

**IN THE CIRCUIT COURT OF COOK COUNTY  
OF THE STATE OF ILLINOIS**

|                                               |                               |
|-----------------------------------------------|-------------------------------|
| <b>RICHARD P. CARO, A STATE OF ILLINOIS )</b> |                               |
| <b>TAXPAYER ON BEHALF OF AND FOR THE )</b>    |                               |
| <b>BENEFIT OF THE TAXPAYERS OF THE )</b>      | <b>CASE NO. 07 CH 034353</b>  |
| <b>STATE OF ILLINOIS, )</b>                   |                               |
| <b>Plaintiff, )</b>                           | <b>HON. JAMES E. EPSTEIN,</b> |
| <b>-against- )</b>                            | <b>Circuit Judge</b>          |
| <b>HON. ROD R. BLAGOJEVICH, )</b>             | <b>REPLY MEMORANDUM</b>       |
| <b>GOVERNOR OF THE STATE OF ILLINOIS, )</b>   | <b>IN SUPPORT OF TRO</b>      |
| <b>ET AL., )</b>                              |                               |
| <b>Defendants. )</b>                          |                               |
| _____ )                                       |                               |

**PRELIMINARY STATEMENT**

On December 12, 2007, an emergency motion to intervene was filed by Ronald Gidwitz Gregory Baise and the Illinois Coalition for Jobs, Growth and Prosperity. I consent to their intervention since, as taxpayers, they have a right to contest expenditures they claim are in violation of the Constitution and law.

The term "Defendants" in this Memorandum refers to all the names Defendants with the exception of the Comptroller, Daniel W. Hynes.

STATEMENT CONCERNING THE FACTS

The material facts I presented and rely upon are based almost exclusively on official documents and documents from the Governor's office. My Affidavit attests that the attached documents are true and correct copies of what I have stated they are. The core facts are, in fact conceded and admitted by the Defendants: Free Breast Screening has been expanded without DPH complying with any provision of the APA regarding rulemaking. (Affidavit of Shannon R. Lighter, ¶s 6-7, Defendants' Exhibit B.) They have also admitted that Family Care coverage has been expanded to now include persons whose gross income is between 185% and 400% of the Federal Poverty Level. (Affidavit of Tamara Tanzillo Hoffman, ¶5, Defendants' Exhibit C.)

While there may be some question about how much money the expansions will cost, \$48

to \$368 million for Family Care, \$50 million to ? for Free Breast Screening, there have been admissions establishing that the expansions are in effect, and there is no question that liabilities are being incurred, moneys spent. For example in the Governor's December 6, 2007 Press Release, appended hereto as Exhibit 13, he states that since October 1 there has been a 121% increase over the same period last year in the number of women getting free breast screening. Exactly what the costs of the expansion are and are expected to be as distinct from what the costs of the program for women meeting the pre-October eligibility requirements has not been disclosed by the Defendants. The Governor's August request was for \$50 million to cover the additional costs that would result from the expansion. (Caro Exhibit 7.)

Defendants state that \$5.9 million is the amount of money that has been appropriated by the Legislature for the Breast Screening Program. That appropriation, however, was not to cover the additional costs of the expansion.<sup>1</sup> Even with the \$4 million transfer from DHFS to the program (Lighter Aff. ¶14, Defs. Ex. B) there will be a substantial shortfall. The Governor's August 23, 2007, proposal for the additional \$50 million appropriation for the expanded program has not been approved by the Legislature. There thus has been no appropriation to cover the costs of the expansion.

As for the costs of the expanded Family Care Program, Defendants have not stated in their papers what the additional costs are being incurred and expected to be incurred this fiscal year. Again, the Governor's August 23, 2007, proposal for an appropriation in \$48 million for the expanded program has not been approved by the Legislature. There thus has been no appropriation to cover the costs of this expansion in any amount<sup>2</sup> either.

There is also no genuine dispute that the Legislature rejected the Governor's bill to expand State programs providing subsidized health coverage and that the Legislature has not adopted the Governor's proposals for spending the \$463 million from vetoed items on the health care programs listed in his August 14, 2007 Press release. (Caro Aff. Exhibit 7.) The Governor's

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<sup>1</sup> Inclusion of the amount of federal money that's available is not relevant since our concern is only what the costs to the State will be for the expansion. The Governor put that at \$50 million in his August 14, 2007 Press Release. (Caro Exhibit 7.)

