Connecticut Bar Association

30 Bank Street
PO Box 350
New Britain
CT 06050-0350
06051 for 30 Bank Street

P: (860) 223-4400
F: (860) 223-4488

Testimony of
Elder Law Section
Connecticut Bar Association

In Opposition to
Governor's Bill 1013, Section 40

Human Services Committee
March 15, 2011

Good morning, members of the Human Services Committee. I am Whitney M. Lewendon, a member of the Connecticut Bar Association Elder Law Section. I am testifying on behalf of the Section in opposition to a proposal in the Governor's budget bill, 1013, Section 40, concerning a dramatic and drastic change in a Medicaid eligibility rule. This proposed change could be the single most significant development to adversely affect vulnerable senior citizens and younger disabled individuals who need access to critical health care that I have seen in my more than 37 years of experience working with the Connecticut Medicaid program.

The proposal found at Section 40 of the Governor's bill to change the transfer of asset rule suffers from fatal legal defects that are similar or nearly identical to a rule that was found illegal by Connecticut's federal district court in 1976. It is, however, in many ways much worse than the rule in the 1970s. This new proposal is a significant, ill-advised shift in public policy that will have consequences which will drain funds from our long term care system.

I will begin with the public policy issue. The proposal before you in Section 40 concerns the Medicaid transfer of asset policy. Paragraph (d) of Section 40 prohibits the reduction of a penalty resulting from a transfer of asset even if there is a partial return of the gifted funds. The new proposal provides that there will be no reduction whatsoever in the length of the penalty period unless all the funds that were previously given away are returned. Moreover, it requires that each person who received those initial gifts returns every gift before the penalty is reduced.

This is a complete reversal in the existing practice followed in Connecticut for decades and also in place in all of our neighboring states in New England, as authorized by federal Medicaid law. The practice in effect right now recognizes that when a transfer of an asset creates a penalty which results in a denial of Medicaid benefits, the length of the penalty will be shortened if some funds are returned.

I. Connecticut's Current Practice Complies With Federal Law.

This reduction in the penalty is authorized and approved in the federal legal authority governing the Medicaid program, found specifically in the State Medicaid Manual written by the federal agency which oversees the administration of the Medicaid program, the Centers for Medicare and Medicaid Services ("CMS"). It is also the rule followed in the federal SSI program that provides financial support to low income seniors and younger disabled individuals.

The reasoning underlying the so-called "partial return" rule is simple: if there has been a gift that results in a penalty, the person who has made the gift may be subject to a penalty, but the length of the penalty should be based only on the actual amount of the assets that the person no longer has.

When assets are returned, the amount of the gift is reduced and the length of the penalty is accordingly shortened.

Here is an example to help illustrate how the "partial return" rule has been applied in Connecticut and all of our neighboring states in the past. Assume that a widowed mother decided to make gifts to her two children approximately two years ago, each child receiving $10,000. The motives for the gifts were different. One of the children had lost work, could not keep up rental payments and health insurance premiums and was faced with eviction and loss of health insurance. The $10,000 gift helped that individual through that period of unemployment.

The second child who received the $10,000 gift had two children eventually headed for college and the $10,000 gift was intended to create a fund to help with their tuition.

If that same widowed mother now is in need of long term care services and applies for Medicaid benefits, she will be denied Medicaid because of those gifts two years ago. The length of the penalty would be approximately two months.

Under our current Medicaid rules, family members can return some of the funds they received and thereby shorten the penalty period in such cases. The second child who now has two children in college is able to return the gift to his widowed mother. The first child, however, has spent the funds, has continued to struggle to meet basic expenses and is not able to replace the funds that his widowed mother had given him.

The partial return by the second son of the college funds reduces the length of the penalty period from two months to one month under our existing rule. This makes sense because the actual net gift is only the $10,000 that was not returned, not the $20,000 given away initially.

II. The "Full Return" Rule Will Reduce Private Funds for Long Term Care.

The proposed change to a "full return" rule eliminates any incentive this family has to replace the funds that they had received from their widowed mother. If, for instance, only the second son who received college funds can return those college funds, then the "full return" rule means that the penalty is not shortened at all by the amount of the returned funds.

None of our neighboring states have adopted the "full return" rule which Connecticut is proposing. Indeed, at best, it appears that only a small handful of states nationwide follow the "full return" rule.

Let me emphasize that federal law authorizes States to follow a "partial return" rule, so that the length of a penalty is reduced by the amount of the gifts returned, even when the returned funds are only part of the initial gift.

Why should our Connecticut seniors be treated differently than their counterparts in any of our neighboring states, or in fact in most of the states of this country? The "full return" rule is simply a bad idea.

III. The "Full Return" Rule As Proposed in the Governor's Bill Does Not Comply With Federal Law.

But it's not just a bad idea. Other parts of this proposal are also contrary to federal law. As the members of the Committee know full well, in order for Connecticut to qualify to receive federal financial participation for Medicaid expenses, Connecticut must follow the Medicaid statute. This proposal conflicts with the federal Medicaid statute. And in fact, DSS knows full well that it does not have authority in federal law for a key portion of its proposal. It has been told so by CMS.

One of the fatal legal defects in the proposal is to treat any gift which has been returned as having been available to the individual all along, from the date of the original gift to the date of its return. Section 40, paragraph (d) (2). This is a concept which DSS has tried to write into its proposed regulations in the past but has been rejected.

A. The Legislature Has Previously Rejected a Similar Concept.

In March, 2009, DSS filed proposed regulations with this Legislature's Regulations Review Committee which included a similar concept. The Legislative Commissioner's Office analyzed the proposed regulations and reported to the Regulations Review Committee that this particular concept, assuming that returned assets had been available to the individual all along, violated the federal Medicaid statute and controlling federal case law. The Regulations Review Committee followed the advice of the Legislative Commissioner's Office and rejected the DSS proposed regulations.

DSS then wrote to CMS in July, 2009 requesting confirmation that the federal law required it to treat returned assets as available all along, from the date of the original transfer to the date of the return. After more than a year of deliberation, CMS replied to DSS in October, 2010 and again in December, 2010. CMS has advised DSS that its interpretation of federal law is wrong. That conclusion applies regardless of whether DSS follows a "partial return" or a "full return" rule.

B. The "Full Return" Rule is Contrary To The Federal Medicaid Statute and Federal Case Law.

The federal Medicaid statute states in no uncertain terms that it is illegal to deem assets available to an individual who does not actually possess them. 42 U.S.C. 1396a (a) (17). The concept that the current DSS proposal depends on is to deem assets, that is, to pretend that an individual has assets which are actually owned by someone else.

Moreover, there is still good, controlling law on the issue of how assets which have been given away are treated. In 1976, the United States District Court for Connecticut ruled that a similar assumption, that an individual had assets even though they were not in that person's actual possession, was contrary to federal Medicaid law and in violation of the Supremacy clause. It struck down the Connecticut statute which was based upon that attribution of assets. *Buckner vs. Maher*, 424 F. Supp. 366 (D.Conn., 1976). I was one of the plaintiff's attorneys in that case.

C. CMS has Told DSS It's Concept Is Not Based On Federal Law.

Now DSS has an explicit opinion issued by CMS that another federal Medicaid authority, not just the Medicaid statute but the State Medicaid Manual, does not require the treatment of assets that DSS is proposing. DSS has been told that the proposal to treat