



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #478

Provider Fraud and Abuse (DHFS -- Medical Assistance)

[LFB 2001-03 Budget Summary: Page 366, #20]

CURRENT LAW

Provider Certification and Recovery of Payments. Under current law, the Department of Health and Family Services (DHFS) is responsible for establishing the criteria for certification of medical assistance (MA) providers, certifying those providers and reimbursing those providers for services they provide to MA recipients in accordance with criteria established in state and federal law, federal regulations and administrative rules. The criteria for reimbursement of services are described in handbooks available to MA-certified providers.

DHFS is required to recover money improperly or erroneously paid to a provider, after providing reasonable notice to the provider and the opportunity for a hearing. DHFS can recover improper and erroneous payments by offsetting or adjusting amounts owed to the provider, crediting the amount against a provider's future claims for reimbursement or by requiring the provider to make direct payment to DHFS or its fiscal agent.

DHFS is required to decertify or suspend a provider's certification under MA, if after giving reasonable notice to the provider and an opportunity for a hearing, DHFS finds that the provider has violated federal or state law or administrative rule and such violations are by law, regulation or rule, grounds for decertification or suspension. No payment may be made to a provider subsequent to its decertification or during a period of suspension.

Authority to Audit or Investigate and Issue Subpoenas. Currently, DHFS may appoint personnel to audit or investigate and report to DHFS on any matter involving violations or complaints alleging violations of statutes, regulations or rules applicable to MA and to investigate or audit providers to verify that the services or items were actually provided and the appropriateness and accuracy of claims submitted for reimbursement by providers. Employees appointed by the DHFS Secretary to conduct such investigations and audits have access to any provider's records, books, documents or other needed information. These employees may also

hold hearings, administer oaths, take testimony and perform all other necessary duties to bring such matters before DHFS for final adjudication and determination.

The DHFS Secretary may issue subpoenas for the production of any pertinent books, records or other information. A person refusing to obey any such subpoena may be jailed by order of a judge in a court of record in the county where the individual is served. Failure to obey the subpoena constitutes grounds for decertification or suspension of certification under MA.

MA Offenses. Persons convicted of committing fraud against MA or soliciting, offering, accepting or paying remuneration, including kickbacks, bribes or rebates, in connection with MA payments are subject to fines of more not than \$25,000 and no more than seven years and six months in prison. Individuals convicted of helping others to commit fraud against MA are subject to fines of not more than \$10,000 and no more than one year in jail. The Department of Justice (DOJ) operates a Medicaid fraud control unit (MFCU) that investigates cases alleging fraud in MA.

Transfer of Business, Liability for Repayment. If a provider is liable for repayment of improper or erroneous payments or overpayments under MA and that provider transfers all or substantially all of the assets of the business, both the transferor and the transferee of the assets are liable for the repayment. Prior to final sale, the transferee is responsible for contacting DHFS and ascertaining whether the transferor is liable for repayments under MA. These provisions supersede other statutory provisions regarding business corporations, nonstock corporations and cooperatives.

If a sale or transfer occurs and the applicable amount of any recovery is not paid in full, DHFS may proceed against either the transferor or the transferee. Within 30 days after receiving notice from DHFS, the transferor or the transferee must pay the amount in full. Upon failure to comply, DHFS may bring an action to compel payment. If the transferor fails to pay within 90 days after receiving notice from DHFS, DHFS may decertify or suspend that provider's certification.

Certification of Overpayments to DOR. At least annually, DHFS must certify to DOR the amount that DHFS may recover for incorrect payments for benefits paid under MA if the incorrect payment results from any misstatement or omission of a fact by a person applying for MA. This right of recovery is against the MA recipient and is limited to the amount of the benefits incorrectly paid. DHFS may only certify to DOR such amounts if it has provided sufficient notification to the MA recipient's last known address at least 30 days prior to when it certifies to DOR the amount to be recovered. Additionally, DHFS may only certify to DOR any amounts that have not been appealed or are no longer under appeal. Such certification to DOR allows the amount of any recovery against a person to be set off from any state tax refund that may be due that person.

DHFS Audit Operations. In 1999-00, DHFS recovered approximately \$14.2 million (all funds) as a result of its provider auditing activities. DHFS has 45.0 positions in its Bureau of Health Care Program Integrity including nine financial auditors and seven nurse consultants that

conduct medical audit and review activities. These positions conduct between 15 and 20 on-site audits per month. DHFS uses a variety of information sources to determine which providers to audit, including external data provided by federal authorities, complaints and referrals from MA recipients and other providers. Additionally, DHFS uses internal resources to identify potential problem areas, including unusual claims activity and past performance of a provider. DHFS also randomly selects providers to be audited.

