



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.

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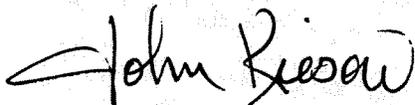
As much as \$10,000 per month of SSI is overpaid to persons who are ineligible for some or all of the payment they receive. While it is obviously important to recover these overpayments, the department is committed to doing so only as permitted by law. Therefore, in direct response to the Mack decision's 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,



John Kiesow
Executive Assistant

Cc: Representative Glenn Grothman
Kathleen Luedtke

SENATOR JUDITH B. ROBSON
CO-CHAIR

PO BOX 7882
MADISON, WI 53707-7882
(608) 266-2253



REPRESENTATIVE GLENN GROTHMAN
CO-CHAIR

PO BOX 8952
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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

A

Emergency Rule HFS 79



State of Wisconsin
Department of Health and Family Services

Tommy G. Thompson, Governor
Joe Leean, 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.

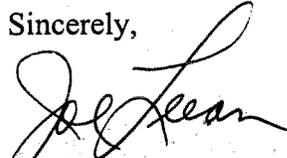
Replacement permanent rules were sent to the Legislative Council for review on October 25, 2000 and were the subject of a public hearing held on December 13, 2000. The Department sent the Legislative Report on CR 00-150 to the Presiding Officers of the Senate and Assembly on January 10, 2001. Clearinghouse 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 Leean
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.”

- 1) overly Broad - no specific authority to resolve conflict ER has 0 statutes - specify grant limits 3 exceptions rule proposes to reduce the amt -
- 2) waiver / where overpayment is not the fault of the recipient
 render what circumstances - waiver
 (have for wa cases overpayment)
- 3) Fed regulations -
 however
 3-facet -
 defeat the purpose of SSI
 supplemental security income needed for ordinary
 necessary living expenses

No standards

Spouse waiver



State of Wisconsin
Department of Health and Family Services

JAN 08 2001

Tommy G. Thompson, Governor
Joe Leean, Secretary

January 5, 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, and **will expire on February 11, 2001**, unless extended. Before that date, the Department had no administrative rules governing its administration of Supplemental Security Income state supplemental payments to low income elderly and disabled residents of Wisconsin and their dependent children. Absent an administrative rule authorizing the Department to recoup payments, the Wisconsin Court of Appeals, District II, found that the Department lacked the authority to recoup benefits overpaid to recipients who were ineligible for the benefits or to whom the Department paid an incorrect amount of benefits.

The Department's inability to recover payments made in error would cost the Department about \$10,000 per month. Developing and promulgating permanent administrative rules to address the Court's decision was estimated to require at least 7 months, thereby costing the Department approximately another \$70,000. The Department deemed that unanticipated expense a threat to the public welfare insofar as Wisconsin and federal taxpayers should not be called upon to shoulder the burden of these unanticipated and undeserved expenses. Therefore, the Department promulgated the emergency rule until the Department could promulgate a similar permanent rule.

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

Senator Robson

January 5, 2001

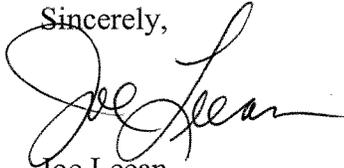
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both state and federal public welfare funding. Through the rule, the Department can recover taxpayer monies to which SSI recipients were not entitled, pending the promulgation of permanent rules.

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 intends to send the Legislative Report to the Presiding Officers of the Senate and Assembly by January 10, 2001. Consequently, the Department will not be able to file the rules until at least February 12 for an April 1, 2001, effective date. Therefore, I request an extension of the effective period of the emergency rules by **60 days**, through April 12, 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,

A handwritten signature in cursive script, appearing to read "Joe Llean".

Joe Llean
Secretary

Attachments

cc Representative Grothman
Senator Fred Risser
Assemblyman Scott Jensen

ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
CREATING RULES

FINDING OF EMERGENCY

The Department of Health and Family Services finds that an emergency exists and that the rules are necessary for the immediate preservation of the public peace, health, safety or welfare. The facts constituting the emergency are as follows:

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 pricing 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. Developing and promulgating permanent administrative rules to address the Court's decision will require at least 7 months, thereby costing the Department approximately another \$70,000. The Department deems this unanticipated expense a threat to the public welfare insofar as Wisconsin and federal taxpayers should not be called upon to shoulder the burden of these unanticipated and undeserved expenses. Therefore, the Department is promulgating this emergency rule until the Department can promulgate a similar permanent rule.

This emergency rule provides the Department with the authority to recoup benefits incorrectly paid under ss. 49.77 and 49.775, Stats., and to again effectively administer both state and federal public welfare funding. By issuing 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, 227.11 (2) and 227.24 (1), 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), to implement aspects of a program to administer SSI 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 individuals' 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, or both.

HFS 79.30 Definition. In this chapter, "department" means the department of health and family services.

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., from 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 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.

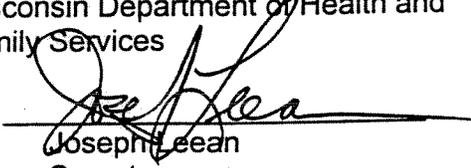
HFS 79.50 Waiver of recovery. The Department may waive recovery of incorrectly paid benefits when the recovery or adjustment is less than \$100.

HFS 79.60 Appeal Rights. The department shall send a notice of adverse administrative action which meets the requirements of ch. 227, Stats., 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 rules contained in this order shall take effect as emergency rules upon publication in the official state newspaper as provided in s. 227.24 (1) (c), Stats.

Wisconsin Department of Health and
Family Services

Dated: September 13, 2000

By: 

Joseph P. Lee
Secretary

SEAL: