

CITY OF PHILADELPHIA

BOARD OF ETHICS
PACKARD BUILDING
1441 Sansom Street
2nd Floor
Philadelphia, PA 19102-3026
(215) 686 – 9450
FAX 686 – 9453

This Opinion is out-of-date because the City gift ordinance was significantly amended in March 2014.

Philadelphia Board of Ethics Formal Opinion No. 2009-006

October 21, 2009

Hon. Curtis Jones, Councilman, 4th District
c/o Shoshana Bricklin, Legislative Staff Attorney
Room 404 City Hall
Philadelphia, PA 19107

Re: Council Office Sending Newsletter Funded by Private Source

Dear Councilman Jones:

You have requested public advice on whether any issue under the ethics laws would arise if your office were to send out a letter to your constituents in the Councilmanic 4th District, regarding the availability to eligible families to enroll in Pennsylvania's Children's Health Insurance Program (CHIP), if the "cost for the letter" will be borne by one of the providers in that Program, AmeriChoice.

The Facts

You have advised us of the facts provided here. You have provided us with a text of the proposed letter, which is attached. The letter summarizes the function of CHIP, as follows, in part:

CHIP covers all uninsured children under age 19, who are not eligible for Medical Assistance, regardless of income. CHIP benefits include medical, dental, prescriptions, and more.

It is our understanding from representations of your staff that AmeriChoice proposes to pay the costs of this letter, which we understand to include materials, printing, and mailing. Your office has advised that there are approximately 120,000 pieces to be sent. Your office declined to provide an estimate of the total cost. Your office confirmed that AmeriChoice is one of several vendors in the CHIP Program, but did not have details. We found that the CHIP Program has a website, which included a December 2008 report prepared for the Pennsylvania Insurance Department that states the following about CHIP providers:

CHIP is provided by the following private health insurance companies that are licensed and regulated by the Pennsylvania Insurance Department and have contracts with the Commonwealth to offer CHIP coverage:

- Aetna, Inc.
- AmeriChoice of Pennsylvania
- Blue Cross of Northeastern PA (BCNEPA)
- Capital Blue Cross (CBC)
- Keystone Health Plan East
- Highmark Blue Cross Blue Shield – western region
- Highmark Blue Shield – central region
- Unison Kids
- UMPC for Kids

The website for the CHIP Program identifies only three of the above as active vendors in Philadelphia: AmeriChoice, Keystone Health Plan East, and Aetna.

The draft letter would include this statement referring to AmeriChoice:

AmeriChoice has made it their goal to make it easy for any eligible family to apply for and enroll in CHIP. To be eligible, children must be U.S. citizens or lawful aliens and must not be eligible for Medical Assistance.

The last paragraph of the letter states:

To enroll a child in the CHIP program contact **1-800-687-8945 Ext. 3018**. A representative will personally assist you with the application process. For any further questions and concerns do not hesitate to call **1-800-687-8945 Ext. 3018**. (Bold font in the original.)

We determined that the phone number listed in the proposed letter is a number at the offices of AmeriChoice. Your initial request advised that the reverse of the letter would consist of a “fact sheet about CHIP eligibility.” Subsequently, your office advised that the “fact sheet” would instead be a brochure, which is attached. Although the brochure bears the logo of the CHIP program, it is clearly an AmeriChoice brochure. The brochure refers to “CHIP, brought to you by AmeriChoice,” includes the AmeriChoice telephone number and web address, and makes no reference to the fact that there are other providers of CHIP benefits in Philadelphia.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this advice is predicated on the facts that have been provided to us. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Although previous opinions of this Board that interpret statutes are guidance to how this Board will likely interpret the same provision in the future, previous opinions do not govern the application of the law to different facts. Ethics opinions are particularly fact-specific, and any official or employee wishing to be assured that his or her conduct falls within the permissible scope of the ethics laws is well-advised to seek and rely only on an opinion issued as to his or her specific situation prior to acting. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that you may be concerned about, we encourage you to contact the Board for specific advice on the application of the ethics laws to those particular facts.

Philadelphia Code – Conflicts of Interest

The general purpose of laws against a “conflict of interest” is to prevent a City officer or employee from having a conflict between his duty in acting honestly and capably on behalf of the public on the one hand and a personal interest in obtaining or preserving a financial benefit to himself (perhaps indirectly through an employer or relative) on the other hand. It is desirable to prevent such

situations because that official may be tempted to act in a way that benefits that personal interest to the detriment of the proper execution of his official duties. Even if the official does not actually yield to the temptation of incurring a private benefit to himself, public confidence in the official's decisions and in the impartiality of government is undermined by the mere existence of such competing interests.

