



State of Wisconsin
Department of Health and Family Services

Scott McCallum, Governor
Phyllis J. Dubé, Secretary

March 28, 2001

Senator Judy Robson
Co-Chair
Joint Committee for Review of Administrative Rules
PO Box 7882
Madison WI 53707-7882

Re: Chapter HFS 79 of the Wisconsin Administrative Code Related to State SSI Payments

Dear Senator Robson:

Thank you for your letter of February 28, 2001, expressing concern about the Department's authority to recover state SSI overpayments, and about the Department's provisions for waiving recovery of overpayments.

Your letter states that "the benefit level can only be reduced when authorized by a statute," and also states ss. 49.77 and 49.775, Stats., do not authorize recovery of overpayments. In fact, those statutory sections simply state Wisconsin's SSI eligibility requirements, one of the more important being Wisconsin residency. Overpayments occur either when a person receives too much in a monthly SSI payment or they receive an SSI payment they are ineligible for. These overpayments occur because of delays in data transfer between the federal and state automated systems, but also because SSI recipients fail to report changes, such as leaving the state, that make them ineligible for the state SSI payment. Under federal law, the SSI "benefit level" and "payment amount" are defined differently precisely because the objective "benefit level" is reduced to a lower "payment amount" whenever a person is responsible for repaying such a previously received overpayment.

The District II Court of Appeals recently ruled that the Department clearly does have a right to recover these SSI overpayments, but that to do so by reducing monthly SSI checks, the Department needs either express statutory authority or administrative rules. See Janice Mack v. Wisconsin Department of Health and Family Services, 231 Wis. 2d 644; 605 N. W. 2d 651 (1999). The court went on to rule that the express statutory authority does not exist, and that the policy the Department relies on to recover these overpayments is, by any other name, an administrative rule that the Department implemented without proper promulgation under Chapter 227, Stats.

Wisconsin.gov

As much as \$10,000 per month of SSI is overpaid to persons who are ineligible for some or all of the payment they receive. While it is obviously important to recover these overpayments, the department is committed to doing so only as permitted by law. Therefore, in direct response to the Mack decision's clear authorization, the Department promulgated an emergency rule that took effect on September 16, 2000. Since the standing committee review period expired without committee comment, the Department filed the permanent rule, which will be effective on May 1, 2001.

Your letter states the current permanent rule language is bad policy relative to waiving recovery of overpayments, and also suggests the Department took the Committee's request too lightly for proposed statutory language authorizing both recovery and waiver of recovery. I assure you the Department attempted to comply with every request made at the hearing. Our records, however, show only a request for language authorizing recovery of overpayments, and no request for statutory waiver language. The Department proposed broad statutory language to avoid the obvious problem of having the statutes say "as required by the Department by rule" for every SSI policy provision. And the Department is already drafting rules, including waiver provisions, to govern the full range of state SSI program operations. We hope the public and the legislature will carefully scrutinize these rules at each step of the process.

In the meantime, the Department accepts your recommendation to implement a waiver process similar in policy and procedure to that operated by the federal government. Prior to the promulgation of a full permanent rule, we plan to implement this policy via the same policy manual we currently use to distribute and implement SSI policies and procedures.

I hope this information is informative. Please contact me if you would like any of the above information clarified.

Sincerely,

A handwritten signature in cursive script that reads "John Kiesow". The signature is written in dark ink and is positioned above the typed name and title.

John Kiesow
Executive Assistant

Cc: Representative Glenn Grothman
Kathleen Luedtke

SENATOR JUDITH B. ROBSON
CO-CHAIR
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REPRESENTATIVE GLENN GROTHMAN
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JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

February 28, 2001

Secretary Phyllis Dube
Department of Health and Family Services
1 West Wilson Street, Room 650
Madison, Wisconsin

Re: HFS 79, relating to: administration of Supplemental Security Income (SSI) state supplemental payments to low income elderly and disabled residents of Wisconsin and their dependent children

Dear Secretary Dube:

On February 20, 2001, the Joint Committee for Review of Administrative Rules held a public hearing and executive session on the department's emergency rule relating to recoupments of state supplemental SSI overpayments.

A motion to extend the effective period of the emergency rule was defeated on a 4-6 vote. The JCRAR declined to extend the effective period of the rule for two reasons.

First, a majority of the members of the committee believe that the rule is without statutory authority. Department representatives testified that they believe chapter 227 of the statutes gives the department authority to write administrative rules for programs administered by the department. While this is generally true, other statutes need to be examined to answer this question.

The benefit level for state supplemental payments to SSI recipients is established by statute. (Sections 49.77 and 49.775, *stats.*) Therefore, the benefit level can only be reduced when authorized by a statute. An administrative rule reducing benefit payments to recoup a previous overpayment would be illegal because an administrative rule cannot trump a statute. What is needed is a statute authorizing recoupment in certain situations.

Second, a majority of the members of the committee believe that the rule is bad policy. The rule does not contain any provisions that would permit the department to waive recoupment in cases where the recipient is without fault and recoupment would be a burden on the recipient.

At its January 24, 2001 meeting, the JCRAR asked the department to draft legislation that would satisfy the committee's concerns regarding statutory authority and waiver in appropriate cases. The department's response to the committee's discussion and request was so vague and overly broad that some members of the committee were offended. The department's one line response suggested, perhaps wrongly, that the department was unwilling to address the concerns raised by committee members.

