

THE  
ROGER  
BALDWIN  
FOUNDATION  
OF ACLU,  
INC.

SUITE 2300  
180 NORTH MICHIGAN AVENUE  
CHICAGO, IL 60601-1287  
T: 312-201-9740  
F: 312-201-9760  
WWW.ACLU-IL.ORG



**DELIVERED VIA EMAIL AND U.S. MAIL**

March 9, 2017

Lynette Schafer  
Illinois Department of Healthcare and Family Services  
Division of Medical Programs  
Bureau of Managed Care  
201 South Grand Avenue  
East Springfield, IL 62794  
[HFS.Procurement@illinois.gov](mailto:HFS.Procurement@illinois.gov)

Re: State of Illinois Medicaid Managed Care Organization Request for Proposals 2018-24-001

Dear Ms. Schafer:

I am a staff attorney in the Women's and Reproductive Rights Project of the Roger Baldwin Foundation of ACLU, Inc. ("ACLU" or "ACLU of Illinois"). I write to raise questions and concerns regarding the State of Illinois Medicaid Managed Care Organization Request for Proposals 2018-24-001 ("the RFP"), including the draft Model Contract between HFS and contracting managed care organizations ("MCO" or "Contractor") set forth in Appendix I of the RFP ("the draft Model Contract").

The ACLU of Illinois is a nonprofit organization dedicated to securing freedom, liberty, equality and justice. The ACLU's Women's and Reproductive Rights Project seeks, through litigation, public education, and administrative and legislative advocacy, to ensure that all in our society have access to the full range of reproductive health care options. The ACLU has a long and proud history of defending religious liberty and believes that the right to practice one's religion, or no religion, is a core component of our civil liberties. For this reason, the ACLU routinely brings cases designed to protect the rights of individuals to worship and express their religious beliefs. At the same time, the ACLU vigorously protects women's rights and reproductive freedom. To that end, we have been conducting an investigation of Medicaid coverage of reproductive health care services, including abortion care, in Illinois. We have, among other things, gathered documents through Freedom of Information Act ("FOIA") requests to the Illinois Department of Healthcare and Family Services ("HFS") and information about the experiences of patients in the Medicaid system who face barriers to access to essential reproductive health care.

As set forth below, the RFP and draft Model Contract raise critical issues about coverage for such care, including creating harmful barriers for patients who participate in the Medicaid program. We urge HFS to address these issues to ensure that all enrollees in MCOs selected for contracts under this RFP have adequate access to medically necessary covered services as required by state and federal law.

**1. The Draft Model Contract Language Regarding “Right of Conscience” Creates Refusal Rights Beyond Those Contemplated by the Health Care Right of Conscience Act.**

Section 5.6 of the draft Model Contract purports to incorporate rights under 745 ILCS 70/1 et seq., the Illinois Health Care Right of Conscience Act (“HCRCA”), by permitting any contracting MCO to “choose to exercise a right of conscience by refusing to pay or arrange for the payment of certain Covered Services.”<sup>1</sup> The draft Model Contract allows a contracting MCO to do so simply by notifying HFS in writing of the “services that the Contractor refuses to pay, or to arrange for the payment of.”<sup>2</sup> This contractual provision expands the right to refuse to participate in payment for services beyond that which is provided for in the HCRCA.

Contrary to the draft Model Contract, the HCRCA only permits a health care payer to refuse “to pay for or arrange for the payment of any particular form of health care services that violate the health care payer's conscience” if the health care payer’s objection is “*documented in its ethical guidelines, mission statement, constitution, bylaws, articles of incorporation, regulations, or other governing documents*” (emphasis added).<sup>3</sup> The draft Model Contract must therefore be revised to properly incorporate the terms of the HCRCA by requiring an objecting Contractor to submit to HFS formal corporate documents that demonstrate that the health care services at issue violate the health care payer's conscience.

**2. HFS Must Create Procedures to Ensure That Enrollees Can Access Covered Services When Their MCO Objects Under the HCRCA.**

HFS must take steps to ensure that Medicaid enrollees have adequate and timely access to covered services, as required by law, even when their MCO refuses to cover such services because of an objection covered by the HCRCA. As the Illinois General Assembly recently affirmed in an amendment to the HCRCA that went into effect on January 1, 2017, it is “the public policy of the State of Illinois to ensure that patients receive timely access to information and medically appropriate care,” even in the face of conscience objections to such services.<sup>4</sup>

We appreciate that the draft Model Contract requires that, when a contracting MCO refuses to be involved in payment for health care services under the HCRCA, it must notify potential, prospective and existing enrollees at certain times specified in Subsection 5.6.2., and that such notice must include information about how an enrollee can obtain information from HFS regarding those covered services. However, we do not believe that this is adequate notice. Patients often do not know that they will need a particular service in advance and thus could not choose an MCO based on the notice that is currently required. We urge HFS to specify in the contract that the MCO must follow specific procedures that will enable an enrollee to access services when their MCO will not pay for, or arrange for payment of, such services. We also urge HFS to ensure that such information is available to enrollees at all times by requiring that the contracting MCO include this information in its enrollee handbook.