DHFS audits include pre-onsite, onsite and post-onsite activities.

Pre-onsite activities include the selection of the providers to be audited, development of an audit plan, preparation of data and sending an audit announcement letter to the provider two weeks in advance of the audit.

Onsite activities include an entrance conference, in which DHFS audit staff explain to the provider the steps involved in the audit, identify the types of documentation needed and the anticipated length of the audit. After completing the audit activities, an exit conference is held, in which DHFS audit staff discuss with the provider their preliminary findings and the timeline for the next steps.

The post-onsite activity includes providing a letter identifying the audit's preliminary findings and the amount DHFS intends to recover, if any. Forty-five days following the preliminary findings letter, if DHFS intends to seek recovery of payments, DHFS provides a letter indicating that it intends to recover any amounts identified in the audit and notifies the provider of the provider's right to a hearing.

If the audit uncovers any activities that suggest the provider is committing or has committed fraud, DHFS notifies the DOJ MFCU of its findings. If the audit uncovers any activities that suggest that professional standards are being violated, DHFS notifies the Department of Regulation and Licensing of its findings.

GOVERNOR

Decrease the MA benefits appropriation by \$207,500 (\$86,600 GPR and \$120,900 FED) in 2002-03 to reflect projected MA benefits savings that would result by enacting the following statutory modifications, which are intended to reduce fraud and abuse by MA providers.

Limit on the Number of Certified MA Providers. Authorize DHFS to limit the number of providers of particular MA services that may be certified, or limit the amount of resources, including employees and equipment, that a certified provider may use to provide particular services to MA recipients, if DHFS finds that: (a) existing certified providers and resources provide services that are adequate in quality and amount to meet the need of MA recipients for the particular services; and (b) the potential for MA fraud and abuse exists if additional providers are certified or additional resources are used by certified providers.

Recoveries and Opportunity for a Hearing. Delete the requirement that DHFS provide an

opportunity for a hearing before recovering money improperly or erroneously paid to an MA provider. Instead, require DHFS to provide an opportunity for the provider to present information and argument to DHFS staff, before DHFS could recover money improperly or erroneously paid. Require DHFS to establish a deadline for payment of a recovery and require providers to pay interest on any delinquent recoveries at the rate of 1% per month or fraction of a month from the date of the overpayment.

Fees for Repeat Offenders. Authorize DHFS, after providing reasonable notice and an opportunity for a hearing, to charge a fee to a provider that repeatedly has been subject to recoveries because of the provider's failure to follow identical or similar billing procedures or to follow other identical or similar program requirements. The fee could not exceed \$1,000 or 200% of the amount of any repeated recoveries, whichever is greater. The revenue from these fees would be used to partially support the costs of conducting provider audits and investigations.

Require a provider subjected to such a fee to pay it to DHFS within 10 days after receipt of the fee notice or the final decision after an administrative hearing, whichever is later. Authorize DHFS to recover any part of a fee not paid within the 10 days by reducing any payments owed to the provider for services provided. Further, authorize DHFS to refer any such unpaid fees not recovered to the Attorney General for collection. Specify that failure to pay such a fee is grounds for decertification as an MA provider. Specify that payment of the fee does not relieve the provider of any other legal liability for recovery, but payment of the fee is not evidence of violation of a statute or rule.

Revenue received from the payment of fees charged to repeat offenders under this provision would be credited to a new PR appropriation. The ability to charge providers a fee for repeated recoveries would first apply to repeated recoveries from the identical provider that are made on the bill's general effective date.

Restriction on Provider's Participation. Require DHFS to restrict a provider's participation in MA, rather than suspend a provider's certification, if after giving reasonable notice and opportunity for a hearing, DHFS finds that the provider has violated a federal statute or regulation or a state statute or rule and the violation is by statute, regulation or rule grounds for decertification or restriction. Require DHFS to suspend the provider pending a hearing if DHFS includes in its decertification notice findings that the provider's continued participation in MA pending the hearing is likely to lead to irretrievable loss of public funds and is unnecessary to provide adequate access to services to MA recipients. Require DHFS to issue a written decision as soon as practicable after the hearing. These provisions would first apply to violations of federal and state statutes, regulations and rules committed on the bill's general effect date.

Require Surety Bond as a Condition of Certification. Authorize DHFS to require, as a condition of certification, all providers of a specific service, to file with DHFS, a surety bond issued by a surety company licensed to do business in Wisconsin. Providers subject to this provision would be those that provide MA services for which providers have demonstrated significant potential to violate specified MA offenses, to require recovery or to need additional sanctions. Require that the surety bond be payable to DHFS in an amount that DHFS determines is reasonable

in view of amounts of former recoveries against providers of the specific services and DHFS' costs to pursue those recoveries.

