

The Governor's "Illinois Covered" proposed a FamilyCare expansion which would double the income level of persons eligible: where FamilyCare had covered children and caretaker relatives with income levels up to 200% of the federal poverty level (approximately \$40,000 in annual income for a family of four), the proposed FamilyCare expansion would extend coverage to all eligible children and caretakers with an income up to 400% of the federal poverty level (approximately \$82,000 in annual income for a family of four). ¶¶23, 63 and Exhibit E (federal poverty guidelines).

The Governor proposed a Gross Receipts Tax ("GRT") to pay for "Illinois Covered." The Illinois General Assembly rejected it. Thereafter, in his proposed Fiscal Year 2008 Budget, the Governor requested the inclusion of the sum of \$358 million for "Illinois Covered", promising that the appropriations for it would be filed as a separate appropriations bill. The General Assembly, however, did not appropriate money in its 2008 Budget for "Illinois Covered," nor did it pass a separate appropriations bill for that purpose. Its appropriation to DHFS, as the appropriations materials demonstrate, was for different purposes and programs. ¶¶24-28.

On August 23, 2007, the Governor signed the Illinois 2008 Fiscal Year Budget, exercising his veto power to cut approximately \$463 million in spending. He proposed that the \$463 million be spent to expand various health care programs, including \$43 million for an expansion of the FamilyCare health insurance program and \$50 million to expand the Free Breast Cancer Screening program. ¶61 and Exhibits H and I. The Legislature had not appropriated these amounts. The Governor was quoted August 30, 2007 in *The Chicago Tribune* saying, "Because we couldn't get some legislators to support this, I'm acting unilaterally to expand health care." ¶32 and Exhibit A.

Effective October 1, 2007, Director Arnold and DPH expanded the Free Breast Cancer Screening program to cover all uninsured Illinois women without regard to their income or wealth and without regard to the financial eligibility limitations in the Public Aid Code, 305 ILCS 5/5-2(12) (incorporating by reference the federal eligibility standards in 42 U.S.C. §1396a(a)(10)(A)(i)(iv)(1)(2)(A) (setting 185% of the federal poverty level as an income limit generally, and for women needing treatment for breast cancer, 42 U.S.C. 1396a(aa)(3)) and 42 U.S.C. 1396a(a)(10)(A)(i)(XIII) (setting a 250% income limit). ¶63 and Exhibit J.

Effective November 7, 2007, Director Maram and DHFS issued an emergency rule under the Public Aid Code, under 89 Ill. Adm. Code 120, entitled “Medical Assistance Programs.” Part of the emergency rule was an amendment to 89 Ill. Adm. Code §120.32 to respond to the sunset of the SCHIP federal health care assistance program that potentially might result in some Illinois citizens losing State-provided health care under the corresponding Illinois’ Children’s Health Insurance Program, 215 ILCS 106/1, *et seq.* (“CHIP”). ¶¶33-34 and Exhibit B.

The other part of the emergency rule, however, created a new section, 89 Ill. Adm. Code §120.33, which essentially was the originally proposed FamilyCare expansion proposed by the Governor that the General Assembly rejected. The new §120.33 (i) made eligible for State-funded medical assistance an entirely new class of persons -- those whose annual income was between 200% and 400% (approximately \$40,000 for a single person and \$82,000 for a family of four) of the federal poverty level and (ii) imposed new levels of premiums for coverage.² ¶35.

² CHIP, as enacted by statute, limits eligibility for its health plan. *See* 215 ILCS 106/20. It requires a person to be a child or the caretaker of a child under the age of nineteen years of age and, relevant here, have an annual household income above 133% but below 200% of the federal poverty level. *See id.* at 26(2). The CHIP health plan allows health insurance coverage both to the child and the caretaker with premiums for the coverage set by the statute. *See id.* at 215 ILCS 106/30.

At its meeting on November 13, 2007, JCAR considered the “emergency” rulemaking containing the proposed §120.32 and §120.33. During the hearing, JCAR members repeatedly asked that the §120.33 expansion of the FamilyCare program be separated from §120.32 because §120.33 was not based on an emergency while §120.32 might well be. DHFS declined to separate them. ¶¶47-49 and Exhibit C (JCAR minutes).

The new §120.33 was not based on a new development or time sensitive emergency. DHFS conceded at the JCAR hearing that it was to address the ongoing problem of the middle class being uninsured. ¶36. As a result, JCAR:

voted to object to and suspend [DHFS’s] emergency rule ... because, contrary to Section 5-45 of the [APA], 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 [DHFS] 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.

¶¶50 and Exhibit D (JCAR objection).

