STATE OF MISSISSIPPI

JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

January 15, 2013

Honorable Mike Chaney
Commissioner of Insurance
1001 Woolfolk State Office Building
Jackson MS 39201

Re: Opinion Request on Authority to Submit Application for Health Insurance Exchange

Dear Commissioner Chaney:

Attorney General Jim Hood has received you request for an official opinion and assigned it to me for research and response. Your letter requests this office's opinion on two issues as set forth below:

> 1. Does MID in fact have the authority under Mississippi constitutional and statutory law to submit an application on behalf of the State to the United States Department of Health and Human Services for the establishment of an insurance exchange under the ACA without the approval of the Governor?
>
> 2. If the answer to Question 1 is in the affirmative, does MID have the authority under the powers granted to it by the Legislature and pursuant to Miss. Code Ann. Section 83-9- 201, et seq., on behalf of CHIRPA to apply for and administer federal grant funds that are provided under the ACA without the approval of the Governor?

Your letter contains substantial legal analysis and directs our attention to various statutory provisions that support the claim by you and the Mississippi Insurance Department ("MID") that MID has the authority to make the application without the approval of the Governor. Your letter also contains both statutory and textual arguments that MID is an agency independent from the control of the Governor absent any specific grant of that authority to the Governor.

After receipt of your opinion request, we forwarded it to the Governor's office and asked for the Governor's position on this issue. The Governor's response was provided to our office the same afternoon. The Governor's response focused on his opinion that there had been no legislative grant of authority to MID with regard to establishing a health insurance exchange. Additionally, the Governor's position is that because MID is purely a creature of statute, it cannot exercise authority over any executive function where, as here, the Governor, who acts as the chief executive officer of the State, objects to that action.

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Although there is no agreement between you and the Governor's office on the independence of MID to act without approval from the Governor, there does appear to be general agreement that, at least initially, this matter turns on whether there was a legislative grant of authority to submit an application to establish a health care exchange. Neither MID nor the Governor's office has questioned the propriety of the Legislature granting or not granting authority with regard to submitting an application. Based on our research of this issue under Mississippi law, it is our opinion that such a matter is one vested in the prerogative of the Legislature. Given the positions of your and the Governor's office, we conclude there is no disagreement on that point.

As you note in your letter, with regard to MID, Mississippi law states:

> There is hereby continued a separate and distinct department of insurance, which shall be charged with the execution of all laws (except as otherwise specifically provided by statute) now in force, or which may hereafter be enacted, relative to all insurance and all insurance companies, corporations, associations, or orders.

Miss. Code Ann. Section 83-1-1 (as amended). Section 83-1-3 provides that "[t]he chief officer of the department shall be denominated the Commissioner of Insurance" and further provides the Governor with authority over approval of the bond that must be executed by the Commissioner as a prerequisite to taking office. With regard to authority to establish a health insurance exchange, Section 83-9-203 states:

> It is the purpose of the Legislature to establish a mechanism to allow the availability of a health insurance program and to allow the availability of health and accident insurance coverage to those citizens of this state who (a) because of health conditions cannot secure such coverage, or (b) desire to obtain or continue health insurance coverage under any state or federal program designed to enable persons to obtain or maintain health insurance coverage.

Section 83-9-203 was amended in 2009 to include the underlined provisions. By virtue of this amendment, the Legislature apparently intended to expand the purpose of the Comprehensive Health Insurance Risk Pool Association Act (the "CHIRPA Act"), Sections 83-9-201 through 83-9-222, and the Comprehensive Health Insurance Risk Pool Association ("CHIRPA") created thereunder. Prior to amendment the legislative purpose was to facilitate coverage to individuals prevented from procuring insurance by health conditions. After amendment there is an unequivocal broadening of the purpose to facilitate coverage to any citizen that desires to obtain coverage under "any" federal program designed to enable citizens to gain or maintain health coverage.