The Philadelphia Ethics Code prohibits City officers from having conflicts of interest that arise from having a personal financial interest or from being a member of an entity that has a financial interest in their official decisions. As to a personal conflict of interest, Code Section 20-607(a) provides in relevant part:

Unless there is public disclosure and disqualification as provided for in Section 20-608 hereof, no member of Council, or other City officer or employee shall be financially interested in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity, or by any board or body of which he is a member

It is presumed that if AmeriChoice were not funding this letter, it could be sent by your Council office, using appropriated funds, assuming sufficient funds existed. Thus, AmeriChoice's paying for the letter would not relieve you of any personal expense, such that you would have a financial interest in their funding the letter or your decision to send the letter. Based on the draft of the letter you provided, you are advised that the letter appears to be a function of your position as Council representative for the 4th District, rather than a campaign communication, especially given the fact that you are not currently a candidate for elective office in any upcoming election. If you were to consider sending such a mailing at a time when you are a candidate for office, you would need to request advice based on those specific facts. Your candidacy would not only impact the conflict of interest analysis, but also would require us to consider issues under the Campaign Finance Chapter of the City Code, such as in-kind contributions.

In summary, under the facts presented there is no issue that the letter enhances any reelection effort, such that you would have a financial interest arising out of continued service in office related to the letter. Accordingly, you are advised that there is no issue under Code Section 20-607(a).

The City Code also prohibits conflicts of interest arising through a relative or business in Section 20-607(b). That subsection does not apply here, as you have not advised that either you or a close relative is employed by AmeriChoice or has any financial interest in the company.

Philadelphia Code – Gifts

Section 20-604 of the Code provides:

§ 20-604. Gifts, Loans and Favors to City Personnel.

(1) No member of Council or other City officer or employee, shall solicit, accept or receive any gift, loan, gratuity, favor or service of substantial economic value that might reasonably be expected to influence one in his position in the discharge of his official duties, from any person, firm, corporation or other business or professional organization.

(2) No person, firm, corporation or other business or professional organization shall offer, make or render any gift, loan, gratuity, favor or service of substantial economic value to any member of Council or other City officer or employee which might reasonably be expected to influence such officer or employee in the discharge of his official duties.

Since there does not appear to be any consideration for AmeriChoice to bear the costs of the production and mailing of this letter, this is not a contractual matter; rather, it is a gift. An initial question under Code Section 20-604 is whether a gift is “of substantial economic value.” Although your office has not provided an estimated value, we presume that production and mailing of a letter to 120,000 recipients would cost in excess of \$10,000. This is clearly “substantial economic value.” However, there remains the question of whether there is any gift at all to you personally.

The Board of Ethics has previously ruled that, in certain circumstances, a gift may be considered to be a “gift to the City” and not a gift to an individual City officer or employee, provided that certain criteria are met. These criteria were outlined in Advice of Counsel No. GC-2008-501, dated January 2, 2008:

As to the “gift to the City” exception, although the City Solicitor’s Office and our predecessor board, the advisory Board of

Ethics, have both allowed City employees to accept certain gifts as a “gift to the City,” the advisory Board had spelled out, in a number of rulings, the criteria:

- The gift must not simply be offered to and accepted by the City employee receiving the benefit of the gift.
- Instead, the private entity wishing to make a gift to the City, such as attendance at a dinner or conference by certain mid-level managers, must make the offer to the appointing authority of any officials invited to attend, so that appointing authority can approve acceptance and then make the decision as to which City employee/official is the logical person to represent the City at the dinner or conference.
- The recipient official’s appointing authority must be able to articulate a defensible justification as to a legitimate governmental purpose of the City that is advanced or assisted by the acceptance of this gift.
- In determining whether a gift is justifiable, the official should consider whether the City would be willing to expend funds out of the City budget for a similar purpose.

See Opinion Nos. 2004-01, 2004-02, and 2005-01 of the former, advisory Board of Ethics (all posted on the Board’s web site). For the purpose of the above criteria, it can be difficult to define the “appointing authority” when such a gift is offered to the Mayor and other high officials. In such a case, we believe it is up to the Board of Ethics to determine whether there is “a defensible justification as to a legitimate governmental purpose of the City that is advanced or assisted by the acceptance of this gift.”

