



STATE OF IDAHO

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February 13, 1986

Representative Christopher R. Hooper
Chairman, House
Health and Welfare Committee
Statehouse Mail
Boise, Idaho 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL'S OPINION AND IS
PROVIDED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Representative Hooper:

Our office has received your request for legal advice on whether RS 12257 (copy attached) would be a valid law of general applicability.

CONCLUSION:

As the proposed amendment to Idaho Code § 32-1008A would restrict its application solely to one part of the medicaid program it would probably not withstand scrutiny by a court of competent jurisdiction as to its being a law of general applicability.

ANALYSIS:

The proposed amendments to Idaho Code § 32-1008A would delete a reference to medicaid recipients and add the language: "and such person's personal financial resources are insufficient to pay for the cost of his care in such facility and he requires state assistance to pay those costs..." The deletion of the terms "medicaid" and "medicaid recipient" appears to follow one of the suggestions in

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Attorney General Opinion No. 84-7, page 5, paragraph 2 (copy attached). However, by the addition of the words "state assistance" the inference still clearly shows that this statutory section is aimed only at medicaid payments.

Attorney General Opinion No. 84-7 at page 6 found that the limitation of the program solely to medicaid recipients rendered § 32-1008A invalid as a "special" law:

As aforementioned, Idaho Code § 32-1008A is applicable only to Medicaid recipients. Although it is in the form of a statute rather than a Medicaid plan, we feel that this is a distinction without consequence in that the net effect on Medicaid recipients and their relatives is identical to that which would have resulted had the state merely adopted a plan which required contributions solely from the relatives of Medicaid patients. It is our opinion that the limitation of the applicability of § 32-1008A to relatives of Medicaid recipients renders it a statute of special rather than general applicability and, as a consequence, we believe that it does not comport with the requirements of the transmittal or with the Social Security laws which the transmittal attempts to interpret. Therefore, it is our opinion that Idaho is not in compliance with the requirements of the federal Medicaid program.

Footnote 2 on page 5 of that Opinion opined that the more generally worded § 32-1002 also would not pass the test of general applicability.

As a practical matter the person residing in a skilled nursing facility who would be seeking state assistance to pay for the costs of such care would have only the medicaid program open to them. Residents of nursing homes may be eligible for other public assistance programs such as AABD, SSI, etc. However, these programs are general assistance programs and are the vehicle by which an indigent person qualifies for categorical assistance thereby becoming eligible for medicaid. These other programs do not pay the cost of nursing home care as the medicaid program does that.

The proposed amendment does not remedy the defect in subsection (1) of Idaho Code § 32-1008A wherein it still refers to payments under the medical assistance program. Subsection (5) still provides that any amounts collected by the Department of Health and Welfare shall be deposited in the medical assistance account established by § 56-209b(2).

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The medicaid assistance account is strictly limited to contributions and payments to the medical assistance program of the state. Eliminating the words "medicaid" in subsection (1) of Idaho Code § 32-1008A does not cure the defect which still prevails by the continued use of the terms "medical assistance program" and "medical assistance account".

Other than the medicaid program the only assistance programs to individuals in these types of facilities would be governed by the county medical indigency program. However, as the county medical indigency program is funded by county funds, it is clear that the proposed amendments would relate only to the state medicaid assistance program. Therefore, the attempted amendment does not remedy the defect that this is not a law of general applicability.

The apparent reason that the word "medicaid" was added to the original draft of Idaho Code § 32-1008A was to make it clear that this law was not aimed at non-medicaid recipients so that nursing homes would not have to worry about non-medicaid patients being discouraged from entering their facilities. However, by satisfying the concerns of the nursing home industry, the inclusion of that language made it a law which is not one of general applicability. By including the words "state assistance" the same defect exists. If § 32-1008A is to be a law of general applicability and if such a law of general applicability could apply only to the cost of nursing home care, it would have to be a general support statute and apply to all residents of nursing homes at the very least. Common sense would dictate that under the principles announced in Medicaid Manual Transmittal, H.C.F.A. Pub. 45-3, No. 3812 (February 1983), a program under a law of general applicability would have to extend beyond the parameters of the medicaid program. As the proposed amendments restrict the application of the relative responsibility program to only one part of the medicaid program, it is probable that it would not stand the test of general applicability in a court of competent jurisdiction.