Section 83-9-213(2)(p) provides that CHIRPA may "[s]erve as a mechanism to provide health and accident insurance coverage to citizens of this state under any state or federal program designed to enable persons to obtain or maintain health insurance coverage." Additionally, as your letter notes, various provisions of Section 83-9-213 provide the Commissioner with authority to promulgate rules and regulations necessary to implement the CHIRPA Act and provide CHIRPA with authority to contract with

regard to various aspects necessary to carry out the "provisions and purposes" of the CHIRPA Act.

The Governor points out that MID sought unsuccessfully to have enacted H.B. 1220 which would have allowed for the creation of an exchange to be administered by a proposed new entity named The Mississippi Health Benefit Exchange Board. This bill, which died in committee, would have set up a separate and differing scheme from that currently advocated by MID. However, this office is not inclined to use the Legislature's failure to enact this bill as an interpretive tool in ascertaining the meaning of the current existing law contained in the CHIRPA Act. This office cannot ascertain nor infer any legislative intent from mere non-passage of H.B. 1220. Indeed, it could as easily be inferred that the Legislature decided to allow an exchange to be established under the existing provisions in the CHIRPA Act. Likewise, it could be inferred that the Legislature's failure to remove language from the CHIRPA Act, which facially grants authority to MID with regard to federal health insurance programs evidences, an intent to leave such authority intact. In the present situation, although the language of the CHIRPA Act is not voluminous, it is clear and unequivocal. It plainly states that the purpose of the CHIRPA Act is to facilitate the ability of citizens to "obtain or continue health insurance coverage *under any . . . federal program designed to enable persons to obtain or maintain health insurance coverage.*" The CHIRPA Act further facilitates this same purpose through various powers granted to the Commissioner and CHIRPA. Thus, it is the opinion of this office that the CHIRPA Act unambiguously grants MID, acting pursuant to the CHIRPA Act, authority to submit an application and undertake appropriate action with regard to a health insurance exchange.

The Governor also points out that the Legislature in the 2011 Regular Session extended for two years the repealer of a 2010 law that created a "Health Insurance Exchange Study Committee." *See* H.B. 377 (2011 Reg. Sess.). However, H.B. 377 calls for a study committee and does not enact any substantive provisions with regard to authority to establish a health insurance exchange. Moreover, H.B. 377 presented the opportunity for the Legislature to amend the CHIRPA Act had it wanted to change MID's authority granted thereunder. As this opinion noted above, the State's decision, *vel non,* to establish a health insurance exchange appears undeniably to be one of Legislative prerogative. The Legislature is currently in session and can act to change any authority of the Commissioner and MID.

In reaching this opinion, we are mindful of the Supreme Court's admonition with regard to the interpretation of statutes within their field of expertise and which govern their operations. In this regard, our Court has held:

> An agency's interpretation of a statute governing its operation is a matter of law and is thus reviewed de novo, but with great deference to the agency's interpretation. *Miss. Methodist Hosp. and Rehab. Ctr.*, 21 So.3d at 606. Deference is afforded the agency because "the everyday experience of the administrative agency gives it familiarity with the particularities and nuances of the problems committed to its care which no court can hope to replicate." *Id.* (quoting *Gill v. Miss. Dep't of Wildlife Conservation*, 574 So.2d 586, 593 (Miss. 1990)). If an agency's interpretation of a statute is contrary to the unambiguous language or best

> reading of a statute, however, this Court will not afford it any deference. *Id.* This Court will not uphold an agency's interpretation if "it is so plainly erroneous or so inconsistent with either the underlying regulation or statute as to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Id.* (quoting *Buelow v. Glidewell*, 757 So.2d 216, 219 (Miss. 2000)).

Dialysis Solution, LLC v. Mississippi State Dept. of Health, 31 So.3d 1204, 1211 (Miss. 2010). Where, the statute "is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion to resort to rules of statutory interpretation." *Diamond Grove Center, LLC v. Mississippi State Dept. of Health*, 98 So.3d 1068, 1072 (Miss. 2012). Even where the statute is "ambiguous or silent" then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Barbour v. State ex rel. Hood,* 974 So.2d 232, 240-241 (Miss. 2008)(citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (emphasis added)).

