emergency Rule Amending 89 Ill. Adm. Code 120.33

Dear Members of JCAR,

On November 7, 2007, the Department of Healthcare & Family Services filed with you an Emergency Rule to amend 89 Ill. Adm. Code 120.32 and 120.33. Upon a determination that parts of that rule were not warranted by the emergency which HFS presented to justify proceeding on an emergency basis, you suspended the Emergency Rule on November 13, 2007. Notwithstanding, HFS did not suspend the changes nor appeal your ruling. You are now considering whether that Emergency Rule should become a permanent Rule. I object to that part of the Rule which creates a State subsidized health insurance as an expansion of the Family Care for families whose household income exceeds 185% and is at or below 400% of the federal poverty level on the ground that HFS does not have the statutory authority to make this change, that is a change that under the Constitution only the Legislature may do.

Attached is the Trial Brief filed in *Caro v. Blagojevich*, Case No. 07 CH 34353 (Circuit Court, Cook County) last Friday, which, in part, addresses that question. In addition to the reasons presented in the Trial Brief, I ask that you consider the following:

A. THE NEW EXPANDED FAMILY CARE PROGRAM

HFS states that it extended Family Care coverage allowed under CHIP, 215 ILCS 106/20(a)(2) and 25(a)(1), to statutorily eligible persons from 185% of the FPL to non statutorily eligible persons with incomes up to 400% of the FPL pursuant to its authority under 305 ILCS 5/5-2 and 12-13. Accordingly, to determine whether HFS acted within the statutory bounds, the two statutes need to be construed.<sup>1</sup>

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<sup>1</sup> The Illinois Supreme Court has recently restated the generally accepted principles of statutory construction in *Brucker v. Mercola*, 102440, pp. 7-8 (Ill. 12-28-2007):

The principles informing statutory construction are familiar. The primary rule of statutory construction is to ascertain and give effect to

## 1. *Medical Assistance/Medicaid Provisions*

Illinois Public Aid statute establishes two classes of persons eligible for medical assistance, also known as Medicaid. 305 ILCS 5/5-2(1) and (2). The second group, which is the one relevant in this case, are those “eligible for basic maintenance \*\*\* but who fail to qualify \*\*\* on the basis of need and who have insufficient income and resources to meet the costs of necessary medical care \*\*\*.” The second group are commonly referred to as the “medical needy.” *Hines v. Department of Public Aid*, 221 Ill.2d 222, 227 (2006). This requirement applies to the classes of persons described in 5-2(2)(a) and (b), including those “eligible for such basic maintenance under Article IV [Temporary Assistance For Needy Families] by disregarding the maximum earned income permitted by federal law.” The State’s income limitations under Article IV, however, remain in effect and that income “must be insufficient to equal the grant amount \*\*\*,” 305 ILCS 5/4-1.6, which is less than 100% of the federal poverty level. Thus, as explained in the Trial Brief, the new expanded Family Care program is not in compliance with the above statutory limitations. Hence, it is not justified as a State Medicaid program.

## 2. *The Children’s Health Insurance Program Act (CHIP)*

The Legislature authorized HFS to obtain waivers under federal SCHIP, 215 ILCS 106/40,<sup>2</sup> for eligible children and their families “whose annual household income \*\*\* is above 133% of the federal poverty level and at or below 200% of the federal poverty level.” 215 ILCS

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the legislature's true intent and meaning. *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 282 (2006). The language of the statute is the best indication of legislative intent, and our inquiry appropriately begins with the words used by the legislature. *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n*, 146 Ill. 2d 175, 207 (1991). If the statutory language is clear and unambiguous, then there is no need to resort to other aids of construction. *Henry v. St. John's Hospital*, 138 Ill. 2d 533, 541 (1990). However, when the language used is susceptible to more than one equally reasonable interpretation, the court may look to additional sources to determine the legislature's intent. *People ex rel. Department of Professional Regulation v. Manos*, 202 Ill. 2d 563, 571 (2002). All provisions of a statutory enactment are viewed as a whole. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 279 (2003). Accordingly, all words and phrases must be interpreted in light of other relevant provisions of the statute and must not be construed in isolation. *Cryns*, 203 Ill. 2d at 279-80. Each word, clause and sentence of the statute, if possible, must be given reasonable meaning and not rendered superfluous. *Sylvester v. Industrial Comm'n*, 197 Ill.2d 225, 232 (2001). In determining the General Assembly's intent, we may properly consider not only the language of the statute, but also the purpose and necessity for the law, the evils sought to be remedied, and the goals to be achieved. *Cryns*, 203 Ill. 2d at 280. Further, when undertaking the interpretation of a statute, we must presume that when the legislature enacted a law, it did not intend to produce absurd, inconvenient or unjust results. *Vine Street Clinic*, 222 Ill. 2d at 282. \*\*\*\*

<sup>2</sup> CHIP is Illinois’ participation the federal SCHIP program and the Illinois program must comply with federal standards and requirements. Illinois’ Family Care program, as it existed prior to November 7, 2007, was established with federal approval pursuant to KidCare Parent Coverage Waiver.

