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(FORM UPDATED: 08/11/2010)

**WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS**

2005-06

(session year)

Assembly

(Assembly, Senate or Joint)

Committee on ... Children and Families (AC-CF)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
 - (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
 - (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (May 2012)

Assembly

Record of Committee Proceedings

Committee on Children and Families

Clearinghouse Rule 03-085

Relating to department recoupment of program benefit overpayments from program recipients.

Submitted by Department of Health and Family Services.

December 29, 2005 Referred to Committee on Children and Families.

February 16, 2006 **PUBLIC HEARING HELD**

Present: (0) None.

Absent: (0) None.

Appearances For

- None.

Appearances Against

- None.

Appearances for Information Only

- None.

Registrations For

- None.

Registrations Against

- None.

February 22, 2006 **PUBLIC HEARING HELD**

Present: (7) Representatives Kestell, Vos, Albers,
Jeskewitz, Vukmir, Grigsby and Seidel.

Absent: (1) Representative Sinicki.

Appearances For

- Ron Hermes — DHFS

Appearances Against

- Bob Anderson — Legal Action of Wisconsin

Appearances for Information Only

- None.

Registrations For


- None.

Registrations Against

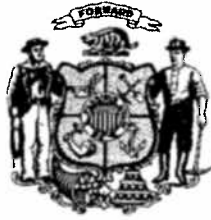
- None.

May 4, 2006

No action taken.



David Matzen
Committee Clerk



STATE REPRESENTATIVE
STEVE KESTELL
27TH ASSEMBLY DISTRICT

TO: Members of the Children and Families Committee
Representative Vos Representative Sinicki
Representative Albers Representative Grigsby
Representative Jeskewitz Representative Seidel
Representative Vukmir

FROM: Representative Steve Kestell, Chair

DATE: December 29, 2005

RE: Clearinghouse Rule 03-085

On December 29, 2005 the following clearinghouse rule was submitted by the Department of Health and Family Services and was referred to the Assembly Children and Families Committee:

Clearinghouse Rule 03-085, relating to HFS 2, recoupment of program benefit overpayments from program recipients. The Department is proposing to create a new chapter of administrative rules, HFS 2; that addresses recoupment of overpayments made to recipients of benefits paid under chs. 48 and 49, Stats. The fiscal notes states that Clearinghouse Rule 03-085 would increase existing revenues at the state level, and would not have an effect on local government.

The deadline for committee action on this rule is **JANUARY 30, 2006**. If you are interested in obtaining a hard copy of the rule or requesting a hearing, please do so prior to the deadline date. This rule can be accessed online in FOLIO under the "Clearinghouse Rules" InfoBase.

Steve Kestell
Chair, Assembly Committee on Children and Families

CR 03-085 Meeting (4-12-06)

1. Adoption of a hardship exception

(DHFS agreed to this modification)

2. Limitation that recoupment for agency error cannot go back more than 12 months before the date the error was discovered

(DHFS will take this into consideration, bring it back to the Secretary)

3. Ensure that recoupment is made only from the parent who received the overpayment

(DHFS current practice)

4. Provide that the rule apply to SSI cases

(Would this change the scope of the Rule? DHFS will take this into consideration, bring it back to the Secretary)

5. Provide that the notice of hearing given the recipient tells the recipient that the grounds for the determination may be appealed as well as the recoupment action itself.

(current practice of DHFS)

6. Provide for continuing benefits during the course of the appeal until it is resolved

(current practice of DHFS)

7. Provide that the notices of appeal are explicit about what is involved and are in the recipient's primary language

(current practice of DHFS)





Shirley S. Abrahamson
Chief Justice

Supreme Court of Wisconsin


DIRECTOR OF STATE COURTS
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

16 East State Capitol
Telephone 608-266-6828
Fax 608-267-0980

A. John Voelker
Director of State Courts

September 30, 2005

TO: The Honorable Governor James E. Doyle
The Honorable Members of the Senate
The Honorable Members of the Assembly

FROM: A. John Voelker 
Director of State Courts

Pursuant to s. 758.19(5)(i), Wis. Stats., the information reported to the Director of State Courts under ss. 758.19(5)(e) and 758.19(6)(d), Wis. Stats., by Wisconsin's counties has been compiled and is herein submitted. Under ss. 758.19(5)(e) and 758.19(6)(d), Wis. Stats., each county is required to submit an annual report to the Director of State Courts which provides information on the actual amount expended in the previous calendar year for court costs relating to the circuit court support and the guardian ad litem payment programs. Statutes prohibit the Director of State Courts from requiring counties to submit audited annual reports to ensure accurate, uniform information. As a result, due to the differing and inconsistent accounting practices among and within counties, the following reported expenditures are not comparable among counties.

Under the circuit court support payment program, counties received \$18,739,599 during 2004 to be used to offset the following court costs incurred during the calendar year:

- Juror fees under s. 59.64(1)(g), Wis. Stats.;
- Fees for expert witnesses called by the guardian ad litem under s. 767.045(6), Wis. Stats., if either or both parties are unable to pay those fees;
- Witness fees set under s. 814.67(1)(b)1 and (c), Wis. Stats., for witnesses called by the court on its own motion or called by, or subpoenaed at the request of, a district attorney, the state public defender or private attorney appointed under s. 977.08, Wis. Stats.;
- Fees for expert witnesses appointed under s. 907.06, Wis. Stats., by the court on its own motion or by the court at the request of the district attorney, the state public defender, or a private attorney appointed under s. 977.08, Wis. Stats., or by the court upon agreement of the district attorney, the state public defender or a private attorney appointed under s. 977.08, Wis. Stats.;

- Fees for witnesses or expert witnesses subpoenaed by the court at the request of the district attorney, coroner, or medical examiner under s. 979.06(1) and (2), Wis. Stats.;
- Salaries and fringe benefits for judicial assistants for circuit court judges;
- Any other court costs, except costs related to courtroom security, including security personnel, and costs related to rent, utilities, maintenance, rehabilitation, and construction of court facilities.

The guardian ad litem payment program allows counties to use payments to defray the costs of guardian ad litem compensation incurred under chs. 48, 55, 767, 880, and 938. The Director of State Courts was appropriated \$4,738,500 for state fiscal year 2004-2005 to make these payments to counties.

The annual report from counties was due May 15, 2005 for calendar year 2004. As of October 1, 2005, all counties have submitted the annual report to the Director of State Courts. A county which does not meet the annual reporting requirement under s. 758.19(5)(e), Wis. Stats., is not eligible to receive its circuit court support payment for one year after the July 1st due date or until the annual report is submitted, whichever is earlier. In addition, under s. 758.19(6)(b), Wis. Stats., a county that does not submit its annual report by the May 15th date will forfeit its July 1 guardian ad litem payment.

Circuit Court Support Payment Program. Attachment A is a compilation of the information provided by counties for calendar year 2004 on the actual costs incurred during the year in the allowable categories. Based on these annual reports, counties reported incurring \$125,038,194 in these court costs throughout the calendar year. Specifically:

- salaries and fringe benefits for judicial assistants totaled \$15,845,875;
- juror fees totaled \$3,901,140;
- witness and expert witness fees totaled \$935,568; and
- other court costs except courtroom security, rent, utilities, maintenance, rehabilitation, and construction of court facilities totaled \$104,355,611.

The \$15.8 million reported in salaries and fringe benefits for judicial assistants actually represents the cost of providing clerical assistance to circuit court judges. Many counties continue not to provide their circuit court judges with a position exclusively identified as a judicial assistant. As a result, these counties reported a portion of the salaries and fringe benefits of the county personnel who may perform one or more of the duties described in the judicial assistant job description developed by the Director of State Courts as required by s. 758.19(5)(h), Wis. Stats. Consequently, the reported salaries and fringe benefits of judicial assistants may be a percentage of the salaries and fringe benefits for register in probate staff or clerk of circuit court staff who also provide clerical assistance to the judge.

Counties reported expending \$3.9 million in juror fees during the past calendar year. Of this \$3.9 million, 60 percent or \$2.3 million relates to the daily fee paid to jurors for their attendance while the remaining fees relate to mileage, meal, and lodging expenses paid for jurors. It also should be pointed out that the daily fees and mileage rates paid to jurors vary widely from county to county. According to s. 756.25(1), Wis. Stats., jurors are not to receive less than \$16 for each day's actual attendance at circuit court and an amount equal to the mileage rate set under s. 20.916(8), Wis. Stats., which was 32.5¢ per mile during calendar year 2004. The data collected on the calendar year 2004 annual reports show the juror daily rate paid by counties to range from \$16 to \$50. The mileage rate counties used to reimburse jurors ranged from 31.0¢ to 40.5¢ per mile. Only Oconto County reported paying less than 32.5¢ per mile during the calendar year.

For calendar year 2004 counties reported expending \$935,568 for witness and expert witness fees. Not all counties were able to provide the same level of detail on the annual report for these fees. However, from the information available, 48 percent of the witness and expert witness fees paid during calendar year 2004 relate to witnesses and expert witnesses called or subpoenaed by the district attorney while 1.7 percent of the fees were paid to witnesses and expert witnesses of the state public defender.

Finally, counties reported incurring \$104 million in other eligible court costs under the circuit court support payment program. The comparability among counties of the information reported in this category is questionable. When reviewing the detail counties provided to support the amount reported as "other" court costs, it appears that they do not categorize them consistently. For example, some counties reported the total costs of the circuit court, clerk of court, register in probate, and the court commissioner(s) while other counties included costs of other areas as part of the county's court budget (i.e. costs associated with corporation counsel, family mediation/counseling, child support, etc.). Furthermore, counties do not typically include the same type of expenditures in court budgets which makes it difficult to compare court costs among counties. As an example, one county may have reported the cost of providing indigent counsel while another county may not because it was included in another county department's budget.

Guardian Ad Litem Payment Program. Counties were also required to report the costs of those guardian ad litem fees which are listed under s. 758.19(6), Wis. Stats. Attachment B provides the information counties were able to report for calendar year 2004. Of the \$9,394,257 counties reported guardian ad litem services paid during 2004:

- \$3,792,513 were for guardian ad litem services provided under Chapter 48 and 938 of the Wisconsin Statutes;
- \$1,789,043 were for guardian ad litem services provided under Chapters 55 and 880 of the Wisconsin Statutes; and
- \$3,550,966 were for guardian ad litem services provided under Chapter 767 of the Wisconsin Statutes.

The remaining \$261,735 was reported as "other guardian ad litem services" mainly because counties could not identify easily the proper category where these costs belonged. Moreover, counties also reported that they recouped at least \$2,710,476 in guardian ad litem fees from those parties to whom the services were provided.

