SB

288

No. 1

FISCAL NOTE

Bill Version: SB 288

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL (S) Publish Date: 5/13/91

Revision Date:
Dept. Affected: Health and Social Services
Title: Audits and Inspections of Certain Health Facilities/Results used for payment & Ratesetting
BRU:
Component:
Sponsor: Rules Committee
Requestor: Governor
COMPONENT SERIAL NO.

Expenditures/Revenues (Thousands of Dollars)

OPERATING	FY92	FY93	FY94	FY95	FY96	FY97
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE	940.0	1,128.0	1,354.0	1,624.0	1,949.0	2,339.0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
OTHER	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary)

Revenue is calculated assuming that one percent of facility medicaid expenditure is recouped through audits. Fifty percent of these collections will be returned to the federal government.

See attached for further analysis.

Prepared by: Jay A. Livey, Deputy Commissioner
Phone: 465-3030
Division: Office of the Commissioner
Date: 4/26/91

Approved by Commissioner: Theodore A. Mala, MD, MPH
Date: 4/30/91
Agency: Department of Health and Social Services

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
OMB
Impacted Agency(ies)

(Rev 10/90)

ANALYSIS (cont.):

If this legislation passes, there is no expenditure impact because the Department will continue its current auditing activities. However, there is a positive revenue impact to the State because the legislation will allow the Department to be able to continue to audit into the future. Based on departmental experience and Medicare audit results, the Department estimates that, annually, one percent of future expenditures can be recouped as a result of audits.

If this bill were to not pass, the legal confusion resulting from the Cordova decision would make it difficult for the Department to be able to recoup any funds through audits from health providers for overpayments made by the Department during past years nor would the Department be able to recoup future overpayments. The Department has estimated that potential recoveries from audits for fiscal years 1985 through 1991 will range from between $7,000,000 and $10,000,000. Additionally, without this legislation it is possible that the revenue identified in the fiscal note would not be collected. It should be noted that because Medicaid is a federal participation program, fifty percent (50%) of audit collections would be returned to the federal government.

If the State were not allowed to recoup funds based on audit findings, the Federal government would still expect their share of overpayments to facilities for medicaid patients to be returned to them for both past and future years. Even though the State would not be aggressively auditing facilities, the Federal government would be auditing the State rate setting process and refusing to participate in payment rates which are questioned through an audit. We anticipate that these audits would result in a state liability for past years that is less than the audit finding projected above but one that could still be significant. The Department has projected that without the statutory ability to audit, recoup, and incorporate the findings into future rates, Federal audits of the State rate setting process could result in a State liability of approximately $850,000 per year for fiscal years 1989, 1990 and 1991. State liability in future years will depend upon the degree of aggressiveness with which the Federal government audits.

WALTER J. HICKEL
GOVERNOR

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

May 13, 1991

The Honorable Richard I. Eliason
President of the Senate
P.O. Box V
Juneau, AK 99811

Dear President Eliason:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to audits and inspections of health facilities receiving payment for medical assistance for needy persons and to the use of audit and inspection results in recapturing overpayments and reimbursing underpayments to such health facilities.

The bill has three major components: the findings of the legislature concerning its intent on the role of audits and inspections in state medical assistance programs; expressly stating in statute the legislature's intent that the results of Department of Health and Social Services' audits and inspections be used in setting prospective rates to facilities; and expressly stating in statute the legislature's intent that the department collect for overpayments made to facilities, and issue additional payment to facilities if the audit or inspection shows an amount due.

The bill is needed to clarify that, from the time it established a prospective rate system for the medical assistance program in 1983, the legislature intended that the department use audit and inspection results in setting prospective rates, adjusting payments to facilities, collecting for overpayments, and reimbursing for underpayments to facilities. The bill is necessary because the Alaska Supreme Court ruled in City of Cordova v. Medicaid Rate Commission, 789 P.2d 346 (Alaska 1990), that the rate-setting statute for facilities in the medical assistance programs (AS 47.07.070) was silent on the subject of prospective recoupment from a facility based on audit results and, therefore, precluded recoupment by the department. Given the substantial commitment of public money to medical assistance

programs, it is important for the legislature to more clearly affirm its position that the department use audits and inspections to monitor the spending of that money to appropriately adjust rates, to seek reimbursement for overpayments, and to pay the facilities additional money in the case of underpayments.

Failure to adopt this bill will likely result in additional litigation regarding the use of these audits, with a substantial amount of money at issue. I urge your prompt and favorable action on this legislation.

Sincerely,

Walter J. Hickel

Walter J. Hickel
Governor

PROPOSED CHANGES TO
SB 288

From the Department of Health & Social Services

Page 3, Line 11:

Insert after "shall" **for the facility's fiscal year beginning after June 30, 1992**

Page 3, Line 13

Insert after "facility" **based upon prospective rates set after July 1, 1992.**

Page 3, Line 17:

delete Sec. 4., renumber following sections.

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

March 31, 1992

Senator Arliss Sturgulewski
Room 427
State Capitol
Juneau, Alaska 99811

Dear Senator Sturgulewski:

Yesterday you expressed interest in the status of SB 288. This bill was introduced after the Alaska Supreme Court ruled that the Department of Health and Social Services does not have the authority to recapture funds from health care facilities when audits disclose differences of opinion over accounting methods.

The court said the department could recapture funds under other circumstances including cases of fraud or misrepresentation.

The bill as it was introduced would give the department the authority to conduct audits in any manner and at any time they choose and then recapture funds from the facilities.

The audit staff in the department has a backlog of work that goes back as far as 1986.

The Alaska State Hospital and Nursing Home Association (ASHNHA) believes that it is unreasonable for the department to be allowed to recapture funds that are the subject of disagreements over accounting methods when the audit raising the issue is six years late.

The department audit staff works without formal regulations, without standard audit programs or procedures and the ASHNHA membership believes that structure should be developed.

With that in mind, we have worked with department audit personnel and the Commissioner's Office over the past eight months to try to convince them to take a more comprehensive approach to SB 288.

ASHNHA members worked with me to develop the attached bill draft which we believe will produce an auditing program that will work for the state, for ASHNHA members and keep our prospective rate setting system intact.

Senator Fischer chaired a meeting of the interested parties and ASHNHA and the department each agreed to consider several compromise language changes.

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When we next met (without Senator Fischer) the department said they can not accept ASHNHA's approach to the legislation and asked if we would be willing to let the bill die and work on the structural problems during the coming interim.

The ASHNHA negotiators agreed to continue working with the department on this problem through the interim because we believe a bitter fight over the original version of SB 288 would be detrimental to the working relationship between the department and the facilities.

Senator Fischer has tried to help find a way for the department and facilities to agree on an audit process. The department however, still resists the development of a formal written process.

