6-1800-9090-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of Proposed Adoption of Amendments to Department of Human Services Rules Governing the Surveillance and Integrity Review Program, Minn. Rules, Parts 9505.2160 to 9505.2245.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on November 21, 1994, at 9:30 a.m. in St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, 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 the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by DHS after initial publication are impermissible, substantial changes.

Robert Sauer, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Department at the hearing. The Department's hearing panel consisted of Tom Neumann, Surveillance Unit Senior Investigator; Kay Fellows, Case Manager Coordinator; Constance Jacobs, Staff Attorney; and Robert Klukas, Rulemaker. Thirty-four persons attended the hearing. Twenty-five persons signed the hearing register. 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 hearing, to December 12, 1994. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on December 19, 1994, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period. The Department submitted written comments responding to matters discussed at the hearings and proposing further amendments to the rules.

DHS must wait at least five working days before the agency takes any final action on the rule(s); during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his

approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise DHS of actions which will correct the defects and the Department may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, DHS may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Department does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If DHS elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Department may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If DHS makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On September 8, 1994, the Department filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules certified by the Revisor of Statutes;
(b) the Order for Hearing;
(c) the Notice of Hearing proposed to be issued;
(d) the Statement of Need and Reasonableness (SONAR);
(e) a list of additional persons to receive the Notice of Hearing; and
(f) an estimate of the number of persons who would attend the hearing and how long the hearing is expected to last.

2. On September 28, 1994, DHS mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice and the persons who appear on the list of additional persons to receive the Notice of Hearing.

3. On October 3, 1994, the Notice of Hearing and the proposed rules were published at 19 State Register 721.

4. On October 18, 1994, DHS filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed;
(b) a copy of the State Register pages containing the Notice of Hearing and its proposed rules;
(c) a copy of the Notice of Solicitation of Outside Materials published at 17 State Register 2159 on March 8, 1993, and all materials received pursuant to those Notices;
(d) the names of agency personnel and witnesses called by the Department to testify at the hearing;
(e) the Department's certification that its mailing list was accurate and complete;
(f) the Affidavit of Mailing the Notice to all persons on DHS's mailing list; and,
(g) the Affidavit of Additional Mailing.

Nature of the Proposed Rules and Statutory Authority.

5. The Department operates a program known as Surveillance and Integrity Review (SIRS). SIRS monitors compliance of service vendors with the various statutory and rule requirements under which Medical Assistance (MA), General Assistance Medical Care (GAMC), MinnesotaCare, and other State program services are provided. Under Minn. Stat. § 256B.04, subd. 4, DHS must cooperate with the U.S. Department of Health and Human Services (DHHS) to qualify for federal funds. Under Minn. Stat. § 256B.04, subd. 10, the Department must establish rules to investigate MA fraud and abuse. Rules to investigate inappropriate use of GAMC services are required of the Department by Minn. Stat. § 256D.02, subd. 7. The proposed rules amend existing rules governing the SIRS program. The amendments require additional recordkeeping and reporting of services provided under programs overseen by SIRS. Investigatory methods and sanctions are amended by the rules. The appeal process is also altered. The Administrative Law Judge concludes that DHS has general statutory authority to adopt these rules.

Small Business Considerations in Rulemaking.

6. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. In its SONAR and Notice of Hearing, DHS maintained that the proposed rules fall within the exemption set forth at Minn. Stat. § 14.115, subd. 7(3) for rules relating to medical programs regulated for standards and costs. SIRS applies only to programs providing medical care that are regulated for both standards and costs. DHS has met the requirements of Minn. Stat. § 14.115, subd. 2.

Fiscal Notice.

7. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of $100,000 per year by local public bodies. The notice must include an estimate of the total cost to local public bodies for a two-year period. The proposed rules relate only to the expenditure of state and federal money. The Department prepared a fiscal note in which DHS identified the rule as fiscally neutral, requiring no additional spending by counties or the state.

The fiscal note requirement arises when the rules would increase costs to "local public bodies." Costs incurred by the State are not costs to local public bodies. There is no evidence that the proposed modifications to the SIRS rules would shift any costs to the counties. The proposed rules will not require expenditures by local governmental units or school districts in excess of $100,000 in either of the two years immediately following adoption, and thus no notice is statutorily required.

