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 | ADMINISTRATIVE DIRECTIVE |
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TRANSMITTAL: 90 ADM-28

TO: Commissioners of
 Social Services

DIVISION: Medical
 Assistance

DATE: September 4, 1990

SUBJECT: Spenddown of Resources (Westmiller v. Sullivan)

SUGGESTED
 DISTRIBUTION:

Medical Assistance Staff
 Fair Hearing Staff
 Legal Staff
 Accounting Staff
 Staff Development Coordinators

CONTACT
 PERSON:

MA Eligibility Representative 1-800-342-3715,
 extension 3-7581. MA New York City Representative
 at (212) 587-4853.

ATTACHMENTS:

See Attachment I for list of attachments.
 (List is available on-line.)

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
87 ADM-48		18 NYCRR	P.L. 100-360		GIS 87 MA041
87 ADM-4		360-4.8(b)	MCCA		GIS 89 MA006 GIS 90 MA015 DCL 7/10/86

I. PURPOSE

The purpose of this Directive is to advise social services districts of the actions to be taken as a result of the federal court decision in the case of Westmiller v. Sullivan. The decision overturns federal policy of not allowing a spenddown of resources when determining Medical Assistance (MA) eligibility for medically needy (FP) individuals. This Directive only applies to case determinations for the period January 1, 1982 through February 28, 1989. A separate Directive will be issued to provide instructions regarding resource spenddown policy for case determinations on and after March 1, 1989.

II. BACKGROUND

From the inception of the MA program in 1966 until late 1980, federal policy permitted the use of a resource spenddown when determining eligibility. This policy allowed an MA applicant whose resources exceeded the resource standard to spenddown excess resources by incurring medical bills equal to or greater than any excess resources.

Effective January 1, 1982, New York State deleted resource spenddown provisions from the State Plan (Plan Amendment 82-9) in compliance with Health and Human Services Transmittal (80-58). However, it was not until a July 10, 1986 Dear Commissioner Letter that social services districts were directed to discontinue the resource spenddown policy when determining MA eligibility. This delay was due to ongoing discussions with the federal government regarding their interpretation of federal statute. The Department's State Plan Amendment and change in policy were challenged in the Westmiller v. Sullivan class action, which was commenced in U.S. District Court, Western District of New York, in September, 1987.

The Medicare Catastrophic Coverage Act of 1988 (P.L. 100-360) included provisions that allowed New York State to reinstate a resource spenddown policy. Effective March 1, 1989, Department regulation 18 NYCRR Section 360-4.8(b) was promulgated to provide for a resource spenddown and districts were instructed to implement the new regulations in a February 15, 1989 GIS message.

Subsequently, the federal court decision in the case of Westmiller v. Sullivan reinstated the use of a resource spenddown for the period January 1, 1982 through February 28, 1989. The resulting court order signed February 6, 1990 directed the Department to identify class members and provide restitution to such members for medical bills that should have been paid by the MA program but for the failure to provide a resource spenddown policy.

The order defines class members as individuals in New York State who applied for MA as medically needy during the period January 1, 1982 through February 28, 1989 and who had for the month(s) coverage was sought:

1. Resources in excess of the allowable MA standard; and
2. Incurred medical bills that exceeded the amount of excess resources.

III. PROGRAM IMPLICATIONS

The court order in Westmiller v. Sullivan requires that districts identify class members from medically needy cases denied MA due to excess resources for the period January 1, 1982 through February 28, 1989 and provide restitution to such members for medical bills that should have been paid by MA if a resource spenddown policy had been in effect at the time of the denial. Since the Department did not restrict the spenddown of resources policy until July, 1986, district reviews will be limited to case determinations for the period July 1, 1986 through February 28, 1989.