**Circuit Court Support Payment Program
Reported Actual Costs Incurred By Counties During Calendar Year 2004**

Attachment A

County	Total Amount Reported As Salaries and Fringe Benefits of Judicial Assistants For CY 2004	Total Amount Reported As Juror Fees For CY 2004	Total Amount Reported As Witness and Expert Witness Fees For CY 2004	CY 2004 Other Allowable Court Costs Allowed Under CCSP	Total Reported Allowable Court Costs Under Circuit Court Support Payment Program
Adams	\$37,649	\$28,801	\$751	\$428,304	\$495,505
Ashland	\$241,427	\$31,658	\$9,123	\$158,719	\$440,928
Barron	\$101,721	\$61,991	\$5,569	\$666,687	\$835,968
Bayfield	\$16,570	\$12,299	\$875	\$347,484	\$377,228
Brown	\$470,593	\$170,749	\$34,190	\$3,455,526	\$4,131,058
Buffalo	\$20,780	\$12,850	\$5,523	\$299,190	\$338,343
Burnett	\$38,314	\$17,959	\$24	\$254,293	\$310,590
Calumet	\$31,863	\$17,493	\$9,211	\$514,589	\$573,156
Chippewa	\$101,691	\$24,027	\$3,223	\$1,215,491	\$1,344,432
Clark	\$54,132	\$15,632	\$4,446	\$514,711	\$588,921
Columbia	\$97,934	\$21,774	\$7,502	\$739,074	\$866,284
Crawford	\$53,499	\$14,445	\$1,792	\$430,274	\$500,010
Dane	\$928,862	\$381,633	\$27,897	\$8,006,919	\$9,345,311
Dodge	\$121,211	\$65,806	\$12,406	\$1,662,934	\$1,862,357
Door	\$79,991	\$29,891	\$6,715	\$661,031	\$777,628
Douglas	\$96,340	\$16,108	\$9,120	\$811,652	\$933,220
Dunn	\$81,353	\$41,533	\$4,927	\$775,180	\$902,993
Eau Claire	\$220,598	\$64,273	\$8,852	\$1,796,458	\$2,090,181
Florence	\$4,459	\$2,053	\$3,485	\$174,985	\$184,982
Fond Du Lac	\$347,338	\$100,604	\$11,252	\$1,861,648	\$2,320,842
Forest	\$24,863	\$4,262	\$11,338	\$233,984	\$274,447
Grant	\$83,764	\$26,844	\$3,323	\$663,371	\$777,302
Green	\$40,951	\$14,418	\$13,199	\$618,445	\$687,013
Green Lake	\$48,357	\$2,268	\$1,639	\$360,552	\$412,816
Iowa	\$21,459	\$12,470	\$4,917	\$280,658	\$319,504
Iron	\$48,080	\$3,995	\$2,063	\$136,284	\$190,422
Jackson	\$28,747	\$2,156	\$2,660	\$387,194	\$420,757
Jefferson	\$199,816	\$59,392	\$9,165	\$1,909,993	\$2,178,366
Juneau	\$41,313	\$32,729	\$3,642	\$575,985	\$653,669
Kenosha	\$318,299	\$81,982	\$39,646	\$3,529,578	\$3,969,505
Kewaunee	\$44,229	\$9,142	\$3,223	\$466,275	\$522,869
La Crosse	\$203,629	\$52,820	\$105,115	\$1,785,567	\$2,147,131
Lafayette	\$25,291	\$2,950	\$308	\$292,832	\$321,381
Langlade	\$43,321	\$10,081	\$12,505	\$418,680	\$484,587
Lincoln	\$91,456	\$33,186	\$8,533	\$609,086	\$742,261
Manitowoc	\$178,990	\$29,488	\$50	\$1,312,060	\$1,520,588
Marathon	\$257,443	\$47,127	\$10,596	\$2,384,980	\$2,700,146
Marinette	\$44,285	\$40,785	\$8,279	\$700,060	\$793,409
Marquette	\$23,242	\$13,746	\$4,737	\$497,360	\$539,085
Menominee	\$3,701	\$1,614	\$905	\$90,793	\$97,013
Milwaukee	\$6,294,052	\$836,402	\$38,678	\$24,041,154	\$31,210,286
Monroe	\$93,129	\$52,347	\$7,585	\$654,645	\$807,686
Oconto	\$60,067	\$19,674	\$6,421	\$691,094	\$777,256
Oneida	\$85,013	\$30,310	\$4,498	\$564,021	\$683,842
Outagamie	\$391,419	\$89,426	\$23,571	\$2,787,512	\$3,291,928
Ozaukee	\$144,075	\$45,021	\$4,198	\$1,026,485	\$1,219,779
Pepin	\$14,433	\$5,775	\$0	\$293,836	\$314,044
Pierce	\$50,031	\$26,189	\$4,482	\$502,559	\$583,261
Polk	\$103,862	\$60,468	\$10,306	\$586,498	\$761,134
Portage	\$141,902	\$95,200	\$2,627	\$1,003,908	\$1,243,637
Price	\$34,249	\$7,332	\$0	\$337,315	\$378,896
Racine	\$582,587	\$126,436	\$46,987	\$2,341,211	\$3,097,221
Richland	\$24,519	\$9,969	\$13,261	\$262,273	\$310,022
Rock	\$374,302	\$49,740	\$15,206	\$3,267,723	\$3,706,971
Rusk	\$48,594	\$11,739	\$5,388	\$255,025	\$320,746
Sauk	\$130,274	\$64,502	\$8,892	\$1,145,614	\$1,349,282
Sawyer	\$39,222	\$2,988	\$246	\$289,775	\$332,231
Shawano	\$74,015	\$31,990	\$26,059	\$609,122	\$741,186
Sheboygan	\$132,690	\$52,045	\$28,473	\$2,057,458	\$2,270,666
St. Croix	\$150,309	\$65,976	\$10,565	\$1,245,584	\$1,472,434
Taylor	\$51,379	\$12,270	\$8,082	\$462,920	\$534,651
Trempealeau	\$51,262	\$5,210	\$2,489	\$673,720	\$732,681
Vernon	\$39,311	\$16,892	\$4,185	\$381,056	\$441,444
Vilas	\$47,005	\$20,907	\$4,719	\$302,542	\$375,173
Walworth	\$245,939	\$97,086	\$15,527	\$2,179,143	\$2,537,695
Washburn	\$48,943	\$11,067	\$2,396	\$450,812	\$513,218
Washington	\$130,028	\$69,476	\$6,886	\$2,318,806	\$2,525,196
Waukesha	\$566,027	\$129,894	\$193,268	\$6,749,934	\$7,639,123
Waupaca	\$131,085	\$40,347	\$105	\$893,023	\$1,064,560
Waushara	\$41,370	\$10,854	\$1,733	\$506,471	\$560,428
Winnebago	\$455,046	\$105,993	\$15,503	\$2,356,923	\$2,933,465
Wood	\$152,175	\$84,581	\$10,528	\$1,088,562	\$1,335,844
Totals	\$15,845,875	\$3,901,140	\$935,568	\$104,355,610	\$125,038,194

Reported Actual Costs and Recoupment of GAL Services During Calendar Year 2004

County	Actual Guardian Ad Litem Costs Under Chapter 48 & 938	Actual Guardian Ad Litem Costs Under Chapters 55 & 880	Actual Guardian Ad Litem Costs Under Chapter 767	Actual Guardian Ad Litem Costs Under Other	Total Amount Reported As Guardian Ad Litem Costs for CY 2004
Adams	\$1,681	\$1,619	\$14,758	\$404	\$18,462
Ashland	\$6,959	\$10,484	\$23,303	\$8,629	\$49,375
Barron	\$41,954	\$33,054	\$51,957	\$3,541	\$130,506
Bayfield	\$3,250	\$9,838	\$21,491	\$3,424	\$38,003
Brown	\$70,990	\$62,123	\$299,008	\$3,362	\$435,483
Buffalo	\$4,072	\$6,554	\$10,696	\$161	\$21,483
Burnett	\$0	\$23,281	\$25,340	\$0	\$48,621
Calumet	\$16,147	\$7,128	\$1,506	\$0	\$24,781
Chippewa	\$8,454	\$20,085	\$37,185	\$0	\$65,724
Clark	\$13,398	\$19,795	\$42,182	\$4,349	\$79,724
Columbia	\$18,127	\$23,241	\$65,173	\$5,483	\$112,024
Crawford	\$24,227	\$12,320	\$18,404	\$0	\$54,951
Dane	\$255,115	\$146,670	\$117,094	\$10,355	\$529,234
Dodge	\$28,780	\$10,529	\$88,781	\$256	\$128,346
Door	\$17,442	\$6,530	\$51,960	\$0	\$75,932
Douglas	\$5,739	\$14,424	\$1,695	\$0	\$21,858
Dunn	\$22,274	\$15,931	\$51,541	\$2,003	\$91,749
Eau Claire	\$64,359	\$35,147	\$12,535	\$98	\$112,139
Florence	\$646	\$1,793	\$0	\$0	\$2,439
Fond Du Lac	\$39,518	\$17,379	\$105,368	\$0	\$162,265
Forest	\$2,569	\$7,289	\$1,070	\$0	\$10,928
Grant	\$12,496	\$14,433	\$65,881	\$0	\$92,810
Green	\$26,539	\$13,572	\$15,216	\$1,931	\$57,258
Green Lake	\$11,475	\$17,942	\$12,818	\$0	\$42,235
Iowa	\$26,922	\$5,443	\$27,992	\$0	\$60,357
Iron	\$1,984	\$14,714	\$4,284	\$130	\$21,112
Jackson	\$3,619	\$12,753	\$8,024	\$257	\$24,653
Jefferson	\$20,755	\$55,680	\$89,495	\$0	\$165,910
Juneau	\$16,825	\$20,346	\$29,146	\$3,588	\$69,905
Kenosha	\$60,012	\$51,746	\$125,835	\$2,987	\$240,580
Kewaunee	\$7,549	\$10,226	\$8,843	\$855	\$27,473
La Crosse	\$94,180	\$71,108	\$28,265	\$2,254	\$195,807
Lafayette	\$33,079	\$18,630	\$12,846	\$0	\$64,555
Langlade	\$4,325	\$18,915	\$5,658	\$0	\$28,898
Lincoln	\$23,648	\$22,947	\$51,090	\$0	\$97,685
Manitowoc	\$50,568	\$24,655	\$76,290	\$0	\$151,513
Marathon	\$32,100	\$33,507	\$66,297	\$0	\$131,904
Marinette	\$16,147	\$21,721	\$33,364	\$0	\$71,232
Marquette	\$11,350	\$11,473	\$12,313	\$0	\$35,136
Menominee	\$0	\$411	\$0	\$0	\$411
Milwaukee	\$1,760,894	\$181,886	\$594,581	\$0	\$2,537,361
Monroe	\$22,825	\$19,387	\$864	\$620	\$43,676
Oconto	\$11,208	\$5,338	\$52,300	\$0	\$68,844
Oneida	\$37,081	\$7,900	\$31,059	\$0	\$76,040
Outagamie	\$19,953	\$42,942	\$58,047	\$0	\$120,942
Ozaukee	\$11,547	\$27,753	\$21,466	\$0	\$60,766
Pepin	\$1,959	\$9,364	\$2,259	\$0	\$13,582
Pierce	\$11,816	\$9,472	\$2,578	\$0	\$23,866
Polk	\$14,437	\$28,747	\$15,928	\$0	\$59,112
Portage	\$18,120	\$24,315	\$40,185	\$1,337	\$83,957
Price	\$3,215	\$21,052	\$24,863	\$0	\$49,130
Racine	\$60,216	\$90,324	\$150,540	\$0	\$301,080
Richland	\$9,346	\$2,969	\$19,123	\$0	\$31,438
Rock	\$22,764	\$55,283	\$84,551	\$0	\$162,598
Rusk	\$7,253	\$20,184	\$9,273	\$0	\$36,710
Sauk	\$34,117	\$21,870	\$92,494	\$5,969	\$154,450
Sawyer	\$3,893	\$8,303	\$4,980	\$213	\$17,389
Shawano	\$2,329	\$22,384	\$1,854	\$0	\$26,567
Sheboygan	\$43,412	\$17,432	\$54,919	\$1,550	\$117,313
St. Croix	\$0	\$0	\$0	\$58,193	\$58,193
Taylor	\$23,917	\$7,380	\$20,241	\$0	\$51,539
Trempealeau	\$13,998	\$18,519	\$35,560	\$0	\$68,077
Vernon	\$18,971	\$8,350	\$8,867	\$0	\$36,188
Vilas	\$6,462	\$11,769	\$3,079	\$0	\$21,310
Walworth	\$1,728	\$0	\$131,920	\$0	\$133,648
Washburn	\$5,824	\$12,922	\$12,352	\$31,126	\$62,224
Washington	\$42,828	\$34,256	\$154,912	\$0	\$231,996
Waukesha	\$153,469	\$78,970	\$156,324	\$5,571	\$394,334
Waupaca	\$29,599	\$9,381	\$22,428	\$1,886	\$63,294
Waushara	\$3,159	\$3,105	\$27,382	\$0	\$33,646
Winnebago	\$283,369	\$20,241	\$0	\$101,203	\$404,813
Wood	\$13,529	\$41,851	\$1,333	\$0	\$56,713
Totals	\$3,792,512	\$1,789,043	\$3,550,966	\$261,735	\$9,394,257

