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ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 93-006

PUBLIC HEALTH:
Status of Illinois Health Facilities
Authority and Illinois Development
Finance Authority as State Agencies

Mr. Phil Bradley
Director
Illinois Department of Public Aid
100 South Grand Avenue East
Springfield, Illinois 62762-0001

Dear Mr. Bradley:

I have your letter wherein you inquire whether the Illinois Health Facilities Authority (hereinafter referred to as "IHFA") and the Illinois Development Finance Authority (hereinafter referred to as "IDFA") are governmental entities or agencies, for purposes of section 1902(a)(32) of the Social Security Act of 1935 (42 U.S.C. § 1396a(a)(32)). For the reasons hereinafter stated, it is my opinion that IHFA and IDFA are both governmental entities or agencies of the State of Illinois, within the purview of that section of the Social Security Act.

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IHFA has recently begun a program under which hospitals and nursing homes that provide services to clients of the Illinois Department of Public Aid (hereinafter referred to as "Department") may assign to IHFA their right to receive payment from the Department (hereinafter referred to as "receivables") for services rendered. IHFA executes agreements with a provider to purchase the receivables designated by the provider, and pays the provider for the receivables, at a discounted amount, at the time of the sale. In return, IHFA acquires the right to receive payment for the receivables directly from the State Comptroller. This program allows providers to accelerate their receipt of payment for medical services provided to the Department's clients. IDFA is structuring a similar program designed to benefit pharmacies and other Medicaid providers. The payments to providers generally qualify for partial reimbursement under the Federal Medicaid program and consequently are subject to Medicaid requirements.

Although section 1902(a)(32) of the Federal Social Security Act generally prohibits vendors from assigning payments to be made under the Medicaid program, it is permissible for payments to be assigned to "a governmental agency or entity". Section 1902 requires that a State plan for medical assistance:

" * * *

(32) provide that no payment under the plan for any care or service provided to an

individual shall be made to anyone other than such individual or the person or institution providing such care or service, under an assignment or power of attorney or otherwise; except that--

* * *

(B) nothing in this paragraph shall be construed (i) to prevent the making of such a payment in accordance with an assignment from the person or institution providing the care or service involved if such assignment is made to a governmental agency or entity or is established by or pursuant to the order of a court of competent jurisdiction * * *.

* * *

"

The applicable regulation implementing the statute further provides that:

"

* * *

(e) Reassignments. Payment may be made in accordance with a reassignment from the provider to a government agency or reassignment by a court order.

* * *

"

(42 C.F.R. § 447.10(e) (1991).)

Therefore, although assignment agreements are generally barred under Federal law and regulation, they are not prohibited if the recipient is "a governmental agency or entity".

The term "governmental agency or entity", however, is not defined in section 1902(a)(32) or elsewhere in the Social Security Act. The legislative history of that section reveals that prior to 1972 there was no prohibition on assignments of Medicaid receivables, and that a significant problem had arisen

due to the "factoring" of such receivables. Collection agencies which had purchased receivables at a discounted rate had become a significant source of incorrect, inflated and fraudulent claims. Consequently, in 1972, Congress attempted to halt assignment of Medicaid and Medicare receivables by enacting Public Law 92-603. That Act, however, did not prohibit the use of powers of attorney to accomplish the same result, so Congress again addressed the problem in 1977 by adopting Public Law 95-142, which added subsection 1902(a)(32). (H. Rept. No. 95-393, 95th Cong., 1st Sess., pt. 1, at 43-45, 77-79, pt. 2, at 48-50 (1977).) Throughout its discussion of the problem and proposed amendment, the pertinent House Report repeatedly refers to the exception for governmental entities or establishments or agencies, without further explaining the nature of the entities referred to. It is clear, however, that the intent of Congress was to prohibit uncontrolled factoring of claims through private entities which were making inflated or fraudulent claims. There was no intent to prohibit assignments of approved claims to a State managed and controlled entity.

