

OFFICE OF LEGISLATIVE RESEARCH
PUBLIC ACT SUMMARY



PA 11-176—sSB 973
Aging Committee
Human Services Committee

**AN ACT CONCERNING THE DETERMINATION OF UNDUE
HARDSHIP FOR PURPOSES OF MEDICAID ELIGIBILITY AND
DISABILITY DETERMINATIONS FOR BENEFICIARIES OF A
SPECIAL NEEDS TRUST**

SUMMARY: This act generally prohibits the Department of Social Services (DSS) from imposing 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. And it specifies the circumstances under which DSS must impose the penalty even if doing so will result in such a hardship. The penalty period is a period during which a person is ineligible for Medicaid based on the uncompensated value of the transferred asset.

The act establishes and generally 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' policy manual already includes provisions concerning undue hardship but the act's provisions supersede any conflicting department policies.

Finally, the act requires the DSS commissioner to make an independent disability determination when someone who claims to have a disability and is a beneficiary of a special needs trust has not received such a determination from the Social Security Administration (SSA).

EFFECTIVE DATE: July 1, 2011, except the provision concerning DSS determinations of disability, which is effective upon passage.

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 (see BACKGROUND). 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 act generally prohibits the DSS commissioner from imposing a penalty period if the penalty would create an undue hardship. DSS policy similarly provides that no penalty period can be imposed if it would cause an undue hardship.

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Undue Hardship Defined

Under the act, 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 and the long-term care provider has notified the applicant that it intends to discharge or discontinue providing him or her such services due to nonpayment (Medicaid would stop paying during the penalty period) or (b) 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 imposition of a penalty period; and
4. no other person or organization is willing and able to provide long-term care services to the applicant.

DSS policy sets conditions that must exist for it not to impose 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 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 DSS Must Impose Penalty

The act requires the commissioner to impose 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 assets even if the penalty will cause an undue hardship.

The act 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 or assignment, (2) suffered from such an impairment at the time of the transfer or assignment of assets, or (3) was exploited into making the transfer due to such an impairment. And it adds a fourth condition: when the applicant’s legal representative or the record owner of a jointly held asset made the transfer or assignment of assets without the applicant’s authorization.

PROCESS FOR IMPOSING PENALTY PERIOD

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Notice and Extensions

Under the act, 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 contest the imposition of a penalty period by filing a claim of undue hardship or providing evidence to rebut the presumption, which the applicant must do within 15 days from the notice's postmark date. (DSS policy requires this within 10 days.)

The act requires the commissioner to grant one extension if the applicant requests it and to 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 act, prevent an applicant from making an undue hardship claim at an administrative hearing.

DSS Decision Whether Undue Hardship Exists

Under the act, if the applicant contests the imposition of the penalty period, the commissioner must provide an interim decision notice to him or her within 10 days after the applicant files a claim or provides evidence. The notice must indicate whether the commissioner has decided to reverse or uphold the imposition of the penalty period. (This essentially mirrors DSS policy.) If the commissioner decides to uphold the penalty period's imposition, the interim notice must specify its projected starting and expiration dates.

The act requires the DSS commissioner to provide a final decision notice to the applicant when he determines the applicant's Medicaid eligibility. The notice must include a statement confirming any determination the commissioner has made with respect to the imposition of the penalty period and describing the applicant's appeal rights. (The DSS policy manual states 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 A LONG-TERM CARE PROVIDER INTENDS TO CEASE PROVIDING SERVICES

The act authorizes a Medicaid applicant to appeal if, during the penalty period, a long-term care provider notifies the applicant that it (1) intends to discharge the applicant or (2) refuses to provide or will no longer provide services 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. Once he receives the claim, the commissioner has 10 days to provide a final decision notice to the applicant. The notice must inform the applicant whether undue hardship exists and the penalty will be waived.

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UNDUE HARDSHIP CLAIM EXTENSIONS WHEN APPLICANT IS INCAPABLE OF MANAGING HIS OR HER AFFAIRS

The act authorizes a nursing home, on a Medicaid applicant's behalf, to request an extension of time to claim undue hardship if the (1) applicant is receiving nursing home services, (2) applicant has no legal representative, and (3) home provides certification from a doctor that the applicant is incapable of caring for himself or herself or incapable of managing his or her affairs. The DSS commissioner must grant this request to allow a legal representative to be appointed to act on the applicant's behalf.

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

DSS DETERMINATION OF DISABILITY FOR BENEFICIARIES OF SPECIAL NEEDS TRUSTS

The act requires the DSS commissioner to independently determine whether a beneficiary of a special needs trust has a disability as defined in federal law (see BACKGROUND) when the beneficiary has not received a disability determination from the SSA. The act prohibits the commissioner from requiring the trust beneficiary to apply for disability benefits or obtain a disability determination from the SSA.

DSS has a contract with Colonial Cooperative Care to conduct disability determinations on the agency's behalf. The contractor uses the same criteria for determining disability that the SSA uses.

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 his or her consent (42 USC § 1396p(c)(2)(D)).

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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 act changes. Based on concerns about a portion of the proposed regulations regarding waiving the penalty period, and advice from the Legislative Commissioners' Office as to the regulations' compliance with federal law, the Regulation 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).

Disability Definition

The federal Social Security Act generally provides that a person is considered to be disabled for purposes of eligibility for the Supplemental Security Income program if he or she is unable to engage in any substantial gainful activity (earn \$1,000 or more per month in 2011) by reason of any medically determinable physical or mental impairment that can be expected to result in death or which has lasted, or can be expected to last, at least 12 months (42 USC § 1382c(a)(3)).

OLR Tracking: RC:KS:JL:ts