Require DHFS to promulgate rules to specify: (a) those MA services for which providers have demonstrated significant potential to violate specified MA offenses; (b) the amount of the surety bonds; and (c) the terms of the surety bond, including amounts, if any, without interest to be refunded to the provider upon withdrawal or decertification from the MA program.

Certification of Overpayments to DOR. Modify the provision that requires DHFS to certify to DOR, at least annually, any amounts that are subject to recovery to include recoveries owed by an MA provider so that the amount of the recovery can be setoff from any state tax refund that may be due to the provider.

Transfer of Business Operations. Require DHFS to require a person who takes over the operation of a provider, to first obtain certification for the provider's operation, regardless of whether the person is currently certified. Authorize DHFS to withhold the certification until any outstanding recoveries are paid. Specify that before a person takes over the operation of an MA provider that is liable for repayment of improper or erroneous payments or overpayments, full recovery of the improper or erroneous payment or overpayment must be made. Upon request, DHFS must notify the provider or the person that intends to take over the operation of the provider as to whether the provider is liable for a recovery.

If a person takes over the operation of a provider and any applicable recoveries have not been made, in addition to withholding certification as a provider, DHFS may proceed against the person taking over the provider's operation. The person taking over the provider's operation must pay any applicable recovery in full within 30 days after the person receives notification from DHFS about any recovery. If full payment is not received within 30 days, DHFS may bring action to compel payment or decertify the person or restrict his or her participation in the MA program, or DHFS may do both.

Specify that whenever ownership of a nursing home or community-based facility is transferred to another person or persons, both the transferee and the transferor must comply with the above provisions, if the transferor was an MA provider. Under current law, only the transferee is responsible for complying with the provisions regarding recovery of payments before the transfer of a facility's ownership.

To take over the operation of a provider would mean to obtain any of the following: (a) ownership of the provider's business or all or substantially all of the assets of the business; (b) majority control over decisions; (c) the right to any profits or income; (d) the right to contact and offer services to patients, clients, or residents served by the provider; (e) an agreement that the provider will not compete with the person at all or with respect to a patient, client, resident, service, geographical area, or other part of the provider's business; (f) the right to perform services that are substantially similar to services performed by the provider at the same location as those performed by the provider; or (g) the right to use any distinctive name or symbol by which the provider is known in connection with services to be provided by the person.

These provisions would first apply to sales or other transfers completed on the bill's general effective date.

DHFS Access to Provider Personnel and Records. Specify that, upon request by DHFS audit staff, a provider must provide access to any provider personnel as needed. Specify that under the written request of the audit staff and upon presentation of such authority, providers and recipients must provide the audit staff access to any needed patient health care records of a recipient.

Specify that failure or refusal of a provider to accord DHFS auditors or investigators access to any provider personnel, records, books, MA patient health care records, or other requested documents or records constitutes grounds for decertification or suspension of the provider from participation in MA. Specify that no payment may be made for services rendered by the provider following decertification, during the period of suspension, or during any period of provider's failure or refusal to accord such access.

DHFS Authority to Subpoena Providers. Repeal the DHFS Secretary's authority to issue subpoenas to individuals who are required to provide specified information for the purposes of an audit, investigation, examination, analysis, review or other authorized functions relating to the program and provisions relating to the issuance and enforcement of such subpoenas.

DISCUSSION POINTS

1. The Governor's recommendations are intended to strengthen the Department's authority to recover overpayments or payments made in error that are identified as part of provider audits. DHFS indicates that the current statutes limit its ability to recover improper or overpayments, from providers of certain services that are not typically covered under other health care plans, such as Medicare or private insurance. Such services include specialized medical vehicle transportation, independent nursing and personal care services.

2. The bill reduces the MA benefits appropriations by \$207,500 (\$86,600 GPR and \$120,900 FED) in 2002-03 to reflect the administration's estimate of the immediate savings that would be realized if the Governor's recommendations were enacted. However, enacting these provisions would likely generate long-term savings to MA by enabling DHFS to more effectively deal with those providers that repeatedly abuse the MA program by not following proper billing procedures and program requirements.

Additionally, DHFS indicates that these provisions would enable DHFS audit staff to more effectively focus their activities on identifying new instances of fraud and abuse, by reducing the amount of time the audit staff spend on known problem providers. This could be accomplished by strengthening DHFS' ability to act against these providers and increasing incentives for providers to comply with existing billing procedures and program requirements.