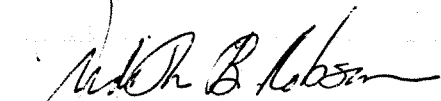
On behalf of the committee members who refused to extend the emergency rule, I respectfully request that you consider fully the committee's refusal to extend emergency rule HFS 79 before promulgating Clearinghouse Rule 00-150, the permanent rule that has language identical to the emergency rule.

I also ask that you reconsider the statutory language proposed by the department so that it reflects that fact that the SSI state supplemental benefit level can only be reduced by statute.

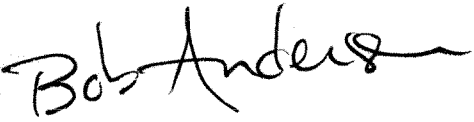
Finally, I understand the department is undertaking the process of writing a comprehensive rule package to govern administration of Supplemental Security Income (SSI) state supplemental payments. We ask that you consider language regarding waiver of recoupment efforts in appropriate cases. Such language would complement federal regulations that permit waiver of recoupment of SSI overpayments in certain cases. In this regard, language submitted to the committee at the February 20 hearing by Mr. Robert Andersen of Legal Action may be an appropriate guide.

Thank you for your cooperation on this important matter.

Sincerely,



Senator Judith Robson
Co-Chair

TO: Sen. Robson
FROM: Bob Andersen 
RE: DHFS' Proposed Legislation Authorizing the Recoupment of SSI Overpayments
DATE: January 31, 2001

The department's recommendation is overboard and allows them to adopt rules governing anything in the SSI program. Attached is a copy of a response that I received from Shirin Cabraal, LAW, indicating the harm the department could do with this overboard language. I do not think it is asking the department too much to stick to the subject. This proposal almost seems to be made out of spite after the committee's action. In addition, the language they propose is so broad that it still probably does not confer upon them the authority to adopt rules reducing grant levels by recoupment. A more specific statutory authorization is necessary to resolve any conflict a recoupment rule would have with the statutes that set grant levels.

In fact, the authorization for recoupment in W-2 provide just that specificity. Attached is a copy of that statute.

As a result, I would recommend something like the following. It is based on the federal regulation language which I have also attached.

49.78 of the statutes is created to read:

49.78 Recoupment of SSI Overpayment

- (1) The department may recover payments incorrectly made under 49.77 or 49.775 by reducing the amount of an individual's benefit payment under 49.77 or 49.775 by no more than 10% if any of the following applies:
 - (a) the recipient failed to furnish information which the recipient knew or should have known was material; OR
 - (b) the recipient made an incorrect statement which the recipient knew or should have known was incorrect; OR
 - (c) the recipient did not return a payment or report an overpayment which the recipient knew or could have been expected to know was incorrect.
- (2) The department shall take into account any physical, mental, educational, or linguistic limitations the recipient may have in assessing the recipient's failure under sub. (1). The department shall waive the recovery of overpayments under sub. (1) where the recovery would cause an undue hardship for a recipient. The department may establish administrative rules to implement the requirements of this section.

From: SHIRIN CABRAAL
To: LAWMAD.MADISON(RJA), SMTP("David.Austin@legis.stat...
Date: 1/29/01 5:42pm
Subject: RE: ssi overpayment regulation -Reply

Bob, The DHFS' proposed language is more than pathetic, it is evil ! At the risk of sounding paranoid, I think DHFS really wants to limit the scope of the C-Supp program as well as recoup overpayments. Right now Karyn and I have several C-Supp cases pending before DHA, where we are challenging the illegal termination or denial benefits, based on unpromulgated policy that conflicts with the statute, or not authorized by the statute. If DHFS gets an open ended statute like the one they are proposing they will be able to get away with a lot more.

As it is there are some pretty serious statutory as well as due process (notice) violations in the C-Supp program. We see many eligible recipients who are not receiving C-Supp.

CC: pdl,klr,smtp:"cmedaris@wccf.org"

(d) No funds distributed under par. (a) may be used to provide care for a child by a person who resides with the child, unless the county determines that the care is necessary because of a special health condition of the child.

(4) **CHOICE OF PROVIDER.** An eligible individual shall choose whether the child care will be provided by a day care center licensed under s. 48.65, a Level I certified family day care provider, a Level II certified family day care provider or a day care program provided or contracted for by a school board under s. 120.13 (14).

(5) **LIABILITY FOR PAYMENT.** An individual is liable for the percentage of the cost of the child care that the department specifies.

(6) **CHILD CARE RATES AND QUALITY STANDARDS.** (a) Subject to review and approval by the department, each county shall establish the maximum reimbursement rate for licensed child care services provided under this section. A county shall set the rate so that at least 75% of the number of places for children within the licensed capacity of all child care providers in that county can be purchased at or below that maximum rate.

(b) Subject to review and approval by the department, each county shall set a maximum reimbursement rate for Level I certified family day care providers for services provided to eligible individuals under this section. The maximum rate set under this paragraph may not exceed 75% of the rate established under par. (a).

(c) Subject to review and approval by the department, each county shall set a maximum reimbursement rate for Level II certified family day care providers for services provided to eligible individuals under this section. The maximum rate set under this paragraph may not exceed 50% of the rate established under par. (a).