Reported Actual Costs and Recoupment of GAL Services During Calendar Year 2004

County	Recoupment of Guardian Ad Litem Costs Under Chapter 48 & 938	Recoupment of Guardian Ad Litem Costs Under Chapters 55 & 880	Recoupment of Guardian Ad Litem Costs Under Chapter 767	Recoupment of Guardian Ad Litem Costs Under Other	Total Amount Reported As Recoupment of Guardian Ad Litem Costs for CY 2004
Adams	\$313	\$576	\$8,864	\$224	\$9,977
Ashland	\$1,112	\$7,320	\$17,131	\$1,049	\$26,612
Barron	\$655	\$11,144	\$36,924	\$1,243	\$49,966
Bayfield	\$4,002	\$5,098	\$8,519	\$78	\$17,697
Brown	\$0	\$0	\$260,502	\$0	\$260,502
Buffalo	\$0	\$663	\$9,839	\$0	\$10,302
Burnett	\$0	\$13,737	\$13,947	\$0	\$27,684
Calumet	\$0	\$0	\$0	\$0	\$0
Chippewa	\$0	\$6,874	\$29,873	\$0	\$36,547
Clark	\$0	\$0	\$37,104	\$0	\$37,104
Columbia	\$7,396	\$6,620	\$87,897	\$5,919	\$107,832
Crawford	\$4,066	\$0	\$20,994	\$0	\$25,060
Dane	\$0	\$200	\$4,047	\$0	\$4,247
Dodge	\$60	\$359	\$38,227	\$0	\$38,646
Door	\$170	\$959	\$41,369	\$0	\$42,498
Douglas	\$0	\$9,311	\$35	\$0	\$9,346
Dunn	\$0	\$6,295	\$38,228	\$0	\$42,523
Eau Claire	\$8,062	\$15,488	\$1,741	\$322	\$25,613
Florence	\$0	\$0	\$0	\$0	\$0
Fond Du Lac	\$0	\$0	\$101,434	\$0	\$101,434
Forest	\$0	\$0	\$0	\$0	\$0
Grant	\$6,421	\$13,038	\$46,450	\$0	\$65,909
Green	\$10,142	\$2,912	\$5,530	\$455	\$19,039
Green Lake	\$0	\$0	\$9,373	\$0	\$9,373
Iowa	\$15,227	\$11,931	\$29,185	\$0	\$56,343
Iron	\$0	\$4,073	\$0	\$0	\$4,073
Jackson	\$581	\$8,217	\$1,998	\$0	\$10,796
Jefferson	\$0	\$4,868	\$56,066	\$0	\$60,934
Juneau	\$0	\$2,818	\$17,221	\$0	\$20,039
Kenosha	\$4,317	\$21,292	\$69,574	\$2,617	\$97,800
Kewaunee	\$0	\$0	\$17,892	\$0	\$17,892
La Crosse	\$0	\$0	\$16,699	\$0	\$16,699
Lafayette	\$10,354	\$931	\$5,187	\$0	\$16,472
Langlade	\$0	\$0	\$3,377	\$0	\$3,377
Lincoln	\$4,958	\$16,958	\$21,527	\$0	\$43,443
Manitowoc	\$632	\$15,291	\$56,997	\$1,257	\$74,177
Marathon	\$10,906	\$2,394	\$53,537	\$236	\$67,073
Marinette	\$4,540	\$3,748	\$32,982	\$0	\$41,270
Marquette	\$0	\$5,451	\$5,674	\$0	\$11,125
Menominee	\$0	\$0	\$0	\$0	\$0
Milwaukee	\$0	\$10,720	\$99,699	\$0	\$110,419
Monroe	\$0	\$30	\$1,287	\$0	\$1,317
Oconto	\$487	\$0	\$46,882	\$0	\$47,369
Oneida	\$0	\$0	\$4,262	\$0	\$4,262
Outagamie	\$0	\$25,241	\$0	\$0	\$25,241
Ozaukee	\$0	\$0	\$0	\$26,043	\$26,043
Pepin	\$0	\$3,853	\$1,617	\$0	\$5,470
Pierce	\$0	\$0	\$1,505	\$0	\$1,505
Polk	\$185	\$5,855	\$9,268	\$0	\$15,308
Portage	\$1,243	\$21,058	\$11,224	\$0	\$33,525
Price	\$552	\$7,590	\$15,145	\$0	\$23,287
Racine	\$5,850	\$30,438	\$63,670	\$0	\$99,958
Richland	\$0	\$353	\$18,586	\$0	\$18,939
Rock	\$918	\$6,897	\$70,551	\$0	\$78,366
Rusk	\$0	\$1,892	\$14,105	\$0	\$15,997
Sauk	\$0	\$0	\$29,906	\$0	\$29,906
Sawyer	\$0	\$5,227	\$5,890	\$0	\$11,117
Shawano	\$1,947	\$15,553	\$5,241	\$0	\$22,741
Sheboygan	\$339	\$0	\$7,549	\$0	\$7,888
St. Croix	\$0	\$0	\$146	\$0	\$146
Taylor	\$0	\$0	\$18,124	\$0	\$18,124
Trempealeau	\$0	\$0	\$30,622	\$23,944	\$54,566
Vernon	\$0	\$0	\$4,047	\$0	\$4,047
Vilas	\$0	\$0	\$1,200	\$0	\$1,200
Walworth	\$0	\$714	\$37,941	\$0	\$38,655
Washburn	\$7,850	\$0	\$6,357	\$23,850	\$38,057
Washington	\$7,076	\$29,247	\$120,816	\$0	\$157,139
Waukesha	\$24,669	\$50,906	\$163,038	\$0	\$238,613
Waupaca	\$0	\$1,268	\$7,878	\$0	\$9,146
Waushara	\$0	\$125	\$15,631	\$0	\$15,756
Winnebago	\$32,862	\$2,347	\$0	\$11,737	\$46,946
Wood	\$0	\$0	\$0	\$0	\$0
Totals	\$177,892	\$417,680	\$2,015,931	\$98,974	\$2,710,476





State of Wisconsin
Department of Health and Family Services

Jim Doyle, Governor
Helene Nelson, Secretary

December 21, 2005

The Honorable Alan J. Lasee, President
Wisconsin State Senate
Room 219 South
State Capitol
P.O. Box 7882
Madison, WI 53707-7882

The Honorable John Gard, Speaker
Wisconsin State Assembly
Room 211 West
State Capitol
P.O. Box 8952
Madison 53708

Re: Clearinghouse Rule 03-085
HFS 2, relating to Department recoupment of program benefit overpayments from program recipients.

Gentlemen:

In accordance with the provisions of s. 227.19 (2), Stats., you are hereby notified that the above-mentioned rules are in final draft form. This notice and the report required by s. 227.19 (3), Stats., are submitted herewith in triplicate.

The rules were submitted to the Legislative Council for review under s. 227.15, Stats. A copy of the Council's report is also enclosed.

If you have any questions about the rules, please contact Don Warnke at 266-5869.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sue Reinardy', written over a horizontal line.

Sue Reinardy
Deputy Secretary

cc Gary Poulson, Assistant Revisor of Statutes
Senator Glenn Grothman, JCRAR
Representative Mark Gottlieb, JCRAR
Don Warnke, DHFS-DMT
Ron Hermes, DHFS Secretary's Office

Wisconsin.gov

**PROPOSED ADMINISTRATIVE RULES – CR03-085; HFS 2
ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES
PURSUANT TO S. 227.19 (3), STATS.**

Basis and Purpose of Proposed Rules

The Department proposes to create a new chapter of administrative rules, HFS 2, that addresses recoupment of overpayments made to recipients of benefits paid under chs. 48 and 49, Stats.

The Department of Health and Family Services had relied on its written overpayment policy to authorize the procedure the Department used to recoup benefit payments. In 1999, in Mack vs. DHFS, the Wisconsin Court of Appeals found that although the Department has the right to recover erroneous payment of public funds, the Department could not employ its recoupment process without promulgating the process as an administrative rule. Therefore, the Department proposed to promulgate its procedure for recouping overpayments as ch. HFS 2.

The proposed rules were submitted to the Legislative Council Rules Clearinghouse on September 12, 2003, under the general authority to promulgate rules under s. 227.11 (2) (a), Stats. Since that time, s. 49.847, Stats., was created by 2005 Wisconsin Act 25 and gives explicit legislative authority to recover benefits incorrectly paid under programs administered under ch. 49, Stats., through administrative recoupment. Also in 2005 Wisconsin Act 25, s. 48.57 (3m) (h) and (3n) (h), s. 48.62 (6) and s. 48.975 (4m), Stats., were created to authorize administrative recoupment of kinship care payments, foster care payments, and adoption assistance payments, respectively. The Department is also authorized to specify by rule the methodology for recovering all of these incorrectly paid benefits.

The Department's authority to create these rules is found in s. 48.57 (3m) (h) and (3n) (h), s. 48.62 (6), s. 48.975 (4m), s. 49.847, and 227.11 (2) (a), Stats. The rules interpret ss. 16.51 (4), 48.57 (3m) and (3n), 48.62, 48.975, 49.847, and 49.85, Stats., and other statutes concerning benefits programs administered by the Department.

Changes to Rulemaking Order Analysis or Fiscal Estimate

- Changes to Rulemaking Order Analysis

The Department significantly revised its analysis section from that in the initial proposed order. The bulk of the changes were due to 2003 Wisconsin Act 118, which mandated changes to the content of several administrative rule-related documents. Specifically, the Department:

- Changed the format of the analysis to conform with newly-required areas required to be addressed;
- Expanded the analysis section to address the information newly-required under s. 227, Stats.;
- Added a section regarding the effect of the rules on small businesses;
- Added a section regarding the fiscal effect on the private sector;
- Added a section that describes how the proposed rules relate to pertinent federal regulations; and
- Added a section that describes the relationship of the proposed rules to comparable rules in adjacent states.

In addition, the statutory authority and associated explanation of authority sections were revised due to the creation of the above-noted statutes which give the Department explicit legislative authority to recover benefits incorrectly paid under chs. 48 and 49, Stats.

- Changes to Fiscal Estimate

The final proposed rule contains no changes that require an amended fiscal estimate.

Response to Clearinghouse Recommendations

The Department accepted all Clearinghouse comments and has responses to the following questions:

5.c. Comment: In s. HFS 2.04 (5), why is the 10% limit in sub. (3) not applicable to sub. (5)? If funds are paid to an entity on behalf of a recipient, any recovery made from those payments is going to affect the recipient, not the entity who receives benefits on behalf of the recipient. Therefore, should recipients who have entities receiving funds on their behalf be treated the same as recipients who have no such entity?

Response: Subsection (5) pertains to payments to entities and consisted of two sentences, each of which describes a different situation. The first situation is an entity that currently receives benefits on behalf of eligible individuals, while the second sentence pertained to an entity that no longer receives benefits on behalf of eligible individuals. In response to the Clearinghouse comment, the Department has subdivided sub. (5) into three paragraphs. In the first paragraph, which pertains to the case of an entity that currently receives benefits on behalf of eligible individuals, the Department has included the 10% limit specified in sub. (3), as implicitly suggested by the Clearinghouse. In par. (b), which pertains to cases where an entity no longer receives benefits on behalf of eligible individuals, the Department made no change because reducing future payments by a certain amount when there are no future payments would not apply.

5.d. Comment: Section HFS 2.04 (6) (b) states that a recipient is entitled to no prior written notice if an overpayment was the result of a computer processing or clerical error. Why is this type of error treated differently than any other error, if it affects a recipient in the same way?

Response: A computer processing or clerical error doesn't entail decision-making, and therefore, the Department believes there is no action that may be appealed. However, the Department understands the Clearinghouse concern, and therefore has withdrawn s. HFS 2.04 (6) (b) in its entirety.