106/20(a)(2).<sup>3</sup> The statutory question then is whether HFS has the authority under the Illinois Public Aid Code, 215 ICLS 106/15,<sup>4</sup> to promulgate by regulation new eligibility standards and categories of persons with incomes more than 200% of the federal poverty level so they can obtain state subsidized health insurance above CHIP's Family Care limits, in effect, to create a whole new state subsidized health insurance program for the middle class?<sup>5</sup>

In Plaintiff's view, the answer is no, for several reasons. First, HFS has not established that the new program complies with the limitation set forth in 305 ILCS 5/5-2 (2) which is to provide assistance to the medical needy, *i.e.*, to persons 'who have insufficient income and resources to meet the costs of necessary medical care \*\*\*.'<sup>6</sup> HFS does not have unlimited discretion to interpret that requirement arbitrarily in order to create a new medicaid program for the middle class as it has acknowledged it has done. The class of persons who are "medically needy" has a well established history consistent with judicially recognized legislative intent. *Hines v. Department of Public Aid, supra*, at 227-28; *Gilmore v. Department of Human Services*, 218 Ill. 2d 302, 304-05 (2006). It is difficult to see how a person whose household income is approximately \$42,000.00 a year or a family of four whose household income is approximately \$82,000.00 a year are "medically needy" as that term has been traditionally, uniformly used. As stated above, the new program is simply not a medicaid program and can not be justified as such.

Second, the new program is also not justified as an expansion of CHIP's Family Care because it is not federally subsidized, and is not authorized under either SCHIP, the Waiver, or federal regulation. CHIP, as established and authorized by the Illinois Legislature, is **a joint federal-state funded program** providing of subsidized health insurance to **low income families**. HFS's new creation is not. HFS's creation is **a wholly state funded program for the middle class**.

Third, irrespective of whether there are adequate appropriated funds available to cover the State's costs and expenditures for the new program, HFS has created a new and very significant financial obligations for the State and its taxpayers that did not exist prior to November 7, 2007. That is something that only the Legislature can do and thus beyond the broadest possible

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<sup>3</sup> The Legislature's purpose in establishing CHIP is clearly set forth in the statute, 20 ILCS 106/5, "to enable low-income children \*\*\* to access health benefits coverage \*\*\*" This included providing subsidized health insurance to children and families whose household income is above 150% of the federal poverty level, 215 ICLS 106/30(a)(2) upon payment of the premiums set forth in the statute. That HFS had not prior to November 7, 2007, made this option available for those above 185% federal poverty level and at or below 200% of the federal poverty level was likely due to the lack of the limitation of funding. 20 ILCS 106/5 and 15.

<sup>4</sup> Section 106/15 provides in relevant part that "\*\*\*\*The Department shall have the powers and authority granted the Department under the Illinois Public Aid Code. \*\*\*\*" Accordingly, Defendants cite 305 ICLS 5/5-2 as the predicate for the creation of the new program.

<sup>5</sup> I do not contest the existence of HFS's authority to have applied for federal approval to amend its KidCare Parent Coverage Waiver to raise the maximum eligibility level to 200% subject to the Legislature having first appropriate sufficient funding to cover the costs on the expansion. It has not done so, however.

<sup>6</sup> This provision is a limitation that must be complied with in addition to 305 ILCS 5/4-1 of Article IV of the Public Aid Code which HFS relies upon.

interpretation of authority that HFS has to carry out its statutory obligations.

Fourth, that HFS's authority is far from as broad as it claims is easily seen from an examination of the CHIP statute: that statute sets forth the ranges of income in reference to the federal poverty level for which benefits under that statute are available. **The Legislature did that not HFS.** The statute also set the premiums to be paid by those whose income is in excess of 150% of the federal poverty level. **Again the Legislature did that, not HFS.** The Legislature also directed that HFS proceed under the waiver option to allow benefits to be paid to families, which it did for families whose incomes do not exceed 185% of the federal poverty level. **With the Legislature exercising such careful control, with clearly established limits for a non-medicaid program, it is unreasonable and without justification for HFS to have concluded that it could create a new totally state subsidized medical insurance program, setting premiums it determines should be charged, for a whole new class or category of middle class beneficiaries not expressly established by the Legislature** in either of the two statutes HFS relies upon, **and far in excess of the 200% cap for CHIP, a non-medicaid program for low income families, a limitation which the Legislature set by statute.**

Finally, HFS's interpretation of what it can do and HFS's new health insurance program for the middle class is such **a radical departure** from established Illinois law and public health programs that it requires prior explicit legislative authorization. As the United States Supreme Court stated in *Scheidler v. NOW*, 537 U.S. 393, 409, 123 S. Ct. 1057, 154 L.Ed. 2d 991 (2003), "a significant expansion of the law's coverage must come from Congress", in this case, State subsidized health insurance for the middle class must come from the Illinois Legislature, not HFS.

For these and the reasons stated in the Trial Brief, HFS does not have the authority to provide subsidized health insurance to persons whose household incomes in excess of those set forth in the CHIP statute and the Waiver. That it did so was contrary to law and the Constitution for the reasons stated above and in the Trial Brief. Accordingly, that portion of the Rule should be rejected.

Finally, please note that I fully support the Legislature and, indeed, Congress, addressing the issue of health insurance's unaffordability for more and more Americans and considering reforms to make healthcare available to all persons on a fair and reasonable basis. HFS just doesn't have the right to do that on its own.

Thank you for considering these objections.

Yours truly,

