

NEWS RELEASE

Proposed Medicaid Rules Imperil Seniors, Disabled
Set for Hearing Friday, September 19, 2008
9:00 o'clock a.m. Indiana Government Center

**From the Indiana Chapter of the National Academy
Of Elder Law Attorneys**

For More Information:

Keith Huffman, Esq.
1127 N. Main Street
PO Box 277
Bluffton, IN 46714
800-391-1820
khuffman@dale-huffman.com

W. Wayne Walston
523 S. Buffalo Street
Warsaw, IN 46580
Phone: (574) 268-9911
Fax: (574) 269-7828
waynewalston@lawwarsaw.com

Scott R. Severns
10293 N. Meridian St., Suite 150
Indianapolis, IN 46290
(317) 817-0300
sseverns@severns.com

All but the wealthiest and healthiest Older Hoosiers will have to think twice before writing a check to the Red Cross for disaster relief if Indiana enacts the most punitive Medicaid rules in the country later this year.

The Indiana Chapter of the National Academy of Elder Law Attorneys ([NAELA](#)) has respectfully asked Governor Mitch Daniels and FSSA Secretary Mitch Roob to order that the current proposed rule be withdrawn and re-worked to protect elderly and disabled Hoosiers. Indiana has more than 300 attorneys who devote some or all of their practice

to elder law, which includes counseling and representing people who need Medicaid help for nursing home and related care.

On September 19th, the Indiana Family and Social Services Administration (FSSA) will hold a hearing on sweeping changes to [Medicaid “transfer of assets” rules proposed to take effect in December](#). Medicaid currently helps pay for the care for the majority Hoosiers who are confined to nursing homes.

Ordinary Transactions, Extraordinary Penalties

Under the proposed rules, Medicaid help will be denied to a person in a nursing home after they have exhausted their life savings, if, at anytime over the past five years, the person made a transfer of assets for less than fair market value. Among the transfers that the rules say will result in an penalty are:

- ◇ Gifts to charities
- ◇ Annuity purchases
- ◇ Payments to family members for care to an aging parent
- ◇ Help to family members in times of crisis
- ◇ Ordinary gifts and exchanges between family members

“We were stunned by the punitive provisions that the Indiana FSSA put in this proposal,” said Indianapolis elder law attorney, Claire Lewis. “Either someone at FSSA had a very bad day or was told to dream up every possible way to deny Medicaid to those in need.”

A Heavy Load for Indiana’s Seniors and their Families

Bluffton attorney, [Keith Huffman](#), President of the Indiana Chapter of the [National Academy of Elder Law Attorneys](#), explains that each gift and several types of purchases that a person has made over the past 5 years are presumed to violate the transfer rule. The first transfer would cause one month of care to go unpaid. For each additional \$4,456 transferred during the five-year period, another month of payment for care is denied.

“It’s like a accumulating a bundle of rocks that a senior carries on her back,” said Huffman. “The \$50 graduation gift, each \$40 Christmas present is a little rock. The price of an annuity that does not meet the strict new standards or a \$10,000 payment to prevent foreclosure on an unemployed daughter’s home are heavy rocks. It is only after she desperately needs care and has no funds left that the pile of transfer rocks is weighed. The heavier the pile, the longer that the State will deny Medicaid payment for the care.”

For some people, it will mean many months or years of care will be denied. And transfers as far back as February, 2006 will be included in the “rock pile” of each person who enters a nursing home and exhausts their funds before February, 2011.

Nursing homes will be caught in the middle. Virtually everyone will have some rocks in their 5-year history. Since Medicaid will only weigh the rocks *after* the person enters care and spends down other assets, nursing homes will be in the position of providing months of charity care or evicting an ill, impoverished senior for non-payment.

Family Care Givers are Targeted, Rules Apply Retroactively

Payments to family members to care for an aging or disabled parent are targeted by the proposed rules. An aging mother who gave \$10,000 to her daughter who took time off to provide her with care in 2006 and again 2007 will be denied Medicaid for 5 months after her money runs out if she needs care before 2011.

To escape penalty, the proposed rules require that a written “personal services agreement” have been signed by the mother before the care payments were made. The problem is the penalty is retroactive to February of 2006 - 2 ½ years before these rules were announced, no one could have known what form of agreement FSSA would approve before the proposal was published last month.

“The retroactive effect of this proposal is just plain wrong,” said Warsaw attorney, [Wayne Walston](#), who counsels families with aging parents on the complexity of Medicaid eligibility rules. “When we heard that FSSA was preparing the proposed rules, we asked to meet with them. We requested that new provisions apply only to future transfers. The Agency ignored both requests.”

Seniors may also live to regret helping with a grandchild’s education costs, helping a family-member rebuild after recent floods, or even purchasing an annuity for themselves as far back as February, 2006. If these rules are passed, a person who requires nursing home care within 5 years from the last transfer may require moving to a state with less punitive rules.

Changes in Federal Law are More than Enough

Many middle-class seniors fear losing their homes to a nursing home and so add their children’s name to the deed. Many seniors knew of the Medicaid 3-year “look-back” on transfers. After that time, if nursing home costs later wiped out their savings, Medicaid would still help.

The federal law changed in 2006 to require states to begin using a 5-year “look-back.” In addition, the new law required that the transfer penalty start only *after* the person was both in need of care and wiped out financially.

“This was a huge change that most people did not understand,” said Indianapolis elder law attorney, [Scott Severns](#). “Other states have softened the blow and phased in the changes. Indiana’s proposed rules add many, many unnecessary burdens and applies those rules retroactively, thereby greatly increasing the punitive and harmful effects.”