(d) The department may promulgate rules to establish a system of rates or a program of grants that the department will pay to child care providers that meet the higher quality of care standards established by rules promulgated under sub. (1d) (b). If a system of rates is established under this paragraph, the rates under that system shall be higher than the rates established under pars. (a) to (c).

(7) **REFUSAL TO PAY CHILD CARE PROVIDERS.** (a) The department or the county department under s. 46.215, 46.22 or 46.23 may refuse to pay a child care provider for child care provided under this section if any of the following applies to the child care provider, employe or person living on the premises where child care is provided:

1. The person has been convicted of a felony or misdemeanor that the department or county department determines substantially relates to the care of children.

2. The person is the subject of a pending criminal charge that the department or county department determines substantially relates to the care of children.

3. The person has been determined under s. 48.981 to have abused or neglected a child.

History: 1995 a. 289; 1997 a. 27, s. 1766 to 1775, 1838 to 1857; 1997 a. 41, 105, 237, 252.

49.157 Wisconsin works; transportation assistance.

A Wisconsin works agency may provide transportation assistance in the manner prescribed by the department. The Wisconsin works agency shall limit any financial assistance granted under this subsection to financial assistance for public transportation if a form of public transportation that meets the needs of the participant is available.

History: 1995 a. 289.

49.159 Wisconsin works; noncustodial and minor and other custodial parents. (1) NONCUSTODIAL PARENTS.

An individual who would be eligible under s. 49.145 except that the individual is the noncustodial parent of a dependent child, is eligible for services under this subsection if the dependent child's cus-

todial parent is a participant and if the individual is subject to a child support order. The Wisconsin works agency may provide job search assistance and case management designed to enable eligible noncustodial parents to obtain and retain employment.

(2) **MINOR CUSTODIAL PARENTS; FINANCIAL AND EMPLOYMENT COUNSELING.** A custodial parent who is under the age of 18 is eligible, regardless of that individual's or that individual's parent's income or assets, to meet with a financial and employment planner. The financial and employment planner may provide the individual with information regarding Wisconsin works eligibility, available child care services, employment and financial planning, family planning services, as defined in s. 253.07 (1) (b), community resources, eligibility for food stamps and other food and nutrition programs.

(3) **OTHER CUSTODIAL PARENTS.** A custodial parent in a Wisconsin works group in which the other custodial parent is a participant in a Wisconsin works employment position is eligible for employment training and job search assistance services provided by the Wisconsin works agency.

(4) **PREGNANT WOMEN.** A pregnant woman whose pregnancy is medically verified who would be eligible under s. 49.145 except that she is not a custodial parent of a dependent child is eligible for employment training and job search assistance services provided by the Wisconsin works agency.

History: 1995 a. 289; 1997 a. 27.

49.161 Wisconsin works; overpayments. (1) TRIAL

JOB AND WAGE-PAYING COMMUNITY SERVICE JOBS OVERPAYMENTS. Notwithstanding s. 49.96, the department shall recover an overpayment of benefits paid under s. 49.148 (1) (a) and (b) 2. from an individual who receives or has received benefits paid under s. 49.148 (1) (a) or (b) 2. The value of the benefit liable for recovery under this subsection may not exceed the amount that the department paid in wage subsidies with respect to that participant while the participant was ineligible to participate. The department shall promulgate rules establishing policies and procedures for administering this subsection.

NOTE: Sub. (1) is shown as amended eff. 2-1-99 by 1997 Wis. Act 27. Prior to 2-1-99 it reads:

(1) **TRIAL JOBS OVERPAYMENTS.** Notwithstanding s. 49.96, the department shall recover an overpayment of benefits paid under s. 49.148 (1) (a) from an individual who receives or has received benefits paid under s. 49.148 (1) (a). The value of the benefit liable for recovery under this subsection may not exceed the amount that the department paid in wage subsidies with respect to that participant while the participant was ineligible to participate. The department shall promulgate rules establishing policies and procedures for administering this subsection.

(2) **GRANT-PAYING COMMUNITY SERVICE JOBS AND TRANSITIONAL PLACEMENTS OVERPAYMENTS.** Except as provided in sub. (3), the department shall recover an overpayment of benefits paid under s. 49.148 (1) (b) 1. and (c) from an individual who continues to receive benefits under s. 49.148 (1) (b) 1. and (c) by reducing the amount of the individual's benefit payment by no more than 10%.

NOTE: Sub. (2) is shown as amended eff. 2-1-99 by 1997 Wis. Act 27. Prior to 2-1-99 it reads:

(2) **COMMUNITY SERVICE JOBS AND TRANSITIONAL PLACEMENTS OVERPAYMENTS.** Except as provided in sub. (3), the department shall recover an overpayment of benefits paid under s. 49.148 (1) (b) and (c) from an individual who continues to receive benefits under s. 49.148 (1) (b) and (c) by reducing the amount of the individual's benefit payment by no more than 10%.

(3) **OVERPAYMENTS CAUSED BY INTENTIONAL PROGRAM VIOLATIONS.** If an overpayment under sub. (1) or (2) is the result of an intentional violation of ss. 49.141 to 49.161 or of rules promulgated by the department under those sections, the department shall recover the overpayment by deducting an amount from the benefits received under s. 49.148 (1) (a), (b) or (c), until the overpayment is recovered. The amount to be deducted each month may not exceed the following:

(a) For intentional program violations resulting in an overpayment that is less than \$300, 10% of the amount of the monthly benefit payment.