In compliance with the court order, a list of potential class members was compiled by the Department from the following:

1. cases tracked by districts as instructed in an October 8, 1987 GIS message and forwarded to the Department in accordance with an April 5, 1990 GIS message (GIS 87 MA041 and GIS 90 MA015);
2. fair hearing decisions, court actions and proceedings concerning denial of MA because of the lack of a policy permitting the use of a resource spenddown or coded as MA hearings concerning excess resources;
3. records from WMS and MBL of MA cases denied due to excess resources.

The remaining potential class members are described in Section IV.B.

Districts will be required to review the case records of these individuals to identify class members and to determine and provide restitution, if any, to such members.

IV. REQUIRED ACTION

As a result of the Westmiller v. Sullivan court order, social services districts must take the following actions:

A. Identification of Class Members

Districts must review the case records of medically needy (FP)

individuals denied Medical Assistance due to excess resources for any month or months during the period July 1, 1986 through February 28, 1989 in order to identify class members.

If the MA application was denied solely due to excess resources and the individual had medical bills that were greater than the amount of excess resources in the month(s) coverage was sought, such individual shall be identified as a class member and potentially eligible for repayment of certain medical bills.

Once an individual is identified as a Westmiller class member, the social services district must complete the following steps in accordance with instructions in this Directive:

1. rebudget the case using spenddown of resource provisions;
2. send required notices;
3. provide restitution for medical bills that should have been paid by the MA program if spenddown provisions had been in effect at the time of the denial; and
4. report to the Department the names of identified class members from the lists of potential class members.

B. Mandatory Reviews

Local districts must perform a "Westmiller" case review of the following potential class members:

1. Individuals on the Department List

The Department has compiled a list of potential Westmiller class members from district, fair hearing, WMS and MBL reports. The Department list will be sent to districts upon release of this Directive. Districts must review these cases and make restitution to identified class members from this list within six months of the date of this Directive.

2. Individuals Who Respond to the Notice to Medicaid Providers and Offices for the Aging

The Department will send a copy of this notice (Attachment II) to the following: all hospitals, skilled nursing facilities, health-related facilities, certified home health agencies with an MA provider agreement, adult care facilities and county offices for the aging. Posting of the notice until March 31, 1991 will be requested.

Local districts must review the cases of individuals who request a "Westmiller" review as a result of this posting. These individuals have until August 31, 1991 to request such a review. Case reviews must be completed and restitution made to identified class members within six months of this Directive or within sixty days from the date of request for the review, whichever date is later.

3. Individuals Who Respond to the Notice Entitled "To Anyone Who Was Denied Medicaid Because of Excess Resources..."

The Department will send a copy of this notice (Attachment III) to all individuals with a currently open medically needy MA case within 30 days from the issuance of the Directive.

Districts must review the cases of individuals who request a "Westmiller" review as a result of the notice. These individuals have until August 31, 1991 to request such a review. Case reviews must be completed and restitution made within six months of this Directive or within sixty days from the date of request for the review, whichever date is later.

4. Individuals with Currently Open Medical Assistance Cases

Districts must review at the next recertification all currently open MA cases to determine if the individuals are class members. Case reviews and restitution to identified class members must be made within six months of the date of this Directive or within sixty days of the case being reviewed, whichever date is later. These reviews must continue for one year from the date of this Directive.

5. Individuals with New or Pending Applications

Districts must determine if individuals with new or pending MA applications are class members. Case reviews and restitution to identified class members must be made within six months of the date of this Directive or within sixty days of the case review, whichever date is later. These reviews must continue for one year from the date of this Directive.

C. Budgeting Guidelines

Districts must apply the following guidelines when using the budgeting procedures in Section IV.D.

1. All countable resources must be considered when determining the total amount of resources.

2. All appropriate resource exemptions and disregards must be given in accordance with the category of the individual.
3. Each SSI-related individual is entitled to set aside up to \$1,500 of his/her resources as a burial fund exemption for him or herself and another \$1,500 burial fund for a spouse. A non-SSI related individual is entitled to this exemption only if there is a burial fund agreement with a bona fide funeral director.
4. The excess resources must be offset by medical bills in the following order: (1) bills for non-covered services; (2) bills for services furnished by non-participating providers; (3) older viable unpaid bills; and (4) bills for medical expenses payable by MA. (See 87 ADM-4.)

