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Memo to: Special Committee on Public Benefits Program Integrity

From: Hal Menéndez

Re: Public Benefits Program Integrity Staff Memo No. 6

Date: November 1, 2010

During the discussion of the options outlined in Staff Memo No. 6 on October 12th, I was asked to provide additional information on the following:

- Child care provider payment suspension appeals - DHA hearing decisions and final outcomes
- Suggest language defining "reasonable suspicion"
- Establish and codify waiver of overpayment standards similar to Social Security disability and SSI overpayment waiver provisions

Suspension of payments to child care providers based on reasonable suspicion

Prior to 2009, a child care provider could be refused payment for child care provided if the person was convicted a felony or misdemeanor that substantially relates to the care of children; was the subject of pending criminal charges that substantially relate to the care of children; or had been determined under s. 48.981 to have abused or neglected a child. Wis. Stat. s. 49.155(7) (2007-08). 2009 Wis. Act 28, as amended by 2009 Wis. Act 76, created a new provision that expands the grounds for refusing to make payments to for child care providers. Section 49.155(7)(b)4. now authorizes DCF or a county department to refuse to pay a child care provider for child care provided if the department or county department reasonably suspects that the person has violated any provision under the program under s. 49.155 (the Wisconsin Shares statute) or any rule promulgated under s. 49.155. Reasonable suspicion is not defined.

As applied by DCF, the suspension of payments authorized by s. 49.155(7)(b)4. is indefinite, proof of an actual violation is not required to sustain a permanent refusal to pay a provider, and the indefinite suspension of payments may be based on evidence that would otherwise be insufficient to support findings in administrative hearings. This means that a provider can be permanently deprived of payment for care that has already been provided without a showing that the provider actually committed a violation. In numerous provider appeals, administrative law judges have issued decisions in favor of providers because the department or a county department has failed to present evidence sufficient to prove there is a reasonable suspicion that the provider violated the child care statute or a child care administrative rule. The department has routinely reversed these ALJ decisions. There is correspondence between DHA staff and legislative staff that indicates that in provider appeals of payment suspensions, the department has reversed all of DHA's proposed hearing decisions that were in favor of the provider (with one possible exception in an appeal involving licensing). The Division of Hearings and Appeals can provide more detailed information on the proposed and final outcomes of provider appeals.

The history of the legislation, which includes communication from DCF staff to legislative staff explaining the need for the amendment, suggests that the refusal to pay provision was intended to allow the department to stop payments to providers while it investigates suspected provider violations or fraud and gathers proof of an actual violation to support permanent action, such as a license revocation, revoking child care authorizations, denying new authorizations, or establishing and recovering an overpayment. This is consistent with the department's prior practice as established by administrative rule.[1]

While it may be reasonable and even necessary for the department or a county department to temporarily stop payments to providers when there is reasonable suspicion that the provider has violated the statute or rules while it conducts a further investigation to determine whether to impose a permanent sanction, it is contrary to the intent of the amended statute (and prevailing practice in the administration of public benefits programs) to permanently withhold payments or otherwise impose a sanction based solely on "suspicion" and without having proven that a violation actually occurred.[2] As explained below, the reasonable suspicion provision only allows suspending payments while the department conducts an investigation of a possible violation of a statute or rule.

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[1] Prior to its recent amendment, DCF 201.04(5)(c) provided that if a provider failed to correct a license violation after notice, or provided false attendance records or price information or refused to provide documentation of a child's attendance, DCF could revoke existing authorizations, refuse to issue new authorizations for up to 6 months, or refuse to issue payments until the violation was corrected. The rule required actual proof of the violation or false records or information or refusal to provide documentation of attendance.

[2] Proof of an actual violation by evidentiary standards that normally apply in administrative hearings would only be required when a provider appeals a suspension or refusal to pay and a hearing is held. If a provider is given proper written notice of the refusal to pay and does not appeal within the time allowed to appeal, no further proof of a violation would be necessary to sustain the refusal to pay.

Section 49.155(7m), which was created by 2009 Wis. Act 28 and amended by 2009 Wis. Act 77, provides for withholding payments, recouping payments already made, and imposing a forfeiture if a provider submits false, misleading or irregular information or fails to comply with program requirements under s. 49.155 and fails to provide an explanation for the non-compliance. This provision allows DCF to impose a permanent sanction based on a showing of an actual, unexplained violation of the statute or rules.

Ordinarily, statutes are construed in the context of related statutes and in harmony with related administrative rules. Under this approach, 49.155(7)(b)4 and (7m) should be read together to authorize a two-stage process. The first stage is a temporary, short-term suspension of benefits based on reasonable suspicion of a violation under s. 49.155(7)(b)4. The second stage is a sanction under s. 49.155(7m), which includes withholding payment from a provider, if an actual violation is proved under ordinary evidentiary standards. This two-stage approach serves the purpose of allowing DCF to suspend payments based on reasonable suspicion while it continues to investigate suspected violations and gather evidence to prove an actual violation.

There is no basis for DCF to rely on s. 49.155(7)(b)4. to indefinitely refuse payments to a provider based on reasonable suspicion of a violation when there is a companion statute, s. 49.177(7m), that authorizes permanent sanctions (including withholding payments and establishing and recovering overpayments) based on proof of an actual violation. In view of DCF's application of the refusal provision, the statute should be clarified to unambiguously establish a two-step temporary and permanent suspension process.