(b) For intentional program violations resulting in an overpayment that is at least \$300 but less than \$1,000, \$75.

(c) For intentional program violations resulting in an overpayment that is at least \$1,000 but less than \$2,500, \$100.

(d) For intentional program violations resulting in an overpayment that is \$2,500 or more, \$200.

History: 1995 a. 289; 1997 a. 27.

49.175 Public assistance and local assistance funding. (1) FUNDS DISTRIBUTION. Except as provided in sub. (2), within the limits of the appropriations under s. 20.445 (3) (a), (br), (cm), (dc), (dz), (e), (em), (g), (jg), (jL), (L), (Lm), (mc), (md), (nL), (pm) and (ps), the department shall allocate the following amounts for the following purposes:

NOTE: Sub. (1) (intro.) is amended eff. October 1, 1999 or the date stated in the Wisconsin Administrative Register under s. 767.29 (1) (f), whichever is earlier, by 1997 Wis. Act 27 to read:

(1) FUNDS DISTRIBUTION. Except as provided in sub. (2), within the limits of the appropriations under s. 20.445 (3) (a), (br), (cm), (dc), (dz), (e), (em), (jg), (jL), (k), (L), (Lm), (mc), (md), (nL), (pm) and (ps), the department shall allocate the following amounts for the following purposes:

(a) *Aid to families with dependent children.* For benefits under s. 49.19, \$28,400,000 in fiscal year 1997-98.

(b) *Subsidized employment.* 1. Except as provided in subd. 2. for payments to Wisconsin works agencies for subsidized employment costs, \$155,375,100 in fiscal year 1997-98 and \$158,678,000 in fiscal year 1998-99.

2. The department of revenue shall determine the amount that is required to pay claims approved under s. 71.07 (9e) for participants under s. 49.147 (4) (c). The department of workforce development shall subtract that amount from the allocation in subd. 1. and transfer the amount to the appropriation under s. 20.835 (2) (k).

NOTE: Par. (b) is shown as affected eff. 2-1-99 by 1997 Wis. Acts 27 and 252. Prior to 2-1-99 par. (b) reads:

(b) *Subsidized employment.* For payments to Wisconsin works agencies for subsidized employment costs, \$155,375,100 in fiscal year 1997-98 and \$158,678,000 in fiscal year 1998-99.

(bg) *Long-term and refugee supplement.* For payments to Wisconsin works agencies as a supplement for long-term and refugee cases, \$8,200,000 in fiscal year 1997-98 and \$9,800,000 in fiscal year 1998-99.

(bm) *Wisconsin works agency office costs.* For payments to Wisconsin works agencies for office costs, \$104,117,000 in fiscal year 1997-98 and \$115,293,800 in fiscal year 1998-99.

(c) *Wisconsin works agency contingency fund.* For contingency payments to Wisconsin works agencies for subsidized employment and office costs to be distributed under criteria established by the department, \$25,000,000 in the 1997-99 fiscal biennium.

(cr) *Credit assistance.* For payments to Wisconsin works agencies in 1st class cities for the provision of credit establishment and credit repair assistance to Wisconsin works participants, not more than \$3,000,000 in fiscal year 1997-98 and not more than \$3,000,000 in fiscal year 1998-99. Notwithstanding sub. (2), the department may not use any funds allocated under this paragraph for any other purpose under this subsection.

(d) *Job opportunities and basic skills program.* For services provided under s. 49.193, \$15,079,800 in fiscal year 1997-98.

(e) *County income maintenance administration.* For county income maintenance administration, \$6,665,600 in fiscal year 1997-98.

(f) *State administration of public assistance programs.* For state administration of public assistance programs, \$37,449,500 in fiscal year 1997-98 and \$34,338,100 in fiscal year 1998-99.

(fs) *Food stamps for legal immigrants.* For food stamp benefits provided under s. 49.124 (8) to qualified aliens, as defined in 8 USC1641 (b), \$4,600,000 in fiscal year 1998-99. Notwithstanding sub. (2), the department may not use any funds allocated under this paragraph for any other purpose under this subsection. This paragraph does not apply to the extent that federally funded

food stamp benefits for qualified aliens are restored by the federal government.

(g) *Emergency assistance.* For emergency assistance under s. 49.138, \$3,300,000 in each fiscal year.

(h) *Funeral expenses.* For funeral expenses under s. 49.30, \$3,300,000 in each fiscal year.

(i) *Learnfare case management.* For case management services for learnfare pupils under s. 49.26 (2), \$2,619,100 in each fiscal year.

(j) *Local learnfare projects.* For local projects under the learnfare program under s. 49.26, \$450,000 in fiscal year 1997-98.

(k) *Children first.* For services under the work experience program for noncustodial parents under s. 49.36, \$1,316,400 in each fiscal year.

(L) *County fraud investigations and error reduction.* For county fraud investigations and error reductions under s. 49.197, \$588,000 in each fiscal year.

(m) *Job access loans.* For job access loans under s. 49.147 (6), \$3,645,600 in fiscal year 1997-98 and \$866,900 in fiscal year 1998-99.