NOTE: A viable bill is defined as an unpaid bill where the provider is still seeking payment.

5. Viable unpaid medical bills from the pre-retroactive period can be used to offset excess resources but cannot be paid by Medicaid.
6. If an individual has both excess resources and excess income, medical bills must be used first to offset excess resources.

D. Budgeting Procedures

The following budgeting procedures must be used on a month to month basis, beginning with the first month coverage is sought but no earlier than three months prior to the month of application:

1. First Month
 - a. Determine the amount of countable resources the individual had as of the first day of the month.
 - b. Compare the resources to the applicable MA resource standard in effect at that time. The amount of excess resources, if any, is the individual's liability toward his/her medical bills. (See Attachment IV.)
 - c. Determine the amount of medical bills that may be applied against the excess resource amount. This includes bills incurred and/or paid in this month plus any older viable unpaid bills. (See Attachment V, example 3.)
 - d. Compare the amount of medical bills to the amount of excess resources.

- (1) if the medical bills are greater than the amount of excess resources, the individual is resource eligible for the month.
 - (2) if the medical bills are less than the amount of excess resources, the individual is ineligible for MA coverage for the month.
- e. Determine the amount of restitution to be made to individuals who are MA resource eligible in the following manner:
- (1) apply the excess resources to the medical bills in the order described in Section IV.C.4.
 - (2) if the individual is otherwise eligible for MA, pay for any covered services incurred or paid in the month that were not used to spenddown the excess resource amount. (See Section IV.F.)

2. Second Month

- a. For individuals determined eligible in the first month:
- (1) Determine the amount of any additional resources acquired during the previous month. The additional resource amount, if any, is the individual's liability towards the month's medical bills. (See Attachment V, example 2.)
 - (2) Determine the amount of medical bills. This includes bills incurred and/or paid in the month and any older viable bills not fully offset during the first month.
 - (3) Compare the amount of medical bills to the amount of the individual's additional resources.
 - (a) If the medical bills are greater than the amount of additional resources, the individual is resource eligible for the month.
 - (b) If the medical bills are less than the amount of additional resources, the individual is ineligible for MA coverage for the month.
 - (4) Determine the amount of restitution to be made to individuals who are resource eligible in the following manner:

- (a) apply the additional resources to the medical bills in the order described in Section IV.C.4.
 - (b) if the individual is otherwise eligible for MA, pay for any covered services incurred or paid in the month that were not used to spenddown the additional resource amount.
- b. For individuals determined ineligible for MA coverage in the first month:
- (1) Determine the amount of countable resources the individual had as of the first day of the second month.
 - (2) Compare the resources to the applicable MA resource standard in effect at that time. The amount of excess resources, if any, is the individual's liability toward the month's medical bills.
 - (3) Determine the amount of medical bills that may be applied against the excess resource amount. This includes bills incurred and/or paid in this month, plus any older viable unpaid bills.
 - (4) Compare the amount of medical bills to the amount of excess resources.
 - (a) If the medical bills are greater than the amount of excess resources, the individual is resource eligible.
 - (b) If the medical bills are less than the amount of excess resources, the individual is ineligible for MA coverage for the month.
 - (5) Determine the amount of restitution to be made to individuals who are eligible in the month in the following manner:
 - (a) apply the excess resources to the medical bills in the order described in Section IV.C.4.
 - (b) if the individual is otherwise eligible for MA, pay for any covered services incurred or paid in the month that were not used to spenddown the excess resource amount.

For subsequent months in which coverage is sought, follow the same budgeting procedures as indicated for the first two months.

See Attachment V for budgeting examples.

E. Notices

In accordance with 87 ADM-48 and the court order, districts must send required notices to individuals who had a case review under Westmiller.

