

**2001 DRAFTING REQUEST**

**Senate Amendment (SA-AB274)**

Received: 05/18/2001

Received By: **kenneda**

Wanted: As time permits

Identical to LRB:

For: **Russell Decker (608) 266-2502**

By/Representing: **Barb Worcester (alde)**

This file may be shown to any legislator: **NO**

Drafter: **kenneda**

May Contact: **John Sauer 255-7060, 444-9295**

Addl. Drafters:

Subject: **Public Assistance - med. assist.**

Extra Copies: **ISR**

Submit via email: **NO**

Requester's email:

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Retroactively change nursing home MA wage pass-through recoupment

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**Instructions:**

See Attached

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**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>
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FE Sent For:

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FE Sent For:

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John Sauer 255-7060  
cell phone 444-9295  
Brian Schoerck 444-4263

May 16, 2001

Barb:

Since I received the Wage Pass-Through draft from Jim McGinn, I have met with AFSCME, WHCA and Dave Lund.

These discussions confirmed the following:

- The draft goes too far. It would force DHFS to change the WPT awards for about 300 homes, requiring some homes to return money.
- It would result in award to homes that didn't even appeal the denial of the WPT awards.
- It would violate the understanding we have with AFSCME that WPT dollars should only go to homes that made a good faith effort to pass on the dollars to the staff.

Based on my conversations with the above mentioned parties, I'm suggesting the following:

- Section 9123 (9m) (am) should not be repealed (this section gives the six criteria used to adjust WPT payments)
- The law should be amended to direct DHFS to award WPT funds, notwithstanding Section 9123 (9m) (am), to those homes that
  - Applied for WPT awards and
  - **Appealed** the DHFS decision to deny in part or in full the WPT award

Dave Lund stressed two things:

First, the bill must pass before June 30, 2001 otherwise the WPT dollars won't be available.

And two, the Medicaid appropriation is over budget, although the nursing home/WPT portion of the Medicaid budget isn't.

I apologize for taking so long to get this to you. However, I didn't want to misrepresent the positions of the other groups, especially since we worked so closely with AFSCME on this issue. I still need to confirm the proposed revisions to the bill draft with Greg Spring at AFSCME.

John Sauer

Date by which appeals must have been taken will be provided by Dave Lund: on or before Jan 29, 2001



State of Wisconsin  
**Department of Health and Family Services**

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Scott McCallum, Governor  
Phyllis J. Dubé, Secretary

April 20, 2001

«Legislator»

Subject: Medicaid Nursing Home Wage Pass-Through

Dear «MrMs»:

The 1999-01 biennial budget, Act 9 [Section 9123(9m)], included funds and statutory authorization for a Medicaid nursing home wage pass-through, paid as a supplement to the regular Medicaid nursing home daily rate. The purpose was to increase wages or salaries and fringe benefits of nurse's assistants, or to increase staff hours of nurse's assistants.

This letter provides information on the final results of the wage pass-through for the 1999-01 biennium.

#### Funding

The statutes provide that payments for the wage pass-through be limited to the lesser of:

- a) 5 percent of total nurse's assistants wages on nursing homes' 1998 Medicaid cost reports; or
- b) \$8,309,000 in state fiscal year 1999-2000 (SFY 00) and \$11,078,600 in state fiscal year 2000-01 (SFY 01). In addition, nursing homes could, but were not required to, apply for a wage pass-through supplement up to 5 percent of its nurse's assistant wages.

#### Audits

In order to ensure that a supplement provided to a facility was expended in accordance with the purpose specified above, the Department was directed in statute to prepare a supplemental application form for completion by facilities in applying for the supplement, to "determine whether the facility's nurse's assistants' wage or salary and fringe benefits costs per patient day have increased during the period after June 30, 1999, and before July 1, 2000, by a percentage that is at least equal to the percentage of increase under the supplement . . . ."

Using the supplemental application, which was due August 31, 2000, and the criteria provided in statute, the Department completed a final reconciliation between what the facility was paid in SFY 00 and the amount actually earned for the pass-through. A field review by Department auditors was performed on the sample data submitted by each nursing home. If funds were not properly or fully expended in SFY 00, the Department will recoup the unearned funds. Any facility ineligible for an award in SFY 00 will be ineligible for the pass-through in SFY 01.

