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## **OLR Bill Analysis**

### **sSB 973**

#### ***AN ACT CONCERNING THE DETERMINATION OF UNDUE HARDSHIP FOR PURPOSES OF MEDICAID ELIGIBILITY.***

#### **SUMMARY:**

This bill establishes new and codifies existing circumstances under which the Department of Social Services (DSS) must waive the imposition of a penalty period for certain Medicaid eligibility related asset transfers when such a penalty will create an undue hardship for the person transferring the asset.

The bill also specifies the circumstances under which DSS cannot waive the penalty. The penalty period is a period during which a person is ineligible for Medicaid based on the uncompensated value of the transferred asset.

The bill also establishes and codifies a process that Medicaid applicants (defined as an applicant or recipient) and DSS must follow when an applicant disagrees with DSS' decision to impose a penalty period, DSS' provisions concerning undue hardship are currently covered in its policy manual. Enactment of the bill's provisions supersedes the department's policies.

EFFECTIVE DATE: July 1, 2011

#### **TRANSFER OF ASSETS—UNDUE HARDSHIP EXEMPTION**

When someone transfers assets for less than fair market value within five years of applying for long-term Medicaid benefits, the law presumes the transfer was made to qualify for Medicaid. Federal and state laws require DSS to impose a penalty period based on the uncompensated value of the transferred asset. The penalty period can be waived if (1) the applicant can rebut the presumption by clear and convincing evidence that he or she transferred the assets for some purpose other than Medicaid eligibility, (2) DSS determines that

imposing the penalty period will create an undue hardship, or (3) the applicant has dementia.

The bill codifies the requirement that the DSS commissioner must waive the imposition of the penalty period if the penalty would create an undue hardship.

***Undue Hardship Defined***

Under the bill, an “undue hardship” exists when:

1. the life or health of the Medicaid applicant would be endangered by the deprivation of medical care, or the applicant would be deprived of food, clothing, shelter, or other life necessities;
2. the applicant is otherwise eligible for Medicaid but for the imposition of the penalty period;
3. the applicant is (a) receiving long-term care services at the time the penalty period is imposed, the long-term care provider has notified the applicant that it intends to discontinue providing such services due to nonpayment (Medicaid would stop paying during the penalty period) or (b) is not receiving services at the time the penalty period is imposed and a long-term care service provider has refused to provide services due to the lack of a payment source; and
4. no other person or organization is willing and able to provide services to the applicant.

Current DSS policy sets conditions that must exist for it to waive the penalty. Specifically, it will not impose the penalty period when:

1. the long-term care facility or medical institution has threatened to evict the individual due to nonpayment and the individual has exhausted all legal methods to prevent the eviction, or the medical provider has threatened to terminate home- and community-based services being provided under a Medicaid waiver;

2. the person transferring the asset establishes that the transferee no longer possesses the asset and has no other assets of comparable value with which to pay the transferor's care costs; and
3. no family member or other individual or organization is able and willing to provide care to the individual (DSS Uniform Policy Manual, § 3029.25) (see BACKGROUND).

***When Penalty May or May Not be Waived***

The bill prohibits the commissioner from waiving a penalty period if the (1) applicant transfers or assigns assets to deliberately impoverish himself or herself to obtain Medicaid eligibility or (2) applicant's legal representative or the assets' joint owner transfers or assigns the asset, provided these individuals did not exploit the applicant in the process.

The bill essentially restates the law (CGS § 17b-261a(c)) that permits the commissioner to waive the imposition of the penalty period when the applicant (1) suffers from dementia or other cognitive impairment and cannot explain the transfer, (2) suffered from such an impairment at the time the transfer or assignment of assets was made, or (3) was exploited into making the transfer due to such an impairment.

**PROCESS FOR IMPOSING PENALTY PERIOD**

***Notice and Extensions***

If the commissioner intends to impose a penalty period as a result of an asset transfer or assignment, he must provide a preliminary notice to the applicant. (DSS policy already requires this.) The notice must include a statement that the applicant can file an undue hardship claim or provide evidence to rebut the presumption, which the applicant must do within 15 days from the notice's postmark date. (The DSS policy manual requires this within 10 days.)