1. The following notices must be sent to individuals determined to be Westmiller class members:
 - a. Notice of Medical Assistance Review, DSS-3868 (Attachment VI). The Westmiller language on this attachment must be inserted on the State mandated form. Include the month(s) and year of Westmiller eligibility in the space after "you had medical bills greater than your excess resources in the following month(s)";
 - b. Notice of Decision on Reimbursement of Medical Bills by the Medical Assistance Program, DSS-3869 (Attachment VII);
 - c. Medical Assistance Reimbursement Detail Form, DSS-3870 (Attachment VIII).
2. A Notice of Ineligibility as a Westmiller Class Member must be sent to individuals determined not to be Westmiller class members (Attachment IX). This denial notice is specific to the Westmiller case and must be locally reproduced.

F. Restitution

In accordance with the court order and procedures in 87 ADM-48, districts must provide restitution to class members as follows:

1. pay unpaid bills at the MA rate in effect on the date of service;
2. reimburse the actual amount paid by the class member or others who paid bills on the class member's behalf.

Such payment or reimbursement must be made within six months of this Directive or within sixty days of the case review, whichever date is later.

G. Reporting Requirements

Districts must submit to the Department the following reports:

1. on or before December 31, 1990 a listing of the names of all individuals thus far determined to be class members.
2. on or before October 31, 1991 a listing of the names of all individuals subsequently determined to be class members.

In addition, the reports must include the following information:

1. class member's CIN number and/or social security number.
2. if restitution was made, the amount of such restitution and to whom payment was made.
3. if restitution was not made, the reason it was not made.

The reports must be sent by required deadlines to:

Ruth A. Bongiovanni, Director
Eligibility Policy
New York State Department of Social Services
Division of Medical Assistance
40 North Pearl Street
Albany, NY 12243

V. SYSTEMS IMPLICATIONS

In 87 ADM-48, the Department issued instructions detailing "Systems Implications" for social services districts when payment and/or reimbursement as a result of a court decision is required. Districts must apply the systems implications guidelines of that Directive when processing Westmiller cases.

VI. EFFECTIVE DATE

The provisions of this Directive are effective immediately.

Jo-Ann A. Costantino
Deputy Commissioner
Division of Medical Assistance

List of Attachments

Attachment I	List of Attachments (available on-line)
Attachment II	Notice to Medicaid Providers and Local Offices for the Aging (not available on-line)
Attachment III	Notice entitled "To Anyone Who Was Denied Medicaid Because of Excess Resources" (not available on-line)
Attachment IV	Medically Needy Income and Resource Standards (not available on-line)
Attachment V	Budget Examples (available on-line)
Attachment VI	DSS-3868, Notice of Medical Assistance Review (not available on-line)
Attachment VII	DSS-3869, Notice of Decision on Reimbursement of Medical Bills by the Medical Assistance Program (not available on-line)
Attachment VIII	DSS-3870, Medical Assistance Reimbursement Detail Form (not available on-line)
Attachment IX	Notice of Ineligibility as a <u>Westmiller</u> Class Member (available on-line)

Example 1

Rose Carter, age 67 and single, applied for MA on October 16, 1987. Her MA case was opened October 1, 1987 but denied for the retroactive period due to excess resources. She was otherwise eligible during this period. This case is being reviewed under Westmiller for the period 7/87-9/87.

Resources

7/87 - \$10,000 savings account
 8/87 - \$10,000 savings account
 9/87 - \$10,000 savings account

Medical Bills

7/87 - \$ 8,000 hospital bill
 8/87 - \$ 70 hospital bill
 9/87 - \$ 60 outpatient bill

JulyResources

\$10,000 savings
 -3,000 1987 MA Resource Standard
 -1,500 SSI burial reserve
 \$ 5,500 excess resources