Advice of Counsel GC-2008-501, pages 6-7. *See also* Nonpublic Formal Opinion No. 2009-001 (May 13, 2009) at 3 (applying the “gift to the City” exception where a gift defrays what would otherwise be a legitimate cost of doing City business). These two advisories just cited can be found on our website.

Applying the above criteria, you are advised that it is reasonable to conclude that a legitimate governmental purpose of the City is served by a letter from you to constituents informing them of a State program to insure uninsured

children. Accordingly, you are advised that there is no gift to you in AmeriChoice funding the proposed letter and no issue under Code Section 20-604.

Philadelphia Home Rule Charter – Gratuities

Charter Section 10-105 provides, in relevant part:

§ 10-105. Gratuities.

No officer or employee of the City and no officer or employee whose salary or other compensation is paid out of the City Treasury shall solicit or accept any compensation or gratuity in the form of money or otherwise for any act or omission in the course of his public work.

Even though your decision to send the referenced letter could be considered to be an “act or omission in the course of [your] public work,” under the “gift to the City” analysis above, you are advised that there is no compensation or gratuity to you in AmeriChoice bearing the costs of the proposed letter under the facts that you have provided. Accordingly, you are advised that there is no issue under Charter Section 10-105.¹

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, also has a conflict of interest provision and a gift provision. The gift provision does not appear to apply based on the facts that you have provided as it requires an understanding between the public official and the gift giver that “official action or judgment of the public official . . . would be influenced” as a result of the gift. 65 Pa.C.S. §1103(b), (c) (seeking/accepting improper influence). Section 1103(a) of the Act restricts your activities as a public official relative to the use of authority of your office to obtain a private pecuniary benefit for yourself, a member of your immediate family or a business with which you or a member of your immediate family are associated. *See* 65 Pa.C.S. § 1103(a) (“No public official or public employee shall engage in conduct that constitutes a conflict of interest.”). For you to take official action that has an economic impact on yourself personally would be a conflict under the State Act in the same way it would be under the City Code.

¹ An additional gift provision that you may be aware of is Mayor’s Executive Order No. 002-04. However, Mayor’s executive orders do not apply to other elected officials, such as Councilmembers, so it is not necessary to discuss the Executive Order in this advisory.

In the context of constituent communications, the State Ethics Commission has advised that a member of a legislative body “is authorized, pursuant to law, to distribute to constituents materials printed at public expense where the distribution of such materials constitutes official business of the Member.” Confidential Opinion 09-006 (August 4, 2009) at 4; *see also* Salvatore Order No. 494 (June 20, 1986) at 3 (“A legislator may not use his office or [] public money which is to be expended only for ‘legislative’ purposes to secure or primarily advance his own personal goal of re-election.”). The Commission’s analysis provides that, where a communication would constitute official business and would not be related to a legislator’s campaign, the communication would not form the basis for a conflict of interest under Section 1103(a) of the State Act. State Ethics Commission Confidential Opinion 09-006 at 4 (advising that legislator posting legislative videos to the YouTube website would not give rise to a conflict of interest where the communications in question would not be related the legislator’s campaign); SEC Salvatore Order No. 494 at 4-5 (providing a list of questions the Commission considers in determining whether an elected official’s constituent communication is for a legislative or a non-legislative purpose).

Based on the content of the proposed letter and the fact that you are not involved in a pending election, one may reasonably conclude that an argument can be made, based on State Ethics Commission rulings, that the letter constitutes official business and would not give rise to a conflict of interest under the State Act, 65 Pa.C.S. §1103(a).

You are advised, however, that the State Ethics Commission is the definitive authority on the State Ethics Act. Our advice on the Act is guidance only and does not provide protection from possible enforcement action by the State Ethics Commission. To those who rely in good faith on advice from the Commission itself, the State Act provides a complete defense in any enforcement action by the Commission and evidence of good faith conduct in other criminal or civil proceedings. 65 Pa.C.S. § 1107(10), (11). Upon request, advice from the State Ethics Commission can be redacted to protect the identities of those involved. The State Act also provides certain protection from penalties for those who rely on a non-confidential Solicitor’s opinion. 65 Pa.C.S. §1109(g) (“A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [certain provisions of the Act].”). Since the Board of Ethics is not “the solicitor” of the City, requestors

have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act. *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Any such request, to receive the protection, could not be confidential. For these reasons, you may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