As you know, the Division of Legislative Audit adheres strictly to policies and procedures governing the conduct of their audits. They follow standard procedures for discussing audit findings with the auditees and reporting those findings and conclusions to the Legislature. By doing so, they maximize efficiency and both the auditors and auditees are clear on how the process works.

We believe that the Department of Health and Social Services should conduct their audits under a process that is at least as well defined and documented as that followed by the Division of Legislative Audit.

We request that you allow ASHNHA and the department to work together on this issue and let us drop SB 288 for this year. Passage of that bill will only lead to an acrimonious relationship between the state's health care facilities and the department.

Please let me know if you would like to discuss this issue in more detail.

Sincerely,

Garrey M. Peska, C.P.A.
Vice President - Finance

ALASKA STATE HOSPITAL & NURSING HOME ASSOCIATION

DRAFT OF PROPOSED COMMITTEE SUBSTITUTE FOR SB 288

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to audits of health facilities receiving payment for medical assistance for needy persons and to the use of audit results in setting prospective rates, recapturing overpayments and reimbursing underpayments to such health facilities; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*Section 1. PURPOSE. The amendments of AS 47.07.070 in this Act are adopted to

(A) provide a sound basis for the state to set prospective rates of payment to health facilities;

(B) clarify the process by which audit adjustments may be used to set prospective rates;

(C) clarify the process by which audit adjustments may be retroactively recaptured or reimbursed.

Section 2. AS 47.07.070 (a) is amended to read:

(a) The department shall set the prospective rate of payment to a health facility under this chapter and AS 47.25.120 -- 47.25.300 based on a fair rate for reasonable costs incurred by the facility. <u>In setting a rate the department may utilize the results of department audits as specified in 47.07.070 (g).</u> The department may not set a rate until after a public hearing before the Medicaid Rate Advisory Commission except that this hearing requirement is not applicable if a new rate is immediately necessary to afford adjustmental relief to a facility as determined under regulations

adopted by the department. The department shall by regulation list the factors it considers in making its rate determinations under this section. A rate set under this section does not take effect until it is approved in writing by the commissioner of health and social services or the agency assigned by the commissioner to perform this function. The written determination of the basis of the findings and conclusions, a citation to the regulations supporting the findings and conclusions, and a statement of the decision.

*Section 3. AS 47.07.070 is amended by adding a new subsection to read:

(g) The department may conduct audits of a health facility's records to assure compliance with regulations promulgated under this chapter. Using the results of departmental audits, the department shall ;

(1) set prospective rates based on audit adjustments which have been prepared within six months of the later of the date the cost report is due or submitted and which have been agreed to by the facility and the department. Adjustments which are not agreed upon are addressed in (2) of this section;

(2) recapture overpayments or reimburse underpayments which are due to fraud, intentional misrepresentations or final resolution of disputed audit adjustments. The disputed audit adjustments must have been identified in (1) of this section. The recapture or refund may be by assessment, adjustment to the facility's prospective rate or withholding from payments due to the facility or the department.

(3) promulgate regulations governing the conduct of Medicaid audits of health facilities. The regulations adopted shall include definitions of:

(A) field audits and desk audits

(B) scope and purpose of audits for Medicaid purposes

(C) timing of audits

(D) timing of and procedures for disclosure of audit findings to facilities

(E) procedure for calculation of fiscal impact of proposed audit adjustments

(F) process for facilities to appeal audit findings

(G) process for auditing Medicaid Rate Advisory Commission staff reports used to set rates

*Section 4. This Act takes effect immediately under AS 01.10.070 (c).

ALASKA STATE

HOSPITAL & NURSING HOME

ASSOCIATION

January 21, 1992

Senator Arliss Sturgulewski, Chair
Senate Health, Education & Social Services Committee
Room 427, Capitol Building
P.O. Box V
Juneau, Alaska 99811

Dear Senator Sturgulewski:

Senate Bill 288 is:

> "An Act relating to audits and inspections of health facilities receiving payment for medical assistance for needy persons and to the use of audit and inspection results in recapturing overpayments and reimbursing underpayments to such health facilities; and providing for an effective date"

This bill is currently in the Senate Health, Education & Social Services Committee.

The Alaska State Hospital and Nursing Home Association (ASHNHA) is opposed to SB 288.

The current Medicaid reimbursement system is a prospective rate setting system. Each facility's reimbursement rates are negotiated and set before the beginning of the fiscal year. If the facility is efficient and costs are lower than the pre determined Medicaid reimbursement rate, the facility shares a profit with the state. If they are inefficient and costs exceed the reimbursement rate, the facility takes a loss.

SB 288 would change the Medicaid reimbursement system to allow for recoupments based on audits completed long after the end of the facility's rate year.

The attached June 27, 1991 letter from Gary Grandy, Administrator of Petersburg General Hospital details the objections facilities have to this attempt to create a retrospective reimbursement system through audit findings.

The attached July 1, 1991 letter from Stephen Rose of Inslee, Best, Doezie & Ryder, P.S. details the legislative history of the statutes which established the prospective Medicaid reimbursement system in Alaska.

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According to research done by Mr. Rose, the Federal Government has recognized this problem. The Health Care Financing Administration (HCFA) asked for comments on the subject in 1981 and offered the following statement:

> ". . . we are concerned that the retroactive adjustments in payments that could be required as a result of audit findings might, in some cases, conflict with the requirements of State payment systems. This potential for conflict could arise because some payment systems, especially those that use prospectively determined class rates, do not allow adjustments to be made after a payment rate is determined." (Emphasis mine)
>
> (HCFA Request for Comments, 46 Fed.Reg. 47,967 - 1981)

After reviewing comments on the issue, HCFA decided not to require retroactive adjustments in conflict with prospective payment systems.

ASHNHA membership believes that the state must have the authority to conduct timely audits of the facilities.

ASHNHA membership further believes that the state currently has sufficient authority to conduct timely audits and use audit adjustments in setting facility reimbursement rates.

The primary ASHNHA objection comes when the state conducts audits years after the end of the fiscal year under audit then tries to recoup costs based on those audits.

Audits of 1985 facility operations are still not completed. ASHNHA membership believes that backlog is unacceptable. Facility costs incurred in 1985 were used to set reimbursement rates for 1987. It does not seem reasonable at this late date for the state to attempt to recoup costs that were set five years ago under a prospective reimbursement system.

Please let me know if I can answer questions or provide your committee with additional information.

Sincerely,

Garrey M. Peska, C.P.A.
Vice President for Financial Affairs

Enclosures

PETERSBURG GENERAL HOSPITAL
and Long Term Care Facility
Phone: (907) 772-4291
P.O. Box 589
Petersburg, Alaska 99833

June 27, 1991

Theodore A. Mala, M.D., M.P.H.
Commissioner
Department of Health & Social Services
P.O. Box H
Juneau, Alaska 99811-0601

Dear Commissioner Mala:

Re: 1985 Audit Issue & Senate Bill No. 288

On June 18th, 1991, Karl Garber, Financial Officer for our Lady of Compassion Care Center, and I met with Jay Livey by teleconference regarding the status of the 1985 Appeals and the Senate Bill No. 288. As a follow-up to that meeting, I am writing you to ascertain that you understand some of the issues that remain unresolved and to solicit your assistance in reaching a satisfactory decision for all concerned.

I re-emphasize what I stated when Mr. Garber and I met with you on April 9th, 1991, that my bottom line concern is to put an end to the continuing legal fees that are costly for both the facilities and the State of Alaska.

Therefore, it is imperative that you understand our position. First, we believe that the State's position that there are millions of dollars that need to be recovered from the facilities is a wrong premise for the following reasons:

1. The Supreme Court Decision in the City of Cordova, et el vs. Medicaid Rate Commission, closed the door on recoupments. The only issue arguably left open is whether a Common Law right to recoupment exists based on "false information to the Commission" or whether it was disagreements on "varying interpretations of a 'reasonable allocation method'". I maintain that the latter situation occurred and the Supreme Court does not indicate that this is justification for a Common Law right of recoupment (Opinion, Supreme Court No. 5-3030, 3AN-89--267 Civil, page 11).

   I further maintain that the Affidavit of Michael R. Sanders, Audit Manager, Department of Health and Social Services, stating the "false information" submitted by the facilities is not false information; instead, they are disagreements based on varying interpretations of allocation methods. Please also understand that we do support recoupments where fraud and abuse can be proven.

2. An understanding of a "Prospective" system versus a "Retrospective" payment system is also imperative. A storekeeper who beforehand (prospectively) places a price on a loaf of bread in order to sell that loaf and the buyer of that loaf of bread, who in good faith purchases the loaf, does so with an understanding that six years later the storekeeper is not going to knock on his door and demand additional money for all the loaves bought because the storekeeper has now found that there were disagreements over how accountants determined certain aspects of the original price of the original loaf. Instead, the storekeeper and the buyers settle the accounting disagreements; the storekeeper sets a new price for the future loaves (prospectively) and life moves on.

I remind you that in the case of Petersburg this has already happened. As an example, we disagreed originally over the visiting physician space; we conceded and every Medicare-Medicaid report since then has carved out the costs of the visiting physician space, thus setting the most accurate rates possible for all years since then--because we are on a prospective system.

Does the Department desire to return to a retroactive system of recoupment? Senate Bill 288 certainly does this. In the present form, ASHNHA will vigorously oppose this legislation for the following reasons:

1. It attempts to rewrite history for the past eight years. Has the legislature ever passed a law that retroactively took money from facilities--say schools, for example?

2. It would seem that for the legislature to pass the bill, it would invalidate the State plans that have been filed with HCFA for the fiscal years involved. Those State plans are based on a prospective system and rules and regulations that the Supreme Court has upheld as having no valid recoupment possibility. Why would the legislature muddy the waters by invalidating State plans?

3. Senate Bill 288 is unconstitutional and would be at odds with the legality of "rights acquired by judgement are property rights which cannot be taken without due process of law". And that due process, taken clear to the Alaska Supreme Court, upheld the facilities' rights of no recoupments.

4. I have personally read much of the history of the present Medicaid Statutes and it is replete with indications of a "prospective" system and a "payment rate prior to the fiscal year as a result of discussions between each facility and the State." In other words, a prior agreed upon contract, which had no mention of recoupments--which is a retrospective system. The retrospective system was being abandoned for a new prospective system.

For the sake of brevity, I will not present additional comments at this time. I will conclude by recommending a solution that might meet the needs of the Department and the facilities. We respectively request the Department to withdraw their motion for continuance of the Appeals on Medicaid Audits and allow for their speedy resolution. At least some of the Department's paranoid fears that the Federal Government is going to come "down" on you are not merited. You have complied with your "State Plans", which were based on a prospective system, with no recoupments mentioned.

Next, if the Department desires to have a system that provides for audit recoupment in the future, then I recommend that the Department and the facilities work together and carefully review all of the present regulations, such as year-end conformance and audit procedures, and/or look at a new system route to reach a consensus that can jointly be placed in the bill to affect its passage for future years, but let us not try to rewrite history. That would only set off another round of lawsuits and be very expensive for all concerned.

Believe me, to ignore these recommendations is going to continue the age-old gap between the Department and the facilities. Commissioner Mala, I do not believe that you want that anymore than I do. It is an expensive, ridiculous position for both of us.

To this end, please lend your support to a meeting with Jay Livey, when Mr. Livey returns from his vacation, and some of the facility representatives, to see if we can resolve our differences in a cooperative, open manner. Lastly, and to impress upon you the frustration of this situation which I have seen for nearly five years, the stack of papers on this matter on my desk now measures 12 inches deep. That is a lot of dialogue and represents a lot of legal fees that have been paid.

Please feel free to call or write on this matter. If I do not hear from you, I will trust that you will request those in your Department, who are involved, to work with us in a manner of cooperation to expedite an early and final solution to these problems.

Sincerely,

Gary W. Grandy
Administrator

cc: Jay Livey
Harlon Knutson--ASHNHA
Karl Garber

INSLEE, BEST, DOEZIE & RYDER, P.S.

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July 1, 1991

Please respond to

869-3428

VIA FACSIMILE

Mr. Harlan Knudson
Alaska State Hospital and
Nursing Home Association
319 Seward Street #11
Juneau, AK 99801-1173

Re: SB 288

Dear Mr. Knudson:

Brian Gilbert of Cordova Community Hospital has asked me to share with you an analysis I prepared regarding the Legislative History of the statutes which established the Medicaid prospective payment system in Alaska. As is demonstrated below, it was never the Legislature's intent to establish a recoupment program based on audit results.

SB 288 distorts reality. Namely, SB 288 is an attempt to rewrite the Medicaid statutes to allow for retroactive recoupments based upon audit results.

When you read SB 288 you will note that the Department claims that this Bill "clarifies" the Legislature's intent and that the Legislature always intended to use audits to adjust rates. Nothing could be further from the truth. It is misleading to call this Bill a "clarification". It is nothing less than an attempt to completely alter the Medicaid payment system. In fact, when the prospective payment system was first passed in Alaska, it was the Department who testified before the Legislature that each facility would have to operate and provide care at the rate determined prior to each fiscal year.

Below are excepts from the testimony presented to the Legislature supporting the prospective payment legislation.