<sup>2</sup> The Legislature's estimate for the cost of this expansion is reported to be \$367 million.

has publicly stated that notwithstanding the Legislature's refusal to adopt these expansions, he would have them implemented anyway using his executive authority.

Finally, there is a dispute respecting whether an emergency existed that justified the Department of Health & Family Services' emergency expansion of the Family Care expansion. But this dispute is resolvable as a question of law. The relevant facts are not in dispute, just the conclusions drawn. The Defendants did not address that issue in their Memorandum and have not disputed my argument that such a determination is reviewable by the Court. Here the Defendants did not attempt to show just how the "emergency" justified the expansion. Instead they briefed at great length the question of whether JCAR had the legal authority to suspend the emergency rule.<sup>3</sup> I did not base my motion on the argument that it did because I did not think it needed to be reached if the Court determines that no emergency existed to justify the expansion of the Family Care Program.<sup>4</sup> This is consistent with the judicial rule of practice that constitutional issues should not be reached if the dispute is resolvable on other grounds. I respectfully suggest that is what should be done here.

The questions respecting the scope of discretionary authority the two Departments have to implement the respective expansions involve two issues that need to be resolved: first whether the scope of the discretion Defendants argue was given was in fact given and second whether purported broad discretion, if given, was constitutional, i.e. whether it constitutes an unlawful delegation of exclusive legislative authority. I have argued that here whatever the scope of authority the Executive contends it has, it's been exercised in violation of the Legislature's exclusive right to:

(a) enact, amend laws, define the scope and limitations of programs and those eligible to participate in those programs and

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<sup>3</sup> My reference to JCAR's decision was to support my contention that no emergency existed which justified the expansion of the Family Care Program.

<sup>4</sup> This is not to say that I agree with Defendants' position on the issue. Defendants rely on court decisions of other states to support their argument. They did not, however, point out that the issue must be addressed in light of the Constitutional of each of these States and the history and practice of each State in construing the powers and limitations of power of each such State.

(b) to appropriate money and determine the amount of funding that will be provided for each legislatively authorized program.

For the reasons stated herein and previously, the Court should reject Defendants' arguments and grant the Temporary Restraining Order.

## ARGUMENT

### I

#### DPH IS NOT EXEMPT FROM COMPLYING WITH THE APA'S RULEMAKING PROVISIONS

Every executive agency, department is granted by statute the authority to do certain things to implement the statutory tasks assigned to it by the Legislature. The statutory provisions relied on by the Defendants 20 ILCS 2310/2310-25, 30, and 355 do not state that DPH is exempt from the APA. That it is authorized to promote the public health, enter into contracts for medical services, and to make disbursements doesn't relieve it from having to comply with the APA when it adopts a new or amends an existing rule. Defendants have not denied that the expansion constitutes a rule within the meaning of the APA. The only justification for not proceeding in accordance with the APA is their self serving statement that they do not have to. No authority is cited to support that position and the opinion of Ms. Lightner is not binding on the Court or controlling and her statement is inconsistent with the hundreds of regulations posted on its website.<sup>5</sup> Every executive agency, department can take the same position: since they are authorize to do xyz, they don't have to comply with the APA. If that were true, the APA is a nullity.<sup>6</sup> The absurdity of their argument speaks for itself.

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<sup>5</sup> On DPH's homepage there is a link to "Laws & Rules" which leads to a page with links to "Administrative Rules Only", "Current Laws and Rules", "Emergency Rules", "Proposed and Adopted Rules." When using those links, there are lists of highlighted Rules, which, if accessed leads to numerous rules relating to the subject matter.

<sup>6</sup> DHFS has not made that argument and the fact that it treated the expansion of persons eligible for Family Care as a rule, is a strong and convincing argument that the expansion of person's eligible for Free Breast Screening is also a rule that was required to be implemented in accordance with the APA.

