

State of Wisconsin
Department of Health Services

Jim Doyle, Governor
Karen E. Timberlake, Secretary

April 3, 2009

Attorney General J. B. Van Hollen
Wisconsin Department of Justice
State Capitol, Room 114 East
Madison, WI 53602

Re: Request for Formal Attorney General's Opinion:
Legality under Medicaid Supplementation Laws of Payments by Wis. Stat.
§ 66.0301 Member Counties

Dear Attorney General Van Hollen:

I write to request your opinion on a matter implicating state and federal laws that prohibit Medicaid supplementation. Several counties have proposed entering into an intergovernmental contract under Wis. Stat. § 66.0301 to create a commission ("the Commission") in which each of the contracting counties would be members. The Commission would be the licensed and Medicaid-certified operator of a skilled nursing facility or facility for the developmentally disabled (herein, "nursing home") currently operated by one of the member counties. Other member counties that place their residents in the nursing home would make payments to the Commission to help defray the Medicaid operating deficit incurred by the nursing home in connection with caring for residents of those counties. The question has arisen whether such payments would violate Medicaid supplementation laws.

Any Wisconsin county has the power to operate a nursing home, Wis. Stat. §§ 46.175, 49.70 and 49.72. Currently, approximately 15% of the more than 400 Wisconsin nursing homes are operated by counties. Several counties operate nursing homes with dedicated units that provide specialized services to patients with behavioral and other complex issues that make it difficult for them to be housed and treated in more typical facilities.

Counties also have limited financial liability for providing treatment and services for county residents with certain disabilities. Pursuant to Wis. Stat. § 51.42(1)(b):

The county board of supervisors has the primary responsibility for the well-being, treatment and care of the mentally ill, developmentally disabled, alcoholic and other drug dependent citizens residing within its county and for ensuring that those individuals in need of such emergency services found within its county receive immediate emergency services. This primary responsibility is limited to the programs, services and resources that the county board of supervisors is reasonably able to provide within the limits of available state and federal funds and of county funds required to be appropriated to match state funds. County liability for care and services purchased through or provided by a county department of community programs established under this section shall be based upon the

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client's county of residence except for emergency services for which liability shall be placed with the county in which the individual is found. ...

Few private nursing homes have programs or facilities designed for the special treatment and supervision needs of individuals with significant behavior problems due to mental illness or developmental disabilities who counties are required to serve under § 51.42. As noted above, several counties operate such facilities, but most counties, even those that operate nursing homes, lack adequate placement resources for such residents within their own facilities. For this reason, counties with residents who need specialized nursing home services because of mental illness or developmental disabilities often arrange for their placement in a nursing home operated by another county that has a specialized services unit.

Most individuals placed in facilities operated by other counties are eligible for Medicaid. The county nursing home in which such an individual is placed bills Medicaid for the care provided. The Medicaid reimbursement rate is often less than the full cost of care for such an individual. County nursing homes are precluded from billing the sending counties for the difference between Medicaid reimbursement and their full cost of providing the care by federal and state prohibitions against supplementation. As a result, counties that operate nursing homes pay with funds from the county treasury for Medicaid deficits generated by providing services to other counties' residents. Some counties that operate nursing homes that provide specialized services contend the county can no longer afford to cover these deficits, and may need to close the nursing home.

To address the problem described above, several counties have proposed contracting under Wis. Stat. § 66.0301 to create a Commission that would own and operate a nursing home currently owned and operated by one of the counties. Relevant portions of § 66.0301 and related statutes are set forth in the attachment.

The Commission would be established as a separate legal entity pursuant to an intergovernmental agreement (IGA) approved by the county boards of the several member counties and formally executed by each of the counties. According to the IGA, the purpose of the Commission would be to lease, manage and operate a nursing home; to contract with the current operating county to operate the nursing home; and to provide financial resources for the operation of the nursing home. Under the IGA, the members would empower the Commission to take all action necessary for the operation of the facility as a licensed, Medicaid-certified nursing home. Commission members would have ongoing voting rights relative to the funding of the Commission and operation of the nursing home. The Commission would be funded through assessments paid by member counties. Each member county other than the county that currently operates the nursing home would be assessed an amount representing the Medicaid operating deficit for each resident of that county who is a patient in the nursing home. Because residents of the county that currently operates the nursing home would continue to constitute a majority of the residents of the nursing home, that county would be assessed an amount above the assessment rate, representing the balance of the nursing home's operating losses. Any member county that were to withdraw from the Commission would be required to remove any of its residents who were patients in the nursing home at the time the county withdrew.

