

MINUTES

SPECIAL COMMITTEE ON MEDICAID REFORM

November 21-22, 2005
Room 519-S—Statehouse

Members Present

Senator Derek Schmidt, Chairman
Representative Melvin Neufeld, Vice Chairman
Senator Jay Emler
Senator Anthony Hensley
Senator Tim Huelskamp
Senator Laura Kelly
Senator Dwayne Umbarger
Representative Bob Bethell
Representative Jerry Henry
Representative Mike Kiegerl
Representative Nancy Kirk
Representative Don Myers

Staff Present

Audrey Dunkel, Kansas Legislative Research Department
Emalene Correll, Kansas Legislative Research Department
Lisa Montgomery, Revisor of Statutes Office
Norman Furse, Revisor of Statutes Office
Judy Swanson, Committee Secretary

Conferees

Scott Brunner, Director of Medicaid, Division of Health Policy and Finance
Brian Vasquez, Investigative Attorney, State Recovery Unit
Representative Sydney Carlin
Dennis Priest, State Recovery Unit
Janice De Boer, Department on Aging
Cathye Olson, Another Day
Marty Kennedy, Department on Aging

Others Attending

See attached list.

November 21 Morning Session

The Special Committee on Medicaid Reform was called to order by the Chairman, Senator Derek Schmidt, on Tuesday, November 21, 2005, in Room 519-S of the Statehouse at 10:08 a.m.

Representative Neufeld moved to approve the Minutes of the November 2 Committee meeting. Senator Umbarger seconded the motion, and the motion carried.

Estate Recovery

Scott Brunner, Director of Medicaid, Division of Health Policy and Finance, presented information on estate recovery, *i.e.*, the recovery of Medicaid expenditures from the estate of a deceased recipient which Kansas implemented in 1992. Attached to Mr. Brunner's testimony (Attachment 1) is a five-year summary of the activity for the Department of Social and Rehabilitation Services Estate Recovery Unit. Kansas has collected \$10.1 million in the last five years. The unit categorizes recoveries into eight sources:

- Banks;
- Conservatorships;
- Family-Deceased;
- Family-Prepayment;
- Funeral Refunds;
- PNF ("personal needs funds");
- Probate; and
- Trusts.

There are federal restrictions on recoveries when there are specific survivors. If the Medicaid recipient is survived by a spouse, a minor child, a blind child, or a child who is permanently and totally disabled, the state cannot recover from the estate of the recipient until after the death of the surviving individual. Kansas also has added statutory restrictions.

During Committee discussion, Senator Emler asked for clarification of trusts against which collections may be initiated in order to determine if Kansas law might need to be changed. Kansas has more latitude in its laws than other states, according to Mr. Brunner. The Division's attorneys are very active and involved in getting information out to consumers.

Representative Bethell requested information on the allowable items in the spend-down and by whom they are set. He has a concern about some of the items included, such as luxury cars and extravagant television sets. Mr. Brunner said the spend-down refers to that portion of assets that must be used for medically related expenses.

Representative Kirk asked how the system is set up in order to insure the agency is informed when a Medicaid recipient dies. She inquired as to the mechanism used to find out about excess funds. Mr. Brunner said the agency matches death records supplied by Vital Statistics in the Department of Health and Environment to eligible participants. There is also contact with funeral homes, although no formal report system is set up. He agreed there may be a time lag in filing liens or initiating recovery actions. Asked what recommendations he might have to improve the recovery process, Mr. Brunner said it would help to match information from the claims data, the eligibility records, and Vital Statistics. A requirement that banks, financial institutions and insurance companies, among others, report deaths would be beneficial also.

Senator Emler asked if there is a requirement that a personal representative of a recipient advise Medicaid if there is a probable asset, and if the agency had updated information about the impact of estate planning as it applies to estate recovery. Mr. Brunner indicated answers to both questions are difficult. The Medicaid Director was asked if, when there is a death, the eligibility record is automatically closed. Mr. Brunner indicated closing the record must be done manually. He indicated he has asked why it must be done manually, and has not been given an answer that satisfies him.

Pennsylvania Legislation

Audrey Dunkel, Legislative Research Department, gave a briefing on the Pennsylvania Medical Care Availability and Reduction of Error (Mcare) Act ([Attachment 2](#)). Initially, the act was anticipated to provide modest savings to primary care physicians and slightly more relief for physician specialists through discounts on surcharges and assessments. It contains significant "tort reform" aimed at creating a more balanced system. The Pennsylvania act contains administrative provisions that affect physicians and the physician licensing board. One of the goals is to reduce and eliminate medical errors by identifying problems and implementing solutions that promote patient safety. Representative Neufeld indicated his belief the Pennsylvania law is probably a good piece of legislation and thanked Ms. Dunkel for going through the 42-page act and listing key provisions for the Committee. Ms. Dunkel responded to a question by stating she is not aware of any other state with the same initiative. She will request actual data from Pennsylvania.