The Governor asserts that an exchange could potentially become an expansive bureaucracy and presumably involve many complex issues. However, in this case, these factors, in the opinion of this office, militate in favor of the interpretation of MID, the agency charged with execution of all insurance laws. This office has been unable, based on the facts presented to it, to reach any conclusion that the MID's interpretation "is so plainly erroneous or so inconsistent with . . . the underlying . . . statute as to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *See Buelow v. Glidewell*, 757 So.2d 216, 219 (Miss. 2000). Therefore, it is the opinion of this office that MID is vested with authority to submit the application to establish a health insurance exchange.

The second aspect of both of your questions concerns the role, if any, of the Governor in approving or perhaps overruling by objection the acts of you, as Commissioner, and MID. Our research has yielded no case law which recognizes such authority as having been vested in the Governor. The Legislature created MID and the Office of Commissioner and likewise delegated authority including those powers under the CHIRPA Act. Under Mississippi precedent "all statutes are presumed to be constitutional." *In re Fiscal Year 2010 Judicial Branch Appropriations*, 27 So.3d 394, 395 (Miss. 2010). It is the opinion of this office that the Legislature delegated authority to MID and the Commissioner free from any approval or veto power to the governor. Section 83-1-1 grants MID authority over all insurance laws "except as otherwise specifically provided by statute." Our office has found no statute which would allow the Governor to override a decision of MID or the Commissioner.

Mississippi case law on this issue is limited and no cases appear to address the specific factual issues present here. However, the Mississippi Court has discussed the powers of a governor arising under the Mississippi constitution. Specifically, these powers arise from Article 5, Section 116 and Section 123. Section 116 provides that the governor is chief executive officer of the State and Section 123 provides that "[t]he governor shall see that the laws are faithfully executed." Both of these constitutional sections were discussed by the Mississippi Court in *Clark v. State ex rel. Mississippi State Medical*

Ass'n, 381 So.2d 1046, 1050 (Miss. 1980).[1] Although Clark dealt with different issues, the principles stated therein have applicability to the instant facts. In *Clark,* the Court stated:

> 'This Court is committed to a liberal rule governing the delegation of legislative functions.' *Abbott v. State*, 106 Miss. 340, 63 So. 667, 669 (1913). Although the Legislature cannot delegate its power to make a law, it can delegate to an administrative agency the power to determine some fact or state of things upon which the law makes or intends to make its application depend. The essential is that the statute delegating the power must reasonably define the area in which the administrative agency operates and the limitations upon its powers." 231 Miss. at 561-62, 95 So.2d at 777.

Clark, 381 So.2d at 1050. The *Clark* Opinion further held that where "the power . . . questioned is, by our Constitution, vested in the legislative department of government" the manner in which Legislature exercises that authority "does not encroach upon the governor's constitutional powers." *Id.* Here the Legislature gave MID independent authority, and it is the opinion of this office that such a grant by the Legislature free from control by the Governor is constitutional. Our laws are replete with numerous other examples of legislatively created agencies which are independent of any control by a governor. These other agencies include the Public Service Commission, the Mississippi Transportation Commission and the Mississippi Department of Agriculture and Commerce. Additionally, various commission and boards have members that once appointed by the Governor serve for terms of office and act without control or veto authority of the governor. Such agencies include the State Board of Education, Commission on Marine Resources and the State Board of Health.

