

1999 DRAFTING REQUEST

Bill

Received: 01/24/2000

Received By: nelsorp1

Wanted: As time permits

Identical to LRB:

For: Judy Robson (608) 266-2253

By/Representing: Ron Sklansky

This file may be shown to any legislator: NO

Drafter: nelsorp1

May Contact:

Alt. Drafters:

Subject: Administrative Law

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Discovery by medical assistance providers in class 3 administrative proceedings

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1	nelsorp1 02/07/2000	csicilia 02/07/2000	martykr 02/08/2000	_____	lrb_docadmin 02/08/2000		
/2	nelsorp1 02/11/2000	csicilia 02/11/2000	jfrantze 02/11/2000	_____	lrb_docadmin 02/11/2000	lrb_docadmin 02/25/2000	

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*2/10 Ron S. called. Remove
ref. to HFS 108.02 (9)(e)*

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*1/2 cjs 2/11
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1?	nelsorp1	1 gs 2/7 00	Am 2 F	HH 2 Am 8			

FE Sent For:

<END>

FOR Robsen & Grothman
Ron Steasty - LC 1/24 am

Needs a bill to uphold
to joint comm on adm. rules.
decision to stop an emer.
rule proposed by DHFS. It
invokes DHFS rule which would
provide that no MA provider
has a right to discovery
under ch 804 in a class

3 administrative proceeding. Div. of
Adm Hearing said providers did have
that right because DHFS had no
rule prohibiting it. Bill should
create a section - ~~222.95~~

(8)? - that gives parties
in class 3 proceedings when DHFS
seeking recoupment of payments (under s. 98.
45(2)(a)(10.) for MA services. ^{as provided}
The right to take & preserve ed. under ch 804.

See
sp
270



soon: wanted 2/14

State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-4297/1

RPN: f:...

9 gs

1999 BILL

Handwritten signature/initials in a circle

1 AN ACT...; relating to: the right to discovery in class 3 administrative proceedings
2 regarding recoupment of medical assistance payments.

Analysis by the Legislative Reference Bureau

Under current law, in any class 1 or class 3 administrative proceeding, an agency may by rule permit the taking and preservation of evidence. In those proceeding the taking and preservation of evidence shall be permitted with respect to a witness who is beyond the reach of a subpoena of the agency, is about to leave the state or is so sick or aged as to make it probable that the witness will be unable to attend the hearing. Currently, the department of health and ~~social~~ family services has promulgated an emergency rule regarding the taking and preserving of evidence in class 3 administrative proceedings involving recoupment of overpayments from medical assistance providers.

This bill allows the parties in class 3 administrative proceedings involving recoupment of overpayments from medical assistance providers to take and preserve evidence for the administrative proceeding. The bill allows the hearing examiner, for good cause, to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense during discovery.

This bill is introduced as required by section 227.19 (5) (e), stats., in support of the suspension by the joint committee for review of administrative rules on January 20, 2000, of ~~the~~ 106.12 (9) and 108.02 (9) (e) and (f), the emergency rules promulgated by the department of health and family services that prohibit the parties in class 3 administrative proceedings involving recoupment of overpayments

HFS

BILL

from medical assistance providers from taking and preserving evidence for the administrative proceeding.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 227.45[^] (8) of the statutes is created to read:

2 227.45 (8) In a class 3 proceeding in which the department of health and family
3 services is attempting under s. 49.45 (2) (a) 10. to recover money improperly or
4 erroneously paid or overpayments made to a provider, each party shall have the
5 right, before the date set for hearing, to take and preserve evidence as provided in
6 ch. 804. Upon motion by a party or by the person from whom discovery is sought in
7 the proceeding, and for good cause shown, the hearing examiner may make any order
8 in accordance with s. 804.01[✓] which justice requires to protect a party or person from
9 annoyance, embarrassment, oppression^{or} or undue burden or expense.

10 **SECTION 2. Initial applicability.**

11 (1) This act first applies to administrative proceedings begun on the effective
12 date of this subsection.

13

(END)



wanted 2/14
State of Wisconsin
1999 - 2000 LEGISLATURE

2
LRB-4297/1

RPN:cjs:km

Note

MON

1999 BILL

- 1 AN ACT to create 227.45 (8) of the statutes; relating to: the right to discovery
- 2 in class 3 administrative proceedings regarding recoupment of medical
- 3 assistance payments.

Analysis by the Legislative Reference Bureau

Under current law, in any class 1 or class 3 administrative proceeding, an agency may by rule permit the taking and preservation of evidence. In those proceedings the taking and preservation of evidence shall be permitted with respect to a witness who is beyond the reach of a subpoena of the agency, is about to leave the state or is so sick or aged as to make it probable that the witness will be unable to attend the hearing. Currently, the department of health and family services has promulgated an emergency rule regarding the taking and preserving of evidence in class 3 administrative proceedings involving recoupment of overpayments from medical assistance providers.

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This bill is introduced as required by section 227.19 (5) (e), stats., in support of the suspension by the joint committee for review of administrative rules on January 20, 2000, of HFS 106.12 (9) and 108.02 (9) ~~(g)~~ and (f), the emergency rules

X

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-4297/2dn
RPN:cjs:jf

February 11, 2000

This draft corrects an inaccurate reference to a DHFS administrative rule in the analysis.

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511

**SUBMITTAL
FORM**

**LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street**

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and sign on the appropriate line(s) below.

Date: 02/11/2000

To: Senator Robson

Relating to LRB drafting number: LRB-4297

Topic

Discovery by medical assistance providers in class 3 administrative proceedings

Subject(s)

Administrative Law

1. **JACKET** the draft for introduction

Judy Robson

in the **Senate** or the **Assembly** (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

Not Needed

2. **REDRAFT**. See the changes indicated or attached

A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction

Judy Robson

If the analysis indicates that a **state** **rate** is required because the proposal makes an appropriation or increases or decreases

revenue **state or general local government fiscal liability** or **fiscal estimate** prior to introduction. If you choose to **request** the fiscal estimate will be requested automatically upon introduction of the proposal. Requesting the fiscal estimate prior to introduction of the proposal.

If you have

relating to the

please call 266-3561. If you have any questions

Robert - The SCRAR report to the legislature will be sent over by Rep. Grothman's office. David Austin Sen. Robson's office

Robert P. Nelson, Senior Legislative Attorney
Telephone: (608) 267-7511

LRB
2

(LRB 99-4297/2)

1999 SB433

Joint Committee for Review of Administrative Rules

Office of Sen. Judith Robson
Office of Rep. Glenn Grothman
Phone 608-266-2253
Phone 608-264-8486

• **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).