3. Some provider groups have expressed concern that the provisions in the bill could be abused by DHFS if interpreted broadly and could unfairly treat providers participating in MA. However, two points should be made in response to this concern. First, MA is a program that

provides health care services to low-income families, the elderly and the disabled. As such, the program is not intended to guarantee providers a source of revenue to support their operations. Moreover, providers voluntarily participate in the program. Second, as the administrator of MA, DHFS would have an interest in using the authority provided in the bill in a judicious manner. If DHFS abuses this authority to the extent that providers no longer participate in the program, this could reduce MA recipients' ability to access services.

4. In February, 1999, the U.S. Department of Health and Human Services, Health Care Financing Administration (HCFA) published its Comprehensive Plan for Program Integrity. In this document, HCFA indicates that promoting the integrity of Medicare and MA is a top priority and that promoting provider integrity is essential to ensure that beneficiaries obtain quality medical care cost effectively. HCFA indicates that previously, many providers have regarded participation in Medicare (and MA) as an entitlement, particularly because providers could obtain provider status and billing numbers without having to meet any standards to ensure that they are financially sound, accountable business partners. Once providers are billing Medicare (and MA), it has been difficult to find and penalize providers that are bad business partners or otherwise raise program integrity questions.

5. Applying these provisions to all provider groups would ensure that each group is treated equally. Additionally, while certain provider groups may currently be the target of DHFS audit efforts, applying the provisions to all provider groups assures that DHFS would be able to use these provisions with provider groups that become problematic in the future.

Limit on the Number of MA Providers and Resources

6. The bill would authorize DHFS to limit the number of providers of particular MA service that may be certified, or limit the amount of resources, including employees and equipment, which a certified provider may use to provide particular services, DHFS argues that restricting the number of certified providers or resources available to provide services would limit the ability of more providers to enter an already saturated market and encourage improper billings for services.

This argument was articulated in a March, 1994, Legislative Audit Bureau report on specialized medical vehicle transportation services. In its report, the Audit Bureau indicated that, according to health care researchers and financing experts, new providers entering a medical services market encourage increased service utilization and therefore increase program expenditures. New providers increase the availability of a service and, in seeking new clients, encourage those who might otherwise have continued to do without a service to use it. Therefore, the Audit Bureau's report noted, both new and established providers facing increased market competition have incentives to recruit new clients who might not otherwise use specialized medical transportation services funded under MA.

7. Representatives of some providers have expressed concern that this provision is too vague and it is unclear how DHFS would use this authority. However, the bill specifies that DHFS could only restrict the number of providers or resources if it found that existing certified providers and resources are adequate in quality and amount to meet the need of MA recipients and that the

potential for fraud and abuse exists if additional providers are certified or additional resources are used by certified providers.

8. If the Committee wanted to ensure that there was legislative review of the criteria DHFS would use in exercising this authority, the Committee could modify the bill to require DHFS to promulgate administrative rules specifying how DHFS would determine which providers and resources would be subject to such limitations.

9. Under the bill, it is possible that DHFS could determine that there are currently too many providers in an area that are certified to provide a type of MA service. However, these providers may depend on the continuation of MA payments to support their businesses. If the Committee determines that the Department's authority to limit the number of certified MA providers should not apply to current MA providers that first seek certification as MA providers on the bill's general effective date. Under this alternative, DHFS would be prohibited from discontinuing the certification of current MA providers, based on the criteria specified in the bill.

Opportunity for a Hearing

10. Currently, once DHFS notifies a provider of its intent to recover improper or erroneously paid claims, a provider has an opportunity for a hearing before DHFS can proceed with the recovery. Such hearings are held before an administrative law judge employed by the Department of Administration's Division of Hearings and Appeals. Such a hearing provides the opportunity for the provider to argue against the recovery before an impartial judge and to depose DHFS staff under oath. DHFS indicates that in calendar year 2000, of the 900 audits conducted by DHFS, providers in 45 of those cases used the opportunity for a hearing to plead their case to an administrative law judge.

11. Providers argue that the provision in the bill to eliminate the opportunity for a DOA hearing and to instead have providers argue to DHFS staff is not sufficient to maintain the providers' rights to argue fairly against a recovery. First, providers argue that DHFS is less likely to decide against itself than an impartial judge. Second, providers argue that without being able to depose DHFS staff, they are unable to ascertain all of the standards that were used during an audit.

Third, providers argue that, while providers always retain the ability to proceed against DHFS through the circuit courts, this process is costly for the provider. Additionally, the record a court would use to determine if a recovery was proper is based on the records established during the hearing. If the record is not properly established based on a meeting with DHFS because of the provider's inability to obtain certain information, then the court's ability to thoroughly review a decision is limited.

