

Department of Planning and Budget 2015 Fiscal Impact Statement

1. Bill Number: HB 2251

House of Origin ☐ Introduced ☒ Substitute ☐ Engrossed
Second House ☐ In Committee ☐ Substitute ☐ Enrolled

2. Patron: Preston, Joseph E.

3. Committee: Appropriations

4. Title: Appeals of adverse initial determinations of overpayment; attorney fees

5. Summary: The substitute bill provides that in cases in which the Department of Medical Assistance Services (DMAS) makes an initial determination that an overpayment has been made to a provider and the provider substantially prevails (more than 50 percent of the value of the audit adjustments) on the merits of an appeal of that decision, the provider shall be entitled to attorney fees. Currently, the law requires that the provider substantially prevail on the merits of the appeal and demonstrate that the Department's position was not substantially justified. The bill also provides that if the amount the provider is reimbursed following the appeal is equal to at least 80 percent of the original payment received, DMAS shall automatically pay attorney fees, regardless of the amount.

6. Budget Amendment Necessary: Yes

7. Fiscal Impact Estimates: Preliminary*

Expenditure Impact:

<i>Fiscal Year</i>	<i>Dollars</i>	<i>Fund</i>
2015	\$427,500	General
	\$427,500	Nongeneral
2016	\$427,500	General
	\$427,500	Nongeneral
2017	\$427,500	General
	\$427,500	Nongeneral
2018	\$427,500	General
	\$427,500	Nongeneral
2019	\$427,500	General
	\$427,500	Nongeneral
2020	\$427,500	General
	\$427,500	Nongeneral
2021	\$427,500	General
	\$427,500	Nongeneral

*The amounts reflect the minimum estimate for increased payments due to the automatic payment clause contained in the bill. See item 8.

- 8. Fiscal Implications:** DMAS maintains that audit decisions can only be based upon the documentation that is presented by a provider at the time of the audit. However, in many cases, additional documentation is submitted by the provider during the appeal process, which can result in DMAS significantly reducing the overpayment based on that new documentation. Therefore, based upon the evidence available at the time of audit, DMAS' action was substantially justified. The removal of the limitation on DMAS' obligation to pay legal fees when DMAS is substantially justified in their actions would cause legal fee awards to increase. In FY 2014, DMAS paid out a total of \$220,000 in attorney fees and costs at the administrative level for several agency decisions under the current attorney fee statute and regulation. This figure does not include fee awards in court cases, settlements or additional cases when the provider's request for attorney fees and costs were denied specifically because the department showed that its actions were substantially justified, regardless of the outcome. Removing the substantially justified language from the statute is estimated to result in total fees being paid in the amount of \$455,000 per year. This fiscal impact has been increased (over the previous FIS) since the provider is eligible to recover attorney's fees if they prevail on 50 percent of contested adjustment, as opposed to 80 percent in the introduced bill. In FY 2014, DMAS paid out a total of \$220,000 in attorney fees and costs at the administrative level for several agency decisions. This figure does not include fee awards in court cases, settlements or additional cases that denied the provider's request for attorney fees and costs specifically because the department showed that its actions were substantially justified, regardless of the outcome. It would also be anticipated that removing the "substantially justified" language would increase the number of fee requests, which would likely result in more fees being paid.

DMAS expects an additional fiscal impact associated with the bill's automatic payment clause. If the value of the audit adjustments on which the provider prevails is more than 80 percent of the value of audit adjustments the provider contested in the appeal, the awarding of attorney fees is automatic regardless of the amount of the attorney fees or the provider's failure to demand such fees. DMAS reports that the agency, on average, pays attorney's approximately \$500/hour and spends, on average, 80 hours per case. In the past year, which is relatively typical, DMAS has had at least 10 cases in which the provider prevailed on 80 percent of the claim. If the unlimited automatic payment requirement had been applied to DMAS in this past year for these ten cases, the estimated award of attorney's fees would have been approximately \$40,000 per case and the agency could have paid out \$400,000. However, this amount is should be considered a minimum impact. Under the APA, the award of attorney's fees is limited to those fees that were "reasonable and necessary." The department asserts that the bill's automatic payment for prevailing on 80 percent of the case appears to be unlimited; the award is mandatory "regardless of the amount of the attorney fees." No standard of reasonableness appears to apply, leaving an open contingency of whatever amount the provider's attorney may submit. There is no limit on the hourly rate charged or the number of hours that may be claimed.

- 9. Specific Agency or Political Subdivisions Affected:**
Department of Medical Assistance Services

10. Technical Amendment Necessary: No

11. Other Comments: None

Date: 2/3/15