2007 DRAFTING REQUEST

Bill

Received: **09/18/2006**

Received By: **dkennedy**

Wanted: **As time permits**

Identical to LRB:

For: **Administration-Budget**

By/Representing: **Pink**

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

Drafter: **dkennedy**

May Contact:

Addl. Drafters:

Subject: **Health - medical assistance**

Extra Copies: **PJK**

Submit via email: **YES**

Requester's email:

Carbon copy (CC:) to: **robin.ryan@legis.wisconsin.gov**

Pre Topic:

DOA:.....Pink, BB0014 -

Topic:

Medical Assistance retroactive eligibility repayments

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	dkennedy 10/02/2006	jdyer 10/03/2006		_____ _____			S&L
/1	dkennedy 11/10/2006 dkennedy 11/13/2006		jfrantze 10/03/2006	_____ _____ _____ _____	sbasford 10/03/2006		S&L
/2	dkennedy 12/27/2006	jdyer 12/28/2006	nnatzke 12/28/2006	_____ _____	cduerst 12/28/2006		

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FE Sent For:

<END>

DAK/RLR

2007-09 Budget Bill Statutory Language Drafting Request

- Topic: Repayment to Recipients in Case of Retroactive Eligibility
- Tracking Code: BB0013
- SBO team: Health and Insurance
- SBO analyst: Michelle Pink
  - Phone: 7-7980
  - Email: michelle.pink@wisconsin.gov
- Agency acronym: DHFS
- Agency number: 435

Medicaid priority

DHFS

Department of Health and Family Services
2007-2009 Biennial Budget Statutory Language Request
September 13, 2006

Repayment to Recipients in Case of Retroactive Eligibility

42 USC 1395cc

Current Language

Section 49.49(3m)(a)2 of the Wisconsin statutes allows a provider to keep the difference between the amount paid by Medicaid and the amount a private pay applicant for Medicaid paid in cases where the applicant has been found eligible for Medicaid retroactively. A July 19, 2005 letter from the federal Centers for Medicare and Medicaid Services (CMS) to the Department of Health and Family Services points out that our statute 49.49(3m)(a)2 is out of compliance with section 1919(c)(5)(a)(iii) of the Social Security Act and 42 CFR 447.15. In the letter, CMS concludes that Wisconsin law is contrary to federal provisions relating to payment in full and requests that the Department change its policies and practices. The Department has not yet responded to CMS' letter.

? 42 USC 1396a (a)(10)(B)? (34)

Proposed Change

Section 49.49(3m)(a)2 of the Wisconsin statutes needs to be modified to prohibit a provider from keeping the difference between the amount paid by Medicaid and the amount a private pay applicant for Medicaid paid in cases where the applicant has been found eligible for Medicaid retroactively.

Background and Rationale for the Change

If CMS finds Wisconsin out of compliance and imposes sanctions, costs to the state could reach millions of dollars as this practice has been in place since 1978. In calendar year 2005, there were about 24,160 people who were determined retroactively eligible for Medicaid. Medicaid claims for nursing homes and inpatient hospital services totaled approximately $28,825,000 for these individuals during their periods of retroactive eligibility. While it is impossible to predict how CMS will respond if Wisconsin remains out of compliance, the state could lose up to 58% in federal matching funds for these claims each year.

Desired Effective Date:	Upon passage
Agency:	DHFS
Agency Contact:	Kirstin Nelson
Phone:	(608) 266-5362

42 USC 1396b (f)(2)(A)
1396b(m)(5)A)(ii)
1396b(u)(1)(D)(iii) ?

Note: This is, in part, based on Kaup v. DHFS, 269 Wis 2d 59, 675 N.W.2d 755, 2004 WI 16 (2004)

DIVISION OF HEALTH CARE FINANCING
1 WEST WILSON STREET
P O BOX 309
MADISON WI 53701-0309

Telephone: 608-266-8922
FAX: 608-266-1096
TTY: 888-692-1402
www.dhfs.state.wi.us

Jim Doyle
Governor

Helene Nelson
Secretary

State of Wisconsin

Department of Health and Family Services

FAX TRANSMITTAL

DATE: 9-29-06

TO: Debra Kennedy

PHONE NO:

FAX NO: 264-6948

TOTAL NO. OF PAGES INCLUDING COVER SHEET: 3

FROM: James Cobb

WISCONSIN DIVISION OF HEALTH CARE FINANCING
P.O. Box 309
1 West Wilson Street, Room 350
Madison, WI 53701-0309
(608) 266-8922

FAX NO: (608) 266-6786

INTERNET ID: @DHFS.STATE.WI.US

MESSAGE:

CMS Query Concerning Retroactive Refund of Nursing Home Private Pay

Background

Althea Keup entered Mequon Care Center in September 1999 as a private pay resident. She applied for Medicaid in mid-October and was certified as eligible back to October 1, 1999. Medicaid paid the facility at its Medicaid rates for October and the facility then refunded that amount to Keup under the authority of § 49.49(3m)(a) 2 that provides:

> If an applicant is determined to be eligible retroactively under s. 49.46 (1) (b) and a provider bills the applicant directly for services and benefits rendered during the retroactive period, the provider shall, upon notification of the applicant's retroactive eligibility, submit claims for reimbursement under s. 49.45 for covered services or benefits rendered during the retroactive period. Upon receipt of payment, the provider shall reimburse the applicant or other person who has made prior payment to the provider. No provider may be required to reimburse the applicant or other person in excess of the amount reimbursed under s. 49.45."

