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