Prior to 1983 the Medicaid program in Alaska reimbursed health care facilities based upon the "reasonable costs" incurred by the facility for patient care. (AS 47.07.070, Repealed § 3, ch. 95 SLA 1983). The methodology in 1983 was retrospective cost-based. The Commissioner for the Department of Health and Social Services in his Position Paper regarding H.B. 19 in May of 1983 described this methodology as follows:

> Hospital and Nursing home [sic] rates in Alaska have traditionally been established retrospectively, that is, costs are estimated at the beginning of a fiscal year and an "interim payment" determined. At the end of the fiscal year, the total interim payments made is [sic] compared to the allowable costs of the facility. The difference is either collected from or paid to the facility. This process is referred to as "cost settlement." (Emphasis added).

The Medicaid methodology was called retrospective because the final reimbursement calculation was made after the patient's treatment. The system was "cost-based" because the measure of reimbursement was based on expenditures actually made by the health care facility.

Major deficiencies in the cost-based reimbursement system began to be realized. Since health care providers were reimbursed for their expenditures actually made, the provider earned additional income for each service rendered. It became apparent that a cost-based retrospective methodology simply lacked incentives for health care providers to hold down costs. (See, 50 Fed. Reg. 24, 459 (1985)).

In 1983 the State of Alaska made the decision to abandon its retrospective cost-based system and to adopt a prospective budget based system. (AS 47.07.070, Repealed, § 3, ch. 95 SLA 1983). The Legislature made the following finding in 1983:

> The legislature finds that, because Medicaid is a joint state and federal program and because federal Medicaid funds have been and are likely to continue to be reduced dramatically, a retrospective payment system no longer serves as an appropriate method of compensation . . . A prospective payment system is

> necessary to prudently address payments to health facilities under Medicaid and general relief medical assistance programs. (Emphasis added).

In 1983 the State of Alaska began implementation of a budget based prospective payment system and established the Medicaid Rate Commission (See, Ch. 95, SLA 1983 recorded at AS 47.07.070 and AS 47.07.180; 7 AAC 43.670 (Reg. 92, Jan. 1985)).

The Alaska State Legislature in 1983 directed the Department of Health and Social Services to establish a Prospective Payment System to be administered by the newly created government body called the Medicaid Rate Commission. (AS 47.07.070 and AS 47.07.180, Ch. 95, SLA 1983).

In 1983, AS 47.07.070 was amended to read in pertinent part:

> The [medicaid rate] commission shall determine prospectively the rate of payment to a health facility under this chapter . . . (Emphasis added).

AS 47.07.070(a), § 1, Ch. 182, SLA 1972; am § 3, Ch. 95, SLA 1983.

The implementing regulations stated in pertinent part:

> PROSPECTIVE PAYMENT RATES DEFINED. (a) Prospective payment rates are prospectively determined payment rates to be paid by the department to health facilities providing health care services to recipients of the Medicaid and General Relief Medical Programs.
>
> (d) Prospective payment rates will have an effective date. All services provided before the effective date will be paid by the department at the preceding rate. All services provided on or after the effective date will be paid by the department at the new prospective payment rate. (Emphasis added).

Many attempts were made to pass prospective payment system legislation prior to the actual passage in 1983. Certain topics recur throughout the proposed legislation as cornerstones of the prospective payment system. First, the prospective payment system required the up-front negotiation of

rates which would then be fixed for the fiscal period to which they applied. Second, the year-end recoupment and cost settlement practices were to be eliminated. Third, the reimbursement system was to be based on current budgeted costs as opposed to actual costs incurred.

On January 27, 1983, SB 85 was introduced in the Senate. Testimony before the Senate HESS Committee addressed the need for the establishment of a prospective payment system. SB 85 was later replaced by a Committee Substitute draft of SB 85 (CS SB 85 (HESS)).

On April 4, 1983, the Department of Health and Social Services again issued its Position Paper on CS SB 85.

The Position Paper on CS SB 85 begins with an overview of the Medicaid reimbursement in Alaska and notes:

> Prospective payment, on the other hand, provides for the establishment of the payment rate prior to the fiscal year as a result of discussions between each facility and the State, each facility must then operate and provide care at this predetermined rate for the fiscal period. (Emphasis added).

On February 23, 1983, Frank W. Seuffert, a researcher for the State Advisory Council, prepared a Memorandum for Senator Kerttula, regarding SB 85. In pertinent part, researcher Seuffert's Memorandum states:

> Prospective reimbursement would be desirable for Medicaid and GRM for the following reasons: (1) It encourages cost containment by giving hospitals a set target over which they make a profit, under which they accept a loss . . .

In keeping with its previous Position Paper which noted that there would be no retroactive cost settlement with a prospective payment system, Position Paper CS SB 85 notes that one of the "major provisions of SB 85" is the repeal of the definition of "cost settlement" as was contained in AS 47.07.080(a).

On April 18, 1983, Mr. Betit, Director of the Department's Division of Public Assistance, testified before the House Finance Committee regarding the House counterpart to CS SB 85.

Mr. Betit explained that the prospective payment system as detailed in CS SS HB 19 provided for up-front negotiations before the fiscal year started in order to "set" the prices which the Department would pay. Mr. Betit stated that this approach would "give us greater certainty about what it is we are spending . . . and hold the hospitals and nursing homes to these prices for the duration of the year". (Emphasis added). (House Finance Committee Hearing on CS SS HB 19 (Fin.), April 18, 1983, recorded on tape HFC 83-45.

Mr. Betit concluded his testimony by commenting on year-end and audit procedures stating:

> There would be no cost settling or getting . . . basically . . . either paying up or recouping from the hospital at the end of each fiscal year as presently goes on. (Emphasis added).

The prospective payment system legislation was formerly adopted by the Legislature and became law. (AS 47.07.070, Ch. 95, SLA 1983). After the prospective payment system was adopted, the Medicaid Rate Commission listed its objectives for this new system. One objective was to "provide predictability" for state program expenditures to health facilities. (7 AAC 43.674(2)).

In order to comply with the new prospective payment system legislation, organizational changes had to be made within the Department of Health and Social Services. The first change was the creation of the Medicaid Rate Commission. (AS 47.07.070, Ch. 95 SLA 1983). The second major change was the elimination of the "audit function".

This complete elimination of the audit function is described in the Legislative Audit of the Department of Health and Social Services for Fiscal Year 1985 (hereafter "1985 Legislative Audit") as follows:

> Prior to [the establishment of the Medicaid Rate Commission] health facility providers submitted cost settlement reports at year-end which were then reviewed and/or audited by DHSS auditors. This procedure was in effect under the retrospective payment system of cost settling with Medicaid health facility providers. Subsequently, statute changes required that Medicaid health facility providers be

> paid under a prospective payment system. Under the prospective payment system, patient day rates are established based on estimated reimbursable costs submitted by the provider and approved by the MRC [Medicaid Rate Commission]. The audit positions that previously performed the audits were transferred to the MRC. However, these positions were reclassified to budget analysts. No audit positions have been established at the MRC. (Emphasis added).

The Executive Director of the Medicaid Rate Commission, Dr. Charles L. Eveland, prepared an Organizational Chart of the Medicaid Rate Commission which showed the replacement of the auditor positions by Program Budget Analysts.