Medical Bills

\$8,000 hospital bill

\$ 8,000 medical bills
 -5,500 excess resources
 \$ 2,500 excess medical bills

AugustResources

Countable - \$0

Medical Bills

\$ 70 outpatient bill

SeptemberResources

Countable - \$0

Medical Bills

\$ 60 outpatient bill

Disposition:

1. Rose Carter is a Westmiller class member as her medical bills exceeded the amount of excess resources for the months coverage was sought.
2. There are no excess resources for August and September since the excess resources were completely offset by July's bill.
3. Medicaid can pay for the following medical bills at the MA rate:
 - a. July- \$2500 of the hospital bill
 - b. August - \$70 outpatient bill (fully eligible)
 - c. September - \$60 outpatient bill (fully eligible)

Example 2

Jean Lewis, age 72 and single, applied for MA on December 19, 1987. Her MA case was opened December 1, 1987 but denied for the retroactive period due to excess resources. She was otherwise eligible during this period. The case is being reviewed under Westmiller for the period 9/87 - 11/87.

<u>Resources</u>	<u>Medical Bills</u>
9/87 - \$10,800 savings acct.	9/87 - \$20,000 hospital bill
10/87 - \$15,000 savings acct.	10/87 - \$15,000 hospital bill
11/87 - \$ 9,000 savings acct.	11/87 - \$ 80 outpatient bill

September

<u>Resources</u>	<u>Medical Bills</u>
\$10,800 savings	\$20,000
-3,000 1987 MA Resource Standard	
-1,500 SSI burial reserve	
\$ 6,300 excess resources	
\$20,000 hospital bill	
-6,300 excess resources	
\$13,700 excess bills	

October

<u>Resources</u>	<u>Medical Bills</u>
\$15,000 savings 10/87	\$15,000
-10,800 savings 9/87	
\$ 4,200 excess resources	
\$15,000 medical bills	
-4,200 excess resources	
\$10,800 excess bills	

November

<u>Resources</u>	<u>Medical Bills</u>
Countable - \$0	\$80 outpatient bill

Disposition:

- Jean Lewis is a Westmiller class member as her medical bills exceeded the amount of excess resources for the months coverage was sought.
- The individual is entitled to the MA Resource Exemption Standard only in September (the first month coverage was given).
- Even though the excess resources in September were completely offset by medical bills, the individual acquired additional resources in October. This additional resource amount is the individual's liability toward October's bill.
- Medicaid can pay for the following medical bills at the MA rate:
 - September - \$13,700 of the September hospital bill
 - October - \$10,800 of the October hospital bill
 - November - \$80 outpatient bill (fully eligible)

Example 3

John Phillips, age 70, applied for MA on April 25, 1988. His MA case was opened April 1, 1988 but denied for the retroactive period due to excess resources. He was otherwise eligible during this period. The case is being reviewed under Westmiller for the period 1/88 - 3/88. In addition to medical bills in the retroactive period, Mr. Phillips has viable unpaid bills from months prior to the retro period.

ResourcesMedical Bills

1/88 - \$ 8,000 savings acct.	pre-retro	11/87 - \$ 1,500	home health svcs
2/88 - \$ 8,000 savings acct.	period	12/87 - \$ 2,500	"
3/88 - \$ 8,000 savings acct.	retro period	1/88 - \$ 2,000	"
	"	2/88 - \$ 1,900	"
	"	3/88 - \$ 2,100	"

JanuaryResourcesMedical Bills

\$ 8,000	savings	11/87 - \$ 1,500	pre-retro
-3,100	1988 MA Resource Standard	12/87 - \$ 2,500	pre-retro
<u>-1,500</u>	SSI burial reserve	1/88 - \$ 2,000	retro period
\$ 3,400	excess resources	\$ 6,000	bills
\$ 4,000	medical bill (pre-retro)		
<u>-3,400</u>	excess resources		
\$ 600	excess bills (pre-retro)		
\$ 2,000	excess bills (January)		

FebruaryResourcesMedical Bills

Countable - \$0		\$1,900	
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MarchResourcesMedical Bills