Impact on Agricultural Land.

8. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory notice 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 (1988).

Proposed Rule 9505.2160 - Scope and Applicability.

9. Proposed rule 9505.2160 establishes the scope of the SIRS rules. The term "provider" is replaced by the term "vendor" throughout the rule part. Other terms are updated to conform the rule to that statutory scope of the SIRS program. At the hearing, the Department modified subpart 1 to replace the term "prepaid medical assistance programs" with "prepaid health plans." The change was made to meet the concerns of Medica, BlueCross BlueShield BluePlus of Minnesota, St. Paul-Ramsey Medical Center, and HealthPartners, who provided comments before the hearing in this matter. The term more accurately describes what the Department intends to cover with the rule.

10. In addition to the comments toward subpart 1, Medica and the HMO Council urged DHS to explicitly exempt prepaid health plans from the SIRS program altogether. The commentators based this suggestion on the incongruity between the SIRS recordkeeping requirements and the methods in use by these health plans. As part of their cost-containment methods, these health plans do not require the bookkeeping necessary under the SIRS rules. The commentators pointed out that these health plans negotiate the terms upon which care is delivered under these prepaid health plans. Applying the SIRS recordkeeping requirements would, in essence, defeat the purpose of using prepaid health plans to reduce costs.

In response to these issues, the Department proposed an amendment to subpart 2. The new language, proposed at the hearing, states:

> To the extent that provisions of a contract between the department and prepaid health plans have functionally equivalent requirements, the department shall exempt the prepaid health plans from the specific requirements of parts 9505.2160 to 9505.2245.

DHS maintains that the modification eliminates duplication of contract requirements and rule requirements. Medica and the HMO Council generally supported the new language, but also asked that prepaid health plans be expressly exempted from the audit and enforcement requirements of the SIRS rule. The Department declined to further modify the rule.

At the hearing, the Department's witnesses indicated that DHS holds the responsibility to audit and recover overpayments in prepaid health plan arrangements. This responsibility inherently requires the Department to limit exemptions and thereby retain authority to audit and enforce SIRS requirements. This authority exists even if the Department does not currently engage in active oversight of such prepaid plans. There is no need for the Department to expressly state its authority in these rules. If the Department concludes in the future that the policy must be changed to exempt prepaid health plans from SIRS oversight, a change can be made. Exempting prepaid health plans from the SIRS rules, to the extent that the contract fulfills the need for oversight, is needed and reasonable. Extending further exemptions based on current Department policy is not needed. The new language was based on suggestions by commentators and does not constitute a substantial change.

Proposed Rule 9505.2165 - Definitions.

11. Proposed rule 9505.2165 defines terms used in the SIRS rule. Only the terms requiring discussion will be mentioned in this Report. The other definitions are found to be needed and reasonable.

Subpart 2 - Abuse

12. "Abuse" is defined in item A of subpart 2 to include a pattern of specified practices such as the repeated submission of improper claims. Item 18 is proposed for addition by the Department. Item 18 defines "abuse" to include "failing to comply with the requirements of the provider agreement that relate to the programs covered by parts 9505.2160 to 9505.2245." MMA objected to the lack of any requirement that the failure to comply be "repeated." The Department agreed with the comment and made that change. The modification is not a substantial change. The item as modified is needed and reasonable.

13. Item B of subpart 2 defines "abuse" by listing prohibited practices. The existing item B(2) prohibits a recipient from obtaining duplicate medical services from multiple providers for the same medical condition. The new language adds "or comparable" to extend the prohibition to similar services for the same medical condition. Rick E. Carter, President of Care Providers of Minnesota, objected to the inclusion of "or comparable" as overbroad. Mary Rodenberg-Roberts, Director of Consumer Services for REM, suggested that alternative medical techniques should not be seen as abuse by a patient seeking effective treatment of a condition. The Department declined to make any changes to the definition, explaining that multiple treatments are exactly the sort of problem the rules are meant to prohibit. The Department noted that a patient seeking a second opinion is not included in the definition of abuse. The proposed rule has been demonstrated to be needed and reasonable.