Although there is no absolute formula for determining whether an entity is a governmental agency or entity, many reported cases have discussed the question of whether a particular entity is an agency of the State or Federal government for various purposes. In making this determination, the courts have generally examined the statute creating the entity

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for indicia of intent, including: the extent to which the entity is free from direct governmental control; its existence as a corporate entity; its funding; the status of the entity's employees; its ownership; the manner of selection of its officers; the governmental nature of the function it performs; and the manner in which the entity is treated in other statutes. (See, e.g., Guse v. Board of Trustees of Public School Teachers' Pension and Retirement Fund (1990), 203 Ill. App. 3d 111, 115-119 (teachers' pension fund board is not a State agency for purposes of the Illinois Administrative Procedure Act); Lewis v. United States (9th Cir. 1982), 680 F.2d 1239, 1240-42 (Federal Reserve Bank is not a Federal agency under Federal Tort Claims Act); Reconstruction Finance Corporation v. J.G. Menihan Corp. (2d Cir. 1940), 111 F.2d 940, 941-42 (Reconstruction Finance Corporation is a governmental agency upon which costs of suit cannot be imposed); Posey v. Tennessee Valley Authority (5th Cir. 1937), 93 F.2d 726, 727 (TVA is a governmental agency for purposes of United States Employees' Compensation Act).) A similar analysis may be employed in determining whether IHFA and IDFA are governmental agencies or entities, for purposes of section 1902(a)(32) of the Social Security Act.

IHFA was created by the Illinois Health Facilities Authority Act (see Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1101 et seq; 20 ILCS 3705/1 et seq. (West 1992)). Section 3 of the Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1103; 20 ILCS 3705/3 (West 1992)) provides:

"There is hereby created a body politic and corporate to be known as the 'Illinois Health Facilities Authority'. The Authority is constituted a public instrumentality and the exercise by the Authority of the powers conferred by this Act shall be deemed and held to be the performance of an essential public function."

The governing body consists of seven members, appointed by the Governor with the consent of the Senate (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1103.01; 20 ILCS 3705/3.01 (West 1992)), each of whom must execute a surety bond, approved by the Attorney General and filed with the Secretary of State, conditioned upon faithful performance of his or her duties (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1103.05; 20 ILCS 3705/3.05 (West 1992)). IHFA is charged with studying and making recommendations to the General Assembly and other State agencies concerning the financing of health care in the State (Ill. Rev. Stat. 1991, ch. 111 1/2, pars. 1104.19, 1104.23, 1113; 20 ILCS 3705/4.19, 4.23, 13 (West 1992)). It must report all of its activities, receipts and expenditures to the General Assembly, the Governor, the Comptroller and the Illinois Economic and Fiscal Commission, and is subject to audit by the State Auditor General (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1120; 20 ILCS 3705/20 (West 1992)). It is exempt from all State and local taxes and assessments (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1126; 20 ILCS 3505/26 (West 1992)) and bonds issued by IHFA are deemed to be securities of a public instrumentality of the State (Ill. Rev. Stat. 1991,

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ch. 111 1/2, par. 1127; 20 ILCS 3705/27 (West 1992)). Although IHFA is not authorized to incur liabilities beyond the extent of the funds generated by its activities (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1105; 20 ILCS 3705/5 (West 1992)), and its bonds do not constitute debt of the State (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1111; 20 ILCS 3705/11 (West 1992)), the State has pledged not to limit or alter the rights of obligees, and IHFA, as agent for the State, is authorized to include this pledge in its obligations (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1112; 20 ILCS 3705/12 (West 1992)).

Further, I note that both IDFA and IHFA are referred to as governmental agencies or entities in the section permitting payment of Medicaid funds to them (Ill. Rev. Stat. 1991, ch. 23, par. 11-3.3; 305 ILCS 5/11-3.3 (West 1992)).