5.e. Comment: Section HFS 2.04 (3) deals with a situation in which benefits have been incorrectly paid to an individual currently eligible to receive benefits. Subsection (4) deals with the situation in which benefits have been incorrectly paid to an individual who is no longer eligible to receive benefits. The latter provision also requires the department to send a notice of intent to recover under sub. (6) before it can take further legal action. Subsection (6) (b) indirectly states that a notice of intent to recover must be sent in certain cases under sub. (3) to an individual currently eligible to receive benefits. The rule would be clarified if s. HFS 2.04 (3) stated positively that a notice of intent to recover under sub. (6) (a) is required except in those circumstances stated in sub. (6) (b). [See also s. HFS 2.05 (5). Are there circumstances under which sub. (5) requires that a notice of intent to recover be sent?]

Response: The Department has added the sentence, "A written notice of intent to recover shall be provided to the individual as required under sub. (6)" to the end of s. HFS 2.04 (3).

Moreover, to address the Clearinghouse's bracketed comment [which the Department assumes was meant to pertain to 2.04 (5) instead of the stated 2.05 (5)], the Department has added a new par. (c) to s. HFS 2.04 (5) that specifies the applicable circumstances under which a notice of intent to recover be sent.

Final Regulatory Analysis

The proposed rules concern the administration of state program benefits. The proposed rules do not directly affect small businesses, as defined under s. 227.114 (1), Stats. Accordingly, the Department is exempt from performing an analysis of the affect on small businesses by operation of ss. 227.114 (8) (b) and 227.19 (3m) Stats.

Comments on Proposed Rule

- Public Hearing Summary

The Department held one public hearing on the proposed rule in Madison on November 5, 2003. Larry Hartzke and Shelley Malofsky of the Department's Office of Legal Counsel, and Amy Korpady of the Department's Bureau of Fiscal Operations staffed the hearing. Three persons attended the hearing:

1. Robert Baranowski of Madison, WI
2. Sarah Orr, Elder Law Center, Coalition of Wisconsin Aging Groups, Madison, WI
3. Kim Waldman, Elder Law Center, Coalition of Wisconsin Aging Groups, Madison, WI

All three persons were attending to observe only. None of the persons presented testimony on the rule.

The Department's comment period remained open until Tuesday, November 11, 2003, although the Department did accept comments from a representative of the American Civil Liberties Union submitted on November 24, 2003. On November 10, 2003, the Department received written comments from three individuals and, as mentioned, from a representative of the ACLU on November 24, 2003. These comments, and the Department's responses to them, are summarized on a table in this report.

- Public Comments Summary

The seven persons commenting on the initial proposed rule were opposed to the rule for several reasons. First and foremost, three persons asserted that the Department lacks statutory authority to promulgate the rule. For reasons stated in the next section of this report, the Department contests this assertion. One or more persons objected to more specific provisions in the rule, such as the following:

- the need for (and the lack of) the rule to identify which programs the rule applied to;
- the lack of specificity regarding how an overpayment is determined;
- the need to apply the rule only to future overpayments;
- the need to offset overpayments by any amounts that are owed the eligible individual or the entity receiving benefits on behalf of the eligible individual because of underpayments;
- objecting to recouping administrative costs from beneficiaries;
- the need to continue benefits if a reduction in future benefits is proposed;

- the unfairness of not offering administrative appeal to benefit recipients to whom overpayments were made due to computer error; and
- disagreement with the timeframes the Department proposed for the DOA Div. Of Hearings and Appeals to hold a hearing.

Public Comments on Proposed HFS 2 Order and Department Responses

Rule Reference HFS 2.01

Comment and Attribution

The Rules Lack of Statutory Authority

The proposed administrative rule is not authorized by current state statutes, and insofar as it seeks to authorize recovery of benefits out of continuing benefits in particular programs (e.g., in kinship care, foster care, or adoption assistance cases), it contravenes statutory authority governing benefits for those programs. **2, 3**

What constitutes an overpayment, what overpayments should be collected, how the overpayments should be collected and whether there should be a procedure for waiver of overpayments is a **legislative**, not an **administrative**, determination. **2**

The Department of Health and Family Services cannot rely on s. 16.51(4), Stats., as the statute the Department is interpreting because s. 16.51 is administered by the Department of Administration. **2, 3**

The statutes governing the foster care, adoption assistance, kinship care (subchapters 14 and 16 of ch. 48; section 48.975; and section 48.57, Stats., respectively) provide no authority for the Department's proposed rule, and, in fact, contain language that directly contravenes recoupment. The Department cannot promulgate any rule that is not expressly or impliedly authorized by the legislature. **2, 3, 4**

Section 46.03, Stats., which describes the powers and duties of DHFS, does not grant DHFS the authority to establish or collect foster care payments. The absence of statutory language giving the Department the authority to specify rules allowing the Department to recoup payments the Department has made, when similar statutes have done so, shows that the legislature did not intend the Department to have the authority to recoup payments. **4**

There is no provision for reducing any of the statutory entitlement amounts based upon overpayments. **2, 3**

The Department's reliance on Mack v. DHFS, 231 Wis. 2d 644, 605 N.W. 2d 651 (Wis.App. 1999) for support for its proposed HFS 2 rulemaking is

Departmental Response

The Department disagrees with commenters' contention that the Department lacks authority to promulgate these rules. The Department possesses a common law right to recover erroneous payments most recently recognized in Mack v. DHFS. Sec. 227.11, Stats., also gives the Department authority to interpret provisions of the statutes regarding benefit programs that it administers. The authority to create a rule prescribing the method of recovery of erroneous payments is necessarily implied in statutes authorizing the Department to make payments under circumstances established by the Legislature.

Section 16.51 of the statutes is also proper authority because each agency is responsible for collection of the debts owed it, under delegated authority from DOA. This rule is the tool to enforce that responsibility. In addition, it is important to note that these rules were reviewed and commented upon by the Legislative Council Rules Clearinghouse. In assisting the ultimate legislative standing committee review of the Department's final proposed rules, one of the responsibilities of the Rules Clearinghouse is to review initial proposed rules for *sufficient statutory authority*. The Clearinghouse did not express that the Department lacks sufficient statutory authority as one of its comments on the rules.

Note: The proposed rules were submitted to the Legislative Council Rules Clearinghouse on September 12, 2003, under the general authority to promulgate rules under s. 227.11 (2) (a), Stats. Since that time, s. 49.847, Stats., was created by 2005 Wisconsin Act 25 and gives explicit legislative authority to recover benefits incorrectly paid under programs administered under ch. 49, Stats., through administrative recoupment. Also in 2005 Wisconsin Act 25, s. 48.57 (3m) (h) and (3n) (h), s. 48.62 (6) and s. 48.975 (4m) were created to authorize administrative recoupment of kinship care payments, foster

misplaced. **3**

care payments, and adoption assistance payments, respectively. The Department is also authorized to specify by rule the methodology for recovering all of these incorrectly paid benefits.

HFS 2.02

The language of HFS 2.02 is needlessly vague. For clarity, this section should specifically name and provide a statutory reference for each department-administered financial assistance program to which HFS 2 is applicable. **1, 2**

The Department's intent of creating a generally-applicable recoupment process would be defeated by limiting the process to only a specified list of benefit programs. The provision has been revised to indicate the circumstances under which the rules do not apply.

HFS 2.04

The proposed rules are vague and fail to offer sufficient guidance on how an overpayment should be determined. **2**

This rule is limited to directing the procedures by which recoupments occur. Each benefits program develops its own process for determining the proper amount and payment of benefits and for determining errors made in issuing those payments. Those processes are outside the scope of this rule.

HFS 2.04

The proposed rules, if adopted, should be limited only to future payments. **4**
There should not be recovery allowed for errors that occurred more than six months in the past. The Department is required to review all reimbursement rates every six months. The foster family should be allowed to rely on the Department's review process. **7**

Individuals are not entitled to receive benefits for which they are not eligible, regardless of when they were made. It is a debt to the program that needs to be repaid.

HFS 2.04

Prior to any collection process, the Department should review the reimbursement record of the eligible individual to determine if any underpayments have occurred. The eligible individual should be able to offset any overpayments with any underpayments. **7**

The Department agrees and has consequently amended s. HFS 2.04 (1) and (6) (c) to state that the amount of overpayments to be recovered will be offset by any amounts that are owed the eligible individual or the entity receiving benefits on behalf of the eligible individual because of underpayments.

HFS 2.04(2)

The Department's proposed assessment of administrative costs against the beneficiary of the financial assistance is problematic. **3**

Administrative costs are only paid under contracts with organizations and facilities that receive benefits on behalf of an eligible individual or a group of eligible individuals for whom the entity is responsible. The costs are specified

The proposed rules allow for recovery of administrative costs without

specifying what these costs are, how they are to be determined or what statutory provision authorizes such recovery. **2**

The rule does not define "administrative costs." The commenter would object to the Department recouping costs from the foster parents due to agency errors. To hold the foster parent responsible for administrative costs in addition to overpayments incurred due to agency error is a double penalty. If that is not the intent of the section, it should be clarified. **7**

HFS 2.04(3) and (5)(a) The proposed rules fail to provide for continuing benefits if a reduction in future benefits is proposed. **2**

HFS 2.04(6)(a) The Department's failure to limit recoupments from entities receiving benefits on behalf of individuals to the 10% applied in other cases is problematic. **3**

HFS 2.04(6)(a) The 20-day timeline for a foster parent to appeal an overpayment claim is unreasonably and unnecessarily short. Section 48.64(4), Stats., clearly states that the Department must provide a reasonable time for the household to request a fair hearing in any decision or order issued by an agency that affects the head of a foster home or the children involved. For every other type of overpayment, state and federal rules provide 45 or 90 days to appeal. **4, 5, 7**

HFS 2.04(6)(a) Paragraph (a) fails to require the Department to include clear and understandable worksheets (or any worksheets at all) with the overpayment notice. **4**

HFS 2.04(6)(b) The Department's proposed refusal of notice of recoupment due to "computer processing or clerical error" is problematic. **3**

The proposed rules allow DHFS to dispense with notice when the overpayment is the result of a computer processing or clerical error and to

under these contracts. They are not paid to individual foster parents, adoptive parents or kinship relatives and therefore would not be part of a recovery action. The Department has modified s. 2.03 to define administrative costs.

Section HFS 2.06 (2) as initially proposed did provide for continuing benefits. However, the Department revised it to make that fact clearer.

The Department agrees with the comment and has consequently subdivided s. 2.04(5) into three paragraphs. In the first paragraph, which pertains to the case of an entity that currently receives benefits on behalf of eligible individuals, the Department has included the 10% limit specified in sub. (3), as implicitly suggested by both the commenter and the Leg. Council Rules Clearinghouse.

The Department acknowledges the concern and is modifying s. HFS 2.06(2) to provide for a 45-day appeal time. However, benefits will continue pending a hearing only if the request for hearing is filed before the effective date of the intended action; the effective date will be after a 20-day prior notice. This practice is consistent with procedures in other benefit programs.

The Department agrees that due process requires that there be adequate explanation of the basis for the recovery. Instead of constraining individual program discretion in this rule, the Department believes it best to let each benefit program develop its own notice to comply with this requirement.