Bills Introduced in 2005

Emalene Correll reviewed 2005 HB 2538 ([Attachment 3](#)). The bill, which would provide for assessments on certain skilled nursing facilities, was requested for introduction by the Kansas Health Care Association. Monies collected would be used to increase or supplement the rates paid to skilled nursing facilities for providing services pursuant to the state Medicaid program only and could not be used directly or indirectly to replace existing state expenditures for payments to such facilities. In response to a question, Ms. Correll said it appeared the intent of the bill is that the assessment would be based on all residents except Medicare Part A related residents. Representative Bethell questioned the wisdom of including individuals who are receiving Medicaid as a part of the assessment base. Ms. Correll noted "adult care," as used in the bill to relate to the purpose for which a portion of the funds raised by the proposed assessment may be expended, is not defined. She also noted federal law would probably prohibit guaranteeing that the facilities subject to the assessment would receive at least the amount of the assessment from the fund created by the bill. Representative Kirk noted there is a provider tax collected from

hospitals. Ms. Correll responded the hospital tax, enacted in 2003, does not guarantee the allocation of the monies raised will be returned to the hospitals.

Representative Bethell moved, and Senator Emler seconded, a motion that the Committee charge the Health Policy Authority and the Department on Aging to consult with personnel from the Centers for Medicare and Medicaid Services about the possibility of a "skilled nursing facility provider tax" and determine whether community-based services would also have to be covered by the assessment. The motion carried.

Ms. Correll reviewed the proposed new version of HB 2294, Adult Care Home Group-funded Liability Pools (Attachment 4). Unlike the original bill, the version presented to the Committee is based on the Workers Compensation pool statutes rather than group funded insurance pools. Staff noted she had been told the present version of HB 2294 met with the approval of the Insurance Department with whom the proponents had worked in redrafting. Several members indicated the bill would be helpful to adult care homes.

Representative Bethell moved to have the new version of HB 2294 drafted as a bill for introduction by the Committee and to recommend the bill be referred to the House Committee on Insurance. Representative Kiegerl seconded the motion, and the motion carried.

Ms. Correll reviewed HB 2445, concerning Medicaid fraud (Attachment 5). The bill would add Medicaid fraud to the list of crimes for which seizure and forfeiture is allowed. This bill is pending in the Committee on Corrections and Juvenile Justice. It was requested by the Attorney General. Discussion followed.

Representative Neufeld moved the Committee recommend the Committee on Corrections and Juvenile Justice hold a hearing on HB 2445 because the Special Committee believes it to be a useful addition to the tools for preventing and prosecuting Medicaid fraud. A letter from the Committee Chairman and Vice Chairman should be sent to the House Committee encouraging them to hold a hearing. Senator Hensley seconded the motion, and the motion carried.

The Committee recessed until 1:45 p.m.

Afternoon Session

Estate Recovery

Brian Vasquez, Investigative Attorney with the State Recovery Unit, responded to questions raised by the Committee earlier. He stated a creditor must initiate a probate action within six months. Last year, the state collected over \$2 million, one-half from creditors through probate and one-half from others. Vital Statistics and the Medicaid agency provide the Unit with a report on death certificates and individuals receiving Medicaid. There are many people who contact the Estate Recovery Unit or the state agency to let them know of the death of a recipient.

Responding to questions, Mr. Vasquez stated potentially the state has lien authority, however, it depends on how the property is owned. A Transfer on Death Deed is filed, creating a cloud on the title. A Determination of Descent precludes the state from filing a claim after six months. Federal statutes make application for a lien more difficult because there are more

restrictions. A lien can be filed on a Medicaid recipient's property while the recipient is still alive if he or she is:

- An in-patient;
- Given notice; and
- Given a fair hearing.

Senator Emler asked Mr. Vasquez what the Committee could do to assist the Estate Recovery Unit. The conferee said he would check with other states and get back to the Committee. In response to Senator Emler, he said the whole landscape involving trusts changed dramatically in 1993 under federal law. If one creates a trust using his own funds and the money is put in a revocable trust, it must be treated like cash. If it is put in an irrevocable trust, asset transfer provisions would apply. In Kansas, if one has set up a trust with discretionary language, it can be tapped by the state. Kansas adopted the Uniform Trust Act in 2002. There are some solutions to the trust issue, but it is possible for a trust to be written so the state cannot get to it.

