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9-1800-5453-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Department of Human Services Rules Governing Chemical Dependency Care for Public Assistance Clients, Minnesota Rules, parts 9530.6600 to 9530.6655, and the Consolidated Chemical Dependency Treatment Fund, Minnesota Rules, parts 9530.7000, 9530.7021 and 9530.7031.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

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The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha on May 17, 1991, at 9:00 a.m. at the Department of Human Services, Rooms 5A and 5B, 444 Lafayette Road, St. Paul, Minnesota.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comments, to determine whether the Minnesota Department of Human Services (DHS or Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of rules, whether the proposed rules are needed and reasonable, and whether any modifications to the rules constitute impermissible substantial changes.

Kim Mesun, Special Assistant Attorney General, 520 Lafayette Road, St. Paul, Minnesota 55155 appeared on behalf of the Department. The Department's hearing panel consisted of Cynthia Turnure, Chemical Dependency Program Division Director; Phil Brekken, Chemical Dependency Program Services Supervisor; Stephanie Schwartz, DHS Rules Division; and William Novak, DHS Management Division.

The hearing register was signed by twenty-nine persons. Eleven members of the public provided oral testimony at the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the date of the hearing to June 6, 1991. Pursuant to Minn. Stat. § 14.15, subd. 1 (1990), three business days were allowed for the filing of responsive comments. At the close of business on June 11, 1991, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period. The DHS submitted written comments responding to matters discussed at the hearing and written comments received during the comment period.

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Commissioner of Human Services makes changes in the rule other than those recommended in this report, she must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On March 26, 1991, the Department filed the following documents with the Chief Administrative Law Judge:

(a) A preliminary Notice of Hearing;

(b) A copy of the proposed rules certified by the Revisor of Statutes;

(c) A statement of the number of persons expected to attend the hearing; and the estimated length of time that would be necessary for the Department to present its evidence at the hearing;

(d) A statement that the Department plans to give additional discretionary public notice of the proposed rules and to persons and organizations listed on attached lists.

2. On April 1, 1991, the Department filed the following documents with the Chief Administrative Law Judge:

(a) The Order for Hearing;

(b) The Proposed Notice of Hearing;

(c) The Statement of Need and Reasonableness (SONAR);

(d) A Fiscal Note.

3. On April 1, 1991, pursuant to Minn. Stat. § 14.131, the Department sent a copy of the SONAR to the legislative commission to review administrative rules.

4. On April 23, 1991, the Department filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed;

(b) The Department's certification that its mailing list was accurate and complete;

(c) The affidavit of mailing the notice to all persons on the Department's mailing list;

(d) An affidavit of additional discretionary notice;

(e) A copy of the notice of solicitation of outside opinion along with the materials received.

(f) The names of all persons who would represent the Department at the hearing together with the names of witnesses solicited by the agency to appear on its behalf.

(g) A copy of the State Register in which the notice and rules were published.

(h) A copy of the letters sent to the LCRAR submitting a copy of the SONAR as required by Minn. Stat. § 14.131.

5. On April 10, 1991, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with it for the purpose of receiving such notice.

6. On April 23, 1990, a Notice of Hearing and the proposed rules were published at 14 State Register 2483 through 2579.

7. The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of hearing.

8. The period for submission of written comment and statements remained open through June 6, 1991, the period having been extended by Order of the Administrative Law Judge to twenty calendar days following the close of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1990), an additional three business days were allowed for the filing of responsive comments. The record therefore closed on June 11, 1991.

Statutory Authority

9. Minn. Stat. § 254B.03, subd. 5, provides the Commissioner of the Department of Human Services with authority to adopt rules "as necessary to implement rules governing chemical dependency care for public assistance recipients." It provides in part as follows:

> Subdivision 5. Rules; Appeal. The commissioner shall adopt rules as necessary to implement laws 1986, chapter 394, sections 8 to 20. The commissioner shall ensure that the rules are effective on July 1, 1987.

10. Pursuant to that statutory authority, the Department promulgated in 1987 Minn. Rules pts. 9530.6800 to 9530.7030 (informally known as Rule 24) and Minn. Rules pts. 9530.6600 to 9530.6660 (informally known as Rule 25).

