

# JOINT COMMITTEE ON ADMINISTRATIVE RULES

ILLINOIS GENERAL ASSEMBLY

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SEN. MAGGIE CROTTY

CO-CHAIR:  
REP. BRENT HASSERT

EXECUTIVE DIRECTOR:  
VICKI THOMAS



700 STRATTON BUILDING  
SPRINGFIELD, ILLINOIS 62706  
271/785-2254

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REP. LOU LANG  
REP. DAVID R. LEITCH  
REP. DAVID MILLER  
REP. ROSEMARY MULLIGAN

## MINUTES

January 9, 2008

### MEETING CALLED TO ORDER

The Joint Committee on Administrative Rules met on January 9, 2008 at 11:00 a.m. in Room C-1 of the Stratton Office Building in Springfield 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
X Senator James Clayborne, Jr.	X Representative Brent Hassert
X Senator Maggie Crotty	X Representative Lou Lang
X Senator Randy Hultgren	X Representative David Leitch
Senator Dan Rutherford	X Representative David Miller
Senator Ira Silverstein	X Representative Rosemary Mulligan

### APPROVAL OF THE MINUTES OF THE PREVIOUS JCAR MEETING

Senator Hultgren moved, seconded by Representative Leitch, to approve the minutes of the December 11, 2007 meeting. The motion passed unanimously.

### REVIEW OF AGENCY RULEMAKINGS

*Department of Central Management Service – Pay Plan (80 Ill. Adm. Code 310; 31 Ill. Reg. 14619)*

Representative Lang, seconded by Senator Clayborne, moved that JCAR recommend that, in the future, CMS be more timely in adopting rulemakings so that the rule is in effect before the provisions contained in the rule are applied. The motion passed unanimously.

Co-Chair Crotty asked if any member desired to discuss any other rulemaking. Representative Lang requested consideration of a rulemaking proposed by the Department of Public Health and

Representative Miller asked for a rulemaking proposed by the Department of Healthcare and Family Services.

***Department of Public Health – Smoke Free Illinois Code (77 Ill. Adm. Code 975; 31 Ill. Reg. 13672)***

The Department was represented by Marilyn Thomas, Chief Legal Council; Thomas Schafer, Acting Deputy Director; Julie Doetsch, Tobacco Control Program Manager; Susan Meister, Rules Coordinator; and Rukhaya Alikhan, Staff Attorney.

Representative Lang stated that the Committee had reservations about the due process procedures of the rulemaking. He asked if the Department would agree to an Extension so that the Department could construct due process protections in the rule that would make sense to the members of JCAR.

Ms Thomas responded that the statute does not clearly define the due process mechanisms to be used by DPH. The Department would like to continue to look at this issue, but, at this point, the Department cannot enter into an agreement to that effect.

Representative Fritchey asked why the Department could not acquiesce to the request for an Extension.

Ms Thomas said DPH is very anxious to get this rule adopted. Currently there is a mechanism in place by which if there is a need to enforce the law, DPH can go to the State's Attorney or the Attorney General and seek judicial action to enforce the law. This law is of great interest to everyone in Illinois from a public health perspective.

Representative Fritchey stated that this is exactly why the rule should be constructed correctly. Ms Thomas has said the statute is not clear with respect to due process. He suggested that the statute is actually silent on that subject. He asked if Ms Thomas could cite any portion of the Act that addresses due process.

Ms Thomas said there are provisions prohibiting discrimination.

Representative Fritchey affirmed that the statute does not prescribe due process procedures. Ms Thomas agreed. He then asked if the Department had an opinion on whether there are enough deficiencies in the statute that follow-up legislation is desirable.

Ms Thomas stated that the Department does not believe that follow-up legislation is necessary.

Representative Fritchey stated that he is a strong supporter of the intention of this law and asked again if it is the Department's opinion that nothing in the law needs to be cleaned up. What about the issue of a waiver for tobacco related research at the universities, with the ultimate goal of decreasing the health affects of smoking. Under the current statute, they are going to be prohibited from doing the research. He had understood that the Department was sympathetic to the situation of the universities, but says it doesn't have authority under the law to issue a waiver.

Representative Fritchey also said he has heard that the Department is contemplating a non-enforcement letter for the universities, though he doesn't know how DPH could do that. Doesn't the Department think this needs to be addressed in the statute?

Ms Thomas responded that, yes, this is an issue for the universities. She agreed that this problem has to be addressed by statute, that it cannot be addressed by rule. The Department supports smoking cessation programs and believes they are very important for the public health.