The intent of this provision was to remove computer programming errors resulting in overpayments to a mass population of recipients from the due process provisions that apply to a department determination that an overpayment occurred in an individual case. The

simply adjust future payments. The latter provisions violate both state law and individual recipients' due process rights that require notice and the opportunity for a hearing prior to the reduction of benefits. 2, 4

In an overpayment case, adequate notice is integral to the right to a fair hearing. The core of due process is the right to notice and a meaningful opportunity to be heard. Many alleged overpayments, purportedly caused by "clerical" errors, are, in fact, incorrect, as the commenter has established in numerous cases. In sum, in balancing the private interest, the government interest, and the risk of erroneous deprivation, there is no justification for failing to provide prior notice and an opportunity for hearing before recoupment in all overpayment cases. 4, 5

In all other overpayment cases, the state provides notice and an opportunity for hearing **before** recoupment. 4

The Department must provide written notice of any recoupment action in order for the eligible individual to have an opportunity to show that the recoupment action was started in error before the Department reduces the amount paid to foster parents. 7

HFS
2.04(6)(b)

The Department should not hold foster parents liable for overpayments caused by the agency's error. Doing so means the Department is seeking to collect money from persons who were not at fault, and who normally have already used the money for the benefit of foster or kinship children. Agency overpayments are not created or collected in the Medical Assistance program. 4

Forcing foster and kinship parents to pay back money for errors they never committed will inevitably discourage some families from participating or will cause them to drop out of the system. 4

The fiscal benefit to the Department of collecting funds from foster parents may well exceed the costs of such collection. Instead, the Department should hold the entities that administer the foster care program, such as the sites in Milwaukee, liable for agency error overpayments. 4, 5, 6

Most foster parents do not have the education to independently pursue an appeal or the financial resources to retain a lawyer. 5

The commenter, a foster parent who received a letter asking her to repay

Department acknowledges the commenters' concerns and therefore has withdrawn HFS 2.04 (6) (b).

HFS 2 is similar to the recoupment that occurs in food stamps and that did occur in the former AFDC program. Although the food stamp coupons are essential to the welfare of participants, the department recoups amounts for which they were not eligible from later benefits. This is true whether the overpayments occur as a result of agency errors or client errors. The same was true in AFDC; recoupment of necessary cash assistance occurred, regardless of the cause being agency or client error.

amounts she had received over the previous 2-3 year period, states that agency staff told her different things at different times about the foster care system. **6**

Many foster families with whom the commenter works have been subject to erroneous overpayment collection procedures. **7**

BMCW began a recoupment action against a foster family for the two days a foster child was in the hospital. This is not right. **7**

Foster families are reimbursed for expenses that have already been incurred. If the Department seeks to recover overpayments, it is (wrongly) requiring families to repay money they have already spent for the care of the children. **7**

HFS 2.06(3) The hearing schedule set forth in the rules, which requires a hearing within 30 days and does not mention the statutory requirements, may violate s. 48.64(4), Stats., which states that the Department must provide sufficient opportunity for households to obtain records and documents in advance of the hearing, to obtain and bring witnesses, and to grant continuances. **4**

The Department acknowledges the concern and has modified s. HFS 2.06 (3) to allow the general procedures of HA 3 control the time of the hearing and decision.

- 1** Paul Sherman, Coalition of Wisconsin Aging Groups, Madison, Wisconsin.
- 2** Shirin Cabraal, Legal Action of Wisconsin, Madison, Wisconsin.
- 3** Carol W. Medaris, Wisconsin Council on Children and Families, Madison, Wisconsin.
- 4** Karyn Rotker, Poverty, Race & Civil Liberties Project, ACLU, Milwaukee, Wisconsin.
- 5** Dawn M. Sampson, Greenfield, Wisconsin (comments forwarded by commenter #4)
- 6** Harvenia Williams, (address unknown; comments forwarded by commenter #4)
- 7** In Their Best Interests, Inc., Milwaukee, Wisconsin (comments forwarded by commenter #4)

PROPOSED ORDER OF
THE DEPARTMENT OF HEALTH AND FAMILY SERVICES
CREATING RULES

To create HFS 2, relating to recoupment of program benefit overpayments from program recipients.

Analysis Prepared by the Department of Health and Family Services

Statute interpreted: Sections 16.51 (4), 48.57 (3m) and (3n), 48.62, 48.975, 49.847, and 49.85, Stats., and other statutes concerning benefits programs administered by the Department.

Statutory authority: Sections 48.57 (3m) (h) and (3n) (h), 48.62 (6), 48.975 (4m), 49.847 and 227.11 (2) (a), Stats.

Explanation of agency authority: The explanation of agency authority can be found in the "Plain language analysis" section of this analysis.

Related statute or rule: Sections 48.57, 48.62, 48.975 and 49.847, Stats.

Plain language analysis:

The Department proposes to create a new chapter of administrative rules, HFS 2, that addresses recoupment of overpayments made to recipients of benefits paid under chs. 48 and 49, Stats.

The Department of Health and Family Services had relied on its written overpayment policy to authorize the procedure the Department used to recoup benefit payments. In 1999, in Mack vs. DHFS, the Wisconsin Court of Appeals found that although the Department has the right to recover erroneous payment of public funds, the Department could not employ its recoupment process without promulgating the process as an administrative rule. Therefore, the Department proposed to promulgate its procedure for recouping overpayments as ch. HFS 2.

The proposed rules were submitted to the Legislative Council Rules Clearinghouse on September 12, 2003, under the general authority to promulgate rules under s. 227.11 (2) (a), Stats. Since that time, s. 49.847, Stats., was created by 2005 Wisconsin Act 25 and gives explicit legislative authority to recover benefits incorrectly paid under programs administered under ch. 49, Stats., through administrative recoupment. Also in 2005 Wisconsin Act 25, s. 48.57 (3m) (h) and (3n) (h), s. 48.62 (6) and s. 48.975 (4m), Stats., were created to authorize administrative recoupment of kinship care payments, foster care payments, and adoption assistance payments, respectively. The Department is also authorized to specify by rule the methodology for recovering all of these incorrectly paid benefits.

Summary of, and comparison with, existing or proposed federal regulation:

The Department knows of no comparable federal regulations.

Comparison with rules in adjacent states:

Minnesota – The Department was unable to locate any comparable rules in the Minnesota Administrative Code. Requirements for recoupment of overpayment of program benefits, including those under the Family Investment Program and General Assistance Program are stated in Minnesota statute ch. 256. In addition, the Minnesota Department of Human Services maintains policies and procedures on recoupment of benefit overpayments.

Michigan – Comparable rules from Michigan concerning benefit overpayment recoupment can be found in Mich. Admin. Code R 400.3011, 3131, and 3177. The rules outline criteria for recouping overpaid benefits and allow recoupment from active and inactive recipients groups. Repayment can be made in cash or through benefit reduction. Recoupment may be made because of intentional program violation, client error, or administrative error. The rules also set the maximum amount that can be taken as benefit reductions. An overissuance investigation and administrative hearing precede recoupment resulting from suspected intentional program violations.

Iowa – Comparable rules are found in IAC 441-11. The rules define the Department of Human Services' policies regarding the collection of overpayments in financial assistance and other assistance. The rules outline what information must be maintained for each claim for an overpayment and how the payments are to be applied. The rules also outline the criteria for withholding part or all of federal or state refunds or other state payments owed to the debtor and how they are applied to the debtor's claim for the overpayment and appeal procedures. Subject to the benefit program area, claims for overpayments may be made for agency error, intentional program violations, or recipient error.

Illinois – Comparable rules for Illinois are in 89 Ill. Adm. Code 165. The rules allow the Illinois Department of Human Services to initiate actions to recover overpayment of financial assistance and Food Stamps issued to or on behalf of a client. Actions to recoup overpayments are initiated whether or not a client is currently eligible for financial assistance or Food Stamps. The rules set forth the criteria for determining overpayments; how to establish, terminate, and suspend claims for overpayments; and acceptable forms of payment, including benefit reduction.

Summary of factual data and analytical methodologies:

The proposed rules concern the administration of state program benefits. The proposed rules do not directly affect small businesses, as defined under s. 227.114 (1), Stats. Accordingly, the Department is exempt from performing an analysis of the affect on small businesses by operation of s. 227.114 (8) (b), Stats.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:

The proposed rules concern the administration of state program benefits. The proposed rules do not directly affect small businesses, as defined under s. 227.114 (1), Stats. Accordingly, the Department is exempt from performing an analysis of the affect on small businesses by operation of s. 227.114 (8) (b), Stats.

Anticipated costs incurred by private sector:

The proposed rules concern the administration of state program benefits. The proposed rules do not directly affect small businesses, as defined under s. 227.114 (1), Stats. Accordingly, the Department is exempt from performing an analysis of the affect on small businesses by operation of s. 227.114 (8) (b), Stats.

Effect on small business:

The proposed rules concern the administration of state program benefits. The proposed rules do not directly affect small businesses, defined under s. 227.114 (1), Stats. Accordingly, the

Department is exempt from performing an analysis of the affect on small businesses by operation of s. 227.114 (8) (b), Stats.

Agency contact person:

Don Warnke
Department of Health and Family Services
P.O. Box 7850
Madison, WI 53707-7850
608-266-5869
warndn@dhfs.state.wi.us

Place where comments are to be submitted and deadline for submission:

The comment period for the proposed rules is closed.

Rule Text:

SECTION 1. HFS 2 is created to read:

Chapter HFS 2

Recoupment of Benefit Overpayments

- HFS 2.01 Authority and purpose.**
- HFS 2.02 Applicability.**
- HFS 2.03 Definitions.**
- HFS 2.04 Recovery of incorrectly paid benefits.**
- HFS 2.05 Waiver of recovery.**
- HFS 2.06 Appeal rights.**

HFS 2.01 Authority and purpose. This chapter is promulgated under ss. 48.57 (3m) (h) and (3n) (h), 48.62 (6), 48.975 (4m), 49.847 and 227.11 (2) (a), Stats., to establish procedures for the recovery of incorrectly paid benefits. This chapter interprets ss. 16.51 (4), 48.57 (3m) and (3n), 48.62, 48.975, 49.847, and 49.85, Stats., and other statutes concerning benefits programs.

HFS 2.02 Applicability. This chapter does not apply to any of the following:

- (1) Payments that are not allowed to be recouped under federal or state laws.
- (2) Persons or entities with whom the department or a county has a contractual relationship where the contract specifies the terms of repayments.

HFS 2.03 Definitions. In this chapter:

(1) "Administrative costs" means an entity's costs associated with administering the receipt of benefits paid on behalf of an eligible individual and for which a contract between the department or a county and the entity exists specifying the payment of funds to administer the benefit payments on behalf of eligible individuals.

(2) "Department" means the department of health and family services.

(3) "Benefits" means payments made under chs. 48 and 49, Stats., or other benefit programs that provide financial assistance to individuals. Benefits include payments made to a person or entity authorized to receive benefits on behalf of an individual.

(4) "Eligible individual" means an individual for whom benefits are paid.

(5) "Incorrectly paid benefits" means benefits paid for an individual not eligible for any benefits during the period for which the payment was made or paid in an amount in excess of the amount that the individual was eligible to receive.

HFS 2.04 Recovery of incorrectly paid benefits. (1) Subject to applicable law, if the department, a county or an elected governing body of a federally recognized American Indian tribe finds that incorrectly paid benefits under chs. 48 or 49, Stats., have been made, the department, county or elected governing body may seek recovery from the eligible individual or from the person or entity authorized to receive benefits on behalf of the eligible individual or from both. The total amount recovered may not exceed the amount of the incorrectly paid benefits, and shall be offset by any amounts that are owed the eligible individual or the person or entity authorized to receive benefits on behalf of the eligible individual because of a previous underpayment of benefits.

(2) If payments for administrative costs are made in addition to the benefits paid to a person or entity authorized to receive benefits on behalf of an eligible individual, recovery of the administrative costs associated with the incorrectly paid benefits may also be sought from the person or entity.

(3) Except as provided under s. HFS 2.05, recovery of incorrectly paid benefits from an individual currently eligible to receive benefits may be made by reducing the amount of the individual's benefits by no more than 10% each month until the full amount of the incorrectly paid benefits is recovered, unless the individual requests a larger percentage deduction. A written notice of intent to recover shall be provided to the individual as required under sub. (6).

(4) (a) Except as provided under s. HFS 2.05, recovery of incorrectly paid benefits from an individual who is no longer eligible to receive benefits may be made by sending a notice of intent to recover under sub. (6) requesting the individual to voluntarily repay the amount of the incorrectly paid benefits.

(b) 1. The individual shall repay the amount specified under par. (a) within 30 calendar days after the date of the notice of intent to recover. Notice of intent to recover shall be sent by certified mail.

2. If the individual refuses to voluntarily repay the amount specified under par. (a), collection or court action may be taken.