Finally, I note that the Defendants have not contested that the expansion of persons eligible was in disregard of the statute's financial limitations. Under Defendants' theory, DPH could make Free Breast Screening available to all Illinois women irrespective of statutory eligibility limitations. That, of course, is patently wrong. Neither the Governor nor a public agency may amend a program established by the Legislature or establish a new program that requires prior enabling legislation. In 1977 the then Illinois Attorney General explained why that is beyond the Governor's authority:

“Your ... question is whether the relevant provisions of the Illinois Pension Code may be modified by executive order of the Governor or other exercise of executive authority. The answer clearly is that they cannot. Article V, section 8 of the Illinois Constitution of 1970 provides that ‘the Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws.’ It does not empower the Governor to change the laws.”  
1977 Op. Ill. Atty. Gen. 167, 170 (No. S-1295, Sept. 30, 1977).

Although here there is no Executive Order, what the Governor may not constitutionally do by Executive Order, he can not do by **not** issuing an Executive Order. The Constitution's limitations on his authority apply whether he is acting formally or informally.

The same limitation applies to all state agencies, including the Department of Public Health, and any other agency charged with developing and administering the State's current health care programs: “[A]n administrative agency ... is and was constrained by [statutory] limitations. It has no general or common law authority. The only powers it possesses are those granted to it by the legislature, and any action it takes must be authorized by statute.” *Vuagniaux v. Dep't of Prof. Reg.*, 208 Ill. 2d 173, 186, 802 N.E.2d 1156 (2003); *see also Bio-Medical Labs., Inc. v. Trainor*, 68 Ill. 2d 540, 551, 370 N.E.2d 223 (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”). Even where the Legislature has granted an agency rulemaking authority, that authority must be exercised consistently with the statute. “**A statute which is administered may not be altered or added to by the exercise of a power to make regulations thereunder.**” *Ruby Chevrolet, Inc. v. Dep't of Revenue*, 6 Ill. 2d 147, 151, 126 N.E.2d 617 (1955) (emphasis added).

Thus the DPH's elimination of the statute's financial eligibility limitation is clearly unconstitutional, unlawful and void *ab initio*.

## II

### DEFENDANTS' ADOPTION OF THE 400% STANDARD INCONSISTENT WITH THE STATUTE AND LEGISLATIVE INTENT

That the Governor twice sought to have the Legislature amend the Medical Assistance Article of the Public Aid statute, 305 ILCS 5/5 *et seq.*, when he proposed the Illinois Covered Bill and then the alternative expenditure of the \$463 million from the vetoed items is a *de facto* concession that the expansions he wanted required Legislative approval. That is in fact the case because the purpose of the Medical Assistance provisions is to provide

“\*\*\* a program of essential medical care and rehabilitative services for persons receiving basic maintenance grants under this Code and other persons unable to, because of inadequate resources, to meet their essential medical needs.” 305 ICLS 5/5-1.

The 400% limitation<sup>7</sup> is well beyond providing assistance to persons with “inadequate resources to meet their essential medical needs.” Indeed, the general eligibility standard is linked to financial need to meet basic maintenance requirements for life and health as Defendants acknowledge. For example, 305 ILCS 5/4-1 and 5/4-1.6 allows medical assistance to be provided to families whose available income is “insufficient to equal the [public aid] grant amount \*\*\* for such person.” There is no statutory provision for providing medical assistance to persons and families with incomes that are sufficient to meet basic maintenance requirements. Defendants statement that the expanded class of persons meet this standard simply doesn't make it so. An examination of the application of the 400% standard for persons eligible for Family Care Premium Level 3 speaks for itself. A single person whose gross income is \$3403.00 a month, or \$40,836.00 a year, qualifies for the subsidized health insurance coverage. For a two person family it's \$4,563.00 a month or \$54,756.00 a year. For three persons it's \$5723.00 a month or \$68,676.00 a year. For a family of four, the gross income may not exceed \$6883.00 a

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<sup>7</sup> The rights of persons or families entitled to receive or are receiving basic maintenance grants to qualify for and receive Medical Assistance are not in issue here.

month or \$82,596.00, a year. (Caro Exhibit 5.) It can not be reasonably concluded that persons with these incomes<sup>8</sup> are unable to meet their “basic maintenance requirements” in accordance with the Statute’s stated purpose of providing assistance to those in need.