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<sup>1</sup> Subsection 5.6.1 of the draft Model Contract.

<sup>2</sup> *Id.*

<sup>3</sup> 745 ILCS 70/11.2 to 70/11.4.

<sup>4</sup> 745 ILCS 70/2.

### **3. The Draft Model Contract Misstates the State’s Obligation to Cover Abortion Care for Patients Enrolled in State Medical Assistance Programs.**

Since 1994, Illinois has been under a court order (*Doe v. Wright*) requiring the state’s medical assistance programs to provide coverage for abortion services necessary to protect a woman’s health.<sup>5</sup> This requirement addresses the gap in Medicaid coverage created by the Hyde Amendment, which bans the use of federal Medicaid funding to cover abortion services except in cases of rape, incest, or life endangerment. Such bans on insurance coverage for abortion are heavy-handed intrusions into a decision that is best left to a woman and her family.

Even though the 1994 court order, among other things, enjoined HFS regulations to the extent that they failed to cover abortions necessary to protect a woman’s health, HFS has never updated its regulations to reflect this decision. Outdated regulations, combined with confusing instructions, conflicting paperwork requirements, and other needless obstacles to coverage, have made it so difficult for providers to obtain Medicaid reimbursement for medically necessary abortion services that the Guttmacher Institute recently concluded that Illinois may be in violation of this longstanding court order.<sup>6</sup>

As Illinois has increasingly sought to shift Medicaid enrollees into MCOs, it is particularly important that MCOs have an accurate understanding of what services are covered under Illinois Medicaid. The RFP emphasizes that a contracting MCO must ensure that “providers understand billing requirements” and must “provide billing education to providers,” which includes offering clear and accurate guidance to providers regarding the scope of covered services.<sup>7</sup>

Nonetheless, the draft Model Contract misleadingly describes the scope of covered services for abortion by repeatedly citing outdated state and federal regulations that provide that abortion services are only covered when necessary to save a woman’s life.

First, Section 5.1 of the draft Model Contract states that “Covered Services shall be provided in the amount, duration, and scope as set forth in 89 Ill. Adm. Code, Part 140, and in this Contract” but fails to acknowledge that these regulations include a subsection (89 Ill. Adm. Code 140.413) which has been enjoined because it unlawfully provides that abortion services shall be covered “only in those cases in which the physician has certified in writing to the Department that the procedure is necessary to preserve the life of the mother.”

Second, Subsection 5.5.1 of the draft Model Contract, which purports to explain the limitations on covered services for abortion care, is misleading and inaccurate. This subsection states:

Contractor may provide termination of pregnancy only as allowed by applicable State and federal law (42 CFR §441, Subpart E). In any such case, Contractor shall fully comply with the requirements of such laws, complete HFS Form 2390, and file the completed form in the Enrollee’s medical record. Contractor shall not

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<sup>5</sup> *Doe v. Wright*, No. 91 CH 1958 (Ill. Cir. Ct. Dec. 2, 1994).

<sup>6</sup> Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, Guttmacher Pol. Rev., Vol. 19 (2016), available at [https://www.guttmacher.org/sites/default/files/article\\_files/gpr1904616\\_0.pdf](https://www.guttmacher.org/sites/default/files/article_files/gpr1904616_0.pdf).

<sup>7</sup> Subsection 5.2.8.2 of the RFP.

provide termination of pregnancy to Enrollees who are eligible under SCHIP (215 ILCS 106).

This subsection fails to explain that abortion services are covered by Illinois Medicaid where necessary to protect the health or life of the pregnant woman, or in cases of rape or incest. Moreover, the outdated federal regulation (42 CFR §441, Subpart E) this subsection cites as “applicable . . . law” would limit coverage for abortion services solely to situations in which a woman’s life is in danger.<sup>8</sup> Finally, the guidance offered in this subsection regarding abortion service coverage for enrollees eligible under the State Children’s Health Insurance Program (“SCHIP” or “CHIP”) raises a number of concerns, including that it conflicts with the Illinois CHIP State Plan. The Illinois CHIP State Plan specifically provides that enrollees who are eligible under SCHIP may enroll under Medicaid in order to obtain coverage for abortion services.<sup>9</sup>

HFS has included this misleading and inaccurate language in its contracts with MCOs, as well as in its Managed Care Manual for Medicaid Providers, in the past. As a result, most MCOs provide their enrollees and providers with similarly misleading and inaccurate guidance about the scope of abortion service coverage under Illinois medical assistance programs. The ACLU of Illinois reviewed enrollee handbooks and provider handbooks provided by MCOs for Integrated Care Programs (“ICPs”) and Family Health Plans (“FHPs”) in Illinois, and found that only a few accurately set forth the scope of Illinois Medicaid coverage for abortion services. Most MCO handbooks simply reprint the language of Subsection 5.5.1 verbatim, without attempting to explain to enrollees or providers what services are actually required to be covered. Indeed, several MCO handbooks imported the restrictions of the federal Hyde Amendment without acknowledging that Illinois medical assistance programs must cover abortion services when necessary to protect a woman’s health.<sup>10</sup> These issues put Illinois patients enrolled in Medicaid at risk and deny them their legal rights to access medically necessary health care.