There was discussion on what is allowable when a Medicaid recipient receives an inheritance. Mr. Vasquez said the money must be used for the Medicaid client's benefit. Another option is to have the inheritance used as a pre-payment for Medicaid, rather than becoming ineligible for the Medicaid program for a period of time due to additional assets. As long as Supplemental Security Income rules are followed, nothing can be done about how the money is spent. The state could create more stringent rules. Representative Bethell said he feels the issue should be addressed for eligibility purposes by considering the appropriateness of what is purchased.

Mr. Vasquez replied to a question from a Committee member by stating, when joint-ownership-farming operations are involved, probate action against a Medicaid recipient can be filed, but strict guidelines must be followed for determining eligibility. At both the federal and state levels, there is a waiver process that can be used in cases of undue hardship.

False Claims

Representative Sydney Carlin thanked the Committee for considering the introduction of a False Claims Act she has had drafted that provides for actions for false claims against agencies of the state to be filed by the Attorney General or by a private plaintiff. The proposed bill would include all false claims submitted to agencies of the state, including Medicaid claims (Attachment 6).

Committee discussion followed. Representative Bethell requested that Sections 20-23 be diagrammed to show who gets what in a settlement. Senator Emler questioned Section 14 (c). Representative Neufeld noted the state has other whistle blower legislation. Senator Emler expressed concern that the bill might provide an opportunity for "bounty hunting." A Committee member expressed concern that there might be a risk of a "political purpose" suit. Another member indicated a preference for a broader bill, such as that being reviewed, believing it is important to allow for a private cause of action. It was decided to defer action on the bill draft prepared for Representative Carlin until the afternoon, at which time staff will have a diagram of the settlement divisions proposed and will respond to other questions raised by the Committee.

Attention was called to 2002 SB 535, a copy of which was in the Committee notebooks. The 2002 bill concerns actions arising from false claims in the Medicaid program only. The bill

would allow the Attorney General to file a civil action in the case of fraudulent Medicaid claims. The bill does not authorize private persons to file actions for recovery in a civil suit (Attachment 7).

In discussion, the Chairman suggested the Committee consider false claims arising from Medicare alone versus any false claim against a state agency and which is the better public policy. The Committee members also should consider the actual charge of the Special Committee.

Inspector General

Norman Furse, Revisor of Statutes, reviewed a draft bill that would create the Office of Inspector General within the Kansas Health Policy Authority (Attachment 8). Mr. Furse responded to questions about the bill draft and noted issues that had been raised at the previous meeting when an earlier draft had been reviewed.

Senator Hensley moved the Committee introduce the bill creating the Office of Inspector General, with several changes proposed by the Committee, and request the bill be introduced in the Senate. Included in the motion are the following changes:

- *Clarify KSA 46-201 by adding Inspector General.*
- On page 4, lines 5 through 8, include the bracketed language, “No health care provider shall be compelled under the provisions of this section to provide individual medical records of patients who are not clients of the medical assistance program.”
- *Mr. Furse is to review federal preemption of the privacy of medical records and make any changes necessary to bring the bill into compliance.*

Representative Bethell seconded the motion, and the motion carried.

Medicaid Eligibility

Dennis Priest, Estate Recovery Unit, answered questions from Committee members concerning allowances that pertain to Medicaid eligibility. He noted these issues were addressed by the Long-Term Care Task Force also. Supplemental Security Income has in place limitations on vehicle ownership and personal effects. However, there is no specific provision defining items that are deemed “frivolous.” Mr. Priest said no statutory authorization would be necessary to make changes. The state agency could make the changes by amending regulations.

Representative Bethell moved the Committee encourage the Division of Health Policy and Finance to act on changes reflecting an appropriate amount of money to be protected as personal effects and on automobiles for Medicaid eligibility purposes. Senator Umbarger seconded the motion, and the motion carried.

Long-Term Care

Ms. Correll distributed a copy of 1996 HB 2626, establishing a Kansas long-term care partnership act, that was introduced but not enacted, in 1996 (Attachment 9).

Janice DeBoer, Department on Aging, reviewed a grant for which the agency has applied to the Centers for Medicare and Medicaid Services that will result in the distribution of brochures relating to planning for long-term care to individuals identified by the federal agency. The grant comes with no funding, only the opportunity to participate. Kansas should know soon if the state has been selected to participate. A letter from the Governor will be sent to 150,000 households. Senator Huelskamp questioned this being done in an election year. Ms. DeBoer did not know the cost of mailings done in other states, the timeframe in which the mailing was sent, or the percentage of responses received.