The Department worked with, and shared, preliminary audit results with representatives of both the nursing home industry and the two major labor unions. Their comments and suggestions on

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the audit methodology were incorporated to the extent permissible under the statute. In early 2001, the Department agreed to take facility appeals on the preliminary results. The Department received and accepted 67 appeals; received and did not accept two late appeals. There were two homes that did not file an appeal. Calculations based on the appeals were made using the original calculation, only the calculation time period was expanded from May – June 2000 to July 1999 – June 2000.

Summary of Final Wage Pass-Through Payments After Appeals

	<u>SFY 00</u>	<u>SFY 01</u>
Amount budgeted:	\$8,309,000	\$11,078,600
Amount spent:	<u>\$6,873,000</u>	<u>\$ 9,384,000</u>
Difference	\$1,436,000	\$ 1,694,600

Total Wage Pass-Through Funds Not Paid = \$3,130,600 (16.1 percent)

Number of Facilities

Received 100% of Request	314	75.1%	329	78.7%
Received Partial Request	48	11.5%	33	7.9%
Received No Supplement	43	10.3%	43	10.3%
Did Not File for Supplement	12	2.9%	12	2.9%
No Medicaid Days	<u>1</u>	<u>0.2%</u>	<u>1</u>	<u>0.2%</u>
Total	418	100%	418	100%

Eligibility for Supplement

Increased wages qualifying for the supplement could include a flat amount, a percentage increase or a bonus. The statutes did not provide for a mandate to require providers to increase their wages. However, a provider may not have provided a wage increase, but the facility may have expended the funds properly. As stated in the 1999-2001 budget bill, the Department will include as allowable for the wage pass-through, “. . . increased wages or salaries and fringe benefits for or increase(d) staff hours of nurse’s assistants . . . .”

For example, many homes have added staff or have increased their expenditures for fringe benefits, especially health insurance. This can result in the nurse’s assistants receiving less than a 5 percent wage increase, but the facility may still be eligible for the full wage pass-through award. Another factor in calculating the allowable expense is a change in the nursing home’s census or the acuity level of the residents. Some homes may have retained their staffing levels while the census or acuity levels decreased. In this instance, the wage pass-through could be used for increased staff hours per patient day of nurse’s assistants.

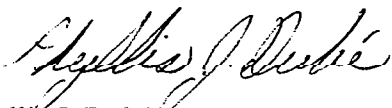
Homes that applied for the supplement in SFY 00 received two interim payments in that fiscal year, subject to the final reconciliation described above.

Exclusion of "Pool" Help

In determining eligibility for the pass-through, the Department has excluded temporary, or "pool," help in the calculations. The wage pass-through legislation prohibits the inclusion of the cost of temporary help by specifying a facility's nurse's assistants' wage or salary and fringe benefits costs per patient day as the basis for qualifying for the supplement. The cost of temporary help is a contracted service and is not included in the definition of wages or salaries. Many homes did increase their use of temporary help, often stating they were not able to find sufficient numbers of permanent staff. However, because statutory provisions were designed to increase wages of permanent employees, the statutes would need to be amended to include the costs of temporary help in the pass-through supplement.

If you have general questions about the wage pass-through supplement, please contact Peggy Bartels, Administrator, Division of Health Care Financing, at (608) 266-8922. If you require specific information about a particular facility, you may contact David Lund, Nursing Home Section Chief, Division of Health Care Financing, at (608) 266-2021.

Sincerely,



Phyllis J. Dubé  
Secretary

«Legislator»  
April 20, 2001  
Page 4

bcc: John Kiesow, Executive Assistant, DHFS

PA04038B.MB

March 30, 2001

David Lund, Chief  
DHCF, Nursing Home Services Section  
Department of Health & Family Services  
1 West Wilson Street  
Madison, Wisconsin 53707-7850

RE: Resolution of Wage Pass-Through Appeals

Dear David:

On March 6th you presented us with DHFS' final decision on disposition appeals filed by 66 nursing facilities. In each of those appeals the facility had disputed the appropriateness of the Department's preliminary findings on the extent of the facility's expenditures of wage pass-through funds for CNA wage, benefit, and staffing increases. As we expressed then, and reiterate here, we are deeply troubled by the rulings and the basis on which they were made. While the decision-making process the Department chose to employ may ultimately prove to be defensible in a strictly legal sense, the results it produced can never be reconciled with considerations of equity, common sense or the spirit and intent of the law.