Despite JCAR’s suspension of the “emergency” rule, since December DHFS and Director Maram have implemented and conducted the expanded FamilyCare program as follows:

- The expanded FamilyCare program provides for and covers enrolled citizens with annual incomes of up to 400% of the federal poverty level. Previously, CHIP had provided insurance benefits to citizens with annual incomes not in excess of 200% of the federal poverty guidelines.
- The expanded FamilyCare program requires enrollees to pay premiums not authorized by and well in excess of those authorized for medical assistance under Public Aid and health insurance under CHIP. ¶¶53-54 and Exhibits F and G.

DHFS and Director Maram had identified Sections 5-2 and 12-13 of the Public Aid Code, 305 ILCS 5/5-2 and 12-13 as support and statutory authority for §120.33. Neither of these sections authorizes either §120.33 or their expansion of the FamilyCare program. ¶¶37-38.

Section 12-13 is simply the provision of the Public Aid Code generally granting authority to make rules and regulations. 305 ILCS 5/12-13. ¶39.

Article V, Section 5-2(2) of the Illinois Public Aid Code, 305 ILCS 5/5-2(2), describes the classes of persons eligible for state-funded medical assistance. As detailed below, in certain limited situations it allows DHFS to expand medical assistance to traditional Article IV public aid recipients (Temporary Assistance for Needy Family (“TANF”) recipients). It does not authorize the sweeping expansion of the FamilyCare program that §120.33 proposed and Director Maram and DHS are now implementing. ¶¶40, 42.

The Legislature has given direct and clear guidance about limits on annual income for CHIP. The CHIP health insurance plan allows eligibility at annual incomes of 133% to 200% of the federal poverty levels. It is not free for persons with incomes above the 150% federal poverty. They must pay premiums.

The cost of the expanded FamilyCare program has been estimated in the hundreds of millions. ¶55.

ARGUMENT

I. Plaintiffs Have A Clear Right To Relief

This Court has the authority to enter a TRO and a preliminary injunction to enjoin wrongful conduct prior to resolving this case on the merits. 735 ILCS 5/11-101 and 102. *Kable Printing Co. v. Mount Morris Bookbinders Union Local 65-B*, 63 Ill. 2d 514, 523-524 (1976); *Granberg v. Didrickson*, 279 Ill. App. 3d 886, 888-89 (1st Dist. 1996). At this stage, Plaintiffs need only establish a “fair question” as to their right to relief. *Continental Cablevision v. Miller*, 238 Ill. App. 3d 774 (1st Dist. 1992). Illinois law gives taxpayers the right to bring suit to enjoin the disbursement of public funds that are based on illegal or unconstitutional laws or

administrative action. 735 ILCS 5/11-301, 303; *see Granberg*, 279 Ill. App. 3d at 889. A taxpayer also has a clear right under the common law to bring suit to protect public monies that are expended by an illegal legislative or administrative act, because the taxpayers own these funds and are liable to replenish them for the deficiency caused by the illegal expenditures. *Crusius v. Illinois Gaming Board*, 348 Ill. App. 3d 44, 49 (1st Dist. 2004).

II. Plaintiffs Will Suffer Irreparable Harm and Have No Adequate Legal Remedy.

“Illinois courts have long viewed public funds as being held in trust on behalf of all taxpayers and have recognized that the wrongful expenditure of public assets necessarily harms the public.” *Granberg*, 279 Ill. App. 3d at 889. Without a preliminary injunction, the State will begin to incur obligations and debt from the expanded Free Breast Cancer Screening and “FamilyCare” programs and public funds will be disbursed before the issues can be heard on the merits. *Id.* Plaintiffs will be without an adequate remedy at law if a TRO and a preliminary injunction does not issue. Once spent, “the disputed funds would be forever lost” and Plaintiffs “would have no recourse.” *Granberg*, 279 Ill. App. 3d at 890. Taxpayers alone would be liable to replenish these lost funds. *Crusius*, 348 Ill. App. 3d at 49; *Jones v. Dept. of Revenue*, 60 Ill. App. 3d 887, 890 (1st Dist. 1978) (taxes voluntarily paid cannot be recovered ... in the absence of a statute providing for a credit or a refund ... even if the taxing statute itself is unconstitutional.”)

“Indeed, the statute authorizing taxpayer actions recognizes this common problem in taxpayer suits by expressly providing for the enjoining of officers of State government from disbursing public funds.” *Granberg*, 279 Ill. App. 3d at 890, *citing* 735 ILCS 5/11-303).