With the implementation of the prospective payment system in Alaska, all audit functions of the Medicaid program ceased. Since the prospective payment system was budget based, it is not surprising that the executive director established three program budget analyst positions to replace the no longer needed auditor positions. Also, since the legislature repealed the definition of "cost-settlement", the legislature made clear its intent to end the year-end audit and cost-settlement process.

Having reviewed the Legislative History behind Alaska's prospective payment system, there is no doubt in my mind that it never contemplated recoupments being taken based on audits. SB 288 euphemistically calls itself a "clarification" of Legislative Intent. It is not. SB 288 represents a radical departure from the prospective payment system.

Very truly yours,

INSLEE, BEST, DOEZIE & RYDER, P.S.

Stephen D. Rose

SDR:ab
3141s

Kodiak Island Hospital
& Care Center

1915 E. Rezanof Drive
Kodiak, AK 99615
(907) 486-3281 FAX (907) 486-2336

February 4, 1992

Senator Arliss Sturgulewski
Room 427, Capitol
P.O. Box V
Juneau, AK 99811

Dear Senator Sturgulewski:

I am writing to encourage your vigorous opposition to SB 288 which would allow the State to make recoupments based upon audits completed long after the end of the facility's rate year. This bill would restore facilities to a retrospective system for recoupments, while the facility is based on a prospective rate system. This means that the State sets the rates for facilities based upon base year costs and the rates are then set prospectively for the year. To permit audits going back several years, or retrospective audits, undermines the prospective payment system. This sets up situations where the State may go back after a three, four or five year period and determine that certain costs that were allowed should not have been allowed and to make recoupments.

The problem with this system is adequately outlined in letters from the Alaska State Hospital and Nursing Home Association to Senator Arliss Sturgulewski and to Commissioner Mala.

I encourage you to vote no on this bill.

Sincerely,

Edmon W. Myers
Administrator

EWM/dpr

EXAMPLE OF PROSPECTIVE 1993 RATES BASED ON AUDITED INFORMATION
FOR FACILITIES WITH A 12/31/91 FISCAL YEAR END

	Desk Review	Field Audit
3/31/92	Cost Reports to Department	
4/30/92	Department's Request for Desk Review Items	
5/31/92	Facilities Response to Request.	
6/30/92	Department's Preliminary Desk Review Report (PDRR).	Department's Decision to do a Field Audit.
7/31/92	Facilities Response to PDRR.	
8/31/92	Department's Final DRR (FDRR).	Department's Field Audit Completed.
9/30/92	Facilities Appeal Deadline on the FDRR.	Department's Preliminary Audit Report (PAR).
10/30/92	Facilities submit Year-end Submittal to the Department.	Facilities Response to PAR.
11/25/92	Department proposes the rate to the Facilities based on unappealed FDRR items.	Department proposes the rate to the Facilities based on agreed-to PAR items.
	Appealed items would be settled at the time the appeal is finally resolved.	Disagreed PAR items would be settled at the time the Audit and any related appeals are finally resolved.
12/15/92	MRAC recommends rate.	
12/31/92	Department sets rate.	

rates:fin

SB 288
Navy Peck
2/7/92

The ASHNHA members are not opposed to the department having the authority to conduct Medicaid audits.

The members believe rates should be set based on timely audit information.

They are opposed to this bill because it reverses the basic concept of prospective rate setting in Alaska's Medicaid reimbursement system.

We have a prospective rate setting system now.

That means each facility's reimbursement rates are negotiated and set before the beginning of the fiscal year.

If the facility is efficient and costs are lower than the pre determined Medicaid reimbursement rate, the facility shares a profit with the state.

If they're inefficient and costs exceed the reimbursement rate, the facility takes a loss.

SB 288 would change the Medicaid reimbursement system to allow for recoupment based on audits completed long after the end of the facility's rate year.

The department has an audit backlog that spans several years now.

The facilities don't think it's reasonable to do an audit 4 or 5 years late and then ask them to pay money back to Medicaid because the audit discloses misinterpretations or disagreements over the meanings of regulations.

If fraud is indicated, ASHNHA believes the state does have and should have the authority to recover the funds.

In the Supreme Court decision that caused the state to introduce this bill, the Court said:

> "We would have no hesitation in ordering a refund of money which had been awarded based on false representations. Likewise, if the grant had been expended for an illegal purpose, a refund would be appropriate. However, those situations do not exist here."

ASHNHA finance officers have offered a number of suggestions for how the department might be able to clear up the audit backlog and stay current.

For example: ASHNHA members believe the department should make more use of desk audits instead of full field audits especially for the facilities that receive the least amount of Medicaid funds.

SB 288
Harvey Belp.
2/7/92

We believe the department auditors should focus their audit procedures on those financial areas that affect the prospective rate setting process.

We see audit adjustments that reclassify assets or revenue accounts when those adjustments have no affect on Medicaid reimbursement rates. We also see audit adjustments for $5 or $10.

The current year Medicaid appropriation for facilities is $109 million. $5 and $10 adjustments are not worth the auditors' time.

Generally, auditors will establish a materiality threshold and they won't even bother with audit adjustments below the threshold dollar amounts.

ASHNHA members believe that the department's Medicaid audits could be done on a timely basis if the audit scope and purposes were better defined.

If this bill is to pass, ASHNHA members believe it should include a requirement that the Medicaid audits be timely completed.

ASHNHA members believe timely completed means within six months of the date the facility has to submit the final Medicaid cost reports for the year.

ASHNHA members also suggest that the bill should require the department to promulgate regulations governing the conduct of Medicaid audits of hospital and nursing home facilities.

That should include definitions of:

(A) Field audits and desk audits
(B) Scope and purposes of audits for Medicaid purposes
(C) Timing of audits
(D) Timing of and procedures for reflecting audit findings in rate setting
(E) Process for facilities to appeal audit findings

The ASHNHA Health Care Financing Committee met this week and reviewed the language the department said they were going to propose as a Committee Substitute for the bill.

The ASHNHA Finance Committee has problems with big chunks of the committee substitute and we're drafting alternative language to submit.

Now that we have the official CS, we can identify the specific page and line numbers for amendments.

I would be happy to answer questions about the work we've been doing with the department on this issue.

There are finance officers from facilities in Anchorage waiting to testify this morning also and they might fill in any holes I've left.

THE SUPREME COURT OF THE STATE OF ALASKA

CITY OF CORDOVA, ALASKA, a Municipal Corporation, and PETERSBURG GENERAL HOSPITAL, Appellants, v. MEDICAID RATE COMMISSION, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, STATE OF ALASKA, Appellee.	Supreme Court No. S-3030 3AN-88-267 CIVIL O P I N I O N [No. 3578 - March 30, 1990]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Karen L. Hunt, Judge.