The clear intent of the wage pass-through legislation was to provide additional funds for the purpose of promoting and maintaining increases in nursing facility CNA wage, benefit, or staffing levels. It was equally clear that the legislation intended that DHFS conduct a retrospective review to ensure that funds a facility received were utilized for those limited purposes.

It was, and remains, our position that for purposes of the appeals, legislative intent, facility performance, and Departmental responsibility would be achieved if the review process established that a facility increased its CNA wages, benefits, or staffing which, under circumstances existing at the time of the increases, could reasonably have been expected to expend an amount equal to or greater than the supplement the facility requested.

Our primary difficulty with the Department's review process is the degree to which recognition of facility expenditures for CNA wage and benefit increases was unjustly skewed by adjustments made for the effect of ancillary factors a facility could not have controlled, anticipated or measured. These included adjustments for changes in the facility's Medicaid rate, patient census, resident acuity, and dependence on contracted labor. We concede that the statute required that these factors be taken into account. However, the Department should also have taken into account the distortion those



adjustments made in depicting the reality of what actually occurred. To that end, the statute expressly afforded the Department discretionary authority to consider and adjust for any other relevant factor that may be necessary to achieve a just and appropriate decision.

We object to the Department rigidly restricting its review to consideration of factors spelled out in the statute and its blanket refusal to consider other factors, circumstances and information that were presented by the facilities in their appeals. As a consequence, we believe Department's final ruling on many of those appeals produced decisions, that while perhaps defensible, are most certainly inequitable. Indeed, we believe the Department could and should have exercised its authority to take into account the reality of what actually occurred and avoid an unjust result for those facilities that clearly intended and acted to provide significant CNA wage, benefit or staffing increases.

Our organizations welcomed the opportunity to participate with you and your staff in the review process and discussion of criteria that be applied in the appeal process. But we quite clearly differed from the Department in the perception of the nature and scope of the factors that should be applied in reviewing the appeals. It is now obvious that we also differed in the perception of the purpose and role our representatives would serve in adjudication of facility appeals. Indeed, both in discussions that occurred two years ago and two months ago it was our expectation that each representative from the four organizations serving on the Department's review committee would be given both a voice and a vote in the appeal decisions.

To that end, our representatives had personally reviewed every one of the 66 appeals, the Department's preliminary calculations relating to those facilities, and the supporting documentation the facility provided in contesting the Department's initial findings. Our review of the appeals assumed the Department would exercise authority to consider relevant factors and information beyond those factors contained in the Department's original review. As a result our conclusions regarding adjudications of the appeals were markedly different from those you informed us on March 6<sup>th</sup> to be the final and binding position of the Department.

We continue to be disturbed by the Department's decision not to review additional information and factors presented by the facilities in their appeals. We also are disturbed by the Department's March 6<sup>th</sup> announcement that it had decided to consider our representatives as holding only an advisory status. And finally we remain upset that the Department rejected our March 6<sup>th</sup> findings and recommendations relative to the review and disposition of appeals.

While entertained by the Department as a post-decision "advisory" vote, WHCA, WAHSA, AFSCME, and SEIU representatives on March 6<sup>th</sup> voted as follows on the 66 appeals:

Unanimously approved ten facility appeals on the basis that the Union which represented the CNAs in the facility will certify that the recommended payment has been spent on increased wages and/or fringe benefits for CNAs of the facility.

On a three to one vote (WHCA, WAHSA, AFSCME-aye/SEIU-nay) approved 25 facility appeals on the basis that:

1. The facility's DHCf Regional Auditor has recognized that the recommended payment has been spent on increased wages and/or fringe benefits for nurse's assistants of the facility, and/or
2. The facility's cost for increased wages and/or fringe benefits for nurse assistants of the facility are greater than the payment allowed by the Bureau of Health Care Financing.