III. The Balance of Harms Clearly Favors Plaintiffs

“Generally, the grant of the temporary [injunctive] relief should outweigh any possible injury which the defendant might suffer by its issuance.” *Wilson v. Wilson*, 217 Ill. App. 3d 844, 849 (1st Dist. 1991). That is certainly true here. If a TRO/preliminary injunction is granted, Defendants would suffer only a temporary delay in the implementation of the expansion of the Free Breast Care Screening and FamilyCare programs and they have multiple avenues to seek to implement such a program lawfully. In contrast, without injunctive relief, the taxpaying public would suffer because the Constitution continues to be breached, unlawful conduct continues to occur and funds continue to be spent. The Verified Second Amended Complaint shows a tremendous expansion of State-funded medical assistance without any lawful authority or funding source to pay for it. The State and the taxpayers are and will be liable for the costs of implementing the expanded programs – by some estimates, hundreds of millions this fiscal year.

In balancing the equities, this Court also should consider the confusion and chaos that will be introduced into the health-care community, where new enrollees, believing they are covered by State-subsidized health care, later find out that they are not – after they have received medical care which will require payment. Medical providers, too, will be uncertain as to whether they will be compensated. A temporary halt to these expansions is critical to preserve the *status quo* and to allow the legal complexities to be sorted out before thousands of people rack up millions of dollars in medical expenses.

IV. Plaintiffs Have a Strong Likelihood of Success on the Merits.

A. §120.33, Which Purported to Expand FamilyCare, Became Void and Unenforceable When JCAR Suspended It.

Under the APA, if JCAR objects to an “emergency” rule, JCAR may issue a statement to that effect to the Secretary of State. Upon receipt by the Secretary of State of the certified

statement, the effectiveness of the rule shall be *suspended*. The agency may not enforce a suspended rule. 5 ILCS 100/5-125. JCAR objected to the “emergency” rule to expand the FamilyCare program and issued a statement to the Secretary of State which has been published. Accordingly, that rule is unenforceable. Director Maram’s and DHFS’ implementation of §120.33 violates the APA, and is unauthorized and unlawful.

B. No “Emergency” Existed To Justify The “FamilyCare” Expansion.

The APA mandates that “all rules of agencies shall be adopted in accordance with this Article.” Thus, all the APA’s provisions for the adoption and implementation of a rule must be first complied with. 5 ICLS 100/5-10, 5-25. The general rulemaking provisions set forth in 5 ICLS 100/5-40 are applicable to the agencies’ proposed or actual adoption of the health benefits programs in issue. A State agency must give 45 days’ notice of its proposed action and accept comments, allow for public hearings if required, and give an additional 45-day notice period. *Id.*; *Ogden Chrysler Plymouth, Inc. v. Bower*, 348 Ill. App. 3d 944, 957 (2nd Dist. 2004). Failure to comply with notice and comment requirements renders the proposed rule unenforceable. *Kaufman Grain Co. v. Dir. Of the Dept. of Agriculture*, 179 Ill. App. 3d 1040 (4th Dist. 1988).

The APA provides for a limited exception to the notice and comment requirements, allowing for “emergency” rulemaking, without notice or hearing. An “emergency” is “the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare.” 5 ILCS 100/5-45(a). An “emergency” rule that is found *not* to constitute an emergency is unenforceable. *Senn Park Nursing v. Miller*, 104 Ill.2d 169 (1984).

There was no “emergency” here. DHFS essentially conceded this at the JCAR hearing. While the lack of insurance for the middle class is an important issue, “important” is not the same as “emergency”. If it were, every important issue would be an emergency and the notice

and comment provisions of the APA would be useless. The Governor proposed the expansion of FamilyCare March, 2007. Had rules been promulgated to address the issue properly and lawfully then, there would be no need to resort to “emergency” rulemaking. *Citizens for a Better Environment v. Illinois Pollution Control Bd.*, 152 Ill. App. 3d 105 (1st Dist. 1987).

C. With §120.33, Director Maram Exceeded The Scope Of His Authority

An administrative agency is a creature of statute, and that agency possesses only those powers granted it by statute. *Nader v. State Board of Elections*, 354 Ill. App. 3d 335, 340 (1st Dist. 2004). An agency may not enlarge its authorizing statutory language or otherwise exceed the scope of its delegated authority. *MCI WorldCom Communications, Inc. v. Metra Commuter Rail Div. of Regional Transp. Auth.*, 337 Ill. App. 3d 576, 581 (2nd Dist. 2003). If an agency promulgates rules beyond the scope of the legislative grant of authority, the rules are invalid. *R.L. Polk and Co. v. Ryan*, 296 Ill. App. 3d 132, 141 (4th Dist. 1998)

§120.33 was beyond the scope of Director Maram’s and DHFS’ authority. They identified, as authority for the rule, Section 5-2(2) of the Illinois Public Aid Code, which concerns State-provided “medical assistance,” or health care. Such an interpretation far exceeds that permissible from either the language of the provision or the legislative history, which makes clear it was intended only as a short term extension of benefits, not a permanent program.