Representative Fritchey asked if Ms Thomas wanted the Smoke Free Illinois (SFI) statute to be the best that it could be. Ms Thomas responded that she wanted all the laws to be the best that they could be. Representative Fritchey stated that JCAR also wants all the rules to be the best that they can be, so he doesn't understand the Department's reluctance to agree to Representative Lang's request for an Extension in order to improve this rulemaking.

Ms Thomas reiterated her refusal to agree to the Extension.

Representative Mulligan asked why, if DPH doesn't believe it has adequate direction on due process procedures from the law, it doesn't seek change in the statute. The General Assembly could address both due process and a waiver for university research. She also asked why the Department can't accept an Extension.

Ms Thomas said again that the Department wants the rules adopted as quickly as possible.

Representative Mulligan said there are other issues on which the Department has delayed rulemaking for 2 years, for example, regulations on how monies will be allocated for grants.

Representative Miller stated that the Department has acknowledged there is a problem of due process for persons cited for violation of the Act, but yet DPH is not willing to take the time to make sure the rights of the citizens of Illinois are protected. This involves such questions as where people will be able to smoke, for what they can be cited, who will be citing them, and what is the process through which they can defend themselves. For example, how can a building owner defend himself when cited for smoking by persons just passing by the establishment or when persons in a bus stop outside the 15 foot buffer zone throw their butts back into the zone around the establishment. Representative Miller said he is also concerned about getting this program into place expeditiously; however, he is also concerned about individual rights.

Ms Thomas said the statute went into effect January 1 and currently applies. A due process mechanism is in place. If an enforcing body needs to go after an individual or receive complaints or issue citations, this is being done right now. This is being enforced in Illinois. She understands JCAR's concerns. One of the things DPH has considered is adopting the rule so it will provide guidance on all the other provisions of the program, then go back and look at the due process provisions and perhaps come back later with guidance in that area. In the meantime, there is due process in place.

Representative Miller pointed out that Ms Thomas had just acknowledged that the rule is not clear. So why not do it now? The one thing he has heard from his constituents is that they know

about the 15 foot buffer zone, but they don't know what their rights are.

Ms Thomas denied that she had admitted to any problems with the rule. There are always opportunities to provide additional guidance and DPH has the ability to do that with additional rulemaking. She urged JCAR to allow DPH to adopt the rules.

Representative Lang stated that he had voted for the underlying legislation, though he recalled characterizing it at the time as being overreaching, and the kinds of problems that can stem from overreaching legislation is now evident. DPH has had several conversations with JCAR regarding due process and a system in which the presence of an ashtray could trigger an investigation. He stated the Constitution, the supreme law of the land, requires that everyone receive due process. Yet DPH is still unwilling to take 30 more days to get it right. The Department admits there are things in the rule and statute that could be worked on, but say they are unwilling to do so. JCAR has a responsibility, whether the members like the underlying statute or not, to follow the Constitutional requirements for due process. The fact that an agency under the Governor is unwilling and unable to do that is appalling, embarrassing and moves Representative Lang to offer a motion.

Representative Lang moved, seconded by Senator Burzynski, that JCAR object and prohibit filing because the rulemaking contains no process by which an accused violator can argue that no violation occurred, appeal a finding of a violation, or appeal the amount of the imposed fine. An alleged violator's only options are to pay the fine or challenge enforcement action through the circuit court. Lack of due process threatens the public interest and welfare. The motion passed on a vote of 9-1-0 (No: Hassert).

***Department of Healthcare and Family Services – Medical Payment (89 Ill. Adm. Code 140; 31 Ill. Reg. 13570)***

Tamara Hoffman, Chief of Staff, represented the Department.

Representative Miller asked what kinds of preventative services would now be reimbursable with this rule change.

Ms Hoffman said this would include preventive services like going for a general health checkup. Clients are now receiving these services, but providers are not allowed to bill for them under medical assistance. This is part of the PCCM program (primary care case management), giving well care rather than forcing the person to wait for the need for acute care in order to see a doctor.

Representative Miller said he doesn't need to be told about the benefits of preventive care, being a practitioner himself. However, he is concerned about the Department's claim that this extension of medical assistance would be cost-neutral. He asked for the Department's estimate of the cost of this extension, and how the Department is going to pay for these expanding costs, in light of the information the Committee has recently received from HFS indicating a substantial backlog in medical assistance payments at the end of the fiscal year, even before adding these existing services.

Ms Hoffman said that she does not have a specific estimate of costs, but, based on disease management and PCCM (primary care case management) studies, the Department believes that preventative care will save money.

Representative Miller said this is a commonly known fact. However, there will surely be short-term costs, and he again asked how these expanded services will be paid for in this fiscal year.

Ms Hoffman repeated her prior response and added that there is a pretty immediate impact from people getting preventive care.

