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VIA EMAIL AND U.S. MAIL

Felicia Norwood, Director  
Illinois Department of Healthcare and Family Services  
201 South Grand Avenue East  
Springfield IL 62763  
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Dear Director Norwood:

We have reviewed the final Illinois Department of Healthcare and Family Services (“HFS”) Model Contract language for managed care organizations (“MCOs”) to provide state medical assistance services beginning January 1, 2018 (“the Model Contract”). With more than 80% of Medicaid enrollees in Illinois expected to participate in these managed care plans, it is essential that the MCO contracts accurately reflect the scope of covered services. In addition, the MCOs must be prepared to provide coverage for such care in their networks and to ensure that enrollees have clear information about such coverage. To this end, the ACLU has repeatedly urged HFS to provide clear and accurate guidance regarding the scope of abortion coverage under state law. For your convenience, we are attaching our previous comments to HFS regarding the MCO RFP and Model Contract.

We understand that Governor Rauner signed House Bill 40 (now Public Act 100-538) after the Model Contracts were largely drafted, and that this timing may have presented certain challenges for HFS. We also recognize that, after HFS received comments on a previous version of the Model Contract, one section was revised to remove inaccurate language restricting abortion coverage and to state that abortion coverage shall be provided in accordance with state law. Unfortunately, however, this change does not clarify the scope of abortion coverage, as the Model Contract continues to reference sources of earlier confusion, such as outdated and inconsistent regulations, policies, and procedures. It is simply not in the interest of enrollees, MCOs or providers for the MCO contracts to perpetuate the confusion and inconsistencies about abortion coverage that P.A. 100-538 should have put to rest. These concerns are all the more urgent because HFS has not updated these regulations, policies, or procedures, or otherwise communicated to MCOs, providers, or enrollees regarding implementation of the new law. We urge HFS to take the necessary steps to assure compliance with P.A. 100-538 when it takes effect on January 1, 2018.

### **1. Conflicting Guidance Regarding Scope of Abortion Coverage**

P.A. 100-538 is clear about the scope of coverage for abortion care in Illinois. It removes from the Public Aid Code the abortion discriminatory language that – although subject to federal

court injunction – previously led to confusion about the scope of abortion coverage. It also includes an affirmative requirement that state medical assistance programs cover all abortion care that is otherwise legal in Illinois.<sup>1</sup> Nevertheless, the Model Contract perpetuates confusion by failing to set forth clearly the scope of abortion coverage. For example, Section 5.5.1 of the Model Contract states that the “[c]ontractor may provide termination of pregnancy only as allowed by applicable State and federal law.”<sup>2</sup> This language suggests that there are limitations on abortion coverage, defined only by reference to “State and federal law.” The provision thus leaves any reader to question whether the restrictions of federal law (under the Hyde Amendment) somehow apply to limit abortion coverage, notwithstanding the provisions of our state statute. Even if the MCOs are not misled by this language, it is likely to confuse providers and enrollees because, as we have explained in previous comments to HFS, most MCO handbooks simply reprint this contract provision verbatim, without attempting to explain what abortion services are actually required to be covered.

Other provisions of the Model Contract create similar confusion. For example, Section 5.1 directs MCOs to conform to HFS regulations regarding covered services, which could be read to incorporate the HFS regulation that states that abortion can only be covered in cases in which the life of the pregnant woman is threatened.<sup>3</sup> This regulation has been subject to two federal court injunctions since the early 1990’s, but has never been corrected by HFS, and stands in direct conflict to P.A. 100-538. The general reference to regulations in the Model Contract serves only to muddy the waters regarding the requirement that enrollees be covered for abortion care.