(5) (a) *Recovery of benefits paid to entities that currently receive benefits on behalf of eligible individuals.* If the incorrectly paid benefits were paid to an entity that currently receives benefits on behalf of eligible individuals, the amount of the incorrectly paid benefits, and associated administrative costs, may be recovered by reducing the amount of the payments currently made to the entity by no more than 10% each month until the full amount of incorrectly paid benefits and associated administrative costs are recovered, unless the entity requests a larger percentage deduction.

(b) *Recovery of benefits paid to entities that no longer receive benefits on behalf of eligible individuals.* If the entity no longer receives benefits on behalf of eligible individuals, the procedures under sub. (4) may be used to recover the incorrectly paid benefits and associated administrative costs.

(c) *Notice.* The entity shall be provided written notice of intent to recover under sub. (6), including the entity's right to appeal under ch. HA 1 and ch. 227, Stats.

(6) Except as provided under s. HFS 2.05, no recovery may be made unless at least 20 days prior written notice of the intention to recover some or all of the amount determined to have been overpaid. The notice shall specify all of the following:

(a) The months for which benefits were incorrectly paid.

(b) The amount of the intended recovery.

(c) The amount, if any, by which the amount owed was offset by any applicable previous underpayments of benefits to the individual or entity.

(d) A summary of the basis for the finding that incorrectly paid benefits were made.

(e) The effective date of the intended action.

(f) The right to appeal the intended action as provided in chs. HA 3 and 227, Stats.

(7) Other action as authorized by law, including state tax refund setoff, may be used to recover incorrectly paid benefits that are not recovered under the methods provided in this section.

HFS 2.05 Waiver of recovery. Recovery of incorrectly paid benefits may be waived when the amount to be recovered is less than \$100.

HFS 2.06 Appeal rights. (1) ADMINISTRATIVE REVIEW. An action taken under s. HFS 2.04 (1) or (2) is subject to review under ch. 227, Stats., and ch. HA 3.

(2) REQUEST FOR HEARING ON RECOVERY ACTION. (a) If an individual or entity chooses to contest a proposed recovery under s. HFS 2.04, the individual or entity shall, within 45 calendar days after receipt of the notice of intent to recover, submit a written request for a hearing on the matter to the department of administration's division of hearings and appeals. The request shall briefly identify the basis for contesting the proposed recovery. The date of service of a recipient's request for a hearing shall be the date on which the department of administration's division of hearings and appeals receives the request. A request by facsimile is complete upon transmission. If the request is filed by facsimile transmission and such transmission is completed between 5 P.M. and midnight, one day shall be added to the prescribed period. If the hearing request is filed prior to the effective date of the proposed recovery, the Division shall order the action be stayed and benefits unchanged pending the hearing decision.

Note: A hearing request should be addressed to the Division of Hearings and Appeals, P. O. Box 7875, Madison, WI 53707. Hearing requests may be delivered in person to that office at 5005 University Avenue, Room 201, Madison, WI. Hearing requests may be faxed to 608-264-9885.

(b) If a timely request for hearing is not received, the amounts as specified under s. HFS 2.04 (1) or (2) may be recovered.

(3) HEARINGS. The division of hearings and appeals shall hold an administrative hearing under ch. HA 3.

SECTION 2. EFFECTIVE DATE: This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2) (intro.), Stats.

Wisconsin Department of Health and
Family Services

Dated:

By: _____
Helene Nelson
Secretary

SEAL:



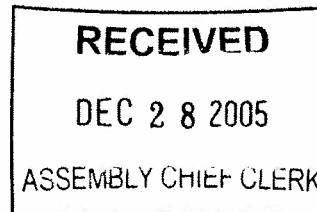


State of Wisconsin
Department of Health and Family Services

Jim Doyle, Governor
Helene Nelson, Secretary

December 23, 2005

Patrick E. Fuller
Assembly Chief Clerk
17 W. Main St., Suite 208
Madison, Wisconsin 53703



Dear Mr. Fuller:

This letter provides a report on the status of hunger prevention strategies in Wisconsin, as required by s.46.76(4) and (5). I am pleased to report that, under the leadership of the Department and the UW-Extension, in 2005 the Wisconsin Food Security Consortium has been re-activated and once again begun meeting on a monthly basis to develop a coordinated approach to address the problems of hunger and food insecurity in Wisconsin. The Consortium is a partnership of government, business, community and university representatives who serve in an advisory capacity to DHFS. Prior to this year, the Consortium had been inactive since 2002. The Department expects that the expertise of the Consortium will be of great benefit to Wisconsin in devising strategies to deal with the problems of hunger and food insecurity.

The Consortium is guided by the definition of food security proposed by the United States Department of Agriculture (USDA), which defines food security as the ability of an entire population to have physical and economic access to sufficient food to meet its dietary needs for a productive and healthy life. Compared to other states, Wisconsin has a relatively low rate of food insecurity, but the problem is growing. In 1999-2001, 8.4% of the population was food insecure and that number increased to 9% in 2002-04. Food insecurity is clearly linked to income and efforts to improve the income level of Wisconsin citizens will benefit the state in many ways. However, the extent of food insecurity is the result of many factors besides income levels. The reduction of hunger in Wisconsin requires a cooperative partnership of federal, state, community, business, university, and individual resources.

Recognizing that creating food secure communities for people in Wisconsin goes beyond providing access to emergency food through food pantries, the Consortium is seeking to establish ways to increase access to food through normal channels. This undertaking involves the coordination and best use of existing resources, including federal food programs, supplemental food programs, food production and marketing, education and public awareness, community infrastructure, economic and job security, and research and evaluation.

In the coming year the Consortium will focus on developing a state plan to combat hunger and food insecurity in Wisconsin. The Consortium is reviewing plans completed

Wisconsin.gov

December 23, 2005

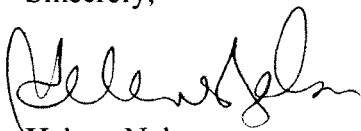
Page 2

by other states and will be examining programs that have worked in Wisconsin and in other areas of the country. One of the tasks which the Consortium has undertaken is to improve the coordination of services among the different parties that have an interest in reducing food insecurity in Wisconsin.

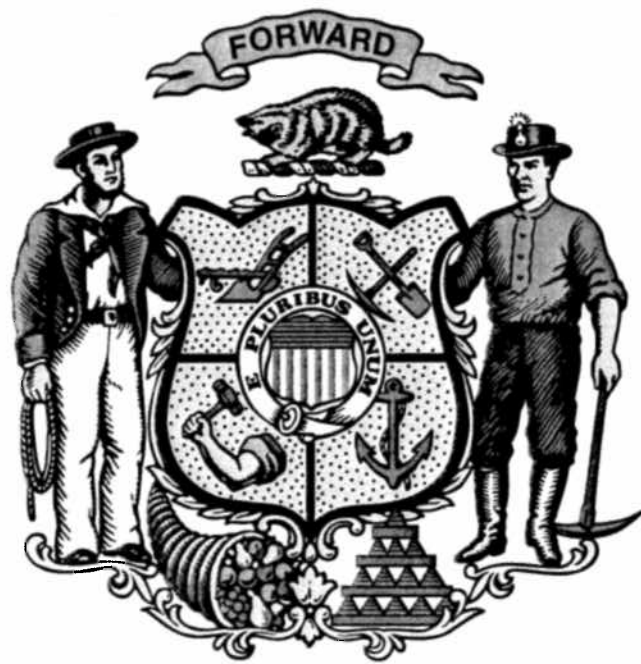
The Consortium is also working to increase participation by local communities. There are approximately 30 local Hunger Prevention Task Forces. The Consortium needs participation from local communities to be successful and it is pursuing ways that information can be shared between the Consortium and local organizations. Among other activities, the Consortium will be exploring ways to increase outreach regarding hunger prevention programs so that all Wisconsin residents are aware of what is available to them.

The Department, with the assistance of the Food Security Consortium, will continue to work with our partners in the public and private sector to develop strategies on this critical issue of improving food security in Wisconsin.

Sincerely,

A handwritten signature in cursive script, appearing to read "Helene Nelson".

Helene Nelson
Secretary



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TO: Representative Steve Kestell
Chairman, Assembly Committee on Children and Families

FROM: Bob Andersen 

RE: Clearinghouse Rule 03-085, relating to recoupment of overpayments of public assistance programs administered by DHFS

DATE: January 6, 2006

Legal Action of Wisconsin, Inc. (LAW) is a nonprofit organization funded by the federal Legal Services Corporation, Inc., to provide legal services for low income people in 39 counties in Wisconsin. LAW provides representation for low income people across a territory that extends from the very populous southeastern corner of the state up through Brown County in the east and La Crosse County in the west. Public benefits law is one of the three major priority areas of law for our delivery of legal services (the other two are family law and housing). As a result, our organization has been extensively involved in W-2 and other public benefits issues over the years.

We respectfully request that you consider scheduling a hearing on this proposed administrative rule for the following reasons. We have also submitted this same memo to Sen. Carol Roessler, asking that she consider scheduling a hearing on this, as well, for her committee. Thank you for your consideration.

CR 03-085 is the latest chapter in a battle that has taken place over the past several years – principally over the recoupment of overpayments of SSI.

- ***The Joint Committee for Review of Administrative Rules initially sided with us in opposing the approval of an emergency rule to do what this rule tries to do – on a bipartisan vote. In fact, JCRAR instructed DHFS to incorporate our concerns into their proposed rule, but DHFS ignored us and the committee (See attached letter from JCRAR, dated February 28, 2001).***

Instead, DHFS slipped the “permanent rule” through the standing committees, which had no notice of JCRAR’s actions. Now, the department seeks to codify the same rule to apply not only to SSI, but to kinship care, adoption assistance, foster care, and subsidized guardianship.



GREEN BAY – Brown, Calumet, Door, Kewaunee, Manitowoc and Outagamie Counties Phone (920) 432-4645 Toll-free (800) 236-1127 Fax (920) 432-5078

LA CROSSE – Buffalo, Crawford, Grant, Jackson, Juneau, La Crosse, Monroe, Richland, Trempealeau and Vernon Counties Phone (608) 785-2809 Toll-free (800) 873-0927 Fax (608) 782-0800

MIGRANT PROJECT – Statewide Phone (608) 256-3304 Toll-free (800) 362-3904 Fax (608) 256-0510

MILWAUKEE – Milwaukee and Waukesha Counties Phone (414) 278-7722 Toll-free (888) 278-0633 Fax (414) 278-7126

OSHKOSH – Adams, Fond du Lac, Green Lake, Marquette, Ozaukee, Sheboygan, Washington, Waushara and Winnebago Counties Phone (920) 233-6521 Toll-free (800) 236-1128 Fax (920) 233-0307

RACINE – Kenosha, Racine and Walworth Counties Phone (262) 635-8836 Toll-free (800) 242-5840 Fax (262) 635-8838

CR 03-085 was given a hearing by the agency a couple of years ago, but has languished in the department, because of agency fears that the agency had no statutory authority to adopt this rule – as we have argued. Now statutory authority was created by the recently enacted budget bill.

- ***While there are several problems with this proposed rule, at a minimum we would like the rule to have two provisions for the benefit of desperate low income people: (1) a waiver of the overpayment where recoupment would cause hardship, and (2) a provision that recoupment may not be had where it was the agency's error – or at least limiting liability to the year previous to the discovery of the error by the administrative agency.***

As you know, recoupment means that the bare subsistence payment that a person receives is to be reduced. The rule proposes to limit that recoupment to 10%. For people who are receiving SSI Caretaker Supplement, SSI-E home care, the SSI State Supplement, and Kinship Care, people are living on fixed budgets that are difficult to meet even when they receive the full amounts they are entitled to – especially during these times of high energy costs. People who are receiving Adoption Assistance, Foster Care, or Subsidized Guardianship payments similarly face difficult times.

