



2005 ASSEMBLY BILL 540

July 7, 2005 – Introduced by JOINT LEGISLATIVE COUNCIL. Referred to Committee on Health.

1 **AN ACT** *to amend* 46.27 (11) (b), 46.277 (2) (intro.), 46.278 (2) (a) and 48.185 (1);
2 *to repeal and recreate* 46.275 (4) (b) 1.; and *to create* 48.14 (12) of the
3 statutes; **relating to:** consent by a person’s legal representative for
4 participation by the person in a medical assistance waiver program.

Analysis by the Legislative Reference Bureau

This bill is explained in the NOTES provided by the Joint Legislative Council in the bill.

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

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

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE:

Legal Representative in Medical Assistance Waiver Programs

Current law creates the following medical assistance (MA) waiver programs: s. 46.27 (11), the long-term support community options waiver program; s. 46.275, the community integration program for residents of state centers for the developmentally disabled, also known as the “CIP IA” program; s. 46.277, the community integration program for persons relocated or meeting reimbursable levels of care; and s. 46.278, the community integration program and brain injury waiver program for persons with

ASSEMBLY BILL 540

developmental disabilities, also known as the “CIP IB” program. The department of health and family services (DHFS) is required, pursuant to 42 CFR 441.302 (d), in its waiver application to the federal department of health and human services, to provide assurances that persons served under these waiver programs are given the choice of either institutional or community-based services. If the individual cannot make that choice, it must be made by the person’s legal representative. The legal representative is designated in accordance with the laws of the state that is granted the waiver.

Under current law, a guardian must be appointed for an individual who is protectively placed. Although the guardian has authority to make many legal decisions on behalf of the ward, under Wisconsin law the guardian may not make a decision to permanently place a ward in a state center for the developmentally disabled. Under s. 55.06 (9) (a), the circuit court that conducts the hearing on the protective placement decision must make the determination regarding where the ward is placed.

Currently, one of the waiver statutes, s. 46.275 (4) (b) 1., provides that consent for participation in the CIP IA program must be given by the person or the person’s guardian, if the person is age 18 or over. That statute also provides, however, that this provision does not limit the authority of the circuit court to order a placement under s. 55.06.

This bill clarifies that, pursuant to 42 CFR 441.302 (d), the person or his or her legal representative must be informed of the alternatives available under the waiver and given a choice whether to participate in the waiver program. For persons over age 18, the legal representative may be the person, the person’s guardian or activated power of attorney for health care, or a court. For persons under age 18, the legal representative may be the person’s parent, guardian, legal custodian, or a court. If the person is under guardianship and protective placement but the legal representative does not consent to participation, a petition is filed with the court, which makes the determination as to whether the person should participate in the waiver program. The determination to participate is made under ch. 55 by the court that ordered protective placement.

1 **SECTION 1.** 46.27 (11) (b) of the statutes is amended to read:

2 46.27 (11) (b) The department shall include all assurances required under 42
3 USC 1396n (c) in the implementation of the waiver, including ensuring pursuant to
4 42 CFR 441.302 (d), that the person or his or her legal representative is informed of
5 the alternatives available under the waiver program and is given a choice whether
6 or not to participate in the waiver program. If the person is a minor, the legal
7 representative may be the minor’s parent, guardian, legal custodian, or the court,
8 except that, if the minor’s legal representative does not consent to participation, the
9 department shall file a petition with the court assigned to exercise jurisdiction under
10 ch. 48 for a hearing on the best interests of the minor and an order requiring
11 participation. If the person is aged 18 or older, the legal representative may be the
12 person’s guardian, the agent under the person’s activated power of attorney for

ASSEMBLY BILL 540

1 health care, if any, or the court. If the person, regardless of age, is under
2 guardianship and subject to protective placement under ch. 55 but the legal
3 representative does not consent to participation, the determination to participate in
4 the program shall be made under ch. 55 by the court that ordered protective
5 placement.

NOTE: Specifies, for the community options MA waiver program, that one of the assurances that must be provided by the DHFS in the waiver is that the recipient or his or her legal representative must be informed of the alternatives under the waiver and given the choice as to whether to participate. Also, describes who may act as a legal representative.

6 **SECTION 2.** 46.275 (4) (b) 1. of the statutes is repealed and recreated to read:
7 46.275 (4) (b) 1. Pursuant to 42 CFR 441.302 (d), that the person or his or her
8 guardian is informed of the alternatives available under the waiver program and is
9 given a choice whether or not to participate in the waiver program. If the guardian
10 does not consent to participation, the determination to participate in the program
11 shall be made under ch. 55 by the court that ordered protective placement.