Item B(13) - Self-Inflicted Injuries

14. Item B(13) of subpart 2 includes in the definition of abuse, medical services sought for self-inflicted injuries or trauma. This proposal was criticized by twenty providers of psychological care, the Minnesota Disability Law Center, the Office of the Ombudsman for Mental Health & Mental Retardation (the Ombudsman), and the Alliance for the Mentally Ill of

Minnesota. The commentators indicated that mentally ill persons are not capable of conforming their actions to the Department's standards and would be denied medical care unfairly. At the hearing, the Department acknowledged that the rule would have the unintended effect of denying those persons medical care and responded by deleting the proposed subitem. The change is needed and reasonable to treat mentally ill patients fairly. The deletion of the subitem is not a substantial change.

Subitem B(14) - Emergency Room Care

15. Subitem B(14) defines abuse to include "repeatedly obtaining emergency room health services for nonemergency care." REM objected to this rule as discouraging recipients from seeking needed medical care. DHS indicated that the rule was directed specifically toward identified instances of excessive, unnecessary emergency room use. In such cases, a primary care case manager is assigned to direct the recipient to appropriate care options. The rule will not deny anyone needed medical care. The rule has been demonstrated to be needed and reasonable.

Subitem B(15) - Transportation

16. Subitem B(15) includes use of medical transportation for medical services when services can be obtained in the local trade area as abuse. The Minnesota Disability Law Center, the Ombudsman, the Alliance of the Mentally Ill of Minnesota, and Northern Pines Mental Health Center, Inc., objected to the restriction proposed on medical transportation in subitem B(15) as unduly restricting appropriate patient options. Since some medical services will always be available within a local trade area, the rule could be read to eliminate transportation as a reimbursable expense. The Department acknowledged that the rule language could be read to exclude more than was intended. To correct this problem, DHS proposed to modify the subitem to limit the definition to when appropriate service can be obtained within the local trade area. The modification meets the commentators' objections by allowing patients to use medical transportation for specialty treatment not available within the local trade area. The rule as modified is needed and reasonable. The new language more accurately states the Department's intent and is not a substantial change.

Subpart 4 - Fraud

17. The Department proposes to define "fraud" by reference to a list of specified state and federal statutes. The Department also proposes a "catch-all", which would define "fraud" to include any false claim or false statement made to a program. MMA objected to this last provision, claiming that it exceeded statutory authority and was unreasonable.

Minn. Stat. § 256B.04, subd. 10 (1994) authorizes the Department to establish by rule general criteria and procedures for the identification of suspected medical assistance fraud, theft, abuse, etc. and for the imposition of sanctions against a vendor of medical care. The statute goes on to provide that if it appears to the agency that a vendor of medical care may have acted in a manner warranting civil or criminal proceedings, the agency shall inform the Attorney General.

Minn. Stat. § 256B.04, subd. 2 directs the Department to make rules for carrying out the MA program, and subdivision 4 requires the Department to cooperate with the federal government to qualify for federal aid in connection with the MA program.

Neither the federal surveillance statute nor the state surveillance statute define "fraud." However, Minn. Stat. § 609.466 provides as follows:

> any person who with intent to defraud, presents a claim for reimbursement, a cost report or a rate application relating to ... [MA] funds ... which is false ... is guilty of an attempt to commit theft of public funds.

(Emphasis added).

By federal rule, "fraud" is defined to mean:

> an intentional deception or misrepresentation made by a person with knowledge that the deception could result in some unauthorized benefit to himself or some other person. It includes any act that constitutes fraud under applicable Federal or State law.

42 C.F.R. § 455.2.

The existing state rule (the one proposed for amendment herein), Minn. Rule part 9505.2165, subp. 4 (1993) limits "fraud" to mean MA fraud as defined in Minn. Stat. § 609.466. That statute, which is quoted above, requires intent.

In the SONAR, the Department did not directly address the issue of intent. In post-hearing comments, DHS explained that the existing rule was too narrow, and that the amendment added a number of other statutes, violation of which would constitute fraud under the proposed rule. The Department noted that each of the newly added statutes requires intent. The Department reasoned (correctly) that there was no need to repeat the intent element in its own rule. But the Department failed to address the lack of the intent element in its "catch-all" provision, which would define fraud to include any false statement, false claim, or false representation made to a program.

