

## MEMORANDUM

DATE: June 16, 2008

TO: All Members of the Delaware State Senate  
and House of Representatives

FROM: Ms. Daniese McMullin-Powell  
Chairperson  
State Council for Persons with Disabilities

RE: S.B. 257 [Medicaid Claims Against Estates]

The State Council for Persons with Disabilities (SCPD) has reviewed S.B. 257 which is intended to increase the State's ability to recover Medicaid expenses by establishing Medicaid expenditures paid for a decedent as a priority claim against the decedent's estate. As background, Delaware law provides guidance to executors and administrators of estates in payment of claims against a decedent. The "order of preference" is compiled in the attached Title 12 Del.C. §2105. S.B. 257 would establish as the fourth (4<sup>th</sup>) priority the following: "(p)ayments for medical care for the decedent made by the Department of Health and Social Services pursuant to the State Medicaid Plan." SCPD opposes the proposed legislation for the following reasons.

First, the attached Medicaid Estate Recovery Policy Brief notes that recovery is only permitted for "deceased recipients who were 55 or older when they received Medicaid benefits or who, regardless of age, were permanently institutionalized." At p.3 . See also p. 4.n.21: "Recoveries may not exceed the total amount spent by Medicaid on the individual's behalf at or after age 55." This limitation is consistent with Title 25 Del.C. §5002 [Medicaid liens applicable only to an "individual who is 55 years of age or older when the individual receives services in a long-term care facility". S.B. No. 257 omits this limitation.

Second, "(s)tates are required to waive estate recoveries when undue hardship would result." Brief, at p. 6. Compare Title 25 Del.C. §5005. Cf. Title 29 Del.C. §7940(g). S.B. 257 omits this limitation.

Third, states may limit estate recovery to long-term institutional services, home and community-based services (HCBS), and hospital and prescription drug services provided while the individual was receiving nursing facility care or HCBS. Brief at p. 2. This approach would be preferable to the "broad sweep" of demanding recovery for all Medicaid services.

Fourth, establishing Medicaid as the fourth priority will ostensibly embarrass the State. For

example, Medicaid reimbursement would precede burial expenses. This presents the specter of families being unable to bury the decedent. Establishing a higher priority for burial expenses in ostensibly common in other states:

The order of payment of debt is established under state law. Mortgages, unpaid tax or public utility bills, child support arrears, burial costs, or other debts may be paid before the Medicaid lien and reduce the amount actually recovered.

Brief, at p 3. At a minimum, the bill would benefit from an amendment making burial expenses a higher priority than Medicaid recovery.

Fifth, there is some “tension” between the unlimited recovery authorized by S.B. 257 and Title 29 Del.C. §7940(a)(2). The latter statute limits spousal liability for inpatient care of a patient to 5 years. It is anomalous to limit spousal liability in this statute while requiring the estate to pay back costs of care with no limit to the detriment of the spouse, the most common estate heir. The sponsors could consider imposing a similar temporal limit on estate recovery.

Thank you for your consideration and please contact SCPD if you have any questions regarding our position on the proposed legislation.

cc: The Honorable Ruth Ann Minner  
Governor’s Advisory Council for Exceptional Citizens  
Developmental Disabilities Council

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