11. The legislation that rules 24 and 25 implement created the Consolidated Chemical Dependency Treatment Fund (CCDTF), allocated funds to counties and Indian reservations for chemical dependency costs, and removed funds for chemical dependency treatment from Medical Assistance, General Assistance medical care and General Assistance funds. Rule 24 governs the administration of the CCDTF. Rule 25 establishes the criteria that county social service agencies and reservations apply in determining the appropriate level of care for public assistance recipients seeking chemical dependency treatment.

12. In addition to the statutory authority found at Minn. Stat. § 254B.03, subd. 5, Minn. Stat. § 254A.03, subd. 3, requires the commissioner to establish by rule of criteria to be used in determining the appropriate level of chemical dependency care for recipients of public assistance. It provides as follows:

> Subdivision 3. The Commissioner of Human Services shall establish by rule criteria to be used in determining the appropriate level of chemical dependency care, whether outpatient, inpatient or short-term treatment programs, for each recipient of public assistance seeking treatment for alcohol or other drug dependency and abuse problems. The criteria shall address, at least, the family relationship, past treatment history, medical or physical problems, arrest record, and employment situation.

13. In 1988, the Department began developing amendments to correct problems identified in the first year of implementing Rules 24 and 25. (SONAR at page 1). Two of the rule parts in this rulemaking proceeding (pts. 9530.6655 and 9530.7021) and other amendments to Rule 24 were promulgated in 1988 without a public hearing.

14. In 1990, Minn. Stat. § 254B.041 (Laws of Minnesota 1990, Ch. 568, Article 2, Sec. 91) required the Department to amend pts. 9530.6600 to 9530.7030 by emergency rulemaking. It provides as follows:

> Subdivision 1. Rule Amendment. The commissioner shall, by emergency rulemaking, amend Minnesota Rules, parts 9530.6600 to 9530.7030, in order to contain costs and increase collections for the Consolidated Chemical Dependency Treatment Fund. The amendment must establish criteria that will:
>
> > (1) Increase the use of outpatient treatment for individuals who can abstain from mood-altering chemicals long enough to benefit from outpatient treatment;

(2) Increase the use of outpatient treatment in combination with primary residential treatment;

(3) Increase the use of long-term treatment programs for individuals who are not likely to benefit from primary residential treatment; and

(4) Limit the repeated use of residential placements for individuals who have been shown not to benefit from residential placements, including long-term residential treatment.

15. The Department promulgated the legislatively-mandated emergency amendments in August of 1990. The proposed permanent amendments to pts. 9530.6600 to 9530.6650 are, with some additional technical changes, the same as the emergency amendments.

16. Similarly, in Minn. Stat. § 254B.041 (Laws of Minnesota 1990, Ch. 568, Article 2, § 91, subd. 2), the Department was given statutory authority to amend parts 9530.7000 to 9530.7025 to require a vendor to collect the cost of care received under the CCDTF. That subdivision provides as follows:

> Subd. 2. Vendor collections; Rule amendment. The commissioner may amend Minnesota Rules, pts. 9530.7000 to 9530.7025, to require a vendor of chemical dependency transitional and extended care rehabilitation services to collect the cost of care received under a program from an eligible person who has been determined to be partially responsible for treatment costs, and to remit the collections to the commissioner. The commissioner shall pay to a vendor, for the collections, an amount equal to 5 percent of the collections remitted to the commissioner by the vendor. The amendment may be adopted under the emergency rulemaking provisions of sections 14.29 to 14.36.

17. In August of 1990, the Department promulgated emergency rule amendments pursuant to the authority found in this subdivision. The proposed permanent amendments in this rulemaking proceeding, with some additional technical changes, are the same as the emergency amendments adopted pursuant to subdivision 2. The Department has the statutory authority to promulgate the proposed permanent amendments to Minn. Rule pts. 9530.6600 to 9530.6655 and 9530.7000, 9530.7021 and 9530.7031.

Nature of the Proposed Rules

18. The purpose of proposed rule parts 9530.6600 to 9530.6650 is to incorporate into permanent rules the legislatively-mandated emergency rule amendments that were intended to decrease chemical dependency care costs and increase revenue for the counties and the state, and to clarify appeal rights

and length of stay appeals. As discussed under statutory authority above, Minn. Stat. § 254B.041, subd. 1, required the Department to amend these rule parts by emergency rulemaking. The Department completed the emergency rulemaking process in August of 1990. The emergency rules, effective August 29, 1990, and published September 10, 1990, in the State Register at Volume 15, No. 11, pages 627 through 629, were intended to decrease chemical dependency care costs and increase revenue for the counties and for the state.