We are not saying that recoupment should not be had, where the person caused the overpayment on his or her own. But where there was a computer error or the like, otherwise innocent and ill informed people should not be punished. **Under the proposed rule, not only are these people punished, but for some inexplicable reason, they are entitled to less notice of recoupment than anyone else!** See HFS 2.04 (6)(b). **And where recoupment would cause a hardship, there should be a provision for waiver, as there is under federal law for SSI, for example.** The proposed rule includes a waiver for any overpayment under \$100 – that is more for the convenience of the agency than it is for the benefit of a poor person.

- ***Under federal and state law, there are protections for recipients where there has been administrative error. Under federal regulations (see at bottom of this memo), SSI overpayments may not be recouped where the individual was not at fault. The contradiction will occur then, that, where there is agency error, a person's SSI payment may not be recouped (under federal law), but that person's State Supplement, or a person's Caretaker Supplement or SSI-E can be the subject of recoupment! Similarly, under state law, overpayments of W-2 or child care cannot be recouped for any time previous to the year before the agency error was discovered. Under federal law Food Stamp overpayments may not be recouped for overpayments due to agency error for the period before the last 12 months.***

Similarly, under federal law governing recoupment of SSI overpayments, federal law does not permit recovery of overpayments where that would violate "equity and good conscience." We would like Wisconsin's law to have at least an exception for "hardship."

This is a rough outline of our concerns with this proposed rule. There are many other questions

that may be asked about other particular provisions contained in this rule, which has such sweeping effect over so many important programs – foster care, adoption assistance, subsidized guardianship. We wanted to get at least these concerns to you as quickly as possible, as the time for scheduling a hearing is running out. There are very likely to be some serious questions raised about what this proposal does to these other valuable programs.

The federal regulations that apply to SSI are as follows:

§416.550 Waiver of adjustment or recovery--when applicable.

Waiver of adjustment or recovery of an overpayment of SSI benefits may be granted when (EXCEPTION: This section does not apply to a sponsor of an alien):

- (a) The overpaid individual was without fault in connection with an overpayment, and
- (b) Adjustment or recovery of such overpayment would either:
 - (1) Defeat the purpose of title XVI, or
 - (2) Be against equity and good conscience, or
 - (3) Impede efficient or effective administration of title XVI due to the small amount involved.

[52 FR 8882, Mar. 20, 1987, as amended at 53 FR 16543, May 10, 1988]

§416.552 Waiver of adjustment or recovery--without fault.

Without fault relates only to the situation of the individual seeking relief from adjustment or recovery of an overpayment. The overpaid individual (and any other individual from whom the Social Security Administration seeks to recover the overpayment) is not relieved of liability and is not *without fault* solely because the Social Security Administration may have been at fault in making the overpayment. In determining whether an individual is without fault, the *fault* of the overpaid person and the *fault* of the individual seeking relief under the waiver provision are considered. Whether an individual is *without fault* depends on all the pertinent circumstances surrounding the overpayment in the particular case. The Social Security Administration considers the individual's understanding of the reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements, understanding of the obligation to return checks which were not due, and ability to comply with the reporting requirements (e.g., age, comprehension, memory, physical and mental condition). In determining whether an individual is without fault based on a consideration of these factors, the Social Security Administration will take into account any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) the individual may have. Although the finding depends on all of the circumstances in the particular case, an individual will be found to have been at fault in connection with an overpayment when an incorrect payment resulted from one of the following:

- (a) Failure to furnish information which the individual knew or should have known was material;

(b) An incorrect statement made by the individual which he knew or should have known was incorrect (this includes the individual's furnishing his opinion or conclusion when he was asked for facts), or

© The individual did not return a payment which he knew or could have been expected to know was incorrect.

[40 FR 47763, Oct. 10, 1975, as amended at 59 FR 1636, Jan. 12, 1994]

§416.553 Waiver of adjustment or recovery--defeat the purpose of the supplemental security income program.

We will waive adjustment or recovery of an overpayment when an individual on whose behalf waiver is being considered is without fault (as defined in §416.552) and adjustment or recovery of the overpayment would defeat the purpose of the supplemental security income program.

(a) *General rule.* We consider adjustment or recovery of an overpayment to defeat the purpose of the supplemental security income (SSI) program if the individual's income and resources are needed for ordinary and necessary living expenses under the criteria set out in §404.508(a) of this chapter

(b) *Alternative criteria for individuals currently eligible for SSI benefits.* We consider an individual or couple currently eligible for SSI benefits to have met the test in paragraph (a) of this section if the individual's or couple's current monthly income (that is, the income upon which the individual's or couple's eligibility for the current month is determined) does not exceed--

(1) The applicable Federal monthly benefit rate for the month in which the determination of waiver is made (see subpart D of this part); plus

(2) The \$20 monthly general income exclusion described in §§416.1112(c)(3) and 416.1124(c)(10); plus

(3) The monthly earned income exclusion described in §416.1112(c)(4); plus

(4) The applicable State supplementary payment, if any (see subpart T of this part) for the month in which determination of waiver is made.

For those SSI recipients whose income exceeds these criteria, we follow the general rule in paragraph (a) of this section.

[45 FR 72649, Nov. 3, 1980, as amended at 50 FR 48573, Nov. 26, 1985]

§416.554 Waiver of adjustment or recovery--against equity and good conscience.

We will waive adjustment or recovery of an overpayment when an individual on whose behalf waiver is being considered is without fault (as defined in §416.552) and adjustment or recovery would be *against equity and good conscience*. Adjustment or recovery is considered to be *against equity and good conscience* if an individual changed his or her position for the worse or relinquished a valuable right because of reliance upon a notice that payment would be made or because of the incorrect payment itself. In addition, adjustment or recovery is considered to be *against equity and good conscience* for an individual who is a member of an eligible couple that

is legally separated and/or living apart for that part of an overpayment not received, but subject to recovery under §416.570.

Example 1: Upon being notified that he was eligible for supplemental security income payments, an individual signed a lease on an apartment renting for \$15 a month more than the room he had previously occupied. It was subsequently found that eligibility for the payment should not have been established. In such a case, recovery would be considered "against equity and good conscience."

Example 2: An individual fails to take advantage of a private or organization charity, relying instead on the award of supplemental security income payments to support himself. It was subsequently found that the money was improperly paid. Recovery would be considered "against equity and good conscience."

Example 3: Mr. and Mrs. Smith--members of an eligible couple--separate in July. Later in July, Mr. Smith receives earned income resulting in an overpayment to both. Mrs. Smith is found to be without fault in causing the overpayment. Recovery from Mrs. Smith of Mr. Smith's part of the couple's overpayment is waived as being *against equity and good conscience*. Whether recovery of Mr. Smith's portion of the couple's overpayment can be waived will be evaluated separately. [60 FR 16375, Mar. 30, 1995]

SENATOR JUDITH B. ROBSON
CO-CHAIR
PO BOX 7882
MADISON, WI 53707-7882
(608) 266-2253



REPRESENTATIVE GLENN GROTHMAN
CO-CHAIR
PO BOX 8952
MADISON, WI 53708-8952
(608) 264-8486

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.

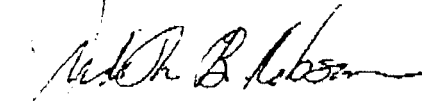
On behalf of the committee members who refused to extend the emergency rule, I respectfully request that you consider fully the committee's refusal to extend emergency rule HFS 79 before promulgating Clearinghouse Rule 00-150, the permanent rule that has language identical to the emergency rule.

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

Record of Committee Proceedings

Joint Committee for Review of Administrative Rules

Emergency Rule 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.

January 24, 2001

PUBLIC HEARING HELD

Present: (9) Senators Robson, Hansen, Schultz, Cowles,
Representatives Grothman, Seratti, Gunderson,
Kreuser and Turner.

Absent: (1) Senator Grobschmidt.

Appearances for

- Larry Hartzke, Dept of Health and Family Services
- John Kiesow, Dept of Health and Family Services
- Sue Dow, Dept of Health and Family Services
- Kathy Luedtke, Dept of Health and Family Services

Appearances against

- Bob Andersen, WI Council on Children and Families

Appearances for Information Only

- None.

Registrations for

- None.

Registrations against

- None.

January 24, 2001

EXECUTIVE SESSION

Present: (10) Senators Robson, Grobschmidt, Hansen,
Schultz, Cowles, Representatives Grothman,
Seratti, Gunderson, Kreuser and Turner.

Absent: (0) None.

Moved by Representative Seratti, seconded by Representative Grothman, that, pursuant to section 227.24(2)(a), stats., the Joint Committee for the Review of Administrative Rules extend the effective period of emergency rule HFS 79 by 15 days.

Ayes: (10) Senators Robson, Grobschmidt, Hansen,
Schultz, Cowles, Representatives Grothman,
Seratti, Gunderson, Kreuser and Turner.

Noes: (0) None.

THAT, PURSUANT TO SECTION 227.24(2)(A), STATS., THE
JOINT COMMITTEE FOR THE REVIEW
OF ADMINISTRATIVE RULES EXTEND
THE EFFECTIVE PERIOD OF
EMERGENCY RULE HFS 79 BY 15
DAYS. RECOMMENDED, Ayes 10, Noes
0

February 20, 2001

PUBLIC HEARING HELD

Present: (9) Senators Robson, Grobschmidt, Hansen,
Schultz, Cowles, Representatives Grothman,
Gunderson, Kreuser and Turner.

Absent: (1) Representative Seratti.

Appearances for

- John Kiesow, Dept of Health and Family Services
- Kathy Luedtke, Dept of Health and Family Services

Appearances against

- Carol Medaris, WI Council on Children and Families
- Bob Andersen, Legal Action of WI

Appearances for Information Only

- None.

Registrations for

- None.

Registrations against

- None.

February 20, 2001

EXECUTIVE SESSION

Present: (9) Senators Robson, Grobschmidt, Hansen,
Schultz, Cowles, Representatives Grothman,
Gunderson, Kreuser and Turner.

Absent: (1) Representative Seratti.

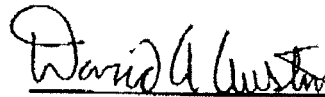
Moved by Representative Grothman, seconded by Representative Kreuser, that, pursuant to section 227.24(2)(a), stats., the Joint Committee for the Review of Administrative Rules extend the effective period of emergency rule HFS 79 by 60 days at the request of the Department of Health and Family Services..

Ayes: (4) Senator Cowles, Representatives Grothman, Gunderson and Kreuser.

Noes: (6) Senators Robson, Grobschmidt, Hansen, Schultz, Representatives Seratti* and Turner.

* voted by polling.

MOTION FAILED



David A. Austin
Committee Clerk



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MEMORANDUM TO: Assembly Committee on Children and Families

FROM: Hal Menéndez, Staff Attorney

DATE: February 16, 2006

RE: Clearinghouse Rule 03-085

My name is Hal Menéndez. I am a staff attorney with Legal Action of Wisconsin, Inc., in Madison. Legal Action of Wisconsin is a non-profit law firm that provides legal assistance to low-income families in 39 counties in the southern half of Wisconsin. Since its inception, LAW has prioritized three areas of law: public benefits law, family law, and housing law. Because we have worked in the field for decades, we are familiar with state and federal public benefit programs and the laws and policies under which these programs operate, including laws, policies and procedures that address overpayments. LAW represented the recipient of state SSI benefits in successfully challenging the DHFS state SSI overpayment recovery policy in Mack v. DHFS in the late 1990's. More recently, LAW represented the plaintiffs who brought an action in Dane County Circuit Court, challenging DWD's practice of establishing and recovering child day care benefit overpayments without having adopted administrative rules, as it was directed to do by statute. That lawsuit eventually resulted in the enactment of an administrative rule on establishing and recovering child day care overpayments.

It's important to keep in mind that overpayments occur for many reasons and are not always the result of the recipient's intentional misstatements or intentional failures to report information. Overpayments may result from the recipient's inability to understand the often complicated program requirements, or from worker errors or omissions in explaining program requirements. They can result from honest mistakes or misunderstandings, including agency errors. Agency error is not limited to computer or processing errors, but can include errors by workers who themselves may not fully understand program requirements, or fail act properly or timely in obtaining or responding to information.