Appearance of Impropriety

In Nonpublic Formal Opinion No. 2009-001, after discussion of “gift to the City” and finding no gift issue, the Board of Ethics noted as follows:

Situations in which there is no conflict of interest or prohibited gift under the letter of the law can nevertheless create appearances of impropriety. Although the ethics laws do not prohibit appearances of impropriety, and an enforcement action could not be brought based on an appearance of impropriety, such appearances can undermine public confidence in government. There is no formal definition of “appearance of impropriety” in the laws under which this Board has jurisdiction, but generally there is an appearance issue any time there is a possible public perception that improper influence was being exerted upon or by a public official or that a public official’s personal interest in a matter is so substantial that it would be difficult to resist the temptation to act in favor of that interest.

Nonpublic Formal Opinion No. 2009-001 (May 13, 2009) at 4.

In the matter that is the subject of your request, a possible public perception might be that a Councilman is implicitly endorsing a particular vendor in exchange for a monetary benefit that perhaps allows him to communicate with his constituents in a way that Council’s budget would not permit, and thus obtain enhanced reputation with the voters. It is of note that AmeriChoice is only one of three CHIP vendors in Philadelphia, and that the telephone numbers listed in the proposed letter (in bold) are AmeriChoice numbers. By making no reference to the fact that other vendors exist, and by implying that the telephone numbers listed are the only numbers to call to enroll a child in the program or to ask questions, the proposed letter and enclosed brochure give a false impression that AmeriChoice is the only vendor. That false impression clearly benefits

AmeriChoice over Aetna and Keystone Health Plan East. Where AmeriChoice proposes to relieve your Council office of an expense of over \$10,000 to send such a letter, this situation could create an appearance of undue influence on a Councilmember by a private vendor that does business in the City.

We believe this appearance could be lessened by a few revisions to the proposed letter. Accordingly, we recommend that the letter include the following paragraph between what are now the 2nd and 3rd paragraphs:

The mailing of this letter is being paid for by AmeriChoice, which is one of three insurance companies providing services under the CHIP Program in Philadelphia. The other companies are Keystone Health Plan East and Aetna. If you wish to contact the CHIP Program directly, you may call 1-800-986-KIDS or go to their website at www.chipcoverspakids.com.

Additionally, we recommend that the final paragraph be amended as follows, with additional language underlined:

To enroll a child in the CHIP program through AmeriChoice contact **1-800-687-8945 Ext. 3018**. An AmeriChoice representative will personally assist you with the application process. For any further questions and concerns do not hesitate to call **1-800-687-8945 Ext. 3018**.

Additionally, you may wish to include some disclaimer language to the effect that your sending this letter does not represent an endorsement of AmeriChoice over the other two vendors in the CHIP Program. It is also recommended that your office contact the State Office of the CHIP Program to ensure that they have no concerns about such a letter.

Conclusion

Based on the facts provided to us, you are advised that the relevant ethics provisions of the City Code and Home Rule Charter do not prohibit your proposed action of sending the attached letter to your constituents, where the costs of production and mailing of the letter would be borne by AmeriChoice. Although this proposal does not appear to present concerns under the State Ethics Act, we have explained the limits of our ability to advise on the State Ethics Act, and you

may choose to seek advice that offers enforcement protection directly from the State Ethics Commission or from the Law Department.

Nevertheless, to avoid an appearance of impropriety, it is recommended that the proposed letter be revised, as suggested in this Opinion, to reduce the appearance that a City Councilmember is endorsing a particular provider of this State program.

Thank you for being concerned about ethics compliance and for recognizing a situation that could present issues under the ethics laws. If you have any additional facts to provide, we will be happy to consider if they change any of the conclusions in this Opinion. Since you have requested public advice from the Board of Ethics, we will make this letter public, as required by Code Section 20-606(1)(d)(iii).

By the Board:



Richard Glazer, Esq., Chair
Richard Negrin, Esq., Vice-Chair
Kenya S. Mann, Esq., Member
Rev. Damone B. Jones, Sr., Member

[There was one vacancy on the board, due to the resignation, prior to the September 16 Board meeting, of Phoebe A. Haddon, Esq.]



CITY OF PHILADELPHIA
CITY COUNCIL

CURTIS JONES, JR.
ROOM 404, CITY HALL
PHILADELPHIA PA 19107
(215) 686-3416 or 3417
Fax No. (215) 686-1934

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Dear Neighbor,

The lack of insurance for children is a problem that many face in the 4th district. It is a necessity for all children to have quality health insurance. The severity of this issue calls for all eligible children to enroll in The Pennsylvania's Children's Health Insurance Program (CHIP).