Defining "reasonable suspicion"

If DCF follows the two-step process described above, defining reasonable suspicion is not as critical as it is under DCF's current scheme because the reasonable suspicion suspension is temporary and payments could not be permanently withheld without proof of an actual violation. Nonetheless, because even a temporary suspension based solely on reasonable suspicion can put a provider out of business, the statute should define reasonable suspicion, establish requirements for making a finding of reasonable suspicion and establish a durational limit for suspending payments to providers based on reasonable suspicion.

One approach can be to require that a refusal to pay a provider under s. 49.155(7)(b)4. based on reasonable suspicion of a provider violation be preceded by written notice that sets out the statute(s) or rule(s) violated and states the facts showing the basis for suspicion that a child care statute or rule was violated; and require that the withheld payment be released after a prescribed period unless DCF or the county department issues a notice of a permanent sanction based on an actual violation or fraud under 49.155(7m), within the prescribed period. Under this approach reasonable suspicion should be based on specific, articulable facts which support an inference that a particular statute or rule has been violated.

Establishing Standards for Waiving Recovery of Overpayments

Most overpayments do not involve fraud but result from unintentional errors by the recipient or the agency. As Staff Memo No. 6 notes, DHS 2.05 and DCF 101.23(13) provide for the waiver of overpayments if it is determined that efforts to recover the overpayments are no longer cost effective or would impede the efficient and effective administration of the program. DHS 2.05 also allows an overpayment to be waived if recovery of the overpayment is considered to be against equity, or would cause undue hardship.

By its terms, DHS 2 applies to overpayments in all benefit programs under Ch. 48 and Ch. 49 of the statues. This includes W-2, child care, medical assistance and Badger Care, Caretaker Supplement, the state SSI supplement, and FoodShare. DHS 2 overlaps with DCF 101.23, which applies to the overpayment of W-2, child care and AFDC benefits.

The overpayment and waiver rules in DHS 2 do not distinguish between overpayments resulting from fraud and overpayments resulting from agency or recipient error that do not involve fraud. They do not set out any standards for determining whether recovery efforts are cost effective or impede the efficient administration of the programs, or when recovery would be against equity or would cause undue hardship.

The Social Security Administration's regulations include standards for waiving the recovery of overpayments of Social Security Old Age and Disability benefits and SSI benefits. Under these rules, an overpayment may be waived if the overpaid individual was without fault in causing the overpayment and if recovery of the overpayment would either defeat the purpose of the program, be against equity and good conscience, or impede the efficient and effective administration of the program because of the small amount involved. 20 C.F.R. 404.506 - .509; 20 C.F.R. 416.550-.555. These standards are analogous to the against equity, undue hardship and impede efficient and effective administration standards found in DHS 2.05.

In determining fault, all pertinent circumstances are considered, including the reasons for the overpayment, and the individual's age and intelligence, any physical, mental, emotional or linguistic limitations. 20 C.F.R. 405.507; 20 C.F.R. 416.552.

The "defeat the purpose" test considers whether the individual's income and resources are needed for ordinary and necessary living expenses. 20 C.F.R. 404.508; 20 C.F.R. 416.553. Under SSA's policy guidelines, the Program Operations Manual System, "[i]t is assumed that a person does not have sufficient funds to meet ordinary and necessary living expenses if he qualifies for public assistance. Therefore, if a person receives cash public assistance, recovery is deemed to defeat the purpose. If recovery causes a person to qualify for public assistance, recovery defeats the purpose beginning with the

month public assistance begins." POMS GN 02250.110.[3] Against equity and good conscience applies if an individual changed his or her position for the worse or relinquished a valuable right based on notice he or she would receive the benefit or because of the overpayment itself or was not living in the overpaid household at the time of the overpayment and did not receive the overpayment. 20 C.F.R. 404.509.

SSA's policy guidelines establish a threshold amount (currently $ 1000.00 or less) for applying the "impede the efficient and effective administration" standard found at 20 C.F.R. 416.550(b)(3). POMS SI 02260.030.[4]

Like the Social Security Administration rules, the Food Stamp regulations distinguish on the basis of the cause of an overpayment and accord overpayments different treatment depending on the cause.[5] The Food Stamp regulations do not include waiver provisions, but provide that a state may elect not to establish overpayment claims for under $ 125 if the household is no longer participating in the Food Stamp program. 24 C.F.R. 273.18(e)(2)(ii). The Food Stamp rules also include guidelines for terminating and writing off claims, including terminating claims for under $ 25 if they are more than 90 days delinquent and terminating a claim in any amount if it has been delinquent for three years. 7 C.F.R. 273.18(e)(8).

The committee may wish to recommend that DCF and DHS adopt rules similar to those cited above to create uniform standards for applying the waiver provisions at DCS 2.05 and DCF 101.23(13) with respect to all non-fraud public benefits overpayments.

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[3] https://secure.ssa.gov/apps10/poms.nsf/lnx/0202250110

[4] https://secure.ssa.gov/apps10/poms.nsf/lnx/0502260030

[5] Food Stamp overpayments are classified as intentional program violations (IPV), inadvertent household error (IHE), or agency error (AE). 24 C.F.R. 273.18(b). While IHE and AE overpayments are limited to 12 months prior to the date the overpayment is discovered, IPV overpayments are calculated from the date violation first occurred. 273.18(c)(1)(i). In addition, the manner in which the overpayment is calculated may differ based on the reason for the overpayment. See, 273.18(c)(1)(ii). The rules also allow a greater reduction in current benefits to recover an IPV overpayment. 273.18(g)(1). The Food Stamp rules also allow for the imposition of a disqualification for intentional program violations, but require a higher standard of proof – clear and convincing evidence – to impose a disqualification. 24 C.F.R. 273.16(e)(6).