Clearinghouse Rule 03-085 proposes the creation of Ch. HFS 2, Wis. Admin. Code,



GREEN BAY – Brown, Calumet, Door, Kewaunee, Manitowoc and Outagamie Counties Phone (920) 432-4645 Toll-free (800) 236-1127 Fax (920) 432-5078

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MILWAUKEE – Milwaukee and Waukesha Counties Phone (414) 278-7722 Toll-free (888) 278-0633 Fax (414) 278-7126

OSHKOSH – Adams, Fond du Lac, Green Lake, Marquette, Ozaukee, Sheboygan, Washington, Waushara and Winnebago Counties Phone (920) 233-6521 Toll-free (800) 236-1128 Fax (920) 233-0307

RACINE – Kenosha, Racine and Walworth Counties Phone (262) 635-8836 Toll-free (800) 242-5840 Fax (262) 635-8838

authorizing DHFS to recoup certain public benefit overpayments. The recently enacted Budget Bill (Act 25) amended ch. 48 and ch. 49 of Wis. Stats. to authorize the department to recover overpayments of kinship care, foster care and subsidized guardianship payments, and adoption assistance, and includes a general provision authorizing the department to recover overpayments of benefits paid by any program administered by the department, for example, the state SSI supplement.

The rule applies to benefit programs that pay adults other than the birth parents of a minor child to care for that minor child. These are children who for any number of reasons must reside with caretakers other than their birth parents in order to have adequate adult care and supervision. The statutory amendments made by Act 25 authorize the recovery of a kinship care, adoption assistance, foster care or subsidized guardianship overpayment from the adult caretaker to whom an overpayment was made. The new statutory provisions, Wis. Stats. sections 48.57(3m)(h), 48.62(6), 48.975(4m), allow DHFS or a county department to reduce the benefits being paid to an adult caretaker of a child to recover an overpayment previously made to that adult caretaker.

The rule, as written, will lead to unintended and unfair results. For example, the rule would allow the recovery of an overpayment from the child for whom the benefits were paid, as well as any adult caretaker to whom benefits have been or are currently being paid (See, HFS 2.03(3),(4) and HFS 2.04(1)). It also allows the recovery of overpayments made by one benefit program by reducing the benefits paid by another benefit program. Because of the way the rule has been drafted, a foster care overpayment that was made to a prior foster parent for a child may be recovered by reducing the foster care benefits paid to the child's subsequent foster parent, or, if the child is later adopted by someone else, by reducing the adoption assistance paid to the adoptive parents, who had nothing to do with and did not receive the overpayment. If kinship care benefits are overpaid to a disabled child's caretaker relative and the child later returns to his birth parents and qualifies for SSI, the rule would allow the kinship care overpayment to be recovered from the child's state SSI benefits.

It's hard to imagine this is what the legislature intended. As a matter of fairness, the rule should not allow the recovery of overpaid benefits from anyone other than the adult caretaker to whom benefits were actually overpaid. The language of the rule should be changed to more closely follow the statutory amendments and limit liability for an overpayment to the adult caretaker who received the overpayment.

The rule should also mirror other public benefits programs and define agency error, unintentional recipient error, and intentional recipient error, and either prevent or limit recovery in the case of agency error or unintentional client error. For example, the recently adopted child day care overpayment rule limits liability for an overpayment that is the result of an agency error to 12 months from the date the error is discovered.

Where the overpayment is not the fault of the recipient - either agency error or unintentional client error - and recovery would pose a hardship, the overpayment

should be waived. Under federal law, an SSI overpayment is waived if the recipient was not at fault and recovering the overpayment would cause financial hardship. (20 C.F.R. §§ 416.550, et seq.). The department should give serious consideration to adopting this approach to overpayments, and in particular to state SSI supplement overpayments, or simply waive a state SSI overpayment whenever the Social Security Administration waives a corresponding federal SSI overpayment.

Finally, the appeal provisions should be clarified and the notice requirements strengthened. The rule (HFS 2.04(6)) requires a notice at least 20 days before any recovery of the overpayment, and of the right to appeal the intended action, but says nothing about appealing the determination that there has been an overpayment. It's clear that the overpayment determination itself may be appealed, and the notice should expressly state that the overpayment determination itself may be appealed, so that the individual who receives the notice is not left thinking that all he or she may not even question whether there has been an overpayment. In addition, because for many recipients who are struggling to make ends meet, the rule should allow for continuing benefits without reduction pending an appeal.

It is also important that the notice be written in clear and understandable language, in the person's primary language, and explain not only that the overpayment determination or proposed recovery may be appealed, but also state the appeal deadline, include detailed instructions explaining how to appeal, and explain the consequences of failing to appeal.





February 17, 2006

Department of Health and Family Services
Helene Nelson, Secretary
1 West Wilson Street, Room 650
Madison, WI 53707

Dear Helene,

On February 8, 2006, the Senate Committee on Health, Children, Families, Aging and Long Term Care voted 5-0 to request modifications to CR 03-085, relating to department recoupment of program benefit overpayments from program recipients.

The Senate Committee on Health, Children, Families, Aging and Long Term Care requests the Department to notify committee members, in writing, before February 22, 2006 of the Department's **intention** to modify CR 03-085. If the Department refuses to agree to make modifications, the Senate Committee on Health, Children, Families, Aging and Long Term Care objects to CR 03-085.

Thank you for your attention to this issue.

Sincerely,

CAROL ROESSLER
State Senator
18th Senate District





State of Wisconsin
Department of Health and Family Services

Jim Doyle, Governor
Helene Nelson, Secretary

February 17, 2006

The Honorable Carol Roessler
Chairwoman, Senate Committee on Health, Children, Family,
Aging and Long-Term Care
Room 8 South, State Capitol
Madison, WI 53702

Dear Senator Roessler:

Thank you for your letter informing me of the Committee's 5-0 vote requesting the Department to make modifications to CR 03-085, related to department recoupment of program benefit overpayments from program recipients.

As was mentioned by, Ron Hermes, during the public hearing on the rule, the department is willing to consider modifications to CR 03-085.

I look forward to working with you to resolve any outstanding issues related to this rule.

Sincerely,

A handwritten signature in black ink, appearing to read 'Helene Nelson', written over a horizontal line.

Helene Nelson
Secretary

cc: Rep. Steve Kestell
Chairman – Assembly Committee on Children and Families





State of Wisconsin
Department of Health and Family Services

Jim Doyle, Governor
Helene Nelson, Secretary

April 25, 2006

The Honorable Carol Roessler
Chairperson
Senate Committee on Health, Children, Families
Aging and Long-Term Care
Room 8 South, State Capitol
P.O. Box 7882
Madison, WI 53707-7882

The Honorable Steve Kestell
Chairperson
Assembly Committee on Children and Families
Room 17 West, State Capitol
P.O. Box 8952
Madison, WI 53708

Dear Senator Roessler and Representative Kestell:

In response to the Senate's Committee on Health, Children, Families, Aging and Long-Term Care February 8, 2006 request for modifications, the Department is hereby submitting germane modifications to Clearinghouse Rule 03-085, relating to recoupment of program benefit overpayments from program recipients. Clearinghouse Rule 03-085 was submitted by the Department to the legislature on December 23, 2005.

The modifications reflect changes to proposed ss. HFS 2.01, 2.03 (1), 2.04 (1), (2), (4) (b) 1., (5) (a) and (title) and (b), (6), and 2.05. In addition, a new treatment SECTION was created to repeal ch. HFS 79 relating to recoupment of state supplemental security income payments. A copy of the modified language is attached.

Sincerely,

A handwritten signature in black ink, appearing to read 'Helene Nelson'.

Helene Nelson
Secretary

Attachment

**GERMANE MODIFICATION TO
Proposed Chapter HFS 2**

Proposed by the Department of Health and Family Services

(CR 03-085)

HFS 2.01 Authority and purpose. This chapter is promulgated under ss. 48.57 (3m) (h) and (3n) (h), 48.62 (6), 48.975 (4m), 49.847 and 227.11 (2) (a), Stats., to establish procedures for the recovery of incorrectly paid benefits. This chapter interprets ss. 16.51 (4), 48.57 (3m) and (3n), 48.62, 48.975, 49.77, 49.775, 49.847, and 49.85, Stats., and other statutes concerning benefits programs.

2.03 (1) "Administrative costs" means an entity's costs associated with administering the receipt of benefits paid on behalf of an eligible individual and for which a contract between the department ~~or a county,~~ or an elected governing body of a federally recognized American Indian tribe and the entity exists specifying the payment of funds to administer the benefit payments on behalf of eligible individuals.

HFS 2.04 Recovery of incorrectly paid benefits. (1) (a) Subject to applicable law, if the department, a county or an elected governing body of a federally recognized American Indian tribe finds that incorrectly paid benefits under chs. 48 or 49, Stats., have been made, the department, county or elected governing body may seek recovery from the eligible individual or from the person or entity authorized to receive benefits on behalf of the eligible individual or from both. The total amount recovered may not exceed the amount of the incorrectly paid benefits, and shall be offset by any amounts that are owed the eligible individual or the person or entity authorized to receive benefits on behalf of the eligible individual because of a previous underpayment of benefits.

(b) The recovery period for incorrectly paid benefits shall be limited to one year prior to the date that the overpayment is discovered.

(1g) Interest may not be accrued or collected on incorrectly paid benefits.

(1r) Administrative costs may be recouped only from the entity who actually received the incorrectly paid benefits.

(2) If payments for administrative costs are made in addition to the benefits paid to a ~~person or an~~ entity authorized to receive benefits on behalf of an eligible individual, recovery of the administrative costs associated with the incorrectly paid benefits may also be sought from the ~~person or~~ entity.

(4) (b) 1. The individual shall repay the amount specified under par. (a) within 30 calendar days after the date of the notice of intent to recover unless the individual appeals as specified under s. HFS 2.06 (2) or makes other payment arrangements. Notice of intent to recover shall be sent by certified mail.

(5) (a) *Recovery of benefits paid to persons or entities that currently receive benefits on behalf of eligible individuals.* If the incorrectly paid benefits were paid to an a person or entity that currently receives benefits on behalf of eligible individuals, the amount of the incorrectly paid benefits, ~~and associated administrative costs,~~ may be recovered by reducing the amount of the payments currently made to the person or entity by no more than 10% each month until the full amount of incorrectly paid benefits ~~and associated administrative costs~~ are recovered, unless the person or entity requests a larger percentage deduction.

(b) *Recovery of benefits paid to persons or entities that no longer receive benefits on behalf of eligible individuals.* If ~~the a person or~~ a person or entity no longer receives benefits on behalf of eligible individuals, the procedures under sub. (4) may be used to recover the incorrectly paid benefits ~~and associated administrative costs.~~

(6) (a) Except as provided under s. HFS 2.05, no recovery may be made unless at least 20 days prior written notice of the intention to recover some or all of the amount determined to have been overpaid. The notice shall specify all of the following:

~~(a)~~1. The months for which benefits were incorrectly paid.

~~(b)~~2. The amount of the intended recovery.

~~(c)~~3. The amount, if any, by which the amount owed was offset by any applicable previous underpayments of benefits to the individual or entity.

~~(d)~~4. A summary of the basis for the finding that incorrectly paid benefits were made.

~~(e)~~5. The effective date of the intended action.

~~(f)~~6. The right to appeal the intended action as provided in chs. HA 3 and 227, Stats.

(b) The notice under par. (a) shall also include notice of a right to appeal the incorrectly paid benefit determination if a right to appeal that determination was not previously provided.

HFS 2.05 Waiver of recovery. ~~Recovery of incorrectly paid benefits may be waived when the amount to be recovered is less than \$100~~ Recovery of incorrectly paid benefits may be waived when the recovery of the overpayment is considered to be against equity or when it causes undue hardship, or the recovery impedes efficient and effective administration of programs due to the small amount involved or the age of the account.

SECTION 2. Chapter HFS 79 is repealed.

SECTION 23. EFFECTIVE DATE: This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2) (intro.), Stats.