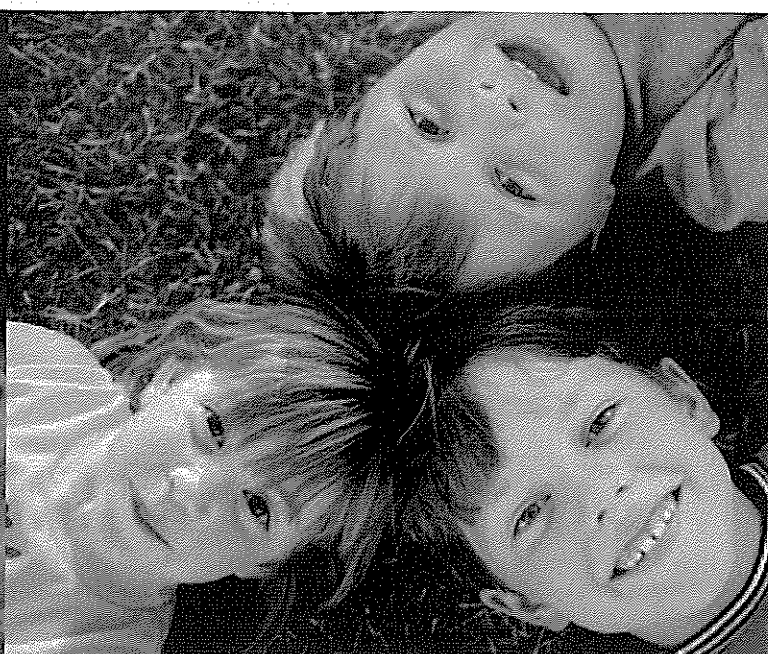
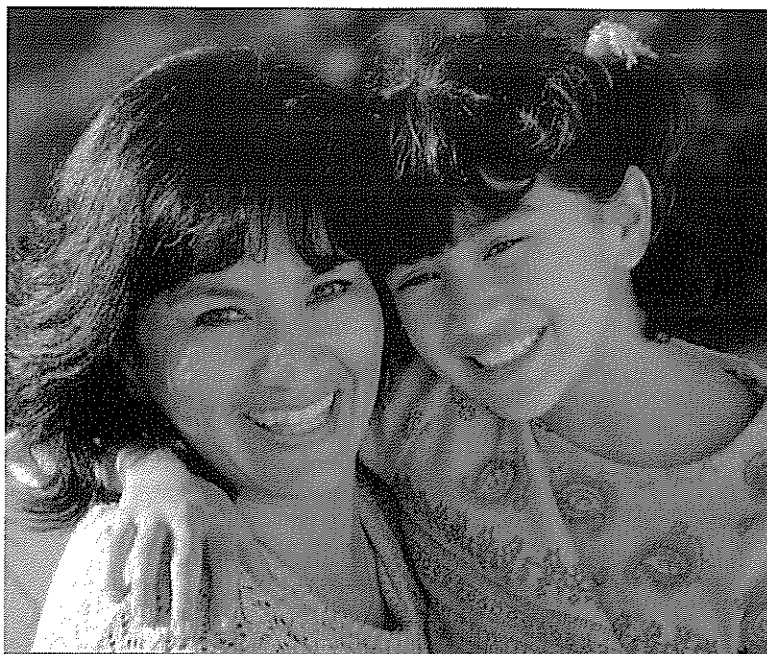
CHIP covers all uninsured children under age 19, who are not eligible for Medical Assistance, regardless of income. CHIP benefits include medical, dental, prescriptions and more.

AmeriChoice has made it their goal to make it easy for any eligible family to apply for and enroll in CHIP. To be eligible, children must be U.S. citizens or lawful aliens and must not be eligible for Medical Assistance.

To enroll a child in the CHIP program contact **1-800-687-8945 Ext. 3018**. A representative will personally assist you with the application process. For any further questions and concerns do not hesitate to call **1-800-687-8945 Ext. 3018**.

Sincerely,

Curtis Jones Jr.
Councilman- 4th District



Yes You Can

Count on AmeriChoice!

Do it for your kids!