Countable - \$0		\$2,100	
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Disposition:

- John Phillips is a Westmiller class member as his medical bills exceeded the amount of excess resources for the months coverage was sought.
- Viable unpaid medical bills from the pre-retro period can be used to "offset" the excess resources but cannot be paid by Medicaid.
- Medicaid can pay for the following medical bills at the MA rate:
 - January - \$2,000 (fully eligible)
 - February - \$1,900 (fully eligible)
 - March - \$2,100 (fully eligible)

Example 4

Donald Clark, age 48, is a widower with two minor children. He applied for MA on August 15, 1987 for the entire family. Mr. Clark was seeking coverage for a hospital bill incurred by his daughter in August. His MA case was denied due to excess resources. In addition, the Clark household has excess income, but is otherwise eligible. The case is being reviewed under Westmiller for the month of August. There were no medical bills during the retroactive period.

<u>Resources</u>	<u>Income</u>	<u>Medical Bills</u>
\$ 9,000 savings acct	\$800 net	\$4,000 hospital bill

August

<u>Resource Eligibility</u>		<u>Income Eligibility</u>	
\$ 9,000	savings	\$ 800	net income
<u>-5,200</u>	1987 MA Resource Std for 3	<u>- 617</u>	MA income standard
\$ 3,800	excess resources	\$ 183	monthly excess income amount
\$ 4,000	hospital bill	\$ 183	excess income
<u>-3,800</u>	excess resources	<u>x 6</u>	months
200	remaining bill	\$ 1098	six month income liability
<u>- 183</u>	excess income		
\$ 17	remaining hospital bill (not payable by Medicaid)		

Disposition:

1. Donald Clark is a Westmiller class member as his medical bills exceeded the amount of excess resources for the month coverage was sought.
2. This non-SSI-related household is not entitled to the \$1,500 burial reserve exemption since there was no bona fide funeral agreement.
3. When there are excess resources and excess income, medical bills should be used first to offset excess resources.
4. The household is ineligible for inpatient Medicaid coverage for August as the six month excess income liability was not met. They would, however, be eligible for outpatient Medicaid coverage for August as the monthly excess income liability was completely offset by medical bills.

NOTE: See 87 ADM-4 for an explanation of the Excess Income Program.

Example 5

Peter Smith, age 66, applied for MA on December 12, 1986. His MA case was opened December 1, 1986 but denied for the retroactive period due to excess resources. He was otherwise eligible during this period. The case is being reviewed under Westmiller for the period 9/86 - 11/86.

Resources

9/86 - \$ 9,000 savings
 10/86- \$ 8,000 savings
 11/86- \$ 7,000 savings

Medical Bills

9/86 - \$ 2,000 hospital bill
 10/86 - \$ 300 outpatient bill
 11/86 - \$ 150 outpatient bill

SeptemberResources

\$ 9,000 savings
 -2,950 1986 MA Resource Standard
-1,500 SSI burial reserve
 \$ 4,500 excess resources

Medical Bills

\$2,000 hospital bill

OctoberResources

\$ 8,000 savings
 -2,950 1986 MA Resource Standard
-1,500 SSI burial reserve
 \$ 3,550 excess resources

Medical Bills

\$ 2,000 (September's bill)
 + 300 (October's bill)
 \$ 2,300 viable unpaid bills

NovemberResources

\$ 7,000 savings
 -2,950 1986 MA Resource Standard
-1,500 SSI burial reserve
 \$ 3,550 excess resources

Medical Bills

\$ 2,000 (September's bill)
 + 300 (October's bill)
 + 150 (November's bill)
 \$ 2,450 viable unpaid bills

Disposition:

1. Peter Smith is not a Westmiller class member as in each month coverage was sought, his excess resources exceeded the amount of his medical bills. His name would not be included in the Report to the Department (see IV.G.).
2. Since Mr. Smith is ineligible for MA in these months, a denial notice must be sent to him (see Attachment IX).