Similarly, Section 1.1.127 defines “medically necessary” services as those services that are appropriate “as indicated in State statute and regulations, the State plan, and other State policy and procedures.” However, the relevant state statute, state regulations, and state policy and procedures offer conflicting guidance regarding abortion coverage. For example, HFS provider handbooks improperly cite outdated state and federal regulations that purport to limit abortion coverage to situations in which the pregnant woman’s life is in danger.<sup>4</sup>

HFS can address the conflicts between the statutory and regulatory language by issuing emergency regulations to implement P.A. 100-538 and then updating its handbooks and other materials to accurately reflect the current state of Illinois law. HFS has the authority to issue emergency regulations here, because its failure to do so creates a threat to the public interest by denying enrollees legally required coverage.<sup>5</sup> Absent emergency rulemaking to bring the relevant regulations into conformity with P.A. 100-538, state statutory and regulatory language will continue to conflict, creating dangerous and unnecessary confusion, until HFS updates the relevant regulation.

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<sup>1</sup> 305 ILCS 5/5-5.

<sup>2</sup> Model Contract, Section 5.5.1.

<sup>3</sup> See 89 Ill. Adm. Code 140.413.

<sup>4</sup> See, e.g., HFS Managed Care Manual for Medicaid Providers (Jan. 2016), at 24 (limiting abortion coverage by citation and link to 42 CFR Part 441, Subpart E, which includes an outdated formulation of the Hyde Amendment), available at <https://www.illinois.gov/hfs/SiteCollectionDocuments/MCOManual.pdf>; HFS Handbook for Providers, Chapter 100 – General Policy and Procedures (Sept. 2017), Sections 103.1 and 104 (limiting abortion coverage by citation and link to 89 Ill. Adm. Code 140.413).

<sup>5</sup> 5 ILCS 100/5-45 (permitting an agency to adopt an emergency rule in any situation that it “finds reasonably constitutes a threat to the public interest, safety, or welfare.”).

If, however, HFS does not intend to issue emergency rules, we urge HFS to issue clear guidance to MCOs, enrollees, and providers regarding the required scope of abortion coverage beginning January 1, 2018 – including the imminent need for MCOs to establish provider networks that assure adequate access to abortion care for enrollees. At an absolute minimum, we suggest addressing these issues in the required Readiness Reviews for MCOs, issuing a bulletin to providers, and requiring revision of MCO handbooks and other materials to ensure that they adequately reflect the scope of required coverage.

## **2. HFS Form 2390 Requirement for Abortion Reimbursement**

Section 5.5.1 of the Model Contract also requires completion of HFS Form 2390 for all abortions. Form 2390 requires that providers indicate whether the abortion was performed because of rape, incest, life endangerment for the woman, or to protect the woman’s health.<sup>6</sup> HFS must immediately inform MCOs and providers as to whether Form 2390 will no longer be required once P.A. 100-538 is in effect, whether it will be required only in cases for which HFS will seek reimbursement from the federal government (life, rape or incest), or whether the form will be altered to reflect the passage of P.A. 100-538 prior to the law taking effect.

## **3. Abortion Coverage for CHIP Enrollees**

Section 5.5.1 of the Model Contract also prohibits contracting MCOs from providing abortion coverage for enrollees in the state’s Children’s Health Insurance Program (“CHIP”).<sup>7</sup> As detailed in our previous comments to HFS, this exclusion violates the injunction entered in *Doe v. Wright*<sup>8</sup> and contravenes the Illinois CHIP State Plan.<sup>9</sup> It is also inconsistent with the clear mandate of P.A. 100-538, which requires the state to cover all abortion care that is otherwise legal in Illinois for those enrolled in the state medical assistance programs.<sup>10</sup>

Because the Model Contract bars MCOs from providing abortion coverage to CHIP enrollees, HFS must take steps to fill this gap in legally required services, either by providing fee-for-service reimbursement or by negotiating separate contracts with MCOs to cover abortion care for CHIP enrollees by January 1, 2018.<sup>11</sup> We urge HFS to promptly inform MCOs, enrollees, and providers about how the state intends to provide abortion coverage to CHIP enrollees pursuant to the requirements of P.A. 100-538 and the CHIP State Plan.<sup>12</sup>

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<sup>6</sup> HFS Abortion Payment Application Form 2390, available at <https://www.illinois.gov/hfs/SiteCollectionDocuments/hfs2390.pdf>.