*For more facts and to apply,
call toll-free:*

1-800-687-8945, ext. 3018



Pennsylvania's Children's
Health Insurance Program

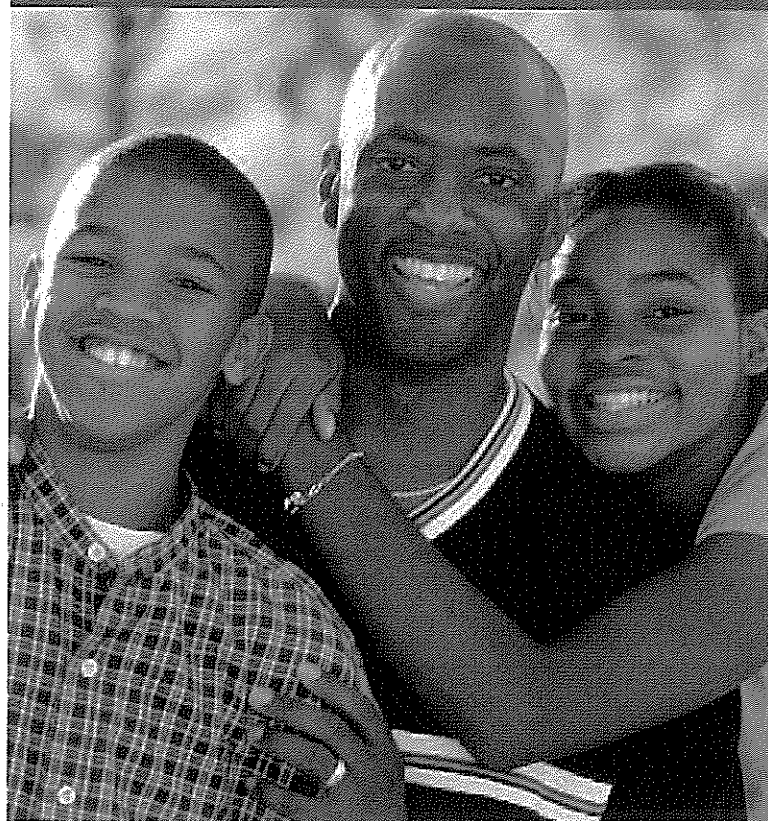
We Cover All Kids.

Commonwealth of Pennsylvania
Edward G. Rendell, Governor



Yes You Can

give your kids the health insurance
coverage they need and deserve with...



CHIP, brought to you by AmeriChoice

*Available to all uninsured kids and teens who
are not eligible for Medical Assistance,
regardless of family income.*

Yes! For the health insurance your kids deserve, *CHIP can be your answer!*

Q. Who can qualify for this plan?

A. Pennsylvania's Children's Health Insurance Program (CHIP) has expanded to cover all uninsured children and teens up to age 19 regardless of family income. Now no family makes too much money to qualify for CHIP. Families whose income falls below CHIP guidelines may qualify for Medical Assistance.

Q. Will I pay a premium?

A. For many families, CHIP is free. Premium amounts and other out-of-pocket expenses are determined by your family size and income.

Q. What does CHIP cover?

A. CHIP covers hospital stays, doctor visits, emergency care, well-child care and vaccinations, x-rays, laboratory and other tests, prescription drugs, mental health services — even dental and eye care.

Q. Can my kids go to the doctors and hospitals we use now?

A. Chances are they can! That's because CHIP, brought to you by AmeriChoice, lets you choose from *doctors and hospitals right in your neighborhood.*

Q. How can I find out more about CHIP, brought to you by AmeriChoice?

A. It's easy! Just call 1-800-687-8945, ext. 3018 or fill out the reply form attached to the letter inside and mail it back to us. We can answer your questions and help you apply for CHIP. Do it now — for health insurance that your children deserve!

Yes You Can

Count on AmeriChoice!

CHIP is a secure choice to make for your children's health insurance. That's because it is brought to you by AmeriChoice — part of UnitedHealth Group, one of the largest health and well-being companies in the country.

For more facts and to apply,
call toll-free today:

1-800-687-8945, ext. 3018

Hablamos Español

**or fill out and mail the reply form
attached to the letter inside!**

*You can also visit us at
www.AmeriChoice.com*

**APPLY TODAY!
Do it for your kids!**



Pennsylvania's Children's
Health Insurance Program
We Cover All Kids.

Commonwealth of Pennsylvania
Edward G. Rendell, Governor

AmeriChoice
A UnitedHealth Group Company