(The statutory provision was passed in the '70s for the benefit of providers.)

Because the refunded amount was less than the amount Keup privately paid she filed an appeal and ultimately a federal section 1983 action arguing that the Wisconsin statute violates the federal requirements at §1919(c)(5)(A)(iii) of the Social Security Act and 42 CFR 447.15 that Medicaid providers must accept Medicaid payments as payment in full. On March 4, 2004, after reviewing the standards to bring a 1983 action the Court held that Keup did not have a federally enforceable right to full reimbursement. While there was some discussion that could be characterized as concluding that the state law was consistent with federal requirements, the specific holding was tied to the question of whether a federally enforceable right existed.

The case is at
http://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=1659

Keup filed a petition for certiorari with the U.S. Supreme Court that it ultimately denied. In recommending against the U.S. Supreme Court accepting the cert petition the Solicitor General claimed that the Wisconsin statute is inconsistent with the "payment in full" provision of federal law and that the Court's analysis of whether the "payment in full" provision creates individual rights is flawed. Nonetheless, the SG said the Court was correct in deciding that Keup did not have a section 1983 remedy. It also noted that the Secretary of HHS can address the Wisconsin statute's deviation from federal law through established state plan procedures.

CMS wrote Mark Moody on July 19, 2005 concluding that Wisconsin law is contrary to federal payment in full requirements and requested that the Department change its policy and practices.

Discussion

The Department may resist the CMS request by noting that we may not ignore an enacted statute that our highest court did not rule to be a violation of counterpart federal law. That could eventually lead to a state plan action being brought against Wisconsin. The Department would have administrative appeal rights. If CMS prevailed, potentially unlimited federal FFP could be at risk.

If the Department does not wish to resist, we will need to request time from CMS to make any statutory changes.

Options

1. Tell CMS that we will push for the repeal of S. 49.49(3m)(a)2 and revise policy and procedures on promulgation.
2. Tell CMS that we feel our statute is appropriate.
3. Ask for a meeting with CMS to discuss this issue.

(f) *Business agents.* Payment may be made to a business agent, such as a billing service or an accounting firm, that furnishes statements and receives payments in the name of the provider, if the agent's compensation for this service is—

(1) Related to the cost of processing the billing;

(2) Not related on a percentage or other basis to the amount that is billed or collected; and

(3) Not dependent upon the collection of the payment.

(g) *Individual practitioners.* Payment may be made to—

(1) The employer of the practitioner, if the practitioner is required as a condition of employment to turn over his fees to the employer;

(2) The facility in which the service is provided, if the practitioner has a contract under which the facility submits the claim; or

(3) A foundation, plan, or similar organization operating an organized health care delivery system, if the practitioner has a contract under which the organization submits the claim.

(h) *Prohibition of payment to factors.* Payment for any service furnished to a recipient by a provider may not be made to or through a factor, either directly or by power of attorney.

[43 FR 45253, Sept. 29, 1978, as amended at 46 FR 42672, Aug. 24, 1981; 61 FR 38398, July 24, 1996]

§ 447.15 Acceptance of State payment as payment in full.

A State plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the agency plus any deductible, coinsurance or copayment required by the plan to be paid by the individual. However, the provider may not deny services to any eligible individual on account of the individual's inability to pay the cost sharing amount imposed by the plan in accordance with § 431.55(g) or § 447.53. The previous sentence does not apply to an individual who is able to pay. An individual's inability to pay does not eliminate his or her liability for the cost sharing charge.

[50 FR 23013, May 30, 1985]

§ 447.20 Provider restrictions: State plan requirements.

A State plan must provide for the following:

(a) In the case of an individual who is eligible for medical assistance under the plan for service(s) for which a third party or parties is liable for payment, if the total amount of the established liability of the third party or parties for the service is—

(1) Equal to or greater than the amount payable under the State plan (which includes, when applicable, cost-sharing payments provided for in §§ 447.53 through 447.56), the provider furnishing the service to the individual may not seek to collect from the individual (or any financially responsible relative or representative of that individual) any payment amount for that service; or

(2) Less than the amount payable under the State plan (including cost sharing payments set forth in §§ 447.53 through 447.56), the provider furnishing the service to that individual may collect from the individual (or any financially responsible relative or representative of the individual) an amount which is the lesser of—

(i) Any cost-sharing payment amount imposed upon the individual under §§ 447.53 through 447.56; or

(ii) An amount which represents the difference between the amount payable under the State plan (which includes, where applicable, cost-sharing payments provided for in §§ 447.53 through 447.56) and the total of the established third party liability for the services.