(n) *Employment skills advancement grants.* For employment skills advancement grants under s. 49.185, \$833,300 in fiscal year 1997-98 and \$1,000,000 in fiscal year 1998-99.

(o) *Direct child care services.* For direct child care services under s. 49.155, \$155,547,200 in fiscal year 1997-98 and \$177,427,200 in fiscal year 1998-99.

(p) *Indirect child care services.* For indirect child care services under s. 49.131 (2) (b) [s. 49.155 (1g)], \$6,002,400 in each fiscal year. Notwithstanding sub. (2), the department may not use any funds allocated under this paragraph for any other purpose under this subsection.

NOTE: The bracketed language indicates the correct cross-reference. Section 49.131 (2) (b) is renumbered s. 49.155 (1g) by 1997 Wis. Act 27. Corrective legislation is pending.

(q) *Reserve for benefit payments in a county with a population of 500,000 or more.* For a reserve for benefit payments in a county with a population of 500,000 or more, \$11,000,000 in fiscal year 1997-98 and \$10,000,000 in fiscal year 1998-99.

(r) *Wisconsin works contracts in certain counties.* For contracts with persons for oversight of the administrative structure of Wisconsin works, and of Wisconsin works agencies, in counties having a population of 500,000 or more, \$1,000,000 in each fiscal year.

(s) *New hope project.* For the new hope project under s. 49.37, \$1,560,000 in fiscal year 1997-98 and \$690,000 in fiscal year 1998-99.

(t) *Transportation assistance.* For transportation assistance under s. 49.157, \$1,000,000 in fiscal year 1997-98 and \$2,000,000 in fiscal year 1998-99. The department may not distribute the funds under this paragraph unless the joint committee on finance supplements the appropriate appropriation from the appropriation under s. 20.865 (4) (m).

(u) *Hospital paternity incentives.* For hospital paternity incentive payments under s. 69.14 (1) (cm), \$54,000 in fiscal year 1997-98 and \$144,000 in fiscal year 1998-99.

(v) *Passports for youth program.* For the passports for youth program operated by the YMCA of Metropolitan Milwaukee, \$500,000 in each fiscal year. The department may not distribute funds under this paragraph if the passports for youth program does not comply with P.L. 104-193, section 103.

(w) *Transfer of federal funds to the department of health and family services.* For the transfer of federal funds to the department of health and family services, as provided in s. 20.445 (3) (md), for the following purposes, the following amounts:

1. 'Kinship care and long-term kinship care assistance.' For the kinship care and long-term kinship care programs under s. 48.57 (3m), (3n) and (3p), \$15,720,400 in fiscal year 1997-98 and \$22,116,400 in fiscal year 1998-99.

§416.550 Waiver of adjustment or recovery--when applicable.

Waiver of adjustment or recovery of an overpayment of SSI benefits may be granted when (EXCEPTION: This section does not apply to a sponsor of an alien):

- (a) The overpaid individual was without fault in connection with an overpayment, and
 - (b) Adjustment or recovery of such overpayment would either:
 - (1) Defeat the purpose of title XVI, or
 - (2) Be against equity and good conscience, or
 - (3) Impede efficient or effective administration of title XVI due to the small amount involved.
- [52 FR 8882, Mar. 20, 1987, as amended at 53 FR 16543, May 10, 1988]

§416.552 Waiver of adjustment or recovery--without fault.

Without fault relates only to the situation of the individual seeking relief from adjustment or recovery of an overpayment. The overpaid individual (and any other individual from whom the Social Security Administration seeks to recover the overpayment) is not relieved of liability and is not *without fault* solely because the Social Security Administration may have been at fault in making the overpayment. In determining whether an individual is without fault, the *fault* of the overpaid person and the *fault* of the individual seeking relief under the waiver provision are considered. Whether an individual is *without fault* depends on all the pertinent circumstances surrounding the overpayment in the particular case. The Social Security Administration considers the individual's understanding of the reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements, understanding of the obligation to return checks which were not due, and ability to comply with the reporting requirements (e.g., age, comprehension, memory, physical and mental condition). In determining whether an individual is without fault based on a consideration of these factors, the Social Security Administration will take into account any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) the individual may have. Although the finding depends on all of the circumstances in the particular case, an individual will be found to have been at fault in connection with an overpayment when an incorrect payment resulted from one of the following:

- (a) Failure to furnish information which the individual knew or should have known was material;
- (b) An incorrect statement made by the individual which he knew or should have known was incorrect (this includes the individual's furnishing his opinion or conclusion when he was asked for facts), or
- (c) The individual did not return a payment which he knew or could have been expected to know was incorrect.

[40 FR 47763, Oct. 10, 1975, as amended at 59 FR 1636, Jan. 12, 1994]



State of Wisconsin
Department of Health and Family Services

Tommy G. Thompson, Governor
Joe Lekan, Secretary

January 24, 2001

The Honorable Judy Robson, Co-Chairperson
Joint Committee for Review of Administrative Rules
Room 15 South, State Capitol
P.O. Box 7882
Madison, Wisconsin 53707-7882

Dear Senator Robson:

The Department of Health and Family Services has an emergency rulemaking order in effect that will expire before the emergency rules are replaced by permanent rules unless the effective period of the emergency order is extended. Pursuant to s. 227.24 (2), Stats., I ask the Joint Committee to extend the effective period of the emergency order by **60 days** as indicated below. The emergency rules are as follows:

State Supplemental Security Income Payments. The emergency rulemaking order creating rules was published and effective on September 15, 2000. The Department's emergency rulemaking order provides the Department the authority to recoup benefits incorrectly paid under ss. 49.77 and 49.775, Stats., and effectively administer both state and federal public welfare funding. Through the rule, the Department can recover taxpayer monies to which SSI recipients were not entitled, pending the promulgation of permanent rules.