This opinion is supported by established case law. In *Henry v. State,* 39 So. 856, 860 (Miss. 1906), the issue involved an injunction sought by the then governor against the board controlling the state penitentiary. The governor sat on the board along with the attorney general and three railroad commissioners. The board of control was a creature of "legislative enactment" and was "entrusted [with] the management of the convicts and the affairs of the state penitentiary." In a 3 to 2 vote and over the governor's objection the board voted to enter into a lease of property with a private individual on which inmates would be worked. *Henry v. State.* 39 So. 856 at 860. The ultimate issue involved was whether the governor, as opposed to the attorney general, had authority to sue to prohibit the contract from going forward. In *Henry,* the argument was such

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[1] The *Clark* opinion was questioned although not overruled in *Alexander v. State By and Through Allain.* 441 So.2d 1329, 1345 (Miss. 1983). In *Alexander*, the Court held that legislative appointments to executive bodies such as the Budget Commission, Capitol Commission, Board of Economic Development, Medicaid Commission, Personnel Board, and Wildlife Heritage Committee were unconstitutional. However, the *Alexander* Court noted that, as in *Clark*, an appointment power granted to "a voluntary association with no ongoing vital connection with prerogatives of the legislative or executive departments of government and with no potential of weakening either of the departments does not reach constitutional proportions as do the charges presently in issue." *Alexander,* 441 So.2d at 1345.

authority existed "because of necessary implication from the constitutional and statutory provisions" which provide that the governor is "chief executive" and charged to "see that the laws are faithfully executed." *Id.* at 861.

The Court ultimately dismissed the action because under then existing law, the governor had no authority to bring it. Relevant to the present issue is the fact that the Court refused to find a power in the governor that was not specifically granted by either the constitution or a statute. Discussing the argument based on the governor's status as chief executive, the Court noted:

> It is a duty enjoined upon the federal and state executives 'to see that the laws be faithfully executed.' It would be dangerous, however, to treat this clause as conferring any specific power which they would not otherwise possess. It is rather to be regarded as a comprehensive description of the duty of the executive to watch with vigilance over all the public interests. This is all that the Constitution meant. No authority can be found in any of the Reports of any of the states sustaining the forced and unnatural construction urged for appellee.

Id. at 862-863.

In a concurring opinion, the issue was discussed by reference to opinions issued by the United States Attorney General. In that discussion the concurring opinion stated:

> The acts of Congress sometimes give the President a broad discretion in the use of the means by which they are to be executed, and sometimes limit his power so that he can exercise it only in a certain prescribed manner. Where the law directs a thing to be done without saying how, that implies the power to use such means as may be necessary and proper to accomplish the end of the Legislature. But when the mode of performing a duty is pointed out by statute, that is the exclusive mode, and no other can be followed. The United States have no common law to fall back upon when the written law is defective. If, therefore, an act of Congress declares that a certain act shall be done by a particular office, it cannot be done by a different officer. The agency which the law furnishes for its own execution must be used to the exclusion of all others." Opinions of Attorneys General, vol. 9, p. 518.

Id. at 867. It is the opinion of this office that the Legislature delegated specific functions to MID and that such functions can be performed without approval by the Governor and in spite of his objections thereto.

In conclusion, your questions were:

> 1. Does MID in fact have the authority under Mississippi constitutional and statutory law to submit an application on behalf of the State to the United States Department of Health and Human Services for the establishment of an insurance exchange under the ACA without the approval of the Governor?

2. If the answer to Question 1 is in the affirmative, does MID have the authority under the powers granted to it by the Legislature and pursuant to Miss. Code Ann. Section 83-9- 201, et seq., on behalf of CHIRPA to apply for and administer federal grant funds that are provided under the ACA without the approval of the Governor?

It is the opinion of this office that for the reasons stated herein, the answer to question number 1 is "yes." With regard to question number 2, it is our opinion that the answer would be "yes" if the terms of such a grant and any obligations placed on the State fall within MID/CHIRPA's statutory authority, e.g. CHIRPA's authority to "enter into contracts as are necessary or proper to carry out the provisions of Sections 83-9-201 through 83-9-222 . . . ." Without knowing the terms or conditions of any proposed grant, it is beyond the authority of this office to issue an opinion. Moreover, question number 2 may be answerable by reference to federal law on which our office does not opine.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:

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