NOTE: Specifies, for the community integration program for residents of state centers, that one of the assurances that must be provided by the DHFS in the waiver is that the recipient or his or her legal representative must be informed of the alternatives under the waiver and given the choice as to whether to participate. Also, describes who may act as a legal representative.

12 **SECTION 3.** 46.277 (2) (intro.) of the statutes is amended to read:
13 46.277 (2) DEPARTMENTAL POWERS AND DUTIES. (intro.) The department may
14 request a waiver from the secretary of the federal department of health and human
15 services, under 42 USC 1396n (c), authorizing the department to serve medical
16 assistance recipients, who meet the level of care requirements for medical assistance
17 reimbursement in a skilled nursing facility or an intermediate care facility, in their
18 communities by providing home or community-based services as part of medical
19 assistance. The number of persons for whom the waiver is requested may not exceed
20 the number of nursing home beds that are delicensed as part of a plan submitted by

ASSEMBLY BILL 540**SECTION 3**

1 the facility and approved by the department. If the department requests a waiver,
2 it shall include all assurances required under 42 USC 1396n (c) (2) in its request,
3 including ensuring, pursuant to 42 CFR 441.302 (d), that the person or his or her
4 legal representative is informed of the alternatives available under the waiver
5 program and is given a choice whether or not to participate in the waiver program.
6 If the person is a minor, the legal representative may be the minor's parent,
7 guardian, legal custodian, or the court, except that, if the minor's legal
8 representative does not consent to participation, the department shall file a petition
9 with the court assigned to exercise jurisdiction under ch. 48 for a hearing on the best
10 interests of the minor and an order requiring participation. If the person is aged 18
11 or older, the legal representative may be the person's guardian, the agent under the
12 person's activated power of attorney for health care, if any, or the court. If the person,
13 regardless of age, is under guardianship and subject to protective placement under
14 ch. 55 but the legal representative does not consent to participation, the
15 determination to participate in the program shall be made under ch. 55 by the court
16 that ordered protective placement. If the department receives this waiver, it may
17 request one or more 3-year extensions of the waiver under 42 USC 1396n (c) and
18 shall perform the following duties:

NOTE: Specifies, for the community integration program for persons meeting reimbursable levels of care, that one of the assurances that must be provided by the DHFS in the waiver is that the recipient or his or her legal representative must be informed of the alternatives under the waiver and given the choice as to whether to participate. Also, describes who may act as a legal representative.

19 **SECTION 4.** 46.278 (2) (a) of the statutes is amended to read:

20 46.278 (2) (a) The department may request one or more waivers from the
21 secretary of the federal department of health and human services, under 42 USC
22 1396n (c), authorizing the department to serve medical assistance recipients, who

ASSEMBLY BILL 540

1 meet the level of care requirements for medical assistance reimbursement in an
2 intermediate care facility for the mentally retarded or in a brain injury rehabilitation
3 facility, in their communities by providing home or community-based services as
4 part of medical assistance. If the department requests a waiver, it shall include all
5 assurances required under 42 USC 1396n (c) (2) in its request, including ensuring,
6 pursuant to 42 CFR 441.302 (d), that the person or his or her legal representative is
7 informed of the alternatives available under the wavier program and is given a
8 choice whether or not to participate in the waiver program. If the person is a minor,
9 the legal representative may be the minor's parent, guardian, legal custodian, or the
10 court, except that, if the minor's legal representative does not consent to
11 participation, the department shall file a petition with the court assigned to exercise
12 jurisdiction under ch. 48 for a hearing on the best interests of the minor and an order
13 requiring participation. If the person is aged 18 or older, the legal representative
14 may be the person's guardian, the agent under the person's activated power of
15 attorney for health care if any, or the court. If the person, regardless of age, is under
16 guardianship and subject to protective placement under ch. 55 but the legal
17 representative does not consent to participation, the determination to participate in
18 the program shall be made under ch. 55 by the court that ordered protective
19 placement.

NOTE: Specifies, for the community integration program and brain injury waiver program for persons with developmental disabilities, that one of the assurances that must be provided by the DHFS in the waiver is that the recipient or his or her legal representative must be informed of the alternatives under the waiver and given the choice as to whether to participate. Also, describes who may act as a legal representative.

20 **SECTION 5.** 48.14 (12) of the statutes is created to read:

21 48.14 (12) Proceedings under ss. 46.27 (11) (b), 46.277 (2) (intro.), and 46.278
22 (2) (a).