<sup>7</sup> Model Contract, Section 5.5.1 states that a contracting MCO “shall not provide termination of pregnancy to Enrollees who are eligible under SCHIP (215 ILCS 106).”

<sup>8</sup> *Doe v. Wright*, No. 91 CH 1958 (Ill. Cir. Ct. Dec. 2, 1994) (requiring that state medical assistance programs cover abortions when necessary to protect a woman’s health).

<sup>9</sup> Illinois CHIP State Plan (2002), at 30, available at <https://www.medicaid.gov/CHIP/Downloads/IL/ILCurrentStatePlan.pdf> (providing that enrollees who are eligible under SCHIP may enroll under Medicaid in order to obtain coverage for abortion services).

<sup>10</sup> 305 ILCS 5/5-5. See also 215 ILCS 106/25 (Illinois CHIP statute requires state to provide eligible children with health care benefits that are identical to those provided to enrollees in the state Medicaid program).

<sup>11</sup> As you are aware, federal regulations require that any state wishing to provide abortion coverage for CHIP enrollees in circumstances beyond those permitted by federal Hyde restrictions must do so through a separate managed care contract using non-Federal funds. 42 CFR 457.475.

<sup>12</sup> In addition, HFS must update the CHIP regulations, 89 Ill. Adm. Code 125.305, to conform to the requirements of P.A. 100-538.

#### 4. Preserving Confidentiality in Recipient Verification of Services Procedures

Finally, we note that the Model Contract requires a contracting MCO to annually submit to HFS, for prior approval, the MCO's plan for verifying with enrollees whether services billed by providers were actually received, as required by federal regulations (42 C.F.R. 455.20).<sup>13</sup> Although neither the Model Contract nor the federal regulations specifically requires that an Explanation of Benefits (EOB) be sent to enrollees to verify that such services were received, such a practice is common among state Medicaid agencies and contracting MCOs.<sup>14</sup>

Information conveyed through an EOB may inadvertently reveal sensitive health care information to parents, a spouse, or other family members about the services a patient has received. In order to protect patient confidentiality, Illinois law restricts Medicaid MCOs from sending EOBs or otherwise divulging information concerning "sensitive health services," except in certain limited circumstances.<sup>15</sup> This statutory provision defines "sensitive health services" to include "reproductive health services [and] family planning services". However, the MCO Model Contract does not include abortion care in its definition of "Family-Planning and reproductive-health services."<sup>16</sup> As a result, MCOs that have procedures in place to comply with the confidentiality requirements for "sensitive health services" may interpret them in a manner that does not cover patients receiving abortion care – which, without question, can put abortion patient safety and confidentiality at risk.

Accordingly, HFS must direct contracting MCOs to take steps, in formulating their plans for verifying with enrollees whether services billed by providers were received, to ensure that information about sensitive health services (including abortion care) is protected in accordance with 305 ILCS 5/5-30(i). HFS must also review any such plan submitted by a contracting MCO to ensure that it has established adequate procedures for protecting confidentiality regarding abortion care.

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As P.A. 100-538's effective date approaches, we urge HFS to immediately take all necessary steps to ensure that it is properly implemented for all medical assistance programs in Illinois.

Sincerely,



Lorie Chaiten  
Director, Women's and Reproductive  
Rights Project



Amy Meek  
Staff Attorney, Women's and Reproductive  
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<sup>13</sup> Model Contract Attachment XIII, page 278.

<sup>14</sup> National Family Planning & Reproductive Health Association, Confidentiality, Third-Party Billing, & the Health Insurance Claims Process: Implications for Title X, at 12, *available at* [https://www.confidentialandcovered.com/file/ConfidentialandCovered\\_WhitePaper.pdf](https://www.confidentialandcovered.com/file/ConfidentialandCovered_WhitePaper.pdf).

<sup>15</sup> 305 ILCS 5/5-30(i).

<sup>16</sup> Model Contract, Section 1.1.79 ("Family-Planning and reproductive-health services are defined as those services offered, arranged, or furnished for the purpose of preventing an unintended pregnancy, or to improve maternal health and birth outcomes.").