19. During the emergency rulemaking process, pursuant to the agency's solicitation of outside opinion, comments were received from regional treatment center employees, from legislators whose districts had regional treatment centers and from unions representing regional treatment center employees. These comments expressed concern that the Department's efforts to contain costs and to increase the use of outpatient treatment or combining outpatient treatment with primary rehabilitation might adversely affect regional treatment centers. Because of these concerns, the Department established an advisory committee consisting of representatives from counties, regional treatment centers, chemical dependency programs, unions, outside experts, and the Department. The advisory committee met to discuss the first proposed draft of the permanent rules. The first draft was based upon the emergency rule previously promulgated. The language of the proposed permanent rule reflects input received from that committee. (SONAR at page 4).

20. Minn. Rules pts. 9530.7000, 9530.7021, and 9530.7031 govern the administration of the consolidated chemical dependency treatment fund. The agency states that the purpose of these proposed rules is to add a definition of "custodial parent" needed to clarify the use of the term in part 9530.7021, require vendors of certain types of chemical dependency treatment services to collect fees directly from clients, and reinstate a third-party payment agreement option. During the emergency rulemaking proceeding, pts. 9530.7000 and 9530.7031 generated little controversy and thus, the Department did not convene an advisory committee to review these rule parts.

21. Parts 9530.6655 and 9530.7021 were originally part of a larger rulemaking proceeding including six other parts of Rule 24 which began in 1988. The Department attempted to proceed with the rulemaking without a public hearing, but because of the comments and the request for hearing generated by the notice regarding parts 9530.6655 and 9530.7021, the Department withdrew these two rule parts from the larger non-controversial rulemaking proceeding. These two rule parts are now part of the instant rulemaking proceeding.

Fiscal Note

22. Under Minn. Stat. § 256E.05, subd. 3(c), the commissioner is required to provide the chairs of each of the eighty-seven county boards in the state, in addition to the notice required pursuant to §§ 14.05 through 14.36, timely advance notice and a written summary of the fiscal impact of any proposed new rule or changes in existing rules which will have the effect of increasing county costs for community social services. Minn. Stat. § 256E.03, subd. 2(a)(7), includes within the definition of community social services drug dependent and intoxicated persons as defined in section 254A.02, subds. 5 and 7, and persons at risk of harm to self or others due to the ingestion of alcohol or other drugs. On April 15, 1991, the requisite notice was mailed.

23. In addition to the notice the commissioner is required to provide to the chairs of each county board under § 256E.05, subd. 3(c), the commissioner is required to prepare a fiscal note giving her reasonable estimate of the total cost to all local public bodies in the state to implement the rule for the two years immediately following adoption, if the estimated total costs exceed $100,000 in either of the first two years after adoption. Minn. Stat. § 145.11, subd. 1 (1990). The fiscal note must be included in the hearing notice. The hearing notices by the Department in connection with this proceeding included a fiscal note containing a reasonable estimate of the total costs to local public bodies to implement the rule. Therefore, it is found that the Department has complied with the provisions of § 14.11, subd. 1.

24. The Department is required by Minn. Stat. § 14.131, to prepare a fiscal note if one is required by Minn. Stat. § 3.98. Subdivision 2 sets out the requirements for fiscal note which includes the effect and dollar amounts, an estimate of the increase or decrease in revenues or expenditures, and the costs which may be absorbed without additional funds. The Department's fiscal note complies with the statutory requirement. Minn. Stat. § 14.11, subd. 1, also requires a fiscal note giving the agency's reasonable estimate of total costs of the proposed rule to all local public bodies in the two years immediately following adoption of the rule. The Department's fiscal note contains a summary of the estimated fiscal impact and complies with the statutory requirement.

25. With one exception, the purpose of the proposed amendments is to decrease costs and increase revenue to the state and the counties. Amendments to 9530.6600 to 9530.6650 decrease costs by diverting certain clients who are in chemical dependency treatment to lower cost services. New Rule pt. 9530.7021 increases revenue by allowing treatment vendors to be paid directly by third-party payors, rather than through the Consolidated Chemical Dependency Treatment Fund. New Rule pt. 9530.7031 increases revenue by facilitating the collection of client fees from extended care and halfway house facilities. Only one of the proposed amendments (9530.6655) increase costs (by $61,648 for the state share and $10,147 for the county share) in the two years immediately following adoption of the amendments. The summary of estimated fiscal impact provides as follows:

Net Effect of Amendments	Cost to State	Cost to Counties
Year One	$ (2,921,116)	$ (515,857)
Year Two	$ (3,184,204)	$ (562,284)
Total	$ (6,105,320)	$(1,078,141)

NOTE: Numbers in parenthesis throughout the fiscal note indicate a reduction in costs or a net savings.

Small Business Considerations

26. Under Minn. Stat. § 14.115, an agency's SONAR must, in some situations, consider the effect of rules on small businesses. However, the requirements of statute or not applicable in this proceeding. Under § 14.115,

subd. 7(b) and (c), agency rules that do not affect small businesses directly, including rules relating to county administration of state programs, and service businesses regulated by governmental bodies are not subject to the small business requirements. For the most part, the proposed rules do not directly effect small businesses; and to the extent they do, they involve the county administration of state programs or the regulation of service businesses. Consequently, the Department is not required to consider the impact on small businesses and the promulgation of these rules.

Impact on Agricultural Land

27. Minn. Stat. § 14.11, subd. 2, imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in the state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1990).

Analysis of the Proposed Rules

28. The substantive amendments proposed in this rulemaking address changes the Department is required to make in order to provide eligible chemical dependency services to clients within the available funding limitations. Further, as discussed in Finding 14 above, Minn. Stat. § 254B.041 (Laws of Minnesota 1990), Ch. 568, Article 2, § 91) required the Department to amend many of parts 9530.6600 to 9530.7030 by emergency rulemaking. During the summer of 1990, the Department completed the emergency rulemaking process, and the emergency rules became effective in August of 1990. The proposed permanent amendments to parts 9530.6600 to 9530.6650, 9530.7000 and 9530.7031 are, with some additional technical changes, the same as the legislatively-mandated emergency amendments; the present process is intended to convert the emergency rules to permanent rules status. The two exceptions, are part 9530.6655 which was originally part of another rulemaking. This rule part is amended to clarify a client's appeal rights. Part 9530.7021, relating to the reinstatement of a third-party payment agreement option, is all new.

29. On the date of the hearing, the Department introduced into the hearing record five pages of technical amendments to the proposed rules. Most of the amendments were made to make individual subparts consistent with the rest of the proposed amendments and to follow the drafting language recommended by the Office of the Revisor of Statutes in its Minnesota Rules Drafting Manual. Other amendments were made to clarify the intent of the proposed rule. The Department explained the need and reasonableness of these technical amendments or the need and reasonableness of them are found in the agency's SONAR. A detailed discussion of each part of these technical amendments is unnecessary. Parts not commented on in this report are hereby found to be needed and reasonable and do not exceed the statutory authority for their promulgation. In addition, any of these technical changes not specifically mentioned in this report is found not to constitute a substantial change. In addition to the technical amendments, the Administrative Law Judge will not comment on each part of the proposed rules. All of the concerns discussed on the record and in written comments have been carefully considered. The Administrative Law Judge has also examined the factual basis

supporting several of the parts as well as the discretionary language not objected to the public. Parts not commented on in this report are hereby found to be needed and reasonable and do not exceed the statutory authority for their promulgation.

Proposed Rule 9530.6605 -- Definitions

30. Subp. 15a define a "facility that controls access to chemicals." Phil Kelly of Project Turnabout asked for clarification as to what type of unlicensed facility the Department included within the definition. The Department responded that the definition of "facility that controls access to chemicals" would include facilities such as jails, corrections, halfway houses, and board and lodging facilities. Because of the great variety of residential facilities and the potential for future new facilities, the Department chose not to list the types of facilities, but to focus on facilities that meet the specific standards listed in the proposed rule. The definition includes all residential facilities licensed by the Commissioners of Corrections, Health and Human Services. If the residence is not licensed, the county is responsible for determining and documenting that the residence has the following:

1. Rules prohibiting residents from using chemicals while living in the facility;

2. Rules prohibiting residents from bringing chemicals into the facility; and

3. Penalties imposed upon violation of the rules.

The definition does not include programs licensed pursuant to Minn. Rules pts. 9530.5000 to 9530.6500, which cover outpatient treatment. Because clients do not reside in outpatient treatment facilities, they do not fall under the definition of facilities that control access to chemicals. The proposed definition of "facility that controls access to chemicals" is needed and reasonable.

Proposed Rule pt. 9530.6630, Placement Criteria for Primary Rehabilitation or Combination Inpatient/Outpatient Treatment.

31. Subp. 1, Item B of part 9530.6630, requires a client to be placed in either primary rehabilitation or in combination inpatient/outpatient treatment when a client cannot abstain from chemicals for fewer than seven consecutive days during the thirty days preceding assessment while outside a facility that controls access to chemicals. Rey Ellingson, Chair of the Minnesota Social Services Association, Region IV, objected to subp. 1, Item B, because it assumes that a client who is able to stay sober for more than seven days will be successful in an outpatient treatment program when the client actually needs a more structured inpatient environment. For example, when chemically dependent persons go through the court system and are faced with the threat of jail, they often times can stay sober for over seven days and up to three or

four weeks, but then begin to use again. In these circumstances, the chemically dependent person may need a more structured inpatient environment rather than an outpatient treatment. The Department responded that its reason for setting the time period for abstinence at seven consecutive days during the thirty days preceding assessment is that it complies with Minn. Stat. § 254A.03, subd. 3, which was developed in response to Minn. Stat. § 254B.041, subd. 1, paragraph (1), which required the Department to "increase the use of outpatient treatment for clients who can abstain from chemicals long enough to benefit from outpatient treatment." In its SONAR at page 7, the Department states that a client who cannot abstain from chemical use for seven consecutive days during the thirty days preceding assessment is more likely to experience withdrawal or require twenty-four hour supervision. Such a client, therefore, has not demonstrated an ability to abstain from chemicals in their usual environment and community. Accordingly, placement in either a primary rehabilitation or combination inpatient/outpatient treatment would be appropriate. On the other hand, a client who has abstained from chemical use for at least seven consecutive days can reasonably be excluded from a residential placement because the client is not likely to experience withdrawal or require twenty-four hour supervision. The client has also demonstrated an ability to abstain from chemicals in the community. This ability to abstain from chemical use in the community objectively indicates that the client could successfully participate in an outpatient treatment program. The Department has established the need and reasonableness for the proposed rule part; and it complies with the statutory mandate to contain costs while also increasing the use of outpatient treatment in combination with primary residential treatment. Subp. 1, Item B, is found to be needed and reasonable as proposed.

Proposed Rule Part 9530.6631 -- Placement Criteria for Combination Inpatient/Outpatient Treatment.

32. Proposed rule 9530.6631 consists of all new material. It requires that a client be placed in combination inpatient/outpatient treatment when the client meets the criteria in pt. 9530.6630, subp. 1, and abstains from chemical use outside a residential facility that controls access to chemicals for at least thirty consecutive days in the past 180 days. The criteria in pt. 9530.6630 (as proposed in this rulemaking are:

A) the client is assessed as chemically dependent;

B) the client is unable to abstain from chemical use for fewer than seven consecutive days during the thirty days prior to assessment; and,

C) the client is experiencing an impairment of education, impairment of employment, lack of family support, arrest, or participated in chemical dependency treatment within the past year.

Whether a choice exists between combination inpatient/outpatient treatment and primary rehabilitation, or whether combination inpatient/outpatient treatment is required, lies in the client's ability to abstain during the 180 days prior to the assessment. If the client cannot abstain for 30 consecutive days

during that period, proposed rule 9530.6630, subpart 1 applies, preserving the choice between primary rehabilitation and combination inpatient/outpatient treatment. If the client has abstained for 30 consecutive days during the 180 days prior to the assessment, combination inpatient/outpatient treatment must be used under subpart 2.

33. Ray Dunfee and Brenda Otto of Olmsted County Community Services, and Steve Schneider of Sioux Valley Hospital, suggested that the Department add to the criteria for his part clients who have abstained more than seven consecutive days of the thirty days prior to assessment. The commentators believe there is a gap in services available for clients who have abstained between eight and twenty-nine days preceding the assessment.

The purpose of these rule parts is not to create steps of care which are tailored to the length of time which a client can abstain from chemicals. Rather, the rules assess the probability that a client will be adequately served by particular types of treatment. DHS has concluded that only clients who cannot abstain for seven of the thirty days prior to the assessment are in need of some type of inpatient care. If that client has abstained for thirty out of the prior 180 days, that care can, at most, consist of combination inpatient/outpatient treatment. If the client can abstain for more than seven of the thirty days prior to the assessment, outpatient treatment is the most intensive care available. This approach carries out the legislative directive to contain costs while directing services to those most in need of those services.

34. In addition to the cost containment benefits of the Department's proposed rule part, it is reasonable to require a client who has thirty consecutive days of abstinence but who meets the criteria of pt. 9530.6630, subp. 1, to be placed in a combination program because the client already has some of the necessary skills for maintaining sobriety. The client has, however, experienced problems using these skills in the community within the thirty days prior to the assessment.. The inpatient portion of the treatment provides the client continuing support and additional skill building while the outpatient portion affords the client the opportunity to practice his or her sobriety in a typical environment. An inpatient placement without the outpatient portion relies entirely upon an artificial setting and does not effectively address the problem of real-life application. (SONAR at page 8). A combination treatment does. The Department has established the need for and reasonableness of proposed rule part 9530.6631.

Proposed Rule Part 9530.6640 -- Placement Criteria for Extended Care.

35. Item A of proposed rule pt. 9530.6640, adds criteria that will increase the use of long-term treatment programs pursuant to the directive found in Minn. Stat. § 254B.041, subd. 1, paragraph (3). This part includes the addition of the following criteria:

> or has participated in primary rehabilitation within the past two years or has participated in Category II, III or IV Programs for a total of three or more times in the client's lifetime.

36. Mr. Schneider proposed that Part 9530.6640, Item A, be deleted and that a "history of primary placement" be added as a requirement for extended care placements. The Department responded that this rule part was developed to include lifetime treatment criteria in determining whether or not a client is likely to benefit from further primary treatment and to avoid unnecessary primary rehabilitation placements. The fact that a client has not benefited from previous residential placements indicates chronic use problems. (SONAR at page 9). Accordingly, it makes sense to place this type of client in extended care because such programs are designed to address this population. In addition, clients who have not experienced primary treatment but who meet extended care criteria are exhibiting characteristics of chronic use which typically cannot be addressed in short-term primary treatment. The Department has established the need for and reasonableness of pt. 9530.6640, Item A, as written.

37. Brenda Otto, representing Olmsted County, submitted written concerns that clients who have participated in Category II, III or IV Programs for a total of three or more times in their lifetime denies their further placement in primary treatment or halfway houses. The Department responded that the profiles described by Ms. Otto (clients who have participated in Category II, III or IV Programs for a total of three or more times in their lifetime) meet the criteria for extended care placement, but are <u>not</u> precluded from further halfway house placements. The rationale for denying chronic use patients access to primary treatment is that the client is not likely to benefit from further primary care. As stated in Finding 36 above, it makes sense to place this type of client in extended care because such programs are designed to address the chronic use population. The rule part is found to be needed and reasonable as written.

38. Brenda Otto also suggested that pt. 9530.6640, Item A, complicates court orders on civil commitments or sentences for legal offenses. Although this rule part requires that clients meeting specific criteria be placed in extended care, civil commitments are exceptions to all placement criteria. The committing court can order a client to any level of care. The court-ordered placement can be at a level of care other than that supported by the documentation in the Rule 25 assessment. Therefore, civil commitments will not be compromised. (Department Post-Hearing Comments dated June 6, 1991, page 5). This exception does not apply to stays of impositions or criminal court sentences that are stayed pending completion of treatment. In those instances, the placement needs to be consistent with the level of care documented by Rule 25 assessment. (Agency Post-Hearing Comments dated June 6, 1991, at page 5).

<u>Proposed Rule 9530.6641 -- Repeat Residential Placements</u>.

39. Proposed rule 9530.6641 establishes a limitation on the consecutive days a client can spend in a residential placement over a two year period. Once the limit has been reached, the client cannot be placed in primary rehabilitation or extended care. The Department has set this limit to carry out the statutory mandate of Laws of Minnesota 1990, chapter 568, article 2, section 91. That legislative enactment, codified as Minn. Stat. § 245B.041, subd 1, requires the Department to change its emergency rules to contain the costs of chemical dependency treatment. It is reasonable to conclude that the Legislature intended that the Department incorporate the same cost containment

methods in its permanent rules. DHS is specifically directed to increase the use of long term programs for those clients who will not benefit from residential treatments and limit repeated use of residential programs by clients who do not benefit from those programs. Setting a limit on consecutive days in a two year period which will disqualify clients from residential placement is needed and reasonable to carry out the intent of the Legislature.

40. The limit chosen by the Department for residential placements is 21 consecutive days. A number of commentators objected to the 21 day limitation. Ray Dunfee, on behalf of Olmstead County Community Services, asserted that 21 days does not give a client "a legitimate shot at rehabilitation." Tr. at 24. Steve Schneider, on behalf of Sioux Valley Hospital in New Ulm, Minnesota, supported a 45 day limitation. Mr. Schneider maintained that expecting treatment objective to be obtained in 21 days is "unrealistic." Tr. at 30. He suggested that allowing longer stays would result in a higher success rate and fewer repeaters, thereby reducing costs. Tr. at 30. Jim Rasmussen, of the Brown County Detoxification Center in New Ulm, also supported a 45 day limit as a more realistic time period in which to achieve success with a residential program. Gary Holen, a Chemical Dependency Counselor with Otter Tail County Social Services, recommended a three to six month limit on extended care. Tr. at 39. Mr. Holen did acknowledge, however, that some clients (referred to as "snowbirds") inappropriately seek residential placement from winter to spring. Tr. at 39.

41. The Department is obligated to support its proposed rules with an affirmative showing of need and reasonableness. For an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. <u>Broen Memorial Home v. Minnesota Department of Human Services</u>, 364 N.W.2d 436, 440 (Minn.App. 1985). These facts may either be adjudicative facts or legislative facts. <u>Manufactured Housing Institute v. Pettersen</u>, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. <u>Manufactured Housing Institute</u>, at 246. The Department's choice of 21 days is a balance between program costs and the potential benefits received through longer placements. DHS believes that clients will have sufficiently detoxified within a 21 day period so that they can determine for themselves whether their needs are being addressed in extended care treatment. SONAR, at 10. Setting the term of care at 21 days is clearly less costly than 45 days, at least on a short term basis. No studies have been introduced into the rulemaking record to show that the rate of success differs with increased lengths of primary care. Absent information that shows the Department's choice is unreasonable, DHS is entitled to make a policy decision on the length of care. After 21 days in a residential treatment program, a client is capable of making informed decisions about further treatment in a non-residential setting. The Department has shown that a 21 consecutive day limit on residential placements is needed and reasonable to permit efficient use of treatment options and prevent abuse of the system by persons seeking shelter, not chemical dependency treatment.

42. One possible outcome of the 21 day limit, however, is that persons will seek a series of 20 day placements. Mr. Dunfee suggested that the Department replace the 21 day limitation with a "cap" of 120 days over a two

year period. Tr. at 26. The Department may, if it chooses, adopt this suggestion either in place of, or in addition to, the 21 day limitation. Placing a cap on services would be needed and reasonable to curb abuses of the treatment system. The change, if adopted by DHS, would not be a substantial change.

Proposed Rule 9530.6650 -- Exceptions to Placement Criteria.

43. The Department proposes to exempt clients from the 21 day limitation when they meet any of the criteria set out in proposed rule 9530.6650, subpart 3a. The exemptions include pregnant women, single parents, clients suffering from previously unrecognized physical or mental ailments, and clients being referred to specific programs. No commentators objected to any of these exemptions or asserted that others should be added. Each exemption category consists of persons who are the most vulnerable as chemical dependents or whose chemical abuse will have a severe impact on other vulnerable persons. The Department has shown that exempting those persons from the 21 day limitation is needed and reasonable to protect persons at risk resulting from a client's chemical abuse, and to soften the potential adverse impact from overly rigid time limitations.

Proposed Rule 9530.6655 -- Appeals.

44. The Department's proposed rule part 9530.6655 alters the appeal process by deleting some existing language, replacing other language, and adding two new subparts. In subpart 1, the deleted language removes a distinction between prepaid health plan appeals and other appeals, since the distinction no longer applies. SONAR, at 12. The replaced language in subpart 2 clarifies what events trigger the right to a fair hearing under Minn. Stat. § 256.045. No one objected to any of the language added or deleted to subparts 1 and 2. DHS has shown that its proposed new language in those subparts is needed and reasonable.

45. Subpart 3 is composed of entirely new language. This subpart clarifies that an appeal does not entitle clients to receive continued services when the appeal is pending. If a provider chooses to continue services, under item A the provider is financially responsible for any services for which the client is not found to be entitled following the appeal. Item B prohibits any provider from charging a client for services after the ending date of the authorized placement. While many providers commented in this rulemaking proceeding, none objected to these provisions. The Department has shown that the limitations on services provided during client appeals is needed and reasonable to prevent abuse of the appeal process and to limit program expenditures.

46. The factors which an appeal referee must take into account are set forth in subpart 4. Together, the four factors listed ensure that an inquiry will be made as to whether appropriate and adequate services are being provided to an individual client. No commentators objected to any of the factors proposed; and no one suggested any factors which should be added to the list the referee must consider. The Department has shown that subpart 4 is needed and reasonable. DHS replaced the word "shall" in this subpart with "must." The modification makes the rule consistent with the rule drafting

recommendations of the Revisor of Statutes. The modification is not a substantial change.

Minnesota Rule 9530.7000 -- Definitions.

47. The Department proposes to add a definition for "custodial parent" to its existing rule 9530.7000 as subpart 9a. DHS originally proposed the term be defined as "a birth or adoptive parent with whom a minor child resides at the time of the assessment." The Department needs to define "custodial parent" since that term is used in other parts of these rules and the term is subject to different interpretations. DHS altered the definition at the hearing to delete the residence requirement and incorporate physical custody and joint physical custody under Minn. Stat. § 518.003 as the elements of being a custodial parent. This alteration is needed and reasonable because many child custody arrangements alternate the child's residence between the two parents. The modification tailors the definition of custodial parent to the reality of current custody arrangements. The change conforms the rule definition to a statutory provision and does not constitute a substantial change.

Proposed rule 9530.7021 -- Payment Agreements.

48. Under proposed rule 9530.7021, DHS provides an option for local agencies, clients, and the vendors of services to agree that the vendor will accept the amount a third party is obligated to pay, together with the client's payment required by Minn. Rule 9530.7022, as payment in full. The effect of this proposed rule is to eliminate charges to the CCDTF in cases where an eligible client has outside insurance but cannot pay the required copayment. In such instances, the client typically avoids using the third party payor and, instead, requests public assistance funding from the CCDTF. This leads to unnecessary use of public money for treatment and, due to discounts offered to CCDTF clients, less money is available to pay providers of treatment (even without the copayment). Mr. Schneider strongly supports proposed rule 9530.7021 as it resolves this problem and avoids the "stigma" of receiving public assistance. No commentator objected to this rule part. DHS has shown that proposed rule 9530.7021 is needed and reasonable. The Department altered the proposed rule to clarify that the agreement is between the local agency, the client, and the vendor, not the third party payor. The modification is not a substantial change.

Proposed rule 9530.7031 -- Vendor's Duty to Collect Client Fees.

49. Minn. Stat. § 245B.041, subd. 2 authorizes the Commissioner of DHS to require vendors to collect the cost of care from clients who are partially responsible for treatment costs. The money collected is to be passed through to the Department, with five percent remitted to the vendor for the cost of collection. Proposed rule 9530.7031, incorporates this statutory mandate and adds the specific steps to be followed in carrying out the collection process. The rule also specifies that the vendor's collection obligation ends with the client's discharge. It further provides that a client's failure to pay is cause for discharge only in certain circumstances. DHS asserts that this rule will aid in the collection of fees owed by clients by billing them when the clients are receiving the services, and when the clients' location is known. SONAR, at 17. The Department has shown that proposed rule 9530.7031

is needed and reasonable. DHS modified the rule at the hearing to change two words consistent with the Revisor's drafting recommendations. These changes do not constitute substantial changes.

50. Several commentators suggested that the Department is not sensitive to the needs of clients and that the lack of funds available for treatment programs is indicative of that attitude. One commentator suggested that restricting funds for chemical dependency treatment programs caused a rise in violent crimes. The Department is obligated to follow the direction set for it by the Legislature. The recent statutory changes show an unmistakable emphasis on reducing the amount of public money expended on CCDTF, increasing the efficiency of the care provided to clients, and using outpatient treatment wherever possible. The Department's efforts, which carry out the Legislature's directions while still providing persons who are dependent upon alcohol or other drugs with a comprehensive range of rehabilitative and social services, have not been shown to be insensitive. DHS has shown that the proposed rules are needed and reasonable and are consistent with the statutory mandates.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Human Services (the Department) gave proper notice of this rulemaking hearing.

2. The Department has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. The additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the

Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated this 11th day of July, 1991.

Phyllis A. Reha
PHYLLIS A. REHA
Administrative Law Judge

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