Assuming, *arguendo*, that DHFS has the broad discretion it claims, then the legislative delegation of such a broad discretion is unconstitutional because it constitutes the exercise of legislative authority as has been argued by the Gidwitz Intervenors and me. That Defendants’ argument is fatally flawed can be seen from the fact that under their construction of the statute, the Department may fix the maximum income level as high as it wishes. If it can be raised to 400% of the Federal Poverty Level, why not 500%, 1000% ? As also argued such power is in violation of the Legislature’s exclusive right to appropriate money for programs and determine the amount of funding available to each such program.

Neither the Governor nor the Department has the authority to impose additional financial burdens on the State, nor the taxpayers of the State without the consent of their duly elected representatives in the State Legislature. As the Illinois Supreme Court held in *County of Cook v. Ogilvie*, 50 Ill. 2d 379, 280 N.E.2d 224 (1972), held:

“\*\*\* Article III of the constitution of 1870, as well as section 1 of article II of the constitution of 1970, . . . preserves the separation of powers between the three branches of government . . . . The power to make appropriations is constitutionally vested in the General Assembly . . . . The question here is whether the Governor can be authorized to do what the General Assembly itself could do only by an act duly passed and approved, i.e., divert the funds appropriated for one particular purpose, thereby reducing one appropriation and increasing the other. While the Governor possesses the power to reduce an appropriation by means of an item veto, he could not exercise, nor could the legislature constitutionally delegate to him or a department of the executive branch of government, the power to transfer funds specifically appropriated for one program.” 50 ILL.2d at 384-85.

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<sup>8</sup> Comparing these figures with the maximum financial limitations applicable before the November 7, 2007 expansion (Caro Exhibit 6) shows the dramatic difference:

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|-----------|-------------------|-----------------------|
| 1 person  | \$1574.00 per mo. | \$18,888.00 per year  |
| 2 persons | \$2111.00 per mo. | \$25,332.00 per year  |
| 3 persons | \$2647.00 per mo. | \$31,764.00 per year  |
| 4 persons | \$3184.00 per mo. | \$38,208.00 per year. |

*See also* 1973 Op. Ill. Atty. Gen. 177, 179 (Op. No. S-643, Oct. 30, 1973), and 1976 Op. Ill. Atty. Gen. 192, 194 (Op. No. S-1097, May 27, 1979). Only the Legislature may impose taxes and appropriate money for programs it authorizes.

Defendants' reliance on the United States Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919, 952-56 (1983), describing what acts are legislative in nature establish Defendants' expansion of this program and the Free Breast Screening Program are legislative in nature. In Defendants' own words:

“The U.S. Supreme Court determined that because the House's action was legislative in nature it was subject to the procedures contained in Article I. The house's action was deem legislative because (1) it altered the legal rights of persons outside the legislative branch; (2) it involved policy determinations; and (3) the only way the same result could have been achieved was by means of enacting legislation. \*\*\*” Defendants' Memorandum at 10.

Expanding the benefits of a program or making new class of persons eligible for the benefits of an existing program are acts which are legislative in nature under the authorities the Gidwitz Intervenor and I have presented in our initial Memoranda.

Since statutes must be construed to be constitutional, if possible, the Court should reject Defendants' construction of their authority because that construction allows and results in an unconstitutional delegation of authority for the reasons that have been presented.<sup>9</sup> Construing the Department's scope of its discretionary authority as limited by the Legislature's exclusive legislative and appropriation powers and by the Constitution's limitations on the ways a public debt/liability may be established renders the expansions here unconstitutional.<sup>10</sup>

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<sup>9</sup> The Court needs to reach the constitutional issues I've raised. While the expenditures can be invalidated and enjoined under the APA, that will allow the agencies to initiate the proper rulemaking proceedings to exercise powers that they do not and may not exercise under the Constitution.

<sup>10</sup> As argued initially, Department of Public Health exceeded the scope of its authority when it eliminated the statutory financial eligibility restrictions for Free Breast Screening.