The proposed amendments do not cure the defect as to whether or not patients in intermediate care facilities for the mentally retarded (ICF/MR) were included within the purview of § 32-1008A. If the legislative intent were to include ICF/MR's within this type of program, the statute should be amended to add "intermediate care facility, including intermediate care facility for the mentally retarded", in the first sentence of subsection (1).

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In the administration of a relative responsibility program there are several other problems which will have to be dealt with before it can be a legally enforceable and cost effective program for the state. The most glaring problem pertains to collection efforts from non-resident responsible relatives. Idaho Code § 5-514 and § 32-1008A do not give the state the required authority to obtain jurisdiction over non-resident responsible relatives. See Official Attorney General Opinion No. 85-10, pp. 10-11 (copy attached). To meet the requirements of due process a long-arm statute would have to provide for reasonable minimal contacts with the state or some contractual undertaking by the non-resident relative. Burger King v. Rudzewicz, (U.S. Sup. Ct., 1985) 53 U.S.L.W. 4541. Without the constitutional ability to obtain jurisdiction over non-residents, the program would be faced by a substantial challenge from residents of the state as to equal protection of the law. This problem is aggravated by the fact that the bulk of the population in the state of Idaho resides within close proximity to the borders of other states, and a substantial number of responsible relatives of patients in Idaho's nursing homes live in the adjoining states.

The problems inherent in trying to collect and enforce the relative responsibility program as proposed by Idaho Code § 32-1008A can best be seen by looking at the history of the child support enforcement program. Several years ago the different states had substantial problems in trying to enforce their obligations in other states where the father was not a resident of the state of the mother and child. There was spotty and ineffective enforcement because the various states did not cooperate with one another and did not have a requirement to enter into reciprocal enforcement agreements. The federal government stepped into this area and adopted a Uniform Reciprocal of Enforcement Act which provides that each state must cooperate with one another and enforce their respective child support laws and judgments. If a relative responsibility program is to be viable in the medicaid program, it can only be done as a federal statute or federal regulation which requires all states to cooperate with one another in their collection and enforcement efforts. Without this an effective system that avoids these constitutional problems would be extremely difficult to obtain.

The ability of the states to adopt a relative responsibility program arose through Medicaid Manual Transmittal, H.C.F.A. Pub. 45-3 No. 3812. This was a reinterpretation of the previous policy which declared that such a program was impermissible under the provisions of the

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federal social security act. This publication was not promulgated pursuant to the federal administrative procedures act. As it would impose fiscal liability upon a wide ranging class of people, it should have been promulgated as a regulation in order that it would have the force and effect of law. Such a medicaid manual transmittal is little more than a federal promise not to impose fiscal disallowances upon the state. However, such a hold harmless promise would not bar a federal court from enjoining the expenditure of federal funds under the medicaid program in an appropriate legal proceeding.

Medicaid Manual Transmittal H.C.F.A. Pub. 45-3 does not address the question as to whether or not the agency of the state which administers the medicaid program, would, also be permitted to be the agency which enforces the statute of general applicability imposing a relative responsibility program. The prohibition under the social security act, as reinterpreted by the transmittal, is that such liability could not be imposed as part of the state plan. As the Department of Health and Welfare is the single state agency that administers the medicaid program in Idaho, it would appear that this agency should not make these collections even under a statute of general applicability. Requests for clarification from the federal authorities on these various points have not resulted in any sort of definitive statement, especially as to what is or is not an acceptable law of general applicability. It must be noted that the federal agency funds about two-thirds of the total cost of the medicaid program and would receive two-thirds of the amount collected under a relative responsibility program. Quarterly Federal Report, H.C.F.A. No. 64. However, it would seem that the medicaid bureau could administer a relative responsibility program under a law of general applicability as the federal policy was contained in a medicaid action transmittal. As such, it would be highly inequitable for the federal funding agency to attempt to impose any fiscal disallowance or sanction for following the medicaid action transmittal; assuming, of course, that the state does have a law which the federal agency would determine to be a law of general applicability. However, a court could question the state medicaid agency's enforcing the state's relative responsibility program as to whether or not it was operating under a law of general applicability.

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I hope this guideline has addressed your concerns with regard to Idaho Code § 32-1008A as proposed to be amended by RS 12257. If this office can be of further assistance, do not hesitate to contact us.

Sincerely,



Michael DeAngelo
Deputy Attorney General
Chief of Legal Services
Division

MD/jb

Enclosure