Appearances: Stephen D. Rose, Inslee, Best, Doezie & Ryder, P.S., Bellevue, Washington, Scott A. Sterling, Jensen, Harris, & Roth, Anchorage, for Appellants. Lawrence C. Delay, Assistant Attorney General, Anchorage, Douglas B. Baily, Attorney General, Juneau, for Appellee.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices.

RABINOWITZ, Justice.

I. INTRODUCTION.

This appeal involves attempts by the Medicaid Rate Commission ("the Commission") to recover $167,361.00 paid by the State to the City of Cordova, owner and operator of the Cordova Community Hospital ("Cordova"), and $26,036.56 paid to the Petersburg General Hospital ("Petersburg") for Medicaid services provided by the two hospitals during 1984-85.

II. FACTS AND PROCEEDINGS.

In 1983, the legislature adopted a prospective payment system for Medicaid.[1] Under the old, retrospective system, health care facilities were reimbursed by Medicaid based on the "reasonable costs" incurred by the facility for patient care. Under the new, prospective system, facilities are reimbursed by Medicaid at rates determined by the Commission in advance of the provision of services by the facilities. See AS 47.07.070(a). The prospective system provides an incentive for facilities to minimize their costs because a facility providing a service at a cost less than the pre-determined rate is permitted to keep the difference ("earns a profit"), while a facility providing the service at a cost greater than the pre-determined amount suffers a loss in the amount of the difference.

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1. Ch. 95, SLA 1983.

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The hospitals submitted budgets and requests for prospective payment rates for their fiscal year (FY) 1985, ending June 30, 1985. These budget requests were reviewed by one of the Commission's program budget analysts. A staff analysis for each of the two hospitals was performed and the budget analyst recommended prospective payment rates for each. The Commission thereafter adopted prospective payment rates for the two hospitals, and paid them for Medicaid services based on these rates.

In the summer of 1986, the Commission began to audit the budget forms and rate requests submitted by health care facilities, including those submitted by Cordova and Petersburg for FY85. Cordova's field audit was conducted in January of 1987. The final audit report was completed in November of 1987. At its December 11, 1987, meeting, the Commission (whose members at this meeting included Mr. Randy Super, designated as a member of the Commission by the Department of Health and Social Services (DHSS) Commissioner Myra Munson) voted to accept the audit, which revealed that Cordova had been overpaid $167,361.[2]

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2. Although representatives of Cordova were present at the hearing, they were apparently not permitted to present evidence or argument. On December 16, DHSS notified Cordova that it could pay the $167,361 in one lump sum within 30 days, or alternatively DHSS would recoup the overpayment from current claims payments to Cordova.

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Petersburg's FY85 audit began in October of 1986. This audit determined that Petersburg had been overpaid $26,036.56. At an informal hearing held on September 18, 1987, the Commission accepted the audit report and sought to recover the overpayment from Petersburg. Under protest, Petersburg paid the alleged $26,036.56 overpayment and filed a request for an administrative hearing.

Cordova filed suit in Anchorage superior court, and the superior court granted Cordova a temporary restraining order preventing the DHSS from recouping the overpayment from current claims payments. Petersburg then filed a motion to intervene as a party plaintiff. The motion was granted. The hospitals thereafter filed a motion for summary judgment and for a permanent injunction. The State filed an opposition to the motion. Among the State's attachments to its opposition were affidavits signed by Millie Duxbury, Mary Bensen, and Sister Barbara Haase. The hospitals subsequently filed a motion to strike these affidavits on the ground that they failed to comply with the requirements of Civil Rule 56(e).

After hearing the parties' arguments on the hospitals' motion for summary judgment, the superior court rendered an oral decision. The court first held that retroactive recoupment of overpayments was not available to the Commission because the relevant statute, AS 47.07.070(a), permits only prospective action. Second, although the Commission presently has authority

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recoupment of past overpayments prior to S .693 being adopted. Therefore, it is this court's conclusion that plaintiffs are not public interest litigants.

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under 7 AAC 43.693(d) (eff. 8/9/86, Reg. 99) to recoup overpayments, it did not have that authority under the applicable audit regulation, 7 AAC 43.700. Third, in a decision going to the heart of the present appeal, the superior court held:

> Until 7 AAC 43.693(d) was promulgated, the Commission did not have any authority to act retrospectively, so if the Commission cannot go back into 1985 and reset the rates, what is its remedy? If the audit reveals error in the budget analysis or misrepresentation, these errors should be corrected by adjusting rates for the ensuing year or years. If the hospital has made a profit on Medicaid payments, then payments exceeded the reasonable costs incurred. If this profit were the result of some miscalculation or misrepresentation, it can be taken into account in subsequent years when the budget analys[t]s are calculating reasonable costs for the upcoming fiscal year. In adjusting the rates for the new year to account for errors made on Medicaid payments from previous years, the Commission is able to recover costs which were paid out in error without acting outside the scope of its authority. Therefore if there were miscalculations or misrepresentations the Commission's remedy is to make prospective adjustments to account for such errors.

The superior court also held that the DHSS Commissioner's designation of Randy Super did not constitute an impropriety that would void the December 11, 1987, hearing; the court concluded that this delegation of the Commissioner's responsibilities to Mr. Super was authorized by AS 44.17.010.

The hospitals then filed a motion requesting that the superior court clarify its oral ruling. The hospitals also filed a motion for actual attorney's fees and costs which was countered

by the State's motion for Rule 82 attorney's fees and a motion to remand the case to the Commission.

The superior court denied the hospitals' motion for clarification and entered an order denying attorney's fees and costs to either party.[3] This appeal followed.

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3. This order stated:

> Both parties have filed a motion seeking to be declared the prevailing party. In addition, the plaintiffs seek to be declared public interest litigants. All motions are denied. The plaintiffs prevailed [o]n the issue of whether the state could retroactively recoup overpayments prior to the adoption of 7 AAC 43.693. The defendants prevailed on the issues of whether the state could audit the plaintiff's FY 1985 year prior to adoption of .693; whether the designee of the commissioner could attend the meetings and vote. Therefore, it is the conclusion of this court that neither party is the "prevailing party" for the purposes of awarding attorney fees.
>
> Further, plaintiffs contend that they are public interest litigants. The plaintiffs fail to meet the test of being litigants which would lack sufficient economic incentive to bring the lawsuit if it did not involve issues of general importance. These plaintiffs do have the economic incentive to file the lawsuit as they readily did. Further, the issues raised are of importance not to the general hospital population in Alaska, but only to these hospitals experiencing a claim for recoupment of past overpayments prior to § .693 being adopted. Therefore, it is this court's conclusion that plaintiffs are not public interest litigants.

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III. DISCUSSION.