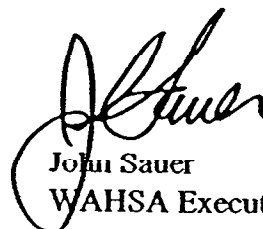
It is one thing to recoup funds because a facility failed to increase CNA staff wage and benefit levels appropriately. It is far another to pursue recoupment where wage and benefit levels were appropriately increased, but the facility was unable to recruit and retain sufficient numbers of staff required to expend all funds available. The latter situation was characteristic in the overwhelming number of appeals where the Department directed that recoupments be made. We submit that few, if any, of the recoupments involved circumstances indicative of a lack of intent or effort to fully expend the wage pass-through funds.


We remain distressed by the Department's post-decision announcement that our organizations had been afforded only an advisory role and that it would not consider the individual recommendations we advanced on those appeals. We believe the failure to consider all relevant factors, to review additional information supplied by the facilities, and the distortion created by adjustments for factors facilities could not control, resulted in a misrepresentation of the intent, extent, and effect of a facility's CNA wage and benefit increases. Again, while the review process and its results may be considered defensible in adhering to the letter of the law, we believe the Department's strict and narrow application of the law, was inconsistent with the intent of the law and distorted the level of CNA wage and benefit increases that were given by facilities.

Finally, we must express our deep concern that the denial of an appeal will be publicly portrayed or perceived as a departmental determination the facility neither intended or acted in good faith to utilize its wage pass-through funds for CNA wage, benefit or staffing increases. Accordingly, we jointly request that in any written or other comment on the results of the review process, the Department acknowledge that any such inference or conclusion should not be made.

For all of the preceding reasons, we request that DHES reconsider its rulings on the 66 appeals, consider the substance of the resolutions our organizations have jointly proposed, and exercise its discretionary authority under the law to assure a more equitable and just result.

Sincerely,  
  
Thomas P. Moore  
WHCA Executive Director

  
John Sauer  
WAHSA Executive Director

  
Greg Spring  
Wisconsin Council 40, AFSCME, AFL-CIO

2001

Date (time) needed

TODAY, if possible

LRBa 0549 / 1

AMENDMENT

DAK : gjs :

See form AMENDMENTS — COMPONENTS & ITEMS.

(S) A AMENDMENT

~~TO S A AMENDMENT (LRBa)~~

~~TO S A SUBSTITUTE AMENDMENT (LRBs)~~

TO 2001 ~~SB SR SR~~ (AB) ~~AR AR~~ 274 (LRB)

At the locations indicated, amend the \_\_\_\_\_ as follows:

(fill ONLY if "engrossed ...." or "as shown by ....." )

#. Page 1, line 3: delete "and" and substitute a comma.

#. Page 1, line 4: after "fund" insert "and requiring payments or completion of payments to facilities for wage or salary and fringe benefits supplements".

#. Page 3, line 14: after that line insert:

#. Page . . . . ., line . . . . .:

#. Page . . . . ., line . . . . .:

**NONSTAT SESSLAW**

1. In the component bar:

For the action phrase, execute: ..... create → action: → \*NS: → nonstat

For the budget action phrase, execute: ..... create → action: → \*NS: → 91XX

For a subsection, execute: ..... create → text: → \*NS: → sub

For a paragraph, execute: ..... create → text: → \*NS: → par

For a subdivision, execute: ..... create → text: → \*NS: → subd

For a subdivision paragraph, execute: ..... create → text: → \*NS: → subpar

2. Nonstatutory subunits are numbered automatically. Fill in the SECTION # or subsection # only if a "frozen" number is needed. Below, for the budget, fill in the 9100 department code.

A " SECTION # 3m <sup>FROZEN NUMBER</sup> [91] MM. Nonstatutory provisions; ...

FOR WAGE (CS)

(#1) MM PAYMENTS OR COMPLETION OF PAYMENTS TO FACILITIES OR SALARY AND FRINGE BENEFITS SUPPLEMENTS. (CS)

Notwithstanding 1999 Wisconsin Act 9, section 9123 (9m) (c), the department of health and family services shall, before July 1, 2001, pay or complete payment <sup>as appropriate</sup> of all moneys required to be paid under 1999 Wisconsin Act 9, section 9123 (9m) (a), to each facility, as defined under section 49.45 (6m) (a) 3. of the statutes, that applied for the moneys in accordance with 1999 Wisconsin Act 9, section 9123 (9m) (a) and appealed a decision by the department of health and family services under 1999 Wisconsin Act 9, section 9123 (9m) (c). (CS)

before January 30, 2001, (End)