We urge HFS to correct this misleading contract language and provide full and accurate guidance to MCOs and providers regarding the extent of required coverage for abortion services under Illinois medical assistance programs.

#### **4. HFS Must Ensure that Contracting MCOs Meet Network Adequacy Requirements and Quality Assurance Standards for Abortion Services as part of Comprehensive Reproductive Health Care.**

Finally, we urge HFS to take affirmative steps to ensure that contracting MCOs have adequate provider networks and quality assurance standards to offer access to all covered services, including abortion services. The RFP and the draft Model Contract recognize that, as required by state and federal laws and regulations, a contracting MCO must build a provider

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<sup>8</sup> In 1993, federal restrictions on abortion coverage were amended to include coverage in cases of rape and incest as well as to preserve the life of the pregnant woman. A 1994 federal court decision ensures that Illinois follows this federal law. *Planned Parenthood v. Wright*, No. 94 C 6886, 1994 WL 750638 (N.D.Ill. Dec. 6, 1994).

<sup>9</sup> Illinois CHIP State Plan (2002), at 30, available at <https://www.medicaid.gov/CHIP/Downloads/IL/ILCurrentStatePlan.pdf>.

<sup>10</sup> Some MCOs have instituted reporting or documentation requirements in cases of rape or incest that even deny or impede coverage for abortion services covered under federal Hyde Amendment restrictions. Such requirements conflict with the Illinois Medicaid State Plan and violate federal law. See *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 181 (3d Cir. 1995).

network and meet quality assurance standards to ensure adequate access to covered services for all enrollees. The RFP requires that MCOs submit information about their provider networks, including proposals for how they plan to recruit providers, build their networks, and monitor compliance with network adequacy standards.<sup>11</sup> The draft Model Contract provides detailed requirements for network adequacy and quality assurance standards to ensure access to care for family planning and reproductive health services,<sup>12</sup> as well as to care provided to pregnant women,<sup>13</sup> but does not address the need for an adequate provider network or other measures to ensure access to abortion services when necessary to protect the health or life of a pregnant woman, or in cases of rape or incest. Access to these covered services is critical to ensure that pregnant enrollees facing a health-endangering or life-threatening condition, or who are the victims of rape or incest, can access the care they need.

We note that the RFP asks MCOs to explain how they would address the needs of a potential Medicaid enrollee in an example vignette featuring a pregnant woman who has two children under the age of 5; she has schizophrenia and her “medications will need to be reduced during her pregnancy, potentially reducing their effectiveness.”<sup>14</sup> The vignette does not specify whether the hypothetical enrollee has decided to carry her pregnancy to term, raising the possibility that she could decide to preserve her health by terminating her pregnancy, in the face of the real and substantial risks to her health posed by reducing her medications during pregnancy. In evaluating each RFP submission, HFS should evaluate whether the responding MCO identifies and addresses the possibility that a pregnant enrollee might decide to terminate her pregnancy in order to preserve her health, and whether the responding MCO offers adequate provider networks and coverage to provide such an enrollee with adequate and timely access to covered abortion services. Unfortunately, in the course of our investigation, we have become aware of women who have needed hospital-based abortion care to address a serious health condition but whose MCO did not contract with a single hospital that provided abortion care. We urge HFS to ensure that that does not continue to happen by requiring true network adequacy.

Thank you for the opportunity to raise questions and concerns regarding the RFP and the draft Model Contract. Please do not hesitate to contact me if you would like to discuss these issues further.

Sincerely,

A handwritten signature in black ink that reads "Amy Meek". The signature is written in a cursive, flowing style.

Amy Meek  
Staff Attorney, Women's & Reproductive Rights Project  
Roger Baldwin Foundation of the ACLU of Illinois

cc: Representative Greg Harris

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<sup>11</sup> Subsections 4.2.6 and 5.2.8 of the RFP.

<sup>12</sup> Section 5.8, Attachment XI (“Quality Assurance”), and Attachment XXI (“Required minimum standards of care”) of the draft Model Contract.

<sup>13</sup> *Id.*

<sup>14</sup> Subsection 5.2.2.1 of the RFP.