In response to MMA's criticism that the rule was unreasonable without an intent element, the Department stated:

> In the event that SIRS discovers that false statements have been made or that false claims have been submitted, or that false representations have been made to any program, there is a basis for referring the case to law enforcement authorities for further investigation to determine the intent of the actor for a potential civil lawsuit or criminal complaint. If no such intent is discovered, the matter would be referred back to SIRS for administrative action as an overpayment for recoupment of funds paid.

Department Comment, at 7.

The Department's announced policy is reassuring, but does not justify labelling both intentional and unintentional acts as fraud. The ALJ concludes that while this rule is not beyond the Department's statutory authority, the Department has failed to document the need and reasonableness of this change insofar as it would include unintentional acts within the meaning of fraud. To label an act as "fraud," even though all parties agree that the act was unintentionally erroneous, requires a degree of documentation of both need and reasonableness that the Department has failed to present.

To correct the defect in the proposed item, the element of intent must be incorporated into the "catch-all" paragraph of the definition. An example of language that would do so reads:

> B. making a false statement, false claim, or false representation to a program, where the person knows or should reasonably know the statement, claim, or representation is false.

The intent standard suggested here is taken directly from the fraud provisions of Minn. Stat. § 256B.064. The suggested language cures the defect in the proposed rule and does not constitute a substantial change.

Subpart 4a - Health Plan

18. Due to other changes proposed in the rule, DHS modified the rule at the hearing to include a definition of "health plan." The definition in subpart 4a identifies health maintenance organizations (HMOs) and other prepaid contract health providers as health plans. The new subpart is needed and reasonable. Adding the subpart does not constitute a substantial change.

Subpart 6c - Investigative Costs

19. Care Providers of Minnesota and Home Free Inc. objected to the imposition of investigative costs on vendors. The Department cited Minn. Stat. § 256B.064 as its authority to impose those costs on vendors submitting fraudulent claims. Minn. Stat. § 256B.064, subd. 1d, allows DHS to recover investigative costs from vendor who knowingly submit false claims. The authority does not extend to unintentional billing errors. The specific items listed in proposed subpart 6c: hourly wages of the investigator, employee benefits, travel, lodging, meals, and data storage costs are all appropriately recouped under Minn. Stat. § 256B.064, subd. 1d.

Care Providers of Minnesota suggested a reasonableness standard be added to the definition to ensure that excessive investigative costs are not imposed on vendors. A number of commentators suggested capping investigative costs, tying those costs to the scope of the case, or allowing appeal of the investigative cost component in a particular case. The Department has shown its approach to be statutorily authorized, needed, and reasonable. The calculation of investigative costs is subject to appeal pursuant to Minn. Stat. § 256B.064, subd. 2 (1992).

Proposed Rule 9505.2175 - Health Service Records

20. The amendments to Minn. Rule 9505.2175 consist of minor changes to subparts 1, 2, and 5, and an entirely new subpart 7. No one objected to any changes other than subpart 7. One concern was expressed by Medica -- that prepaid health plans would be required to audit vendors to the plan under subpart 1 and potentially have to reimburse the Department for overpayments. DHS responded that the rule, and the Department's practice in auditing, was not being significantly changed. To ensure that the rule clearly stated the Department's intent, DHS added "by the department" to the recovery provision in subpart 1. The new language would add clarification, and would not be a substantial change.

Subpart 7 - Requirements for Personal Care Provider Service Records

21. Most of the requests for hearing from vendors cited the increased burden of recordkeeping under subpart 7 as requiring a hearing. Based on these comments, the Department amended the subpart. The changes will be discussed below.

Item A - Physician's Order

22. Item A of subpart 7 requires that the physician's initial and renewal orders for personal care services be placed in the personal care provider record. Claudette Heywood, President and CEO of CHB Enterprises, Inc. (CHB Enterprises), agreed with the physician's orders being required, but suggested that some sort of grace period be expressly included in the rule, for weekends and other cases where physicians do not respond promptly for authorization requests. The Department indicated at the hearing that some language could be added to allow for a five-working-day grace period to get the initial verbal order, and a longer period to get the written order. Tr. 63-66. However, DHS did not suggest a change in its post-hearing comment, asserting that to set a time limit would conflict with the Department's statutory authority. Department Comment, at 10.