Representative Miller said he disagrees with that. Acute problems are acute. Emergency care will still be needed. What will improve is that persons needing routine care will end up going to a primary physician, not a hospital setting. However, there is still going to be ramp up time. Time will be needed to solicit providers, particularly if HFS is not paying down the currently unpaid obligations. He stated that everyone is certainly for health care and preventive care. However, the fiscally responsible thing to do would be to be sure the State has budgeted for this expansion before it occurs, make sure the funds are available to pay for the additional services, have a good estimate of the short-term fiscal impact of adding these services, make sure that providers are available for these individuals to see, and be sure that they receive quality care. Because of the lack of any answers to these questions, Representative Miller indicated he would be making a motion.

Ms Hoffman again stated that persons who are conscientious about their health care are getting preventive services now; however, their care providers can't be reimbursed under medical assistance.

Representative Fitchey: The notion of preventive services being cost-neutral is based on the long term. Money spent on preventive services now will save higher costs of treating serious disease down the road.

Ms Hoffman: I think this is a valid concept, but I have no specific information on it.

Representative Fitchey: In long term, preventive care can be cost-neutral or maybe even cost-savings. However, in the short term, it is going to cost money. HFS coming before JCAR is like seeing my bills come in the mail. Every time I see you now, I know it's going to cost money. This proposal, laudable or not, like the last proposal you brought here, incurs expenses not envisioned by the legislature when it set the medical assistance budget. With the expansion of medical assistance programs, you are going to be spending more money than you were going to spend prior to those expansions.

Ms Hoffman: This is not a general expansion in medical assistance eligibility; it is enabling HFS to pay providers for services they are already performing.

Representative Fitchey: It is an expansion to cover services providers are not currently being paid for; it is an expansion in reimbursement. By virtue of the expanded programs that HFS is

engaged in now, contrary to JCAR's objection, won't you be spending more money than was envisioned when your budget was appropriated? You are spending more money by doing these programs than you would by not doing them. Correct?

Ms Hoffman: Yeah.

Representative Fitchey: Of course you are. If you are doing more, you're spending more.

Ms Hoffman: I know what you are saying.

Representative Fitchey: Money was appropriated in the budget based on what HFS was doing at the time, not on what it is doing now. So isn't it fair to say, coupled with the information on anticipated medical assistance backlog that you provided in response to Representative Leitch's request, that HFS is not going to have sufficient funds, under the current appropriation, to continue medical assistance through this entire fiscal year.

Ms Hoffman: I don't have that information.

Representative Fritchey: Money was appropriated to HFS based on the size and scope of the medical assistance program then in effect. That scope and size have now been expanded, costing more money. HFS has no intention of having enough money to get through this fiscal year, does it?

Ms Hoffman: I don't know the answer to that question.

Representative Fritchey: If you spend more money than we gave you, then you're going to run out of money, correct?

Ms Hoffman: We can't spend more money than you give us.

Representative Fritchey: The hell you can't.

Ms Hoffman: We have to have appropriation authority.

Representative Fritchey: If you run out of the money the General Assembly has appropriated, you will have to come back for more. Correct?

Ms Hoffman: That would be an alternative, I would imagine.

Representative Fritchey: Have there been any discussions in the Department or the Administration on the potential of HFS running out of money during this fiscal year?

Ms Hoffman: I have not had those discussions.

Representative Fritchey: Are you aware that they have been held?

Ms Hoffman: I don't know specifically.

Representative Fritchey: You have no knowledge of any discussions involving the Administration and the Department?

Ms Hoffman: I did not have those discussions. Obviously we have discussions with the budget office all the time about planning and about....

Representative Fritchey: I know a lot of your coworkers, and you and your coworkers are very intelligent people. You have to be able to do the math to say we do not have enough money to get us through the year doing everything that we're doing.

Ms Hoffman: I am not prepared to speak to that.

Representative Fritchey: OK. I've made the point as clearly as I can. Let me ask you this, if this body were to prohibit today, is the Department going to abide by the decision of JCAR?

Ms Hoffman: I am certain that we would take what you say under advisement.

Representative Fritchey: Are you going to abide by the decision of JCAR on this?

Ms Hoffman: I am not the person who would make that decision.

Representative Fritchey: Who is?

Ms Hoffman: The Director of our agency?

Representative Fritchey: Could I request that he appear at the next meeting?

Ms Hoffman: Representative, you can request anything.

Representative Fritchey: Consider that to be a request. Whether Director Maram chooses to honor that request is up to him.

Ms Hoffman: I will share that with him.

