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The fact that State or county employees, or employees of vendors which contract with the State to issue food stamps to recipients, are engaged in federal food stamp activities does not in any way insulate them from possible prosecution for violations of State law. Such employees are subject to State prosecution for embezzlement (N.J.S.A. 2A:102-1) and other offenses notwithstanding their participation in a federal program. Additionally, they are subject to federal criminal sanctions which punish the unauthorized issuance, use, transfer, acquisition, alteration, possession or presentation of such coupons. 7 U.S.C. §2024; 7 C.F.R. §270.4(b). The State and counties are implicitly responsible to investigate the possibility of such offenses and report their findings to State, county or federal authorities, as appropriate, just as they would with offenses by non-food stamp employees.

In sum, prosecutions for abuse of the Food Stamp Program by recipients or employees may be pursued according to State and/or federal law. The State and county welfare agencies have the responsibility to investigate allegations of violations of law, refer such matters to the appropriate prosecutors, and take action to recoup improperly acquired food stamps.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: RICHARD M. HLUCHAN
Deputy Attorney General

April 18, 1978

ANN KLEIN, *Commissioner*
Department of Human Services
135 West Hanover Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 3—1978

Dear Commissioner Klein:

You have asked for an opinion as to whether the Division of Medical Assistance and Health Services may validly promulgate regulations under the Pharmaceutical Assistance for the Aged (hereafter "P.A.A.") Program, excluding the coverage of prescribed drugs, insulin, insulin syringes or insulin needles for persons who are inpatients in nursing homes or hospitals. For the following reasons, you are advised that payments to pharmacies may not be denied for prescription drugs, insulin, insulin syringes or insulin needles of eligible persons solely on the basis of their being inpatients in nursing homes or hospitals.

The P.A.A. Program was enacted by Laws of 1975, c. 194, as a supplement to the New Jersey Medical Assistance and Health Services

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(Medicaid) Act, N.J.S.A. 30:4D-1 *et seq.* As originally implemented, the P.A.A. Program provided for direct reimbursement to certain eligible persons for pharmaceutical costs. As amended by L. 1975, c. 312, effective February 19, 1976, single residents of the State age 65 and over whose annual income is less than \$9,000 and any married residents age 65 and over whose combined income is less than \$12,000 are eligible for P.A.A. except if the prescription drug costs of an otherwise eligible person are wholly covered by any other plan of assistance or insurance, N.J.S.A. 30:4D-21, 23. Although basic eligibility for P.A.A. was thus broadly defined, P.A.A. availability was narrowly limited by income-related deductible provisions located elsewhere in the statute.

The 1977 amendments, L. 1977, c. 268, effective January 1, 1978, address P.A.A. availability by removing all deductible provisions in the Act and substituting a \$1.00 copayment requirement. "Thus all eligible senior citizens' drug costs, less a copayment of \$1.00, would be paid by the State." Assembly Institutions, Health and Welfare Committee Statement on S. 1790, dated July 11, 1977. Pursuant to these amendments, regulations implementing the P.A.A. Program were substantially changed. N.J.A.C. 10:69A-4.3(c) was amended to provide:

P.A.A. does not pay for prescribed drugs, insulin, insulin syringes or insulin needles for persons who are inpatients in nursing homes or hospitals.

Hospital or nursing home inpatients had not been excluded from participation in the Program under previous versions of the Act and its regulations.

In our review of this amended regulation, it is apparent that there is no authority under the Act, as amended, which would allow for the blanket exclusion of inpatients at nursing homes and hospitals as a class from participation in the program. The annual income restrictions and the requirement that other insurance be used to pay for prescription drugs prior to reimbursement by the program are the only legislatively authorized restrictions on eligibility. The eligibility requirements were not affected in any manner by the 1977 amendments. There is no apparent indication of a legislative intent to exclude any category of otherwise eligible senior citizens. The Committee Statement on S. 1790 indicates only that "this legislation would expand coverage to provide assistance to a larger number of elderly citizens . . ." Therefore, it may be reasonably assumed that the legislature intended to continue as heretofore the coverage of all eligible persons including inpatients at hospitals, nursing homes and related facilities.

In addition, there is no apparent legislative purpose to delegate its prerogative to establish the conditions of eligibility for participation in the program. In this regard, the rule-making authority of the Commissioner of Human Services is found in N.J.S.A. 30:4D-24 which provides:

The commissioner shall by regulation establish a system of payments or reimbursements and a system for determining eligibility, including provisions for submission of proof of actual

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and anticipated annual income, and evidence of complete or partial coverage of prescription drug costs by any other assistance or insurance plans.

This statute on its face merely authorizes the Commissioner to establish a system by which the eligibility of individual applicants may be determined under the legislatively prescribed general standards of eligibility. There is no implicit authority in our judgment to allow the Commissioner to set broad conditions of eligibility applicable to classes of senior citizens other than those set forth in the Act. It is therefore clear that a regulation which would exclude from the benefits provided by the Act senior citizens who are inpatients in nursing homes or hospitals would be in excess of the authority granted to the Commissioner in her administration of the P.A.A. Program.

It has been suggested that since the cost of inpatient care at nursing homes and hospitals is so great, income larger than prescribed in the statute may be presumed for any private patient. This is an impermissible assumption. It excludes not only persons who receive income but also persons who liquidate property or other resources to pay for nursing home or hospital care. In using "income" as the principal basis for participation in the program, the legislature apparently recognized the distinction between "income" and "resources" previously established by regulations implementing the Medicaid Program. Compare N.J.A.C. 10:94-4.28 with N.J.A.C. 10:94-4.2. Therefore, unless an otherwise eligible senior citizen's "income" from all sources, including current income produced by resources, exceeds the annual eligibility standards, he or she is eligible for participation in the program without regard to the value of his or her "resources." A determination of inpatient eligibility in the program should be made on a case by case basis and should not assume income in excess of eligibility requirements.*

For these reasons, you are advised that N.J.A.C. 10:69A-4.3(c) which excludes senior citizens who are inpatients in nursing homes or hospitals from the benefits provided by the P.A.A. Program is inconsistent with the governing statutory provisions concerning eligibility and is therefore invalid.

Very truly yours,
JOHN J. DEGNAN
Attorney General

* The Commissioner does have the power to define the term "income" by regulation. This has been done at N.J.A.C. 10:69A-2.1, which provides in part that "[i]ncome received or anticipated shall include all income received from whatever source derived" Under this regulation, treatment of gifts or contributions from family members as "income" is permissible, since such gifts or contributions are not "resources" held by the P.A.A. eligible person but are currently made available in a given year. Gifts of over \$200 have consistently been considered "income" for the purpose of determining Medicaid eligibility, N.J.A.C. 10:4D-4.28, N.J.A.C. 10:94-4.32(a)(8), and a similar interpretation of "gifts" for P.A.A. purposes comports with the supplementary nature of the P.A.A. Program.