At its January 24th hearing, the Joint Committee extended the effective period of the rules to February 26, 2001, 15 days beyond its original expiration date of February 11, 2001. The Committee also asked the Department to submit bill language giving the Department administrative rulemaking authority with respect to ss. 49.77 and 49.775, Stats. A copy of the Department's proposed language is attached.

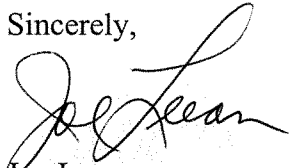
Replacement permanent rules were sent to the Legislative Council for review on October 25, 2000 and were the subject of a public hearing held on December 13, 2000. The Department sent the Legislative Report on CR 00-150 to the Presiding Officers of the Senate and Assembly on January 10, 2001. Clearinghouse Rule 00-150 was referred to the Assembly Committee on Aging and Long-Term Care on January 19, 2001 and to the Senate Committee on Health, Utilities, Veterans and Military Affairs on January 12, 2001. Consequently, the *earliest* the Department could file the rules will be February 19 for an April or May 1, 2001, effective date. Therefore, I request an extension of the effective period of the emergency rules

Senator Robson
January 24, 2001
Page 2

by **60 days**, through May 21, 2001. If the effective period of the emergency rules is not extended, in the interim, the Department will not have the authority to recoup benefits incorrectly paid under ss. 49.77 and 49.775, Stats.

A copy of the emergency rulemaking order is attached to this letter. If you have any questions about the rules, you may contact Kathy Luedtke, SSI Coordinator in the Division of Supportive Living at 266-6890.

Sincerely,



Joe Lekan
Secretary

Attachments

cc Representative Grothman
Senator Fred Risser
Assemblyman Scott Jensen



State of Wisconsin
Department of Health and Family Services

Tommy G. Thompson, Governor
Joe Lekan, Secretary

DHFS Suggested Language Authorizing Department to Establish Rules

The Department proposes adding a new section (1m) to s. 49.77, Stats.:

“(1m) RULES. The department shall prescribe by rule standards and procedures for operation of the state supplemental payment program under this section and s. 49.775.”



"For these are all our children . . .
we will all profit by, or pay for,
whatever they become." James Baldwin

RESEARCH • EDUCATION • ADVOCACY

TO: Joint Committee for Review of Administrative Rules

FROM: Carol W. Medaris
Project Attorney *Carol W. Medaris*

RE: Emergency Rule HFS 79, relating to recoupment of overpayments in the SSI State Supplemental payments and Caretaker Supplement programs

DATE: February 20, 2001

This is in response to your request that I submit my testimony today in writing. At the hearing I basically made five points:

1. The Council is in accord with testimony heard previously by this committee regarding the lack of statutory authority for this rule. In that regard, I attach a copy of my testimony on the final rule, which is in basically the same form as the emergency rule. (See letter to Kathleen Luedtke dated December 15, 2000.)
2. Nearly all families at issue here are living below the poverty line. That means that there is no "extra" income beyond that needed for the most basic necessities. And, the rule will have a particularly profound effect on families with children. All those receiving benefits under Sec. 49.775, the Caretaker Supplement program, are families with children headed by a parent with a disability. The Council is very concerned about the welfare of the children in these families, particularly when they are faced with overpayments that they had no responsibility for creating.
3. The Department's testimony that virtually no one who receives an overpayment is without fault is perplexing, given that the example given in their own Proposed Order creating the rules states:

An unavoidable aspect of the program is the Department's need to periodically recover payments incorrectly made to benefit recipients. Overpayments and incorrect payments occur due to delays in transmission of eligibility and benefit information between the federal Social Security Administration and the Department and are not due to the Department's error or omission.



A MEMBER OF THE NATIONAL ASSOCIATION OF CHILD ADVOCATES

DHFS Emergency Rule
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(See copy of the Proposed Order attached.) It would seem clear that recipients are not normally responsible for delays in transmission of eligibility and benefit information between the federal government and the state, and that is the only example the Department gives for the need for this rule.

4. The Department has indicated that the recipient can always ask for a fair hearing to determine the appropriateness of the recoupment action. However, the rule as written makes such a hearing request largely meaningless because it contains no standards for making exceptions. The rule states that the department

shall recover payments incorrectly made under s. 49.77 or 49.775, Stats. from an individual who receives benefits paid under [either statute] by reducing the amount of an individual's payment . . .

(See emergency rule at section HFS 79.40, emphasis added.) There is absolutely no exception for those without fault (although amounts less than \$100 may be waived, likely for reasons of administrative economy). By the clear language of the rule, the only issue that may be raised at an administrative hearing is whether the person was overpaid. The Department's suggestion that an administrative hearing is of benefit to recipients who are without fault is disingenuous, at best.