Representative Fritchey: There is an unavoidable situation that has been created now by the fact that you are coming to JCAR in an apparent acknowledgement of the rulemaking process, while at the same time saying we are going to do whatever we want to do anyway. You cannot sit here and tell me, like every other agency would do, that you are going to abide by the decision of JCAR, can you?

Ms Hoffman: We would certainly take it under advisement.

Representative Fritchey: I'll take that as a "no". And you cannot explain how HFS is going to spend the money appropriated for a fiscal year in much less than a fiscal year, without a plan on

how to get by the rest of the fiscal year. You are turning into the CTA. You are going to create a doomsday scenario, then come back and say "give us more money or all these people are going to be without essential services". When HFS comes back to the General Assembly down the road for more money because it blew through its appropriation, I want it to be recognized that it was a situation of HFS' making, not JCAR's, not the General Assembly's, not the Republican leaders', not the Democratic leaders'.

Representative Mulligan: I think what is going on here is an insult. Whether they are keeping you in the dark or they are directing you to respond in this manner, I think this is irresponsible. In the past, whenever a program is expanded by an agency, the director of the budget and the Administration puts into it only a certain amount of money until they see how the program is going to run. Now, there seems to be no intention of HFS to go by this process, but just to spend the money without any regard. Can you tell me what percent of this year's medical assistance budget has been spent at this point?

Ms Hoffman: I can't tell you that.

Representative Mulligan: It is an insult to say this is going to be cost-neutral. You will have young men who won't be covered. You are not going to be able to cover the same number of people you covered before in the adult program. Come March, when there's no money left in the lines, providers will come to us because they can't get their bills paid. These are people who legitimately should have their bills paid. What the Department, and perhaps the Administration, thinks is going to happen is that the General Assembly will capitulate and give you a supplemental appropriation. I have an alternative suggestion: that the General Assembly not capitulate and that the people who are legitimately owed money file a class action suit in federal court and have a monitor take over your agency and figure out what's going on here. You cannot decide to spend money you don't have and to continue to give us half-baked answers. At some point, there's going to be a crisis. Why should a crisis you have created come back on us, when you're not working with us? I have worked on the State budget for over 15 years, and I know that agencies usually are responsible in how they expand programs. I don't find this rulemaking to be responsible. The word just comes down from the top that "I'm going to do this. I want to be the guy who provides health care for everybody", regardless of what the population can afford. When an agency gets totally out of control, control has to be returned. You can't say that we are going to spend an unlimited amount of money on programs. I don't know to what age over 21 you intend to cover. I do know that men aren't covered under certain portions of Medicaid. You have no thought of getting a federal match. We can go back and amend the law to clearly limit what the Department can expend under its appropriations. Or we can suggest that the providers, who I feel really bad for, go into federal court and sue because you are obligated to pay their bills because they are obligated to provide the services. Again, you'll end up under a federal monitor. HFS seems to think it has a blank check to do whatever it wants. The irresponsibility of what you are doing here is going to create repercussions.

Representative Leitch: I would agree that this is yet another contemptible situation in which you show up before us with a medical assistance expansion without any idea of what it's going to cost. This will have immediate costs. Practitioners in the medical community are owed what will be at least \$1.7 billion by the end of this year. In large measure, they are not being paid because

of unauthorized expansions that are being implemented by HFS in violation of the Constitutional powers of the legislative branch to appropriate. This is a huge mess. The word everywhere in the building is that the Department is deliberately spending down its appropriation so that a crisis will be created as early as February. I think this is contemptible behavior. It hurts the people it is supposed to be helping. It will result in a very unfortunate situation for the citizens of this State. I would like to share with you how completely unhappy I am with the way this is proceeding and encourage some modicum of responsibility in the future.

Representative Miller moved, seconded by Representative Mulligan, that JCAR object to and prohibit filing of the HFS rulemaking because, given the Department's own estimate that the State will experience a shortfall of at least \$861 million in its ability to pay this fiscal year's claims under the medical assistance program, it is not in the public interest to further increase the State's financial obligations under medical assistance by, at this time, expanding the program to offer preventive care to adults. The motion passed on a vote of 9-1 (No: Hassert).

### **CERTIFICATION OF NO OBJECTION**

Senator Burzynski 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, except that Representatives Hultgren and Hassert asked to be recorded No on the rulemaking of the Department of Public Health titled Hospice Programs (77 Ill. Adm. Code 280; 31 Ill. Reg. 2204).

### **FEBRUARY MEETING DATE**

Co-Chair Crotty announced that the next meeting was scheduled for Thursday, February 14, 2008, 9:00 a.m., Room C-1, Stratton Office Building, Springfield IL.

### **ADJOURNMENT**

Representative Lang moved, seconded by Senator Clayborne, to adjourn the meeting. The motion passed unanimously.