### III

DEFENDANTS HAVE FAILED TO SHOW THAT  
THE PUBLIC DEBT/LIABILITY BEING INCURRED  
UNDER THE EXPANDED PROGRAMS ARE  
CONSTITUTIONAL & AUTHORIZED BY THE LEGISLATURE

The facts establish that the expansions of the two programs in issue were never funded by the Legislature, never the subject of an appropriation, never authorized by the Legislature and that, in addition, the expansions were implemented in violation of the APA and are hence invalid *ab initio*. I have argued that by creating such public debts/liabilities, Defendants have infringed upon and violated the Legislature's exclusive constitutional right to appropriate money and determine the funding for authorized programs. The Constitution in Article IX, Section 9 addresses the only ways that public debts/liabilities may be incurred. It states in subsection (a) that "No State debt shall be incurred except as provided in this Section.\*\*\*"

Subsection (b) provides the first way for a public debt to be authorized:

"State debt for specific purposes may be incurred or the payment of State or other debt guaranteed in such amounts as may be provided either in a law passed by the vote of three-fifths of the members elected to each house of the General Assembly or in a law approved by a majority of the electors voting on the question at the next general election following passage. Any law providing for the incurring or guaranteeing of debt shall set forth the specific purposes and the manner of repayment."

Obviously, the liabilities the Defendants are creating with respect to the expansions of these two programs have not been authorized by a 3/5s vote of both Houses of the General Assembly or by the voters. The contrary is actually true: the General Assembly rejected the expansions and, as a consequence, the State's incurring a public debt and liabilities for them. So the public debts/liabilities being incurred by the expansions can not be validated under this provision.

Subsections (c),<sup>11</sup> (d),<sup>12</sup> and (e)<sup>13</sup> are inapplicable and can't be relied upon in light of the

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<sup>11</sup> Subsection (c) provides:

"State debt in anticipation of revenues to be collected in a fiscal year may be incurred by law in an amount not exceeding 5% of the State's appropriations for

fact that the approved budget already exceeds expected revenues, has been unbalanced for years (see Article VIII, Section 2, Illinois Constitution), and the debt/liabilities in question are not being incurred to pay a prior existing deficit. This leaves subsection (f), the last provision of Section 9. But this is also inapplicable on its face:

“The State, departments, authorities, public corporations and quasi-public corporations of the State, the State colleges and universities and other public agencies created by the State, may issue bonds or other evidences of indebtedness which are not secured by the full faith and credit or tax revenue of the State nor required to be repaid, directly or indirectly, from tax revenue, for such purposes and in such amounts as may be authorized by law.”

Neither Department issued bonds to raise money to pay for the expansions and the debts and liabilities being incurred are intended by Defendants to be secured by the full faith and credit of the State and which are to be paid by tax revenues.

The Defendants are thus incurring a public debt and liability independent of any constitutionally authorized manner and, accordingly, the requested temporary injunction should be granted.

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that fiscal year. Such debt shall be retired from the revenues realized in that fiscal year.”

<sup>12</sup> Subsection (d) states:

“State debt may be incurred by law in an amount not exceeding 15% of the State's appropriations for that fiscal year to meet deficits caused by emergencies or failures of revenue. Such law shall provide that the debt be repaid within one year of the date it is incurred.”

<sup>13</sup> Subsection (3) provides:

“State debt may be incurred by law to refund outstanding State debt if the refunding debt matures within the term of the outstanding State debt.”

## Conclusion

For the reasons set forth above and previously, the Court should grant the Temporary Restraining Order

(A) enjoining and restraining the Defendants, and all those acting in concert with them, or at their directions and orders, from further implementing and authorizing services and expenditures for persons who do not satisfy the eligibility requirements for qualifying for Free Breast Screening and Family Care that existed prior to the implementations of the expansions of those two programs and

(B) enjoining and restraining the Governor, and all those acting in concert with him, or pursuant to his directions and orders, from implementing any of the other expansions of healthcare programs he announced in August 2007 he would implement without Legislative authorization

until a hearing is had on my motion for a Preliminary Injunction and the entry of a further Order of the Court.

Dated December 14, 2007

Respectfully submitted,

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