5. The proposed final rule similarly lacks any standard for waiving recoupment when the person is without fault, or for any other reason. (See Proposed Order attached.)

I would suggest that the Committee 1) reject the Department's request for an extension of the emergency rule based upon the fact that there is no statutory authority for the rule, and 2) strongly urge the Department to develop standards to include in their final rule similar to those exceptions to recovery that currently exist in federal SSI law. (These are all the same families, and in many cases there will be simultaneous recoveries sought of overpayments of federal SSI benefits and State Supplemental and Caretaker Supplement benefits.) I would be happy to serve on a committee to help draft such standards.



"For these are all our children . . .
we will all profit by, or pay for,
whatever they become." James Baldwin

RESEARCH • EDUCATION • ADVOCACY

December 15, 2000

Kathleen Luedtke, SSI Coordinator
Division of Supportive Living
P.O. Box 7851
Madison, WI 53707

Re: Proposed rule relating to recoupment of SSI State Supplement and
Caretaker Supplement overpayments, creating Ch. HFS 79, Wis. Adm.
Code.

Dear Ms. Luedtke,

This letter contains my comments on the above-described, proposed rule. The rule sets forth a basis for recovery of overpayments of State Supplemental payments under sec. 49.77, Wis. Stats., and Caretaker Supplement benefits under sec. 49.775, Wis. Stats. For ongoing recipients recovery would be by decreasing benefit payments by up to 10% of the benefit amount until the overpayment is repaid. According to the Department this recoupment procedure is necessary due to overpayments occurring from delays in transmitting eligibility and pricing information between the federal Social Security Administration and the Department.

Although the Department purports to rely on secs. 49.77, 49.775 and 227.11(2)(a), Wis. Stats. to implement this new rule, these sections contain absolutely no authority for the Department's recovery scheme. In fact, the reduction of benefits as proposed in this rule runs directly counter to the statutes governing the two programs. It therefore may not stand under sec. 227.10(2), Wis. Stats. which prohibits agencies from "promulgat[ing] a rule which conflicts with state law."

A search of secs. 49.77 and 49.775 fails to reveal any language authorizing the recoupment of overpayments in either of these programs. Neither is there any language authorizing the Department to make rules governing collection of overpayments, here or elsewhere in the statutes. This is in contrast to sections governing collections in the AFDC, Wisconsin Works, child care



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subsidy, transportation assistance, and food stamps programs, where the Department of Workforce Development is statutorily granted a right to recover overpayments and promulgate rules to govern the process, secs. 49.195(3), 49.125 Wis. Stats.

The Department also relies upon sec. 227.11(2)(a), Wis. Stats., which allows an agency to promulgate rules,

interpreting the provisions of a statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation.

Here the Department has clearly exceeded those bounds.

Section 49.77 provides that all persons meeting the financial and non-financial eligibility requirements of the federal SSI program are *entitled* to receive supplemental benefits under this section. Subsection (2)(a). Changes to current benefit levels may occur only following the statutorily prescribed review process set forth in subsection (2m), and that process seems to clearly anticipate changes in the overall benefit amount. There is also a provision for increased amounts in certain cases in subsection (3s). Otherwise, in the absence of any other authority the statutes guarantee that all eligible persons receive the current benefit amount, unless they qualify for the additional supplement in subsection (3)(s). The Department's proposed rule to reduce benefits in certain cases, as applied to those receiving benefits under this section, directly conflicts with the statute.

Section 49.775(2) provides that the Department "*shall* make a monthly payment in the amount specified in sub. (4)" to a custodial parent who meets statutory requirements. The amount of the caretaker supplement in subsection (4), as amended by 1999 Act 9, is \$250 per month for the first child and \$150 for each additional child. As with those eligible under sec. 49.77, the Department's proposed rule to reduce benefits for some caretaker supplement families directly conflicts with the statute at issue here, as well.

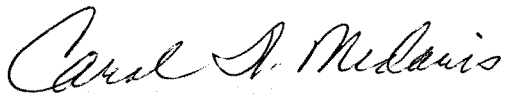
The law has been clear for some time that "[an] administrative rule, even of long duration, may not stand at variance with an unambiguous statute." Basic Products Corp. v. Department of Taxation, 19 Wis.2d 183, 186, 120 N.W.2d 161, 162 (1963), cited in State ex rel. Parker v. Fiedler, 180 Wis.2d 438, 509 N.W.2d 440 (Ct.App, 1993). In State ex rel. Irany v. Milwaukee

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County Civil Service Commission, 28 Wis.2d 132, 118 N.W.2d 137 (1962), the procedure in an employee suspension rule failed because it directly conflicted with the applicable statute requiring a hearing prior to suspension.

As a policy matter, it is important for the legislature to decide whether and when recoupment of overpayments in these programs may occur. Under the federal SSI program upon which these programs are based, recoupment may be waived in cases where the overpaid individual was without fault, and recovery would either "defeat the purpose" of the SSI program, be "against equity and good conscience," or impede administration of the program because of the small amount.* 20 CFR sec. 416.550. This means that in cases in which the overpayment occurred because of miscommunication between the SSA and the Department, as here, the overpayment would be waived in the likely event of the family needing all of its income for ordinary and necessary expenses or the family having changed its position in reliance upon the incorrect payment.