(b) A provider may not refuse to furnish services covered under the plan to an individual who is eligible for medical assistance under the plan on account of a third party's potential liability for the service(s).

[55 FR 1433, Jan. 16, 1990]

§ 447.21 Reduction of payments to providers.

If a provider seeks to collect from an individual (or any financially responsible relative or representative of that

State of Wisconsin
2007 - 2008 LEGISLATURE

LRB-0250/2 1
DAK:...:...

DOA:.....Pink, BB0014 - Medical Assistance retroactive eligibility repayments

FOR 2007-09 BUDGET -- NOT READY FOR INTRODUCTION

don't gen

AN ACT ...; **relating to:** the budget.

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Analysis by the Legislative Reference Bureau

HEALTH AND HUMAN SERVICES

MEDICAL ASSISTANCE

Under current law, DHFS administers the Medical Assistance (MA) Program, which provides federal and state moneys to pay providers for health care provided to MA recipients. MA recipients are persons with very low income and resources who apply for MA benefits and meet certain eligibility requirements. One category of MA recipients is termed "medically needy." These persons have higher incomes than are allowed, but can be determined to be retroactively eligible for MA for a certain period of months if they incur medical expenses that, if paid, would bring their incomes within applicable limits. Currently, if an MA applicant is found to be retroactively eligible as a "medically needy" recipient and a provider has billed the recipient directly for services provided during the retroactive period, the provider, upon notice that the applicant is retroactively eligible, must submit claims for MA payment to DHFS. When paid by DHFS, the provider must reimburse the MA recipient for payment the MA recipient made to the provider for services provided during the retroactively eligible period. Regardless of the amount the provider has charged the MA recipient, no provider may be required to reimburse the recipient more than the amount that the provider is paid for the services by MA.

This bill eliminates the provision that prohibits requiring a health care provider to reimburse for services paid for by an MA "medically needy" recipient in an amount that is greater than the provider is paid for the services under the MA Program.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

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

SECTION 1. 49.49 (3m) (a) 2. of the statutes is amended to read:

49.49 **(3m)** (a) 2. If an applicant is determined to be eligible retroactively under s. 49.46 (1) (b) and a provider bills the applicant directly for services and benefits rendered during the retroactive period, the provider shall, upon notification of the applicant's retroactive eligibility, submit claims for reimbursement under s. 49.45 for covered services or benefits rendered during the retroactive period. Upon receipt of payment, the provider shall reimburse the applicant or other person who has made prior payment to the provider. ~~No provider may be required to reimburse the applicant or other person in excess of the amount reimbursed under s. 49.45.~~

History: 1977 c. 418; 1979 c. 89; 1981 c. 317; 1985 a. 29 s. 3202 (23); 1985 a. 269; 1989 a. 23, 31; 1995 a. 27; 1997 a. 283; 2001 a. 109; 2003 a. 309.

(END)

Kennedy, Debora

From: Pink, Michelle C - DOA [michelle.pink@wisconsin.gov]
Sent: Tuesday, November 21, 2006 11:42 AM
To: Kennedy, Debora
Subject: Re: LRB -0250/1

Attachments: 0250.pdf

0250.pdf (11 KB)

Please see the comments below and let me know if you need further clarification. Thank you.

Michelle Pink

-----Original Message-----
Date: 11/20/2006 02:43 pm -0600 (Monday)
From: Shelley Malofsky
To: Vavra, James
Subject: Re: Fwd: LRB -0250/1 (attached)

Yes, this is wrong. The cross-referenced cite in the 49.49 section being changed is a cross-reference to categorically needy (49.46(1)(b)).
There is the same 49.46 provision in the medically needy section at 49.47(4)(d).
Therefore, both cat and med needy have retroactive eligibility.

The 49.47 cite should be added to the prohibited charges paragraph being changed in 49.49 plus it should be clearly stated that the provider must reimburse "the amount of the prior payment." By just eliminating the last line it makes the paragraph ambiguous and subject to argument -- for those generations that come after us and don't know this history.

State of Wisconsin
2007 - 2008 LEGISLATURE

LRB-0250/~~1~~ 2
DAK:jld:~~jf~~

DOA:.....Pink, BB0014 – Medical Assistance retroactive eligibility repayments

FOR 2007-09 BUDGET -- NOT READY FOR INTRODUCTION

AN ACT ...; **relating to:** the budget.

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to the recipient

recipient

strike

plain period

for services provided to the recipient during the retroactive eligibility period, by the amount of the prior payment made

(END)

or s. 49.47 (4)(d)

under s. 49.45

not# Instead, the bill requires that the health care provider reimburse the MA recipient (or another person) the amount that the recipient (or other person) has paid the provider for the recipient's care. The bill also extends this repayment requirement to persons who are determined to be retroactively eligible for MA as "medically needy" recipients (persons with higher incomes than are usually allowed who incur medical expenses that, if paid, bring their incomes within applicable limits).

State of Wisconsin
2007 - 2008 LEGISLATURE

LRB-0250/2
DAK:jld:nwn

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(END)