12. DHFS staff indicate that the primary purpose for including this provision in the bill is based on DHFS staff efficiency. When a provider exercises the right to a hearing before a recovery, the hearing is scheduled based on the convenience of the administrative law judge and DHFS staff must appear at the hearing at a time specified by a judge. These hearings often interrupt audits currently underway and therefore delay the completion of audits of other providers. By

eliminating the DOA hearing requirement, DHFS can schedule meetings with the provider and their representatives in between audits and at the convenience of DHFS staff.

13. The Committee could delete the provision from the bill that eliminates a provider's right to a hearing before DHFS could proceed with a recovery if it determines that the convenience of DHFS staff time is not a sufficient reason to deny providers the right to argue their case before an administrative law judge and the right to depose DHFS staff. Such rights assure that providers are able to argue their case fairly so that funds are not recovered improperly.

Fee for Repeat Offenders

14. DHFS staff indicate that the purpose of the provision to charge a fee to repeat offenders is to sanction providers that repeatedly violate MA reimbursement policies, regardless of the number of times that provider has been audited and subject to recoveries. These providers, DHFS argues, have no incentive to follow the MA reimbursement policies under current law, because the provider only risks recovery of an amount equal to the original payment. This limits the audit staff's ability to pursue other service areas and providers that require attention from DHFS auditors.

15. The bill does not specify how many times a provider would have to violate the same program or billing procedures to be subject to such a fee. Providers argue that violating billing procedures two or three times should not be sufficient to warrant payment of the fee provided in the bill. However, under the bill, the fee only applies to recoveries. Recoveries only occur as a result of audit findings, after the payment has already been made. Therefore, the fee would not apply in cases where the MA fiscal agent denied a claim up front because the claim did not meet the criteria for billing purposes.

16. DHFS indicates that if it audits a provider and finds that a provider is not properly billing or documenting their costs, that provider should come into compliance with billing requirements. Subsequent to an audit, providers are educated about what steps to take to ensure that future claims are properly provided, documented and billed.

Therefore, DHFS argues, if a provider is subsequently audited and has not changed its billing or documentation practices according to the findings of the first audit, it would be appropriate to subject that provider to the fee because the provider had failed to modify its procedures based on the first audit. This fee would not be applicable if the second audit finds other problems with the provider's billing procedures that were not uncovered in the first audit.

17. If the Committee determines that a provider that violates the same billing and program requirements after being audited should not be subject to a fee for those violations, it could delete this provision from the bill.

ALTERNATIVES TO BASE

1. Approve all of the Governor's recommended statutory changes and reduce MA benefits funding by \$86,600 GPR and \$120,900 FED in 2002-03 to reflect projected savings in MA benefit costs that would be realized with these changes.

<u>Alternative 1</u>	<u>GPR</u>	<u>FED</u>	<u>TOTAL</u>
2001-03 FUNDING (Change to Base) <i>[Change to Bill</i>	- \$86,600 \$0	- \$120,900 \$0	- \$207,500 \$0]

2. Modify the Governor's recommendations by selecting one alternative from each section.

A. Restrictions on the Number of Certified Providers and Resources

1. Adopt the Governor's recommendation to authorize DHFS to restrict the number of certified providers or resources used to provide particular services to MA recipients if DHFS makes specified findings.

2. Require DHFS to submit proposed administrative rules to the Legislative Council staff by the first day of the six month following enactment of the bill that specifies the criteria DHFS would use to restrict the number of certified providers and resources under the authority provided in the bill.

3. Specify that this provision would first apply to a provider that seeks certification as an MA provider on the bill's general effective date.

4. Adopt both 2 and 3.

5. Maintain current law.

B. Opportunity for a Hearing

1. Adopt the Governor's recommendation to eliminate a provider's opportunity for a hearing before DHFS could proceed with a recovery and instead specify that a provider could present information and argument to DHFS staff before DHFS could proceed with a recovery.

2. Maintain current law.

C. Fees for Repeat Offenders

1. Adopt the Governor's recommendation to authorize DHFS to charge a fee to a provider that repeatedly has been subject to recoveries because of the provider's failure to follow identical or similar billing procedures or program requirements.

2. Maintain current law.

3. Delete provision.

Alternative 3	<u>GPR</u>	<u>FED</u>	<u>TOTAL</u>
2001-03 FUNDING (Change to Base)	\$0	\$0	\$0
<i>[Change to Bill</i>	<i>\$86,600</i>	<i>\$120,900</i>	<i>\$207,500]</i>

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