The bill requires the commissioner to grant one extension if the applicant requests one and must grant additional extensions, if "reasonable." (The policy allows for an extension if the request is

reasonable.)

Failure to file a claim of undue hardship at this juncture does not, under the bill, prevent an applicant from making an undue hardship claim at an administrative hearing (see below).

***DSS Decision Whether Undue Hardship Exists***

Under the bill, if the applicant files an undue hardship claim or provides evidence to rebut the presumption, the commissioner must provide an interim decision notice to him or her within 10 days of receiving the claim or evidence. The notice must indicate whether the commissioner finds for the applicant and agrees that the penalty period should be waived or not imposed. (This essentially mirrors current DSS policy.)

When the DSS commissioner determines Medicaid eligibility, the bill requires him to provide a final decision notice to the applicant. The notice must include a statement confirming any determination he has made with respect to an asset transfer and describing the applicant's appeal rights. (The DSS policy manual indicates that DSS sends a final decision notice regarding the undue hardship claim or rebuttal issue at the time it sends notice of its disposition of the Medicaid application. The notice contains all the elements of the preliminary notice and a description of the individual's appeal rights.)

**WHEN LONG-TERM CARE PROVIDER INTENDS TO CEASE PROVIDING SERVICES**

Under the bill, if a long-term care provider notifies the applicant that it refuses to provide, or will no longer provide, services to a Medicaid applicant due to a penalty period being imposed, the applicant can appeal the refusal by filing an undue hardship claim with DSS within 60 days after receiving the notice. The commissioner must provide a final decision notice to the applicant within 10 days after receiving the claim. The notice must inform the applicant whether undue hardship exists and the penalty will be waived.

**WHEN APPLICANT IS RECEIVING CARE IN NURSING HOME FACILITY AND IS INCOMPETENT**

Under the bill, if an applicant is a resident of a nursing home facility and the facility demonstrates that the applicant is not competent, the commissioner must grant an extension of time for undue hardship claims to allow a legal representative to be appointed on the applicant's behalf. (The bill defines a "nursing home facility," by reference, as a nursing home or residential care home, though residential care home services are not covered by the Medicaid program.)

The commissioner must accept any undue hardship claim that a nursing home facility files and allow the facility to represent the applicant regarding the claim if the applicant or his or her legal representative gives the home permission to do so. (The policy manual allows the applicant to give permission for the long-term care facility to file an undue hardship claim on his or her behalf.)

## **BACKGROUND**

### ***Transfer of Assets — Federal Law***

Until 2006, federal law allowed an exemption from the asset transfer penalty if it would cause undue hardship, but it did not establish procedures for determining hardship. The 2005 Deficit Reduction Act (DRA) provided more guidance to states. It requires penalty period waivers if states find that the penalty would deprive the applicant of medical care to the extent that his or her health or life would be endangered or he or she would be deprived of food, clothing, shelter, or other life necessities. The federal Centers for Medicare and Medicaid Services had previously provided these criteria to states in the State Medicaid Manual.

The 2005 act further requires states to provide for (1) notice to recipients that an opportunity for a hardship exception exists, (2) a timely process for determining whether a waiver will be granted, and (3) a process for appealing an adverse determination. It permits nursing facilities to file the hardship waiver applications on the resident's behalf, with consent (42 USC § 1396p(c)(2)(D)).

### ***Status of DSS Regulations and DSS Policy Manual***

In April 2007, DSS published notice of intent to adopt regulations to carry out the DRA provisions, and included the provision defining undue hardship that the bill proposes to change. Based on concerns about a portion of the proposed regulations regarding waiving the penalty period, and advice from the Legislative Commissioners Office as to their compliance with federal law, the Regulations Review Committee rejected the regulations. DSS never resubmitted them.

The legislature has granted DSS the authority to implement policies and procedures to carry out statutory requirements while in the process of adopting them in regulation (DSS Uniform Policy Manual, §§ 3029.25, 3029.30, and 3029.35).

**COMMITTEE ACTION**

Aging Committee

Joint Favorable Substitute Change of Reference

Yea 11 Nay 0 (03/10/2011)

Human Services Committee

Joint Favorable

Yea 18 Nay 0 (03/22/2011)