The Commission and the county that currently operates the nursing home also would enter into a lease and operating agreement (Lease) relative to the operation of the facility. Pursuant to the Lease, the county would remain the fee owner of the nursing home property. The Commission would rent the nursing home facility and all related furniture, fixtures and equipment from the county. The county would provide all labor, materials and related services necessary for the operation of the nursing home. The county would hire, pay, supervise and discharge nursing home employees. The county would collect all charges and maintain financial accounts in connection with the operation of the nursing home. From the proceeds of the assessments described in the preceding paragraph, the Commission would make payments to the county for rental of the facility and for the county's operation of the facility, and would pay all utilities, insurance, repairs and taxes associated with the operation of the nursing home.

This Department's Division of Quality Assurance (DQA) licenses and regulates nursing homes pursuant to Wis. Stat. ch. 50 and serves as the state survey agency for Wisconsin under § 1864 of the federal Social Security Act and 42 CFR § 488.1 for purposes of certifying health care providers, including nursing homes, for participation in the Medicare program under Title XVIII of the federal Social Security Act. This Department's Division of Health Care Access and Accountability (DHCAA) serves as the single state Medicaid agency under 42 CFR Part 431 for purposes of providing Medicaid reimbursement for Medicaid covered services, and certifies nursing homes and other health care providers to participate in the Medicaid program under Wis. Stat. § 49.45(2)(a)11. A nursing home that is licensed by DQA pursuant to Wis. Stat. § 50.03 qualifies as a Wisconsin Medicaid provider, Wis. Adm. Code § 105.08. For purposes of determining what corporate or other entity to certify and reimburse as a nursing home under the Medicaid program, DHCAA refers to the entity named on the Wis. Stat. ch. 50 license issued by DQA. DQA has reviewed the proposed IGA and Lease establishing the Commission and its relationship with its member counties, and has determined that the Commission would be the licensee of the nursing home operated pursuant to these documents. Therefore, DHCAA would regard the Commission as the Medicaid-certified entity and would make Medicaid reimbursement payable to the Commission for services provided in the nursing home that is funded pursuant to the IGA and operated pursuant to the Lease.

This Department's Office of Legal Counsel has reviewed the proposed Lease and IGA as well as relevant provisions of law and has advised that payments by member counties to the Commission in connection with services provided by the Commission's nursing home to patients placed by member counties would not violate state and federal prohibitions against supplementation. As noted above, the Commission would be the entity licensed to operate the nursing home and reimbursed by Wisconsin Medicaid for services provided by the nursing home. All counties making payments to the Commission in connection with services provided by the nursing home would make those payments by virtue of their membership in the Commission and in their capacity as such. Under the IGA, the member counties in the Commission collectively would be responsible for operation and funding of the nursing home.

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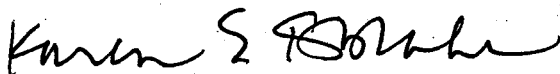
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Therefore, DHS legal counsel has concluded that the payments from member counties to the Commission should be regarded as "internal" to the Commission for purposes of applying state and federal Medicaid supplementation prohibitions. The payments would be analogous to payments by partners to a partnership or by stockholders to a corporation. The payments thus would represent internal transfers of funds within the entity licensed and certified to operate the facility, made for purposes of defraying operating deficits incurred by the entity. The payments would not constitute charges to or payments received from a recipient or other entity on behalf of a recipient and so would not violate the prohibitions against supplementation under 42 USC § 1320a-7b(d) or Wis. Stat. § 49.49 (3m) or (4). This arrangement is legally distinguishable from that addressed in 73 Op. Atty. Gen. 68 (1984), because the intergovernmental agreement envisioned there merely called for intercounty payments, and did not contemplate the creation of a separate legal entity to operate the nursing home.

The state and federal statutes and regulations prohibiting supplementation, summaries of two prior Wisconsin Attorney General Opinions on related issues and relevant portions of Wis. Stat. § 66.0301 are set forth in Attachment 1 to this opinion request.

Because your Medicaid Fraud Control Unit is tasked with enforcement of Medicaid regulations, I would appreciate receiving your opinion on this issue. Please contact our Chief Legal Counsel Diane Welsh if you have any questions.

Sincerely,



Karen E. Timberlake
Secretary