The superior court's decision to grant the State relief prospectively turns on its interpretation of AS 47.07.070.[4] That statute provides:

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4. The superior court first determined that the right to retroactive recoupment is not inherent in the right to audit embodied in 7 AAC 43.700. During FY85, the following two versions of 7 AAC 43.700 were in effect:

> 7 AAC 43.700. AUDIT AND INSTITUTIONAL REVIEW. (a) As a condition of participation in the medicaid program, providers under secs. 675 - 700 of this chapter must provide reasonable access to fiscal and patient care records for all medicaid beneficiaries.
>
> (b) Providers must allow inspection of records by authorized officials of both state and federal agencies connected with the medicaid program.
>
> (c) Providers with facilities in Alaska must make available for inspection their fiscal and patient records either at their facility within the state of Alaska or at a business office located within the state of Alaska. (eff. 8/18/79, Reg. 71)
>
> 7 AAC 43.700. HEALTH FACILITY AUDITS. (a) The commission will, in its discretion, inspect the financial records of a health facility receiving payments from the department. The commission will inspect financial records during normal business hours and will notify a facility of a proposed inspection of its records at least 10 working days before the inspection.
>
> (b) If the commission directs, a health facility receiving payments from the department for aligible state program recipients must produce its financial records for inspection by the commission at a location within the State of Alaska or at

(footnote continued)

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(a) The commission shall determine pro-

(footnote continued)

another place agreed upon by the commission and the health facility.

(c) At the request of the commission, a health facility must send copies of financial records to the commission offices within 10 working days after the request. (eff. 10/21/84, Reg. 92, repealed 8/9/86)

In 1986, the Commission adopted a new audit regulation:

7 AAC 43.693. FACILITY AUDITS. (a) The commission will inspect the financial records of a facility receiving payments from the division of medical assistance. The commission will inspect financial records during normal business hours and will notify a facility of a proposed inspection of its records at least 10 working days before the inspection.

(b) If the commission directs, a facility receiving payments from the division of medical assistance for eligible state program recipients shall produce its financial records for inspection by the commission at a location within the state or at another place agreed upon by the commission and the facility.

(c) At the request of the commission, a facility shall send copies of financial records to the commission office within 10 working days after the request is received.

(d) The commission will review the findings of facility audits. Audit findings that determine that the division of medical assistance has overpaid or underpaid will be acted upon in the following manner:

(1) If the audit findings relate to a facility's fiscal year already ended, the division of medical assistance will be notified of amounts due from or to the facility.

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(footnote continued)

spectively the rate of payment to a health facility under this chapter and AS 47.25.120 - 47.25.300 based on a fair rate for reasonable costs incurred by the facility. The commission shall by regulation list the factors it considers in making its rate determinations under this section.

(b) In determining a rate of payment to a health facility under this section, the commission shall consider the proportionate share of the facility's financial requirements for patient care for

(1) costs of current operations, including salaries and wages, purchased services, supplies, insurance, leases, depreciation, taxes, interest expense, maintenance and other health facility operating expenses; and

(2) education, research, and appropriate capital development.

(footnote continued)

(2) If the audit findings relate to a facility's fiscal year in progress, the approved rate will be adjusted to reflect a correct payment rate. The level of adjustment will be prorated to ensure that the division of medical assistance will recoup all money by the end of the facility's fiscal year or that the facility will receive all money due it, as appropriate. (eff. 8/9/86, Reg. 99)

We agree with the superior court that under AS 44.62.240 ("Silence or failure to follow any course of conduct is considered earlier inconsistent conduct"), the recoupment provision of 7 AAC 43.693(d) is inconsistent with 7 AAC 43.700 because 7 AAC 43.700 is silent as to recoupment. We also agree that "the agency's failure to conduct any audit in the time between the passage of the prospective payment system and the promulgation of 7 AAC 43.693(d)" is an indication of inconsistency, and that the promulgation of 7 AAC 43.693(d) vitiates the State's argument that the authority to recoup is implied in the authority to audit found in 7 AAC 43.700. In brief, we affirm the superior court's holding that ".700 did not provide for recoupment."

We reject the superior court's interpretation of AS 47.07.070. Although AS 47.07.070 authorizes the Commission prospectively to determine the rate of payment to be made to a health care facility, the statute is silent on the subject of prospective recoupment from a health care facility based on audit results. AS 47.07.070 cannot fairly be read as implicitly authorizing the Commission to consider audit results in its determination of prospective payment rates for the current fiscal year. Cf. Bowen v. Georgetown University Hospital, ___ U.S. ___ 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988) (interpreting Medicare Act provision expressly providing for retroactive corrective adjustments, and holding that retroactive cost-limit rules were not authorized by the provision, which permitted retroactive case-by-case adjudication, not retrospective rule-making).

7 AAC 43.693(d) is the only regulation which authorizes the Commission to undertake corrective action based upon an audit.[5] As noted previously, however, that section [illegible]

inapplicable to the issues in this appeal since it became effective after the fiscal year in question.[6]

We also reject appellees' argument that AS 47.07.074 provides authority for recoupment.[7] It is clear that the text of the statute does not state or imply that the amount of the payment will be affected by any audit.

In concluding that the superior court erred, we observe, as we did in Lake Otis Clinic v. State, 650 P.2d 398, 394 (Alaska 1982):

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6. Appellees do not contest the inapplicability of 7 AAC 43.693(d) to Cordova and Petersburg for fiscal year 1985.

Appellees argue that the superior court's ruling can be sustained on the alternative theory that they are entitled to assert a common law right of recoupment. See Mount Sinai Hosp. of Greater Miami, Inc. v. Weinberger, 517 F.2d 329 (5th Cir. 1975). Assuming that we would recognize a common law right of recoupment, the record is devoid of any indication that the facilities presented false information to the Commission. Although this aspect of the case is the subject of ongoing administrative proceedings, it appears from the record that discrepancies between the 1985 fiscal year calculations and calculations made in 1987 turn on varying interpretations of "reasonable allocation method."

7. Alaska Statute 47.07.074 provides:

> Audits and inspections. As a condition of obtaining payment under AS 47.07.070, a health facility shall allow
>
> (1) the department and the commission reasonable access to the financial records of medical assistance beneficiaries; and
>
> (2) inspection of financial records by state

(footnote continued)

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> We would have no hesitation in ordering a refund of money which had been awarded based on false representations. Likewise, if the grant had been expended for an illegal purpose, a refund would be appropriate. However, those situations do not exist here.

We also noted that in the grant context:

> The source of both liability and remedy must emanate explicitly or implicitly from the grant statutes, regulations duly enacted and consistent with the statute, or provisions in the grant agreement. . . . If the grantor, however, has failed to establish such a right of recapture through provisions in the grant agreement or duly promulgated regulations, it may well have forfeited its ability to impose the sanction in the absence of explicit statutory authority. Because of such failure, no legal basis would exist for the sanction; it would also be unfair to grantees to subject them to unannounced and improvised detriments.