Ms. DeBoer said the Department on Aging has a pilot program in place with the North Central-Flint Hills Area Agency on Aging to distribute information to hospital patients upon their release. They have had a positive response in terms of diverting individuals from long-term care facilities. Representative Neufeld said this is an area which this Committee is very interested in pursuing. Ms. DeBoer said that if the program is successful, they are discussing the possibility of offering it statewide.

Senator Schmidt recapped for the Committee the actions they had taken to date, and the Committee was recessed until November 22.

November 22 Morning Session

Chairman Schmidt reconvened the meeting at 9:15 a.m.

Medicaid Payroll Agents and Family Care Providers

Norman Furse reviewed a bill draft concerning Medicaid Payroll Agents and Family Member Care Providers (Attachment 10). As provided in the bill draft, a payroll agent for clients who self-direct attendant care services is to be selected through a competitive bid process. Family members of clients who self-direct their attendant care services may provide services to such clients, but may not be reimbursed more than 75 percent of the regular reimbursement rate for such services. The 75 percent figure came from the Post Audit recommendation. Nebraska currently uses the 75 percent rate. Representative Bethell said the competitive bid process might not be realistic in some rural areas. Mr. Furse noted an exception clause could be added. It was noted, if the word "attendant" were deleted and references in the bill were to "care services," it would not limit the bill to attendant care services only. Staff was directed to amend the bill to give clients more leverage in choosing services. The bill states, for reimbursement, a family member must be 18 years of age or older. The Committee agreed to add "or certified nurse aide" in that section. Representative Kirk said she had concerns about the 75 percent rate. Senator Emler expressed concerns about the competitive bid process. Representative Neufeld concurred with Senator Emler's concern and suggested eliminating the competitive bid process and requiring the

bidding process to be set up by the administering agency. Mr. Furse reviewed the Performance Audit Report on Medicaid waivers (Attachment 11).

Senator Hensley moved the Committee introduce the proposed bill without the words "competitive bid" on line 7, and following the waiver policy by making 18 years of age the minimum age for an attendant. The latter reflects agreement with waiver language approved by the federal agency. He requested the bill be referred to the House Appropriations Committee. Representative Kiegerl seconded the motion, and the motion carried.

Senator Umbarger moved to recommend to the Senate Ways and Means Committee the introduction of a bill similar to the bill the Committee had just agreed to introduce, but with added language relating to providing accounts based on an assessment of the services needed for individuals who want to choose and direct their own services. The motion was rephrased to include further amending the bill the Committee had acted on immediately prior to the motion to delete the word "attendant" on lines 5, 6 and 11, and in the bill title. Senator Emler seconded the motion, and the motion carried.

It is the intent that the bills on which the Committee had just acted be seen as a directive to expand the "Independence Plus" concept in the Home and Community Based waiver programs. A Fact Sheet on Independence Plus is attached to the minutes (Attachment 12).

Cathye Olson, representing "Another Day," a billing agent for the Home and Community Based Developmental Disability waiver, appeared to present a proposed billing system to be used statewide (Attachment 13). Her plan would allow only billing agencies, not billing agents, in Kansas. In response to a question, she said she was not given any guidance from Social and Rehabilitation Services on how to fill out time sheets, and other things, but was given information when she requested it. She suggested the state have only one type of time sheet.

Staff reviewed tentative recommendations the Committee had developed previously (Attachment 14).

False Claims

The Committee returned to the proposed legislation discussed on the previous day. Mr. Furse reviewed the distribution of recovered moneys (Attachment 15). A flow chart was presented showing how a settlement would be handled under Representative Carlin's proposed bill (Attachment 16). The flow chart was based on the premise of a minimum range of awards.

Representative Neufeld moved the Committee recommend to the committees of appropriate jurisdiction in each House that they look at the false claims issue, the inspector general bill, and HB 2445 together and work them as a package. The recommendation is to be conveyed through letters from the Chairman and Vice Chairman. Representative Myers seconded the motion.

Representative Henry made a substitute motion that the Committee introduce Representative Carlin's draft version of a false claims act in both Houses. Senator Kelly seconded the motion. After discussion, the motion failed.

Senator Schmidt moved to introduce the 2002 false claims bill with the word, "Medicaid" stricken, thereby broadening the scope to include all state government. It would be requested

that the bill be introduced in the Senate. Senator Umbarger seconded the motion, and the motion carried.

Representative Neufeld then renewed his motion that the Committee send letters to the committees of appropriate jurisdiction in each House recommending they consider the false claims bill, the inspector general bill, and HB 2445 together and work the bills as a package. Further, the motion includes noting the Special Committee recommends passage of the three bills. Representative Bethell seconded the motion, and the motion carried.