Example: Mattie transferred her home to her daughter in July, 2007. Then, it was worth \$80,000. A gift of \$80,000 results in a transfer penalty of 18 months. Under current law, the penalty period started with the date of the gift. Under the proposed rules, the penalty period *begins after* the person is both in need of care and has depleted their savings.

Since Indiana's FSSA officials were focused on its massive "Modernization" effort, FSSA postponed action on the new federal requirements. FSSA did not publicize the coming changes until the August 27, 2008, publication of the proposed rules.

Unless you were working with an expert in Medicaid law, you had little opportunity to know how badly you could be hurt by something you did in 2006 or 2007. Few understood that they could be refused Medicaid help in 2011 or 2012, even though they paid thousands of dollars for care in the meantime. "Punishing our seniors for what they could not foresee would be outrageous," said Severns.

Proving Pure Thoughts to a Faceless State Worker

A two sentence provision in the proposed rules allows a person to prove with "sufficient evidence" that a transfer was made exclusively for reasons not related to Medicaid eligibility, estate recovery or lien. However, the provision provides no guidance about what such evidence might be and how a state worker will judge it. How does a frail elderly lady who is now confined to a nursing home prove that fear of losing everything to a nursing home was not in her head when she sent her granddaughter money to buy a used car?

Local caseworkers in county offices of FSSA have now been replaced under the "Modernized" FSSA eligibility system. Now, employees of a private contractor gather evidence about an applicant and take calls at call centers. Information gathered is then sent electronically to a state worker housed in various regional offices. If you have a question or concern about an application, you call a call center, not someone familiar with your case.

Seniors, disabled people, nursing homes and elder law attorneys have all reported increasing difficulty reaching the people who make decisions about a Medicaid application, even by phone. Face-to-face meetings with a decision-maker are virtually non-existent.

Return it all, or don't bother?

Indiana's proposed rules have another surprise. One provision prohibits credit for partial returns of the transferred assets. Previously, the Medicaid program in Indiana shortened the penalty period if some of the assets were returned.

Example: Mattie deeded her home to her daughter in 2006, when it was worth \$80,000, and Mattie required care in 2008, after the housing crash. If the

daughter could only sell the house for \$65,000, Mattie would still face 18 months without money and without Medicaid help to pay for her care, under the proposed rules.

A \$15,000 gift would cause only a 4-month penalty. Why would Indiana propose such a horrendous result?

Small Gifts Accumulated, Gifts to Church or Charity May Be Penalized

Most people are not thinking of Medicaid qualification for nursing home care when the offering plate comes around at church. But try to convince a Medicaid worker of that under the new rules.

Example: A woman who sent \$500 for Hurricane Katrina relief 2006, gave \$1,200 to her church each of the past 5 years and \$2,500 to her son whose home was flooded in 2008. Under the proposed rules, she can be assessed a \$9,000 transfer penalty denying more than two months of Medicaid-covered nursing home care in 2010 when she is in desperate need.

Under current Medicaid policy, Medicaid “rounds down” gifts that are less than the cost of one month of nursing home care, unless there is a pattern of monthly gifts. Penalties are not assessed for relatively small, occasional gifts.

The proposed rules prohibit rounding down. Each gift that is a violation will result in some period of ineligibility. In Indiana, eligibility is either approved for a full month or denied for a full month. So, the proposed rules suggest that even the smallest gift will be deemed to violate the transfer provision and cause at least one month of non-payment.

Not only does the proposed transfer provision make no exception for charitable giving and other ordinary, small transfers, the proposal singles out charitable gifts that will disqualify the person from an undue hardship exemption. The proposal actually *prohibits* granting a hardship waiver if the funds were transferred to a charity.

Hardship Waivers only for the Quick and Hardy (who are endangered)

Federal law requires that hardship waivers be available when a transfer penalty endangers the person’s health or deprives them of the necessities of life. The rules proposed by Indiana’s Medicaid officials go out of their way to assure that hardship waivers will rarely be used in Indiana.

In addition to prohibiting hardship waiver for transfers to a charity, or payment to a family member for care without a written agreement, the proposed hardship rule gives the nursing home resident, her representative or nursing home 20 days to apply and requires:

(d) In order to qualify for a hardship exemption, the recipient shall supply written documentation proving all of the following on an approved state form:

(1) The application of transfer of asset rules will deprive the applicant of:

(A) medical care such that the applicant's health would be endangered; or

(B) food, clothing, shelter, or other necessities of life.

(2) The applicant would have otherwise been eligible for Medicaid.

(3) The applicant has no other assets or income that could be used to pay for the care required by the applicant.

(4) The applicant has attempted to regain control of the transferred asset using any and all legally valid methods. The applicant must:

(A) fully cooperate with the state in efforts to recover the transferred asset; and

(B) upon request, assign the applicant's rights to recover the asset to the state Medicaid agency.

(5) A transfer was made to a person who used illegal means to gain the resource and the applicant:

(A) has filed a police report; and

(B) is using legal recourse to regain the resource.

“Its pretty clear that FSSA officials are not looking to grant many hardship exemptions,” said Huffman. To underscore the point, the proposed rules say “Any request for exemption not approved within thirty (30) days shall be deemed a denial...”

“Problems with the proposed rules are too great to fix at the hearing this Friday,” said Huffman. “The elder law bar would be pleased to help FSSA come up with common sense rules that prevent abuses without abusing innocent people who are in desperate need, and would commit to do so immediately, acting with the best interests in mind of all citizens of the State of Indiana.”