Id. at 388 (quoting R. Capalli, Rights and Remedies Under Federal Grants, at 98-99 (1979)).

IV. WAS RANDY SUPER A "DESIGNATED APPOINTEE"?

The superior court held that the Commissioner's designation of Randy Super did not constitute an impropriety sufficient to void the December 11, 1987 hearing, concluding instead that this delegation of authority by the commissioner to Mr. Super was authorized by AS 44.17.010. The State argues that

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(footnote continued)

> and federal agencies to the extent required by federal law.

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this issue is moot because the Commission decided not to act on its December 11, 1987, decision and reheard Cordova's audit review on December 10, 1988, with a panel of members appointed by the governor.

As a general rule, we "refrain from deciding questions 'where the facts have rendered the legal issues moot.'" Hayes v. Charney, 693 P.2d 831, 834 (Alaska 1985) (quoting Doe v. State, 487 P.2d 47, 53 (Alaska 1971)). However, mootness doctrine is a product of judicial policy, not constitutional mandate,[8] and we have recognized on numerous occasions that certain technically moot questions merit review under the "public interest" exception to the mootness doctrine.[9] We recently articulated the criteria to be considered in determining whether to review a moot question:

> The public interest exception involves the consideration of three main factors: 1) whether the disputed issues are capable of repetition, 2) whether the mootness doctrine, if applied, may repeatedly circumvent review of the issue and, 3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine.

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8. See, e.g., Etheredge v. Bradley, 502 P.2d 146, 153 (Alaska 1972).

9. See, e.g., Falke v. State, 717 P.2d 369, 371 (Alaska 1986) (addressing merits of a claim that candidate's name should have been on ballot although election had already been held; Kentopp v. Anchorage, 652 P.2d 453, 457-58 (Alaska 1982) (addressing merits of malapportionment claim even though

(footnote continued)

Hayes v. Charney, 693 P.2d 836, 834 (Alaska 1985) (citations omitted).

We agree with the hospitals that the public interest exception to the mootness doctrine applies and have decided to address this issue. The issue is likely to arise again, may well evade review, and is of considerable public importance.

The hospitals allege that Randy Super's participation as a member of the Commission at the December 11, 1987, hearing was unlawful because he was not appointed by the governor as required by AS 47.07.120-.130. The State contends that his participation was proper, that is, that AS 47.02.120 only required Mr. Super's appointment by the DHSS Commissioner as her designee.

The superior court did not resolve the issue by interpreting AS 47.07.120-.130. Instead, the court relied on AS 44.17.010, which provides:

> Delegation of functions. The principal executive officer or each state department may assign the functions vested in the department to subordinate officers and employees.

The State buttresses the superior court's decision by reference to AS 44.17.040, which includes the word "appointments":

> Department staffs. The principal executive officer of each department may establish

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(footnote continued)

reapportionment plan had already been implemented) and cases cited therein at 457 n.3.

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> necessary subordinate positions, make appointments to these positions, and remove persons appointed within the limitations of appropriations and subject to state personnel laws. Each person appointed to a subordinate position established by the principal executive officer is under the supervision, direction, and control of the officer.

It is a maxim of construction that specific statutes should be given precedence over more general ones. See, e.g., National Bank of Alaska v. State, Dep't of Revenue, 642 P.2d 811, 817 & n.10 (Alaska 1982) (citing numerous authorities). Guided by this maxim, we reject the superior court's reliance on AS 44.17.010 and the State's concomitant reliance on AS 44.17.040). Alaska Statutes 47.07.110, .120, and .130 are more specific, and we hold that they control. Those statutes provide:

> AS 47.07.110. Medicaid Rate Commission established. The Medicaid Rate Commission is established in the Department of Health and Social Services. (S 6 ch. 95 SLA 1983)
>
> AS 47.07.120. Composition of commission. The commission consists of five members as follows:
>
> (1) the chief executive officer of a health facility that is licensed by the state but not owned or operated by the state or federal government and that is subject to the budget review process under this chapter;
>
> (2) the commissioner of administration, the commissioner of health and social services, or the appointed designee of either commissioner;
>
> (3) a physician licensed to practice medicine in the state who is actively engaged in the practice of medicine and who is not employed by the state;

> (4) a certified public accountant with relevant experience;
>
> (5) a person representing consumers of health services who does not have a direct or indirect interest in any entity that provides health care services. (§ 6 ch. 95 SLA 1983)
>
> AS 47.07.130. Appointment of members. Members of the commission are appointed by the governor and serve at the pleasure of the governor. (§ 6 ch. 95 SLA 1983)

Furthermore, we agree with the hospitals' argument that the superior court's decision also violates other principles of statutory construction. First, construing "appointed designee" to have the same meaning as "designee" violates the presumption that every word of a statute has a purpose and is not superfluous.[10]

Second, "statutes relating to the same subject matter should be read together as a whole in order that [the] total scheme . . . avoids ignoring one or the other." National Bank of Alaska v. State, Dep't of Revenue, 642 P.2d 811, 818 (Alaska 1982) (quoting Hafling v. Inlandboatmen's Union of the Pacific, 585 P.2d 870, 678 (Alaska 1978)). That is, AS 47.17.030's

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10. See, e.g., Alaska Transp. Comm'n v. Airpac, Inc., 685 P.2d 1248, 1253 (Alaska 1984) (quoting 82 C.J.S. Statutes § 316, at 551-52 (1953)); Alascom, Inc. v. North Slope Borough, 659 P.2d 1175, 1178 & n.5 (Alaska 1983) (quoting 2A C. Sands, Statutes and Statutory Construction § 46.06 (4th ed. 1973)); City of Homer v. Ganal, 650 P.2d 396, 399 (Alaska 1982); City and Borough of Juneau v. Thibodeau, 595 P.2d 626, 634 (Alaska 1979) (citing State v. Lundquist, 374 P.2d 246 (Wash. 1962)).

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requirements that all members be appointed by the governor cannot be ignored. Thus, we reject the State's implicit argument that AS 47.17.020(2) trumps the "general rule" stated in AS 47.17.030.[11]

The judgment of the superior court is REVERSED.

ORDER

Pursuant to Appellate Rules 508(e) and (f) (1), attorney fees of $ 4,000.00 are awarded to Appellant and the Appellant shall serve and file with this court an itemized and verified cost bill by April 9, 1998. Entered by direction of Justice Rabinowitz.

Dated: 3-30-98 Deputy: Shirley Beck

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11. Our resolution of the recoupment issue makes unnecessary any discussion of the superior court's decision not to strike affidavits which allegedly were out of compliance with Civil Rule 56(e), as well the need to address the attorney's fees issue. Upon remand the superior court should determine the appropriate amount of attorney's fees available to Cordova and Petersburg under Civil Rule 82.

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The End kpv