Section 5-2(2) describes classes of persons eligible for medical assistance. It allows at sub-paragraph (2)(a) for the provision of medical assistance to individuals who might fall under Article III of the Public Aid Code (for the blind, aged, and disabled). Thus, 2(2)(a) provides no authority §120.33, which goes far beyond medical assistance to the blind, aged, and disabled.

Sub-paragraph (2)(b), 305 ILCS 5/5-2(2)(b), refers to Article IV, now the Temporary Assistance to Needy Families (“TANF”) article. (2)(b) permits medical assistance for “[a]ll

persons who would be determined eligible for such basic maintenance under [TANF] by disregarding the maximum earned income permitted by federal law.” 305 ILCS 5/5-2(2)(b). To qualify for expanded medical assistance under sub-paragraph (2)(b), the recipient would have to otherwise qualify for TANF, but for the income eligibility requirement. Thus, DHS’ and Director Maram’s authority is limited to providing medical assistance to persons who satisfy *every single requirement* for TANF other than financial need. §120.33, the rule purporting to expand FamilyCare, went beyond that authority.

The TANF eligibility limitations missing from the expanded FamilyCare program are not trivial. As a precondition to the receipt of TANF assistance, an unemployed parent under the age of twenty who has not completed high school must enroll in a program to obtain a high school diploma or high school equivalency certificate. 305 ILCS 5/4-1.9(b). Moreover, a person may be deemed ineligible for TANF because he or she fails to enroll in a DHFS mandated education, training, and employment program. *See* 305 ILCS 5/4-1.9(a). By contrast, the expanded FamilyCare program does not impose either of these requirements. Thus, an individual who fails to satisfy either of these criteria would be denied TANF assistance but granted coverage under the expanded FamilyCare program. Sub-paragraph (2)(b) limits the Director’s authority to those who would be eligible for TANF coverage in every way other than financial need. It provides no statutory authority for programs that, in effect, sweep away its provisions.

Moreover, paragraph (2)(b)’s initial language requires that coverage only may be extended to individuals “who have insufficient income and resources to meet the costs of necessary medical care.” 305 ILCS 5/5-2(2). Director Maram and DHFS, however, have promulgated a rule that covers *all* relevant individuals with income up to 400% of the federal poverty level (annual income up to \$82,000 per year). They have not explained (and because

this was an “emergency” rule, the public had no chance to ask) the basis for the blanket assumption that every individual at this income level lacks ability to obtain for health-care coverage. Again, Director Maram and DHFS have exceeded the scope of authority by not confining coverage to people lacking financial resources for health care. The rule creating the expanded FamilyCare program is, therefore, null and void.

D. The Directors’ Expanded Programs Violate the APA And The Constitution

Under Illinois law, agencies’ policies, practices and programs that affect people and entities outside the agency are “rules” subject to APA requirements. 5 ILCS 100/1-70; *Denton v. Civil Service Commission*, 277 Ill. App. 3d 770, 772 (4th Dist. 1996). The Directors’ operations of the expanded Breast Cancer Screening and FamilyCare programs are, in-effect, “rules” that wholly fail to comply with the APA because they have been “adopted” by the agency without proper notice, comment or hearing.

Further, since there is no statutory authority or appropriation for the programs, they are unconstitutional and violate the Separation of Powers and the Finance Articles of the Illinois Constitution. *See, e.g., People ex rel. Chicago Dryer Co. v. City of Chicago*, 413 Ill. 315, 320 (1952) (“The power to make laws is vested in the legislature and cannot be delegated to another body, authority, or person.”); *Bridges v. State Bd. Of Elections*, 222 Ill. 2d 482 (2006) (only the Legislature may appropriate revenues).

E. To The Extent There Is A Statutory Grant Of Authority For The Directors To Operate The Expanded Programs, It Is An Unconstitutional Delegation of Authority And Violates The Separation of Powers, Revenue and Finance Articles of the Illinois Constitution

The Illinois Constitution provides for the separation of powers among the executive, legislative and judicial branches. Ill. Const. 1970, Art. II, §1. The power to decide what the law shall be is a sovereign power vested in the legislature, and that power cannot be delegated to the