MediKan

Representative Neufeld asked that MediKan be addressed in the Committee report. He presented the Committee with draft language, including background on MediKan as it is currently administered and a draft recommendation (Attachment 17).

Representative Neufeld moved the draft be adopted and the Committee report indicate the Committee supports the changes proposed by the Division of Health Policy and Finance. Representative Bethell seconded the motion, and the motion carried.

Nursing Facility Reimbursement

Discussion was held on how compensation for nursing homes is determined. Marty Kennedy, Department on Aging, said that compensation is currently based on an FY 2001 base, increased for inflation. The reimbursement method is established by regulation.

Senator Umbarger moved to recommend to the Department on Aging they adopt the policy of re-basing compensation to nursing facilities annually, and that the new base be a rolling average of the prior three years' cost figures. Representative Bethell seconded the motion, and the motion carried.

Home and Community Based Services

Senator Umbarger moved to reflect in the Committee report that the Committee supports and encourages services provided in the community through the HCBS programs. Also, the Department on Aging is encouraged to educate consumers, and hospitals are encouraged to educate patients about available services through hospital discharge planners. Representative Bethell seconded the motion, and the motion carried.

Protection of Assets

Senator Schmidt distributed copies of proposed recommendations relating to the transfer of assets for the purpose of Medicaid eligibility and partnerships for long-term care insurance for Committee consideration.

Representative Bethell moved to re-introduce 1996 HB 2626 to create enabling legislation that would authorize implementation of a partnership program for long-term care insurance should the Congress act to remove the federal bar to such programs and to work through the Kansas Congressional delegation and national organizations to encourage the Congress to give

the states flexibility to develop partnership programs. Further, the Committee recommends the bill be introduced in the House. Representative Neufeld seconded the motion, and the motion was adopted.

Representative Bethell moved the Committee recommend support for increasing the "look-back" period and moving the start date for calculation of the penalty period for transferring assets for the purpose of becoming eligible for Medicaid and the 2006 Legislature adopt legislation directing the state Medicaid agency to make changes in the Kansas policy as soon as federal law permits. Representative Neufeld seconded the motion, and the motion passed

Sedgwick County Proposals

The cost-cutting strategies proposed at the last meeting by Sedgwick County representatives were discussed. As requested, Legislative Research staff had prepared a chart showing the types of actions that would be necessary to implement various of the strategies proposed by the November 1 conferees (Attachment 18).

Representative Myers moved the Committee submit a letter from the Chairman and Vice Chairman addressed to the appropriate agencies asking that the proposals be considered and a report be made to the appropriate committees if there are recommended changes. The Sedgwick County recommendations from the previous Committee meeting should be included in the Committee report. Senator Huelskamp seconded the motion, and the motion carried.

Medicaid Cards

Medicaid cards were discussed. Currently, Medicaid clients receive paper cards that are issued monthly. When an individual applies for a Medicaid card, he or she is asked about citizenship, and a Social Security number must be submitted. It was noted there is a potential for fraud within this procedure.

Senator Huelskamp moved, when an application is made for a Medicaid card, the documents requested be verified as currently is being done by the Department of Revenue for driver's licenses. Representative Neufeld seconded the motion, and the motion carried.

Senator Huelskamp moved the Committee report state the Committee is concerned as to whether there are appropriate penalties in place for the misuse of a Medicaid card and recommends this issue be addressed. Senator Emler seconded the motion, and the motion carried.

Prescription Drugs

Representative Kirk moved that a letter to the Kansas Congressional delegation be sent from the Chairman and Vice Chairman encouraging the delegation to support all efforts to reduce the price of prescriptions through a change in how prices are computed. Senator Hensley seconded the motion, and the motion carried.

Representative Kirk moved the Committee recommend and urge the Health Policy Authority, as rapidly as possible, to set up a system in which physician DEA numbers must be

included with all Medicaid pharmacy claims. Representative Henry seconded the motion, and the motion carried.

Senator Schmidt presented draft language for a recommendation for demonstration projects directed toward increasing Medicaid clients' responsibility for their own health and the appropriate use of health care services (Attachment 19).

Senator Hensley moved to include Senator Schmidt's recommendations in the Committee report. Senator Emler seconded the motion, and the motion carried.

There being no further business to be brought before the Committee, the Chairman thanked members for their patience and hard work on all the issues, and adjourned the meeting at 12:25 p.m.

Prepared by Judy Swanson
Edited by Emalene Correll and
Audrey Dunkel

Approved by Committee on:

December 20, 2006

(date)