

**Testimony of Heather McPherson**  
**On behalf of the Illinois State Bar Association**  
**September 13, 2010**  
**HFS hearing on the Deficit Reduction Act**  
**Chicago, Illinois**

**Background**

The Illinois Department of Healthcare and Family Services has proposed rules implementing the federal Deficit Reduction Act of 2005 (DRA). The Medicaid-eligibility provisions inserted into the DRA were and remain controversial. To become law it required Vice-President Cheney to cast a tie-breaking vote in the Senate and passed the House 216-214. One of DRA's goals was to decrease Medicaid spending by shifting the cost to take care of seniors and people with disabilities to seniors, people with disabilities, and their families.

**Overview of current law prohibiting transfers**

Illinois already restricts transfers of assets by persons entering nursing homes who then seek Medicaid. For example, if a senior improperly gives money or property within three years before applying for Medicaid, he or she is disqualified for assistance for a period of time. If a senior gives a large gift, he or she will be ineligible for Medicaid for a lengthy period. To put this in context, no penalty or investigation is triggered if a senior gives a gift totaling less than the one-month cost of a nursing home (about \$5,500).

**No significant savings for Illinois' Medicaid program**

Although estimated savings from the DRA Medicaid changes vary widely, *not one estimate* projects a significant benefit to the Illinois Medicaid budget. But the additional administrative costs required to audit a senior's finances and to investigate *each* uncompensated transaction for a five-year period have not been calculated. Nor are we aware of any independent studies demonstrating that Illinois' existing rules are inadequate to protect the integrity of the Medicaid program.

## Specific problems with the proposed rules

We respectfully request that the proposed rules be amended to address these specific problems that we believe are unfair to seniors, people with disabilities, and their families.

- 1. New rules must not be retroactive.** Let's not change the rules on a senior in the middle of a senior's more vulnerable years. New requirements should apply only to transactions entered after a final rule is enacted and sufficient notice has been provided to inform seniors. The integrity of the Medicaid program would still be protected by Illinois' existing transfer restrictions. Illinois is not required to make its DRA rules retroactive, and Illinois should use this discretion to make its rules prospective only.
- 2. Keep current law by allowing partial returns of disqualifying transfers to reduce the penalty.** The new rules don't give any credit if a senior returns some of a disqualifying transfer. In other words, HFS' proposed rules advocate a *zero-tolerance policy* that we believe translates into a *zero-justice policy*. No one gains from HFS' all-or-nothing approach. DRA does not require Illinois to abandon its long-standing policy of allowing seniors credit for partially returning disqualified gifts. Therefore, Illinois should not abandon its current policy in this regard.
- 3. Keep current law for annuities.** Federal law currently authorizes the purchase of a single-premium, immediate annuity as long as it is (a) irrevocable and non-assignable; (b) actuarially sound; and (c) provides for payments in equal amounts during the term of the annuity if there is no deferral and balloon payments. The Illinois Central Management Services uses the same criteria regarding annuities. But HFS' proposed rules make it a prohibited transfer for a senior to purchase an annuity if it pays out in a time period that is less than the life expectancy of the senior. Keep current law.
- 4. Protect marriages.** Illinois' proposed rules disallow the long-held right of the spouse who is not in the nursing home to refuse to disclose his or her assets to HFS. In this vernacular, the spouse who is not in the nursing home is referred to as the *community spouse*. Community spouses, typically women, will have no choice but to divorce their institutionalized spouses to avoid becoming impoverished. These proposed rules encourage dissolution of

marriage. Illinois should maintain its current policy of allowing the community spouse to refuse to disclose his or her assets. This change would disproportionately affect women because women live longer than men, and are more likely to be a caregiver for an aging spouse or disabled child. Who is left to care for these women who have cared for everybody else when they are left without their assets? Federal statute along with case law from other states allow spousal refusal.

- 5. Leave current law as is when HFS takes a “snapshot” of senior’s assets.** Under current law HFS takes a “snapshot” of a senior’s assets on the date that HFS decides that a senior may receive Medicaid. The senior’s assets must be less than \$2,000 at this time. The current policy allows seniors to purchase certain allowable expenditures within three months before applying for Medicaid without being penalized. Allowable expenditures may include hospital stays, medical equipment, pre-paid funerals, legal fees, elimination of pre-existing debt, and repairs or improvements to the marital residence. The proposed rule changes the “snapshot” date to when the senior *applies* for Medicaid at which time his or her assets must be less than \$2,000. The proposed rule goes beyond what DRA requires and is not in the best interests of seniors who are trying to settle up their affairs.
- 6. Illinois policy should specifically define what constitutes non-allowable transfers.** The DRA and these rules will affect the health and welfare of seniors, people with disabilities, and their families. The transfers that HFS intends to prohibit must be spelled out as a matter of fundamental fairness. Seniors should not be penalized for ordinary and reasonable family, charitable, educational, and church gifts. These proposed rules are vague and require seniors to prove a negative.
- 7. Illinois must not adopt rules more harsh and restrictive than what DRA requires.** HFS’ proposed rules are riddled with roadblocks to eligibility that are not required by DRA. Federal law mandates that undue hardship waivers be available in all cases of severe need. The proposed rules contain restrictions on special-needs trusts, insert hyper-technical requirements that penalize family members for good-faith efforts to care for their seniors, and attempts to rewrite well-established law by treating real estate as annuities. These provisions will harm our most vulnerable Illinois citizens by penalizing them for helping family members, including disabled family members. None of these punitive provisions were mandated by the DRA and should be abandoned.

We appreciate the opportunity to be heard and look forward to continuing to participate in this process. We respectfully ask that you send to us any second-notice materials and any written public comments as well.

Thank you.