Based upon the stated intent of the General Assembly to create an entity to perform an essential public function, its existence as a body politic and corporate, gubernatorial appointment of its directors, its required reporting to the General Assembly and other State officers, and the manner in which it is treated for purposes of tax and security laws, it is my opinion that IHFA is an agency or governmental entity of the State of Illinois, and qualifies as such for purposes of section 1902(a)(32) of the Social Security Act.

IDFA was created under the Illinois Development Finance Authority Act (see Ill. Rev. Stat. 1991, ch. 48, par.

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850.01 et seq; 20 ILCS 3505/1 et seq. (West 1992)). Section 4 of the Act (Ill. Rev. Stat. 1991, ch. 48, par. 850.04; 20 ILCS 3505/4 (West 1992)) provides:

"There is hereby created a political subdivision, body politic and corporate by the name and style of Illinois Development Finance Authority. The exercise by the Authority of the powers conferred by law shall be an essential public function.

* * *

"

Section 4 of the Act further provides for a 15 member governing board consisting of 13 members appointed by the Governor, with the advice and consent of the Senate, plus the Director of Labor and the Director of the Department of Commerce and Community Affairs, or their designees. IDFA is to use office facilities provided by the State (Ill. Rev. Stat. 1991, ch. 48, par. 850.09; 20 ILCS 3505/9 (West 1992)) and is forbidden to incur obligations for salaries, office or other administrative expenses prior to the making of appropriations to meet such expenses (Ill. Rev. Stat. 1991, ch. 48, par. 850.10; 20 ILCS 3505/10 (West 1992)). Funds appropriated by the General Assembly to IDFA may be held in the State Treasury and any such funds deposited in banks or savings and loans are treated as public funds (Ill. Rev. Stat. 1991, ch. 48, par. 850.14; 20 ILCS 3505/14 (West 1992)). IDFA must make annual reports to the Governor, Secretary of State, Comptroller and General Assembly (Ill. Rev. Stat. 1991, ch. 48, par. 850.16; 20 ILCS

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3505/16 (West 1992)). The Act clearly contemplates that IDFA will lend to certain entities State money appropriated directly to it for the purposes and upon terms described in the Act (Ill. Rev. Stat. 1991, ch. 48, par. 850.07; 20 ILCS 3505/7 (West 1992)). The Authority is declared to be performing a public function, any bonds it issues are deemed to be issued by a public instrumentality and its property is exempt from taxation (Ill. Rev. Stat. 1991, ch. 127, par. 732; 20 ILCS 3515/12 (West 1992)). With respect to environmental facilities, IDFA is specifically exempted from construction and bidding requirements otherwise applicable to public building projects (Ill. Rev. Stat. 1991, ch. 127, par. 738; 20 ILCS 3515/18 (West 1992)), an exemption which would be unnecessary if it were not a governmental entity.

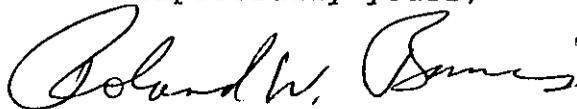
Based upon its organization as a political subdivision of the State, funding by legislative appropriation, gubernatorial appointment of its board, its required reporting to State officers, its treatment as a State instrumentality for purposes of tax, securities and public works laws, and the stated intent of the General Assembly to create an instrumentality to perform an essential public function, it is my opinion that IDFA is also a governmental agency or entity of the State of Illinois, for purposes of section 1902(a)(32) of the Social Security Act.

In summary, it is my opinion that both the Illinois Health Facilities Authority and the Illinois Development Finance Authority are governmental agencies or entities of the

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State of Illinois. Therefore, section 1902(a)(32) of the Social Security Act does not prohibit their sponsorship of programs which permit the assignment of Medicaid receivables to them in return for accelerated payments to providers.

Respectfully yours,

A handwritten signature in cursive script, reading "Roland W. Burris". The signature is written in dark ink and is positioned above the typed name.

ROLAND W. BURRIS
ATTORNEY GENERAL