

COMMENTS AND SUGGESTIONS REGARDING PROPOSED RULEMAKING
DEPARTMENT OF PUBLIC WELFARE - 55 PA. CODE CH. 258
Medical Assistance Estate Recovery Program as published
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January 24, 2000

Department of Public Welfare
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Representative Dennis O'Brien
Chairman, House Committee on Health and Human Services
Room 100 Main Capitol Building
Harrisburg, Pa. 17101

✓ Independent Regulatory Review Commission (IIRC)
14th Floor
333 Market Street
Harrisburg, Pa. 17101

Dear Mr. Jones:

The following are comments in response to the proposed rulemaking for the Estate Recovery Program. Although they are not made within 30 days of publication of the notice, I hope they will still be useful.

I think that 55 PA.Code Chapter 258 should clarify certain issues and codify procedures which are not addressed in the proposed rules.

Estate Recovery is intended to be for the recovery of valid Medical Assistance payments made to beneficiaries to the extent that there are sufficient assets to repay the DPW according to Class 3 and Class 6 priority of its claims under 20 Pa.C.S. §3392(3) and 20 Pa.C.S. §3392(6).

1. The rules should clarify by whom and by what procedure Medical Assistance payments made on behalf of a decedent are declared not to have been valid. If such a determination is made, the rules should specify that the personal representative of the estate be notified in writing that the original MA

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approval is rescinded, together with a statement of why the original approval was not valid and information on procedure of how to appeal such a determination.

2. If assets become available after a MA beneficiary's death which were not available when the request for Medical Assistance was submitted, that should not in itself be cause for declaring the original Medical Assistance approval invalid and the payment which had been made to a provider an "overpayment."

3. The Department of Public Welfare is the payor of last resort. However, once a medical assistance payment has been made to a provider, payment has been made. If assets become available after death, the fact that there was a valid Medical Assistance approval and payment to the provider should not ignored.

4. If no determination is made according to due process that the Medical Assistance approval was invalid, then the DPW can recover funds which become available after death in 2 ways:

a. by claims against the probate estate in accordance with 20 Pa.C.S. §3392 (3) and (6)

or

b. through a claim of an assigned right to particular assets, which gives the Department higher ranking than Class 3 and Class 6.

An example of this is an assignment of Medicare or private health insurance receivables which become available only after a successful appeal of Medicare claims by the personal representative of the estate, if they cover the same time period as the Medical Assistance payments and if the DPW has not already recovered those particular Medical Assistance payments some other way.

If a recovery is made through (b), (which is a higher ranking than a class 3 or class 6 claim against the estate), the DPW should immediately send the personal representative a notice that such funds are being recovered in that manner. At the same time, the DPW should send the personal representative a Revised Statement of Claim, since obviously a recovery made in a different way would reduce the Department's Class 3 or Class 6 claims against the estate.

5. Recovery of funds through a right of assignment by the Department of Public Welfare should not be construed as signifying that the original Medical Assistance approval was invalid.

6. If the Department of Public Welfare chooses to recover under a right to assignment, it should do so directly, and not use a

provider to do the collecting, so as to minimize the risk of the provider's taking additional funds.

7. If there has been no determination by due process that the original Medical Assistance approval was invalid, the Department of Public Assistance should not consider the medical assistance payment which was made to the provider an "overpayment", nor should it request that the provider return to the DPW the medical assistance payment which it originally made. Such an action would appear to a provider as a de facto retroactive denial of the decedent's medical assistance application and can be used as an excuse to collect extra funds which would otherwise go to the estate's valid creditors.

8. 55 PA. CODE CH.1101 states "...all payments made to providers under the MA program plus any copayment required to be paid by a recipient shall constitute full reimbursement to the provider for covered services rendered." (Pa.Bulletin Oct 30,1999)

The Estate Recovery program should not be used as an opportunity for nursing homes to violate that provision by taking extra money to get private pay rates for the approved Medicaid period of time.

The only circumstance in which the nursing home should be allowed to request or accept additional funds is if the Medical Assistance approval is declared by due process to have been invalid.

If the Department of Public Welfare obtains reimbursement under a claim of assignment instead of through a Class 3 or a Class 6 claim against the estate, this should not be considered as also giving the provider a right to assignment to funds which become available after death.

9. If the DPW becomes aware of additional funds taken by a provider in violation of 55 PA. CODE CH.1101, it should assist the personal representative in recovering those funds from the provider. It is a lot easier and cheaper for the DPW to get this money back. If the personal representative has to go to court, the legal costs can quickly exceed the amount of illegal taking by the provider. If the DPW does not cooperate with the personal representative in providing proof that the provider was not entitled to such additional funds, a court action to attempt to recover them from the provider would be futile.

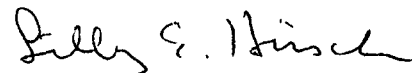
10. The section on Appeals should include reasonable time limits for required responses from the DPW (including for the Secretary's reconsideration.) If there are no time limits stipulated, an estate can be tied up for years if a problem is encountered with Medicaid estate recovery. There should also be provision for what happens if the Department does not answer in the stated period of time.

11. The proposed rules make the personal representative personally liable to pay the Department's claim if property subject to the Department's claim is transferred without satisfaction of the Department's claim. This means that if the provider takes additional funds in violation of 55 PA. CODE CH.1101, and this reduces the amount available to pay the department's Class 3 and Class 6 claims, the personal representative has to make up the difference. That applies no matter how much effort the personal representative made to recover those funds, and even if the DPW hindered those efforts.

The Department is also given authority to "administratively assess liability upon a personal representative." Apparently, a personal representative can fulfill all duties according to the probate laws of the Commonwealth, but still be assessed personal liability bureaucratically by the DPW if there is not enough money to pay the Department's Class 3 and Class 6 claims. The only recourse is the DPW's appeals process which can take an indefinite period of time.

12. Besides the appeals process, there should be other means for the Department and the personal representatives to reach agreement regarding the business of estate recovery. For example, there can be agreement on whether or not to pursue certain assets if the cost of recovering them is high. If there is agreement, for example, not to take a provider to court for taking excess funds, the DPW should also agree not to hold the personal representative personally responsible for the illegally taken funds.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lilly E. Hirsch".

Lilly E. Hirsch