Under its present wording, item A requires a physician's order be in the record for a vendor to be in compliance. CHB Enterprises has identified a situation, a change of providers over a weekend, where the requirement is unreasonable. Home Care, Inc. testified that physicians have taken 30, 60, even 90 days to respond, forcing the vendor to file repeated requests. Tr. 81. DHS has not identified any reason for imposing such a strict requirement on the provider record. Item A is defective for imposing an unreasonable requirement on vendors. To cure the defect, the Administrative Law Judge suggests the following language:

> A. the physician's initial order for personal care services, which shall be included within a reasonable time after the start of such services, and documentation that the physician's order has been reviewed by the physician at least once every 365 days;

The suggested language eliminates the unreasonable aspect of the physician's order requirement without imposing a specific limit on vendors. The use of a reasonableness standard is appropriate to ensure that vendors are

aware of the need to obtain the physician's order. The Department's concern that it lacks statutory authority to set this limit is unfounded. The Department is generally authorized to set procedural standards. If the Department's concern is based upon the case of Leisure Hills v. Levine, 366 N.W.2d 302 (Minn.App. 1985), the concern is misplaced. That case involved an agency's attempt to narrow a vendor's rights, whereas here, the change would be one that would broaden the rights of the regulated public. Failure to keep a physician's order in a proper file is not grounds to seek monetary recovery. See Minn. Stat. § 256B.064, subd. 1a. However, repeated violations of procedural rules can result in other sanctions, such as, prior authorization or review of claims, stipulation to specific conditions, or in extreme cases, debarment of the vendor from contracting with the State. See Proposed Rule 9505.2210, subp. 2. The suggested modification cures the defect in the proposed rule and does not constitute a substantial change.

Home Free, Inc. suggested that there would be quicker physician response to requests if a familiar form, Medicare Form 485, were the required authorization. Tr. 80-81. That may well be correct, but the Department's decision to not require a single form for physician orders is also reasonable.

Item B - Nurse's Instruction

23. Item B of subpart 7 requires inclusion of the nurse's instruction to the personal care provider to be included in the vendor's records. CHB Enterprises asserted that the nurse's care plan should not be required to be passed on to personal care attendants, since much of the information is beyond the scope of the personal care attendant's duties. DHS clarified its intent that whatever instruction is given to the personal care attendant must be documented in the personal care provider record. Department Comment, at 11. Item B is needed and reasonable, as proposed.

Item E - Shared Care

24. A number of comments prior to hearing suggested adding information to the personal care record to document whether a shared care arrangement was in effect. DHS agreed and added that requirement as proposed item E. The new item is needed and reasonable to accurately identify the style of personal care being provided. The modification is not a substantial change.

Item F - Daily Documentation Requirements

25. A substantial new obligation on vendors is found at item F, requiring daily documentation of care provided to persons. The Department cites instances of billing for personal care attendant services when those services had not been performed. In the cases cited, the vendors were unaware of the personal care attendant's failure to provide the service. In some cases, the persons receiving services acted in concert with the personal care attendant to submit fraudulent billings. To provide assurances of billed services actually being performed, the Department proposes that a record of daily services be kept in the personal care provider record.

As originally proposed, the daily documentation required for a person receiving services in an individual care arrangement would include:

(a) the recipient's name;
(b) the personal care attendant's name;
(c) date of services;
(d) location of services;
(e) total hours of service;
(f) attendant's arrival and departure times;
(g) a listing of the services provided;
(h) time spent providing services in the recipient's residence;
(i) time spent providing services outside the recipient's residence;
(j) attendant's notes on the changes in condition, documentation of calls to the supervising nurse, or other required notes;
(k) the attendant's signature; and
(l) the signature or mark of the recipient of services.

Based on comments received from home care providers, the Department proposed to delete the site of services and time spent in and out of the residence from the list of required information. DHS indicated at the hearing that the remaining information was adequate for surveillance and integrity review of providers. The Department's modifications were supported by CHB Enterprises, MHCA, and Accessible Space, Inc.

Other commentators suggested additional changes. Delta Dental urged inclusion of a standard of documentation as used in private business to exclude prepaid health plans from the burden of additional recordkeeping. This goal is accomplished by the modifications to proposed rule 9505.2160, subp. 2.

Lyons Health Care objected to the information required in subitem J as beyond the scope of practice for personal care attendants. DHS explained that the item requires only the "significant observable changes in the recipient's condition." Department Comment, at 12. No diagnosis or other action is required. Reporting observations is currently expected of personal care attendants. Id. While the rule would be clarified by only requiring notes for "significant observable changes," the Department had demonstrated subitem J is needed and reasonable as proposed.

Item F is divided into two sections. Section 1 covers individual care and contains the list of information discussed above. Section 2, as originally proposed, repeated the list for persons in shared care arrangements. To simplify the rule, the Department made changes to section 2 to reference the list in section 1 and indicated that the requirements must be met for each recipient in shared care arrangements.

Item F is needed and reasonable, as modified. The changes to the rule eliminate unnecessary requirements and are easier to read. The modifications do not constitute a substantial change.

Proposed Rule 9505.2185 - Access to Records

26. Home Free Inc. questioned the Department's adherence to the twenty-four hour notice to vendors when seeking access to vendor records. The notice provision is in the existing rule at part 9505.2185 and no change is proposed for the notice period in this rulemaking. The amendments to the proposed rule merely replace "provider" with "vendor." Any problems with the Department's adherence to specific rule provisions must be raised in the proper setting.

Proposed Rule 9505.2200 - Identification and Investigation of Suspected Fraud

27. The only substantive amendment proposed to part 9505.2200 is the addition of item B to subpart 5. Item B authorizes the Department to seek recovery of investigative costs as provided for under Minn. Stat. § 256B.064, subd. 1d. Home Free Inc. objected to the recovery of investigative costs from the vendor as making vendors less likely to cooperate with the Department. The commentator urged that recovery be limited to the amount of profit earned by the vendor, rather than the whole overpayment. In its Reply Comment, the Department indicated that full recovery is required by both federal and state law. While the rule creates an inherent disincentive for vendors to expose improper practices, to ignore those practices raises the possibility of even larger repayments in the future. The employer is in a position to supervise personal care attendants. Requiring employers to bear responsibility for the actions of their employees is reasonable. The rule is needed and reasonable as proposed.

Proposed Rule 9505.2210 - Imposition of Administrative Sanctions

28. The existing rule for imposition of sanctions has one list of sanctions for providers and another list for recipients. The amendment to subpart 2 of Minn. Rule 9505.2210 adds sanctions for vendors and modifies the sanctions applicable to providers. The new sanctions for vendors are suspending or terminating the participation of entities where the vendor has a ownership or control interest. The other sanctions are the former provider sanctions. There are three new provider sanctions: 1) limited duration agreements; 2) specified conditions of participation; and 3) prepayment review. Sanctions for recipients remain unchanged.

The amendments are intended to reflect the differences between vendors and providers in the sanctions available to the Department. SONAR, at 14. DHS intends that the provider sanctions include all the vendor sanctions. SONAR, at 15. The language connecting the two items reads, "for a provider, the actions also include ...." None of the sanctions in item A mention providers. The connecting language at item B does not expressly mention any of the sanctions in item A. The rule is somewhat vague as to what sanctions apply to providers. To clarify the rule, the Department can modify the opening sentence of item B to read:

For a provider, the actions in item A and in addition:

[remainder of item unchanged]

In the alternative, DHS could change the language in item A to read "any vendor or provider" and accomplish the same effect. If this latter change is made, the language in item B should remain unchanged.

The vagueness in the rule does not rise to the level of a defect. The Department is not required to change the language in item B. However, the changes suggested in this Finding do clarify the Department's intent. The rule is needed and reasonable as proposed. If DHS chooses to alter the rule, the new language would not constitute a substantial change.

Proposed Rule 9505.2245 - Appeal of Department Action

29. The only significant addition to the existing rule part 9505.2245 is a new item C to subpart 1. Item C allows the Commissioner the option to suspend payments or reduce the amount of payments to certain providers before an appeal is heard. The Commissioner's discretion is limited by the requirement that the Commissioner determine such action is needed to protect both the public welfare and the MA program. These limits on the Commissioner's discretion render the rule reasonable. The rule is needed to protect against improper spending of MA and GAMC funds.

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

CONCLUSIONS

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

2. DHS 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. DHS 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. DHS 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), except as noted at Findings 17 and 22.

5. The additions and amendments to the proposed rules which were suggested by DHS 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. The Administrative Law Judge has suggested action to correct the defects cited at Conclusion 4 as noted at Findings 17 and 22.

7. Due to Conclusions 4 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

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

