Joint Committee for Review of Administrative Rules

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- **HFS 106 & 108**

Report to the Legislature
Emergency Rule HFS 106.12(9) to 108.02(9)f
The Joint Committee for Review of Administrative Rules

Produced pursuant to s. 227.26(2)(g)

Emergency Rule HFS 106.12(9) and 108.02(9)(f), promulgated by the Department of Health and Family Services, created rules relating to discovery rights in contested case proceedings involving audits of health care providers under the Medical Assistance program.

Description of the Problem

According to current law, there are three classes of contested cases in which state agencies hold administrative hearings. Only in Class 2 proceedings do the parties have an automatic right to take and preserve evidence prior to the hearing by using discovery procedures such as depositions and interrogatories. Section 227.45(7), Stats., provides that an agency by rule may authorize discovery rights in Class 1 and 3 proceedings. The Department of Health and Family Services (DHFS) does not have a permanent rule relating to discovery in Class 1 or Class 3 contested cases. However, the Division of Hearings and Appeals, which conducts hearings for all agencies, currently does have such a rule. Both agencies agree that a DHFS rule would apply to DHFS cases heard by the Division of Hearings and Appeals.

A hearing examiner with the Division of Hearings and Appeals recently allowed the use of discovery in a DHFS Class 3 contested case hearing. The examiner reached this result by deciding that in the absence of a DHFS rule, the rules of the Division of Hearings and Appeals would govern.

The Department responded by promulgating an emergency rule making discovery unavailable in Class 1 and Class 3 Medical Assistance contested case proceedings involving recoupment of MA payments made to providers.

Arguments in Favor of Suspension

- *There is not an existing emergency making the adoption of rules regarding discovery rights necessary for the immediate preservation of the public peace, health, safety or welfare.*
- *The Division of Hearings and Appeals generally allows some discovery in Class 1 and Class 3 cases, and so the Department of Health and Family Services rule would be an exception to the more general practice in Wisconsin.*
- *Health care providers should be allowed discovery rights when the Department of Health and Family Services asserts that they owe money to the government.*
- *Health care providers are placed at a very significant and unfair disadvantage when they are denied any ability to inquire through discovery into the basis for an MA recoupment action.*

Arguments Against Suspension

- *If other hearing examiners issue rulings similar to the one which precipitated the DHFS emergency rule, the Department would be subject to discovery in all cases. This situation would greatly increase administrative costs.*
- *The Department of Health and Family Services believes that all parties will be subject to a prolonged process of litigation if discovery is permitted in Class 3 proceedings involving recoupment of MA payments made to providers.*

Action by Joint Committee for Review of Administrative Rules

On January 20, 2000 the Joint Committee for Review of Administrative Rules held a public hearing and an executive session on Emergency Rule HFS 106.12(9) and 108.02(9)(f). The committee unanimously passed a motion, pursuant to s. 227.26(2)(d), Stats., and for the reasons set forth in s. 227.19(4)(d)1, Stats., to suspend HFS 106.12(9) and 108.02(9)(f).