Respectfully submitted,



Carol W. Medaris
Project Attorney

* The Department's proposed rule does allow for waivers of overpayments of less than \$100.

PROPOSED ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
CREATING RULES

To create HFS 79, relating to administration of Supplemental Security Income (SSI) state supplemental payments to low income elderly and disabled residents of Wisconsin and their dependent children.

Analysis Prepared by the Department of Health and Family Services

Sections 49.77 and 49.775, Stats., authorize the Department to administer Supplemental Security Income (SSI) state supplemental payments to low income elderly and disabled residents of Wisconsin and their dependent children. These SSI payments are funded by state general purpose revenue and federal Temporary Assistance for Needy Families (TANF) grant funding in excess of \$140,000,000 per state fiscal year. These payments are distributed monthly to approximately 100,000 beneficiaries and their dependent children. Neither s. 49.77 or 49.775, Stats., direct the Department to develop administrative rules to administer the program.

An unavoidable aspect of the program is the Department's need to periodically recover payments incorrectly made to benefit recipients. Overpayments and incorrect payments occur due to delays in transmission of eligibility and benefit information between the federal Social Security Administration and the Department and are not due to the Department's error or omission. On November 24, 1999, by order of the Wisconsin Court of Appeals, District II, the Department was found, absent administrative rule, to lack the authority to administratively recoup benefits overpaid to recipients who were ineligible for the benefits or to whom the Department paid an incorrect amount of benefits. The Department sought to appeal the decision to the Wisconsin Supreme Court, but recently learned that the Supreme Court will not hear the case. The Department's inability to recover payments made in error will cost the Department about \$10,000 per month.

The rule proposes to replace an existing emergency rule issued on September 15, 2000. The rule provides the Department with the authority to recoup benefits incorrectly paid under ss. 49.77 and 49.775, Stats., and to effectively administer both state and federal public welfare funding. Through this rule, the Department will effectively recover taxpayer monies to which recipients were not entitled, pending the promulgation of permanent rules.

ORDER

Pursuant to the authority vested in the Department of Health and Family Services by ss. 49.77, 49.775 and 227.11 (2), Stats., the Department of Health and Family Services hereby creates rules interpreting ss. 49.77 and 49.775, Stats.

SECTION 1. Chapter HFS 79 is created to read:

Chapter HFS 79

STATE SUPPLEMENTAL SECURITY INCOME PAYMENTS

- | | |
|-----------|--|
| HFS 79.10 | Authority and purpose. |
| HFS 79.20 | Applicability. |
| HFS 79.30 | Definitions. |
| HFS 79.40 | Recovery of incorrectly paid benefits. |

HFS 79.50 Waiver of recovery.
HFS 79.60 Appeal rights.

HFS 79.10 Authority and purpose. This chapter is promulgated under the authority of ss. 49.77, 49.775 and 227.11 (2) (a), Stats., to administer supplemental security income state supplemental payments to low-income elderly and disabled residents of Wisconsin and their dependent children. This chapter establishes the basis for the recovery of benefits incorrectly paid to individuals who receive benefits under s. 49.77 or 49.775, Stats., or both, provides for the department's waiver of recovery of incorrectly paid benefits and establishes the appeal right of an individual from whom the department seeks to recover benefits incorrectly paid to the individual.

HFS 79.20 Applicability. This chapter applies to the department and to individuals receiving benefits under s. 49.77 or 49.775, Stats., or both.

HFS 79.30 Definition. In this chapter: (1) "Department" means the department of health and family services.

(2) "Incorrectly paid benefits" means payments of any amount dispersed to an individual who was not eligible for any benefit amount during the period for which the payment was made or in an amount which was in excess of the amount for which the person was eligible during the period for which the payment was made.

HFS 79.40 Recovery of incorrectly paid benefits. (1) **CURRENT RECIPIENT.** The department shall recover payments incorrectly made under s. 49.77 or 49.775, Stats., to an individual who receives benefits paid under s. 49.77 or 49.775, Stats., or both, by reducing the amount of an individual's payment under s. 49.77 or 49.775, Stats., or both, by no more than 10% until the full amount of the incorrect payment is recovered by the department, unless the individual requests a larger percentage deduction.

(2) **FORMER RECIPIENT.** (a) The department shall ask a former recipient to voluntarily repay overpayments the department made under s. 49.77 or 49.775, Stats.

(b) If a former recipient refuses to voluntarily repay the amount specified under sub. (2) and the overpayment is \$100 or more, the department may pursue collection or court action.

HFS 79.50 Waiver of recovery. The department may waive recovery of incorrectly paid benefits for an incident of incorrect payment, be it for a single month or for an episode of incorrect payments, when the total recovery or adjustment for the single month or episode is less than \$100.

HFS 79.60 Appeal rights. The department shall send a notice of adverse administrative action to an individual identifying the months and amounts for which benefits were incorrectly paid and the reason for which the individual was ineligible for the payment. The notice shall include information regarding the individual's right to appeal the department's decision as provided in ch. HA 3. The department delegates final decision making regarding appeals to the department of administration's division of hearings and appeals under s. HA 3.09 (9) (a).

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

Wisconsin Department of Health and
Family Services

Dated:

By: _____
Joe Leraan
Secretary

SEAL: