STATE OF WISCONSIN | CIRCUIT COURT BRANCH 12 | WAUKESHA COUNTY

KATHLEEN PAPA
3836 Forest Run
Oconomowoc, WI 53066

PROFESSIONAL HOMECARE PROVIDERS, INC.
W8145 Long Lake Drive
Clintonville, WI 54929

Case No.: 15-CV-2403
Case Code: 30701

Plaintiff,

v.

WISCONSIN DEPARTMENT OF HEALTH SERVICES
1 West Wilson Street
Madison,

Defendant.

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Kathleen Papa, R.N. and the other members of Professional Homecare Providers, Inc. ("PHP," collectively, "Plaintiffs" or "Nurses") are certified Medicaid providers who work as nurses in independent practice, providing in-home care to children and adults with complex medical needs to enable these individuals to remain in their homes. Unlike nurses who provide services through a hospital, clinic, or other healthcare provider, the Nurses directly bill their services to the Medicaid program and receive reimbursement from the Wisconsin Medicaid Program for the nursing services they provide to patients.

The Nurses bring this action for declaratory judgment and injunctive relief pursuant to Wis. Stat. § 227.40(1), *et seq.* and the equitable powers of the Court. They challenge the validity of the policy and interpretations on which the Defendant Wisconsin Department of Health Services ("DHS") relies to demand that independent care nurses return monies for Medicaid-covered services the nurses actually provided to patients, solely because the nurses did not meet one or more of the complex, evolving billing and record-keeping requirements found in statutes, the administrative code, the online Medicaid Provider Handbook ("Handbook"), provider updates issued by DHS, or other sources deemed relevant by individual auditors in DHS's Office of the Inspector General ("OIG").

To justify recouping payments for services that it does not dispute were actually provided, DHS relies on the following statement in the online Medicaid Provider Handbook:

> For a covered service to meet program requirements, the service must be provided by a qualified Medicaid-enrolled provider to an enrolled member. In addition, the service must meet *all* applicable program requirements, including, but not limited to, medical necessity, PA (prior authorization), claims submission, prescription, and documentation requirements.

(Medicaid Provider Handbook, Topic #66; *see* Exhibit A to Plaintiffs' Complaint). DHS interprets and applies Topic #66, in conjunction with other statutes, rules, and policies, to deem services covered by Medicaid under applicable federal regulations and state administrative rules to be ***"non-covered"*** due to minor clerical errors, omissions in documentation of the services, or any perceived or actual imperfection in the delivery of care (hereinafter "the Perfection Rule"). As a result of this policy and practice, DHS has demanded recoupment of hundreds of thousands of dollars in payments from nurses in independent practice, often years after the nurses provided preapproved services to Medicaid-enrolled patients.

As discussed in this brief, DHS' Perfection Rule should be declared invalid by this Court, under Wis. Stat. § 227.40(4), for three separate reasons. First, the Perfection Rule exceeds DHS' statutory authority and is inconsistent with state statutes. DHS is authorized to recoup Medicaid payments in circumstances in which it cannot verify either that the services were provided or that the amount claimed was appropriate for the services rendered. It is relying on the Perfection Rule to recoup payments under circumstances that far exceed this express statutory authority. Second, the Perfection Rule was not properly promulgated as an administrative rule as required by the Wisconsin Statutes. *See* Wis. Stat. § 227.10(1). Third, because DHS relies on the Perfection Rule to deprive Medicaid providers of income they earned for services actually provided, often long after the fact, the Perfection Rule violates due process and constitutes a government taking of private property without just compensation in violation of the Wisconsin and U.S. constitutions. *See* Wis. Const. art. I, §§ 1, 13; U.S. Const. amend. V, XIV.

To be clear, the Nurses are concerned with DHS's practice of demanding the return of payments due solely to record-keeping flaws that are, at worst, mere mistakes or oversights. The Nurses do not contest DHS's authority to require the return of payments that were fraudulent, excessive, or erroneous (e.g., duplicate payments).

The Nurses recognize and support OIG's legal authority to prevent, detect, and end fraud and waste in the Medicaid program. However, OIG's efforts to combat fraud and to ensure compliance with applicable statutes and rules are not furthered by DHS's policy and practice of extracting money from nurses for services they actually provided to Medicaid patients, based solely on documentation errors or other technical flaws in complying with DHS's complex maze of requirements. The Legislature has expressly provided DHS with certain other enforcement

mechanisms—and not recoupment—to correct imperfections in a provider's services and documentation. DHS's practice, under the Perfection Rule, of clawing back compensation previously paid to providers for eligible, preapproved services they indisputably provided to Medicaid patients is a radical bureaucratic overreach by DHS's auditors.

This Court therefore should declare that DHS's authority to recoup moneys from Medicaid providers is limited to payments for which (1) DHS is unable to verify from the provider's records that the service was actually provided; or (2) the payment was inaccurate or inappropriate for the service provided. Because DHS relies on its Perfection Rule to recoup payments due to noncompliance with other program requirements, this Court should declare the Perfection Rule invalid and in excess of DHS's statutory authority.

II. APPLICABLE LEGAL STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Premier Cmty. Bank v. Schuh*, 2010 WI App. 111, ¶ 4, 329 Wis. 2d 146, ¶4, 789 N. W. 2d 388, ¶ 4; Wis. Stat. § 802.08(2) (summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

A court must determine whether a moving party's affidavits and other proofs present a prima facie case for summary judgment. *Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.*, 229 Wis. 2d 751, 756, 601 N.W. 2d 318, 321 (Wis. Ct. App. 1999). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. *Id.* "A party opposing a summary judgment motion must set forth 'specific facts,' evidentiary in nature and

admissible in form, showing that a genuine issue exists for trial. It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge." *Id.* (citations omitted).

III. OVERVIEW OF THE WISCONSIN MEDICAID PROGRAM, MEDICAID PAYMENT PROCESSES, AND DHS' ADMINISTRATIVE AUTHORITY OVER THE MEDICAID PROGAM

Medicaid[1] is a health care program for eligible children, pregnant women, elderly adults, low-income adults, and persons with disabilities, administered by the state and jointly funded by the state and federal government. *See* Wis. Stat. § 49.45; 42 U.S. Code §§ 1396 *et seq.* The Wisconsin Medicaid program is administered by the Wisconsin Department of Health Services. Wis. Stat. § 49.45(1). The Wisconsin Statutes direct the Department of Health Services to carry out various duties in administering the program, including establishing criteria for certification of providers, certifying providers, and setting conditions of participation and reimbursement in provider contracts. Wis. Stat. § 49.45(2)(a)(9), (11). The statutes authorize and direct DHS to promulgate administrative rules as part of its duties in administering Medicaid. See Wis. Stat. §§ 49.45, *passim.*

A. The Statutory Framework for Medicaid Provider Compliance

The Wisconsin Statutes require Medicaid providers to maintain records, as required by DHS, for verification of claims for reimbursement and provide that DHS "may audit such records to verify actual provision of services and the appropriateness and accuracy of claims." Wis. Stat. § 49.45(3)(f)1. Especially important to this case, the Wisconsin Statutes

[1] Medicaid is also referred to in the Wisconsin Statutes and administrative rules as "Medical Assistance" or "MA."

provide that DHS:

> may deny any provider claim for reimbursement which cannot be verified under subd. 1. or ***may recover the value of any payment made to a provider which cannot be so verified***. The measure of recovery will be the full value of any claim if it is determined upon audit ***that actual provision of the service cannot be verified*** from the provider's records or that the service provided was ***not included*** in s. 49.46 (2) or 49.471 (11).[2]

Wis. Stat. § 49.45(3)(f)2. (emphasis added). The health care services covered by Medicaid are defined in more detail in administrative code provisions promulgated by DHS. *See* Wis. Admin. Code ch. DHS 107. The administrative code provides the following "statement of general coverage":

> The department ***shall reimburse providers for medically necessary and appropriate health care services*** listed in ss. 49.46 (2) and 49.47 (6) (a), Stats., when provided to currently eligible medical assistance recipients, including emergency services provided by persons or institutions not currently certified. The department shall also reimburse providers certified to provide case management services as defined in s. DHS 107.32 to eligible recipients.

Wis. Admin. Code § DHS 107.01 (emphasis added).

The Wisconsin Statutes authorize DHS to administer the Medicaid program by establishing criteria for certification of providers; by setting conditions of participation and reimbursement in a contract for services; and by enforcing compliance by restricting a provider's participation in the Medicaid program or suspending or decertifying a provider. Wis. Stat. § 49.45(2). The statutes require DHS to promulgate administrative rules to implement this provision. Wis. Stat. § 49.45(10). Accordingly, DHS has promulgated administrative rules providing detailed policies and procedures for compliance with Medicaid requirements. Wis. Admin. Code ch. DHS 106 (rules establishing compliance policies and sanctions, including

[2] Sections 49.46(2) and 49.471(11) enumerate the health care services covered by Medicaid and BadgerCare Plus for eligible recipients. The two programs have different eligibility requirements and benefits; the differences are not relevant to this case.

termination or suspension of providers from Medicaid or "intermediate sanctions" such as pre-payment review of claims, restricting participation in the program, correction plans, and such.).

DHS's Office of the Inspector General ("OIG") conducts audits of Medicaid providers to ascertain their compliance with applicable laws and policies. *See* Wis. Stat. § 15.193; §§ 49.45(2)(b)4 & (3)(f)1; Wis. Admin. Code § DHS 106.02(9)(e)4. Providers are obligated to "maintain records as required by the department for verification of provider claims for reimbursement. The department may audit such records to verify actual provision of services and the appropriateness and accuracy of claims." Wis. Stat. § 49.45(3)(f)1. Any Medicaid provider who has billed Medicaid within the past five years may be audited by OIG. (Welsh Aff., ¶ 8.)

OIG also administers the Medicaid "prior authorization" process to ensure that certain covered services are medically necessary, of sufficient quality, and cost-effective before they are provided to Medicaid enrollees. Wis. Admin. Code § DHS 107.02(3). Private duty nursing, which is skilled nursing care provided in the patient's home, is a service that requires prior authorization by OIG. Wis. Admin. Code § 107.12(2)(a). Thus, before a nurse provides the care or submits a claim for reimbursement, an approved prior authorization request and Plan of Care must be on file for the patient.

B. DHS's Online Medicaid Provider Handbook

This case involves DHS's interpretation and application of provisions of the Online Medicaid Provider Handbook. DHS publishes the Online Medicaid Provider Handbook online as part of its administration of the Medicaid program.[3] The Online Handbook is an extensive

[3] The Handbook includes thousands of "topics," found on separate webpages under a lengthy series of drop-down menus by program and service area. For example, under the service area "Nurses in Independent Practice," the Handbook lists over 500 sections, each of which provides a link to a list of numbered topics. The numbered "topics"

collection of billing procedures, documentation requirements, and other policies and directives applicable to Medicaid providers. The Online Handbook may be amended at any point in time by DHS without legislative review or oversight. DHS does not have a policy or practice of affirmatively notifying Medicaid-certified providers of every applicable change to the Online Handbook.

DHS also frequently issues Medicaid Provider Updates announcing changes in policies and procedures, such as documentation requirements, claims submission procedures, billing codes, and such.[4] The Updates are published online several times per month and are frequently revised and reissued to correct errors or omissions. Changes in policies and procedures announced in the Updates are generally, but not always, incorporated into the Online Handbook at a later date.

IV. STATEMENT OF UNDISPUTED FACTS

Plaintiff Papa and Plaintiff PHP members are Medicaid-certified nurses in independent practice. (Affidavit of Kathleen Papa, ¶ 2-3.) They provide home-based nursing care to children and adults with complex health needs and bill Medicaid for these services. (Affidavits of Hubertus, ¶¶ 3, 5; Papa, ¶¶ 3, 5; Unke, ¶ 2; Steger, ¶ 2; Goss, ¶ 2; Zuhse-Green, ¶ 2; Rueda, ¶ 2.) Without the private duty nursing services provided by PHP members and other independent nurses, many of these children and adults would be unable to remain in their own homes and would require institutionalization, with Wisconsin Medicaid covering the dramatically higher

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in the online Medicaid Provider Handbook do not appear in numerical order. To appreciate the complexity and expansive scope of the Handbook, Plaintiffs invite the Court to view it online at: https://www.forwardhealth.wi.gov/WIPortal/Online%20Handbooks/Display/tabid/152/Default.aspx

[4] The Provider Updates and other information are available on DHS's ForwardHealth website portal. Providers may register for an email subscription to receive notice of updates. *See* https://www.forwardhealth.wi.gov/WIPortal/Tab/42/icscontent/Provider/Updates/Index.htm.spage

costs of that institutional care. (Affidavits of Rothfelder, ¶ 3; Haidlinger, ¶ 7; Hubertus, ¶ 4; Papa, ¶ 4; Unke, ¶ 4; Steger, ¶ 3; Goss, ¶ 3; Zuhse-Green, ¶ 3; Rueda, ¶ 3.) Many PHP members, like other independent nurses, exclusively provide services to Medicaid patients and reimbursements from Medicaid constitute their entire incomes. (Affidavits of Hubertus, ¶ 5; Papa, ¶ 5; Goss, ¶ 4; Zuhse-Green, ¶¶ 4-5.)

PHP provides informational training and educational services to nurses in independent practice in the form of meetings, conferences, and other training opportunities "to promote quality nursing care and adherence to professional standards and state regulations." (Papa Aff., ¶ 6) Many of PHP's members are small, independently-owned businesses employing 25 or fewer full-time employees. (Papa Aff., ¶ 7; Hubertus Aff., ¶ 7.)

During audits of PHP's members, OIG has sought to recover Medicaid funds based on a finding of noncompliance with a Medicaid Provider Update, a Handbook provision, an Administrative Code provision, or other standard or policy. (Steger Aff., ¶ 7; Zuhse-Green Aff., ¶ 10; Rueda Aff., ¶ 6; Unke Aff., ¶ 6; Goss Aff., ¶ 8; Papa Aff., ¶ 9; Hubertus Aff., ¶ 9.) OIG's findings of noncompliance frequently do not call into question whether the healthcare services were actually provided or whether the Medicaid patient was entitled to receive the healthcare services. (Zuhse-Green Aff., ¶¶ 8-9; Rueda Aff., ¶ 5; Unke Aff., ¶¶ 8-9; Goss Aff., ¶ 7; Steger Aff., ¶¶ 5-6.) Nevertheless, OIG auditors often allege that services were "non-covered," and therefore subject to recoupment, due to alleged documentation or other shortcomings. Accordingly, OIG has at times characterized *all* the compensation a nurse received for services she actually provided to Medicaid patients for days, weeks, months, or even years as "overpayments." (Zuhse-Green Aff., ¶ 9; Unke Aff., ¶ 9; Steger Aff., ¶ 6.) In fact, OIG has

demanded the repayment of amounts exceeding $100,000 from individual nurses for skilled nursing services that OIG does not dispute were provided to Medicaid patients, and, furthermore, that OIG itself previously authorized. (Papa Aff., ¶ 10.)

OIG auditors similarly have sought to recoup payments from nurses because the nurse failed to submit the claims to the patient's employer-based health plan, even when it was previously established that the employer's plan would not cover the service, OIG authorized the services, and Medicaid paid the claims. (Zuhse-Green Aff., ¶ 10; Papa Aff., ¶ 11; Hubertus Aff., ¶ 10.) Likewise, OIG auditors sought to recoup funds from nurses for services actually provided because the nurse provided *additional* care, above and beyond what was on the patient's Plan of Care. (Papa Aff., ¶ 12; Hubertus Aff., ¶ 11.) Similarly, OIG auditors have sought to recoup nurses' earnings for entire shifts of work because a physician, after giving the nurse a verbal order to administer necessary healthcare to a patient, did not timely sign and return a written order to the nurse. (Papa Aff., ¶ 13; Hubertus Aff., ¶ 12.)

As a result, PHP members undergoing audits have had to invest significant time and resources, including attorneys' fees, to defend themselves against OIG's findings and recoupment attempts. (Rueda Aff., ¶ 7; Zuhse-Green Aff., ¶ 13; Unke Aff., ¶ 9; Goss Aff., ¶ 9; Papa Aff., ¶ 14; Steger Aff., ¶ 8; Hubertus Aff., ¶ 14.) This has imposed significant financial burdens on Medicaid providers, such as Plaintiff PHP's members. (Rueda Aff., ¶ 7; Zuhse-Green Aff., ¶ 13; Unke Aff., ¶ 9; Goss Aff., ¶ 9; Papa Aff., ¶ 14; Steger Aff., ¶ 8; Hubertus Aff., ¶ 14.) In some cases, OIG's efforts to recoup funds have caused providers to declare bankruptcy, refrain from providing Medicaid services in the future, or both. (Hubertus Aff., ¶ 15; Papa Aff., ¶ 15; Zuhse-Green Aff., ¶¶ 14, 16; Rueda Aff., ¶¶ 8-9; Unke Aff., ¶¶ 10-11; Goss Aff., ¶ 10;

Rothfelder Aff., ¶¶ 7-8; Steger Aff., ¶ 9; Haidlinger Aff., ¶¶ 13, 15, 17.) Thus, some independent nurses are understandably hesitant to provide Medicaid services at all, for fear that OIG will demand recoupment of days, weeks, months, or even years of income for services they actually provided to patients. (Hubertus Aff., ¶ 16; Papa Aff., ¶ 16; Zuhse-Green Aff., ¶ 16; Rueda Aff., ¶¶ 8-9; Unke Aff., ¶ 11; Goss Aff., ¶ 10; Steger Aff., ¶ 9.)

V. ARGUMENT

DHS's Perfection Rule, i.e., its policy and practice of seeking to recoup Medicaid payments for virtually any discrepancy in the provider's documentation as required under the administrative rules, Online Handbook, or provider updates, without regard to whether the services were actually provided, is invalid on several legal grounds. First and foremost, in cases where DHS can verify that the services were actually provided and that the amount paid was appropriate for the services provided, the Perfection Rule is inconsistent with and exceeds the scope of DHS's statutory authority to demand the return of payments from Medicaid providers. Second, even if DHS's recoupment policy did not exceed its statutory authority, DHS has not properly promulgated the policy as an administrative rule, as required under the Wisconsin Statutes. Finally, because DHS relies on the Perfection Rule to deprive Medicaid providers of income for services they actually provided, long after they could correct the alleged error, the Perfection Rule violates due process and constitutes a government taking of private property without just compensation in violation of the Wisconsin and U.S. constitutions. This Court should declare that DHS's authority to recoup payments after the fact from Medicaid providers is limited to circumstances in which the Department is unable to verify that the services were actually provided or that payments were appropriate for the services provided. Further, it should

enjoin DHS from seeking to recoup past payments for services under circumstances in which it is not statutorily authorized.

A. DHS is Authorized to Recover Payments from Nurses Only if, Upon Audit, it Cannot Verify That Services Were Actually Provided or That the Payments Received by the Provider Were Appropriate and Correct for the Services Provided.

The Legislature has authorized DHS to recover Medicaid payments only if, upon audit, it cannot be verified that the services were actually provided or that the amount paid for the services was appropriate and accurate. The statute both grants and limits DHS's powers to force providers to return payments received for Medicaid services. Under its Perfection Rule, DHS has sought to recoup payments from nurses for a wide variety of compliance errors that do not involve a failure to provide the services billed to Medicaid, such as providing care beyond that specified in the approved care plan (at no additional charge); failing to submit claims first to an employer health plan, when it was established that the employer plan did not cover the service; and providing care as ordered by a physician who failed to timely sign a written order. DHS's Perfection Rule exceeds the scope of its statutory authority and, as such, represents an abuse of its administrative powers.

1. An Agency May Only Act as Authorized by Statute.

It is well-settled that an administrative agency may only act as authorized by the Legislature. *Schmidt v. Dep't. of Res. Dev.*, 39 Wis. 2d 46, 56-67 (1968) (*citing State ex rel. Wis. Inspection Bureau v. Whitman* 196 Wis. 472, 507-08 (1928)); *see also Debeck v. Wisconsin Dep't of Natural Res.*, 172 Wis. 2d 382, 387-388, 493 N.W.2d 234, 237 (Ct. App. 1992) (administrative agencies do not have powers superior to those of the legislature). "[T]here will

remain two checks upon the abuse of power by administrative agencies. In the first place, every such agency must conform precisely to the statute which grants the power; secondly, such delegated powers must be exercised in the spirit of judicial fairness and equity and not oppressively and unreasonably." *Schmidt* at 57.

"[A]ny doubts as to the implied power of an agency are to be resolved against the existence of authority." *Debeck*, 172 Wis. 2d at 387, 493 N.W.2d at 237 (citing *Trojan v. Board of Regents of Univ. of Wis. Sys.*, 128 Wis. 2d 270, 277, 382 N.W.2d 75, 78 (Ct. App. 1985). "An agency charged with administering a law may not substitute its own policy for that of the legislature." *Id.* (citing *Niagara of Wis. Paper Corp. v. DNR*, 84 Wis. 2d 32, 48, 268 N.W.2d 153, 160 (1978)).

2. The Wisconsin Statutes Limit DHS's Authority to Recover Payments Made to Medicaid Providers.

Wis. Stat. § 49.45(3)(f) sets forth the conditions by which DHS may audit and recover Medicaid payments from providers:

> **1.** Providers of services under this section shall maintain records as required by the department for verification of provider claims for reimbursement. The department ***may audit such records to verify actual provision of services and the appropriateness and accuracy of claims.***
>
> 2. The department may deny any provider claim for reimbursement which cannot be verified under subd. 1. or ***may recover the value of any payment made to a provider which cannot be so verified.*** The measure of recovery will be the full value of any claim ***if it is determined upon audit that actual provision of the service cannot be verified from the provider's records*** or that the service provided was not included in s. 49.46 (2) or 49.471 (11). In cases of mathematical inaccuracies in computations or statements of claims, the measure of recovery will be limited to the amount of the error.

Wis. Stat. § 49.45(3)(f) (emphasis added).

The statutes also direct the methods by which DHS may recover payments from a provider that were improper, erroneous, or excessive for the service provided:

> After reasonable notice and opportunity for hearing, *recover money improperly or erroneously paid or overpayments to a provider* by offsetting or adjusting amounts owed the provider under the program, crediting against a provider's future claims for reimbursement for other services or items furnished by the provider under the program, or requiring the provider to make direct payment to the department or its fiscal intermediary.

Wis. Stat. § 49.45(2)(a)10.a. DHS has promulgated an administrative rule that tracks this statutory language regarding the method of recovering overpayments:

> **Departmental recoupment of overpayments.**
> (a) Recoupment methods. If the department finds that a provider has received an overpayment, including but not limited to erroneous, excess, duplicative and improper payments regardless of cause, under the program, the department may recover the amount of the overpayment by any of the following methods, at its discretion:
> 1. Offsetting or making an appropriate adjustment against other amounts owed the provider for covered services;
> 2. Offsetting or crediting against amounts determined to be owed the provider for subsequent services provided under the program if:
> a. The amount owed the provider at the time of the department's finding is insufficient to recover in whole the amount of the overpayment; and
> b. The provider is claiming and receiving MA reimbursement in amounts sufficient to reasonably ensure full recovery of the overpayment within a reasonable period of time; or
> 3. Requiring the provider to pay directly to the department the amount of the overpayment.

Wis. Admin. Code DHS § 108.02(9)(a). Notably, the above statute and rule do not purport to grant DHS any additional authority to recoup payments based merely on the provider's failure to strictly comply with other program requirements. Rather, they direct the specific methods by which DHS may recover payments made to a provider that do not reflect the services provided (e.g., duplicative, excessive, or erroneous payments).

When the value of the payment *can* be verified—in other words, when the audit confirms

that the practitioner provided the care in question and was paid an appropriate amount for that service—DHS lacks statutory authority to recover payments. The Legislature has not authorized DHS to recover funds due to documentation that fails to strictly comply with the copious and sometimes contradictory requirements dispersed throughout its administrative rules, online Handbook, and frequent Provider Updates. Imperfections in the provider's paperwork or other compliance issues do not mean the provider received an overpayment, if in fact the service was authorized, the provider actually provided it, and the payment was appropriate for the service.

Further, DHS' Perfection Rule expressly conflicts with Wis. Admin. Code § DHS 107.01(1), which states:

> The department ***shall*** reimburse providers for medically necessary and appropriate health care services listed in ss. 49.46 (2) and 49.47 (6) (a), Stats., when provided to currently eligible medical assistance recipients, including emergency services provided by persons or institutions not currently certified. The department shall also reimburse providers certified to provide case management services as defined in s. DHS 107.32 to eligible recipients.

(emphasis added). This provision requires DHS to pay providers for appropriate health services authorized by Medicaid. DHS cannot disregard this rule when it wishes to penalize providers for failing to fully comply with DHS's detailed and extensive record-keeping, billing, or numerous other requirements.

3. DHS is Authorized to Impose Sanctions Other than Recoupment of Payments on Providers Who Fail to Comply with Medicaid Requirements.

The Legislature has authorized DHS to take certain corrective actions to enforce the Medicaid statutes, administrative rules, terms of Medicaid provider agreement, and certification criteria. DHS is authorized to "decertify a provider from or restrict a provider's participation in the medical assistance program, if after giving reasonable notice and opportunity for hearing the

department finds that the provider has violated a federal statute or regulation or a state statute or administrative rule and the violation is, by statute, regulation, or rule, grounds for decertification or restriction." Wis. Stat. § 49.45(2)(a)12.a. Importantly, these are *prospective*, not retroactive, sanctions that may only be imposed upon due process. Likewise, DHS is authorized to suspend the provider from Medicaid while the hearing is pending, upon proper notice, if DHS finds that the provider's ongoing participation in Medicaid is "likely to lead to the irretrievable loss of public funds and is unnecessary to provide adequate access to services to medical assistance recipients." *Id.* Additionally, DHS is authorized to "[i]mpose additional ***sanctions*** for noncompliance with the terms of provider agreements…or certification criteria." Wis. Stat. § 49.45(2)(a)13. DHS has defined these "additional sanctions" by a properly promulgated administrative rule. Wis. Admin. Code § DHS 106.065(2), 106.07(4). They include, for example, suspension of payments for particular services, a plan of correction, referral to a licensing agency, or transferring the provider to a provider agreement of limited duration. *Id.*

Thus, the Legislature has authorized DHS to enforce the extensive requirements of participation in Medicaid, including the terms of provider agreements and provider certification requirements, by levying sanctions, which DHS has appropriately defined by promulgating an administrative rule—***not*** to recoup funds. The compliance mechanisms authorized by the statute and rule do not include forcing the provider to return payments for services provided.

4. Construing the Statutes as Authorizing DHS to Recoup Payments from Medicaid Providers Only in Circumstances of Actual Overpayment is Consistent with Sound Public Policy.

The construction of DHS's statutory enforcement authority under the Medicaid program discussed herein advances the public policy goals of avoiding fraud and waste, without

unnecessarily deterring qualified, honest providers from participating in Medicaid. The Legislature has authorized DHS to recoup payments from providers only when the documentation calls into question the actual provision of services or the accuracy of payments. Granting DHS this circumscribed authority to recover payments protects taxpayers against waste and fraud. The Nurses support such actions and do not dispute DHS' ability to utilize sanctions against providers for noncompliance.

By contrast, DHS's interpretation of its statutory authority as empowering its auditors to seek recoupment from the Nurses for virtually any failure to comply strictly with myriad program requirements is a bureaucratic overreach that is contrary to public policy. Rather than deterring waste and abuse, this overly-broad policy is deterring qualified independent care nurses from participating in Medicaid, out of fear that a demand by DHS to repay thousands of dollars for services they actually provided to high-needs patients—along with the legal costs to contest such orders—will drive them into bankruptcy. *See* Hubertus Aff., ¶ 15; Papa Aff., ¶ 15; Zuhse-Green Aff., ¶¶ 14, 16; Rueda Aff., ¶¶ 8-9; Unke Aff., ¶¶ 10-11; Goss Aff., ¶ 10; Rothfelder Aff., ¶¶ 7-8; Steger Aff., ¶ 9; Haidlinger Aff., ¶¶ 13, 15, 17. DHS has exceeded its statutory authority by relying on its Perfection Rule to recoup funds from providers for approved services that were actually provided.

B. DHS' Perfection Rule is Invalid Because it was not Properly Promulgated as an Administrative Rule.

DHS is authorized to "set forth conditions of participation and reimbursement in a contract with [a Medicaid] provider." Wis. Stat. § 49.45(2)(a)9. DHS asserts that this statutory provision authorizes it to adopt the Perfection Rule described above. (Welsh Aff., ¶ 9, Ex. 6, *see,*

e.g., Request for Admission No. 12.) However, DHS' Perfection Rule does ***not*** set forth conditions relating to participation and reimbursement in a contract with a provider. Rather, the Perfection Rule is a statement of general policy, an interpretation of Wisconsin Statutes, or both.

State law requires that a state agency "***shall*** promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute. " Wis. Stat. § 227.10 (emphasis added). Likewise, the statutes define a "rule" as:

> a regulation, standard, statement of policy, or general order of general application which has the effect of law and which is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.

Wis. Stat. § 227.01(13). Thus, a rule is "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency." *Cholvin v. Wis. Dept. of Health and Family Services*, 2008 WI App 127, ¶ 22, 313 Wis. 2d 749, 758 N.W.2d 118 (citing *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)).

DHS does not dispute that the Perfection Rule meets criteria (1), (4) and (5), i.e., that it is "regulation, standard, statement of policy or general order" "issued by" DHS "to implement, interpret, or make specific legislation enforced or administered" by DHS. As discussed below, DHS' Perfection Rule also meets the remaining criteria set forth in Wis. Stat. § 227.01(13), i.e., DHS employs it as a rule of general application with the effect of law. Thus, the Perfection Rule constitutes a rule that must be properly promulgated by DHS.

1. The Perfection Rule is of General Application.

A rule is of general application if it applies to a "class," if "that class is described in general terms and new members can be added to the class." *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 816, 280 N.W.2d 702 (1979). *See also Cholvin*, 2008 WI App 127, ¶ 25 (holding that a Medicaid policy was of general application because it "*applies* to all applicants even though it may only *affect* some of them.") (emphasis in original).

The class to which the Perfection Rule applies is Medicaid providers, which includes Plaintiff Papa and Plaintiff PHP members. New members—additional Medicaid providers—can be added to the class. Likewise, DHS' Perfection Rule establishes a general policy of recoupment applicable to all Medicaid providers, now and in the future, even though it may only affect some of the providers.

2. The Perfection Rule has the Effect of Law.

An agency action has the "effect of law" if criminal or civil sanctions can result as a violation; if licensure can be denied; or if the interest of individuals in a class can be legally affected through enforcement of the agency action. *See generally*, *Wisconsin Electric Company v. DNR*, 93 Wis. 2d 222, 287 N.W.2d 113 (1980); *Schoolway Transportation Co. v. Division of Motor Vehicles*, 72 Wis. 2d 223, 240 N.W.2d 403 (1976); and *Frankenthal v. Wisconsin Real Estate Board*, 3 Wis. 2d 249, 88 N.W.2d 352, 89 N.W.2d 825 (1958).

In this case, the Perfection Rule is more than informational in nature and does not simply recite a policy or guideline.[5] The Perfection Rule has the effect of law because all Medicaid

[5] As argued in Section II *infra*, DHS does not have statutory authority to recoup funds from providers due to minor clerical errors. Thus, since the Perfection Rule has no basis in Wisconsin Statutes or the Administrative Code it is the

providers can be legally affected by the enforcement of DHS' Perfection Rule due to the possibility of an audit that could deprive them of months or years of payments they legitimately earned for approved care they provided.

DHS admits its Perfection Rule was not promulgated as a rule (Welsh Aff., ¶ 9, Exh. 6, Request to Admit 11). DHS failed to comply with any of the rulemaking requirements of Wis. Stat. § 227.10. Moreover, DHS failed to comply with Wis. Stat. § 227.114 even though the rule has a significant effect on small businesses, including some PHP members. The prevention of agency overreach through application of unpromulgated rules in situations such as this is exactly what the Legislature intended when enacting these important, mandatory statutory provisions.

Requiring DHS to formally adopt such an important policy that affects the provision of Medicaid services in Wisconsin is sound public policy. As aptly stated in *Mack v. WDHFS*, 231 Wis. 2d 644, 649, 231 N.W.2d 651, 654 (Ct. App. 1999):

> The requirement of formal rulemaking requires administrative agencies to follow a rational, public process. This requirement ensures that administrative agencies will not issue public policy of general application in an arbitrary, capricious, or oppressive manner. Many public policy concerns could be illuminated through the rulemaking process.

Likewise, an agency must comply with statutory requirements to evaluate the impact of a proposed rule on small businesses before promulgating the rule:

> When an agency proposes or revises a rule that may have an effect on small businesses, the agency ***shall*** consider each of the following methods for reducing the impact of the rule on small businesses:
>
> > **(a)** The establishment of less stringent compliance or reporting requirements for small businesses.
> > **(b)** The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses.
> > **(c)** The consolidation or simplification of compliance or reporting requirements

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enactment of a rule rather than the mere clarification of existing policies or guidelines to assist in the implementation of administrative rules.

> for small businesses.
> **(d)** The establishment of performance standards for small businesses to replace design or operational standards required in the rule.
> **(e)**The exemption of small businesses from any or all requirements of the rule.

Wis. Stat. § 224.114(2) (emphasis added).

DHS' failure to properly promulgate the rule, either under § 227.10 or § 227.114, invalidates the Perfection Rule. Wis. Stat. § 227.40(4)(a). For all of the foregoing reasons, DHS' Perfection Rule must be invalidated because it constitutes a rule that was not properly promulgated.

C. DHS' Perfection Rule Violates Due Process and the Takings Clause of the Wisconsin and United States Constitutions and is Contrary to Public Policy.

Article I, Section 13 of the Wisconsin Constitution provides: "The property of no person shall be taken for public use without just compensation therefor." Wis. Const. art. I, § 13. An unconstitutional taking occurs when (1) a property interest exists; (2) the property interest has been taken; (3) the taking was for public use; and (4) the taking was without just compensation. *Wis. Retired Teachers Ass'n v. Employee Trust Funds Bd.*, 207 Wis. 2d 1, 18–24, 558 N.W.2d 83 (1997). When determining whether a taking occurred under this provision, Wisconsin courts generally apply the same standards that are used to determine whether a taking occurred under the Fifth Amendment to the United States Constitution. *See Zealy v. City of Waukesha*, 201 Wis. 2d 365, 374, 548 N.W.2d 528 (1996) (holding that "[t]his court has adopted a similar method of inquiry" for determining regulatory takings as the United States Supreme Court); *see also Eternalist Found. v. City of Platteville*, 225 Wis. 2d 759, 773, 593 N.W.2d 84 (Ct. App. 1999).

Wisconsin law recognizes a variety of rights and interests in property. *See Penterman v. Wis. Elec. Power Co.*, 211 Wis. 2d 458, 480–81, 565 N.W.2d 521 (1997) ("[I]t is well settled

that the rights of ownership and use of property have long been recognized by this state."). A party has a property interest if he or she has a "legitimate claim of entitlement" to the property, as opposed to an "abstract need or desire" or "unilateral expectation." *Taplick v. City of Madison Pers. Bd.*, 97 Wis. 2d 162, 170, 293 N.W.2d 173 (1980) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *Fazio v. Dep't of Emp. Trust Funds*, 2005 WI App 87, ¶ 11, 280 Wis. 2d 837, 696 N.W.2d 563 (reasoning adopted in *Fazio v. Dep't of Emp. Trust Funds*, 2006 WI 7, 287 Wis. 2d 106, 708 N.W.2d 326).

The Perfection Rule meets all four criteria of an unconstitutional taking. First, Plaintiffs and other Medicaid providers in Wisconsin have a property interest in the funds they receive for the approved services they provide to needy Medicaid patients. Second, when OIG finds a minor deviation, it often relies on its Perfection Rule to recoup all payments from the provider for the services provided, even though there is no question the services were provided and approved. The recoupment constitutes a taking of providers' property interest as providers have a clear expectation of being remunerated for the important services they provide. Indeed, since the OIG audits often occur years after providers rendered the approved services, the providers have had the compensation for those services for years. Third, funds DHS recoups are taken for a public purpose and put to a public use—with roughly one third of the recouped funds remaining with the Department of Health Services and two-thirds being sent to the federal government. Finally, as stated above, providers whose property is taken due to DHS' reliance on the Perfection Rule receive no compensation for either the funds that are taken from them or for the approved services they had actually provided. In fact, OIG has at times sought to recover months of the providers' hard earned salary due to minor noncompliance with Handbook provisions and

Medicaid updates. (Zuhse-Green Aff., ¶ 9; Unke Aff., ¶ 9; Steger Aff., ¶ 6; Welsh Aff., ¶ 12, 13, 14, Exhs. 9, 10.)

VI. CONCLUSION

Ms. Papa and PHP's members fear they will be audited by OIG and forced to turn over some of their hard earned income—which was gained through providing authorized Medicaid services—merely due to minor clerical or other errors. Such a practice essentially forces independent nurse practitioners out of business and results in less care for needy Medicaid patients.

FOR THESE REASONS, Kathleen Papa and the Professional Homecare Providers, Inc. respectfully request that the Court:

DECLARE that the declare that the Department of Health Services' authority, pursuant to Wis. Stat. § 49.45(3)(f), to recoup moneys from Medicaid providers is limited by to payments for which (1) DHS is unable to verify from the provider's records that the service was actually provided; or (2) the payment was inaccurate or inappropriate for the service provided;

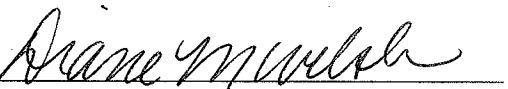
FURTHER DECLARE that DHS's policy of recouping payments due to noncompliance with other program requirements, i.e., the Perfection Rule, exceeds DHS's statutory authority, or alternatively, was not properly promulgated as an administrative rule pursuant to Wis. Stat. § 227.10(1);

DECLARE that the Department's policy and practice of recouping funds in a manner inconsistent with the Medicaid Statutes is a violation of the Takings Clause of the Wisconsin Constitution and United States Constitution, Wis. Const. art. I, § 13 and U.S. Const. amend. V;

PERMANENTLY ENJOIN the Department of Health Services from applying this perfection rule in pending or future audits and recovery efforts of Ms. Papa, members of Professional Homecare Providers, Inc., or similarly situated Medicaid providers.

Respectfully submitted this 17th day of March, 2016.

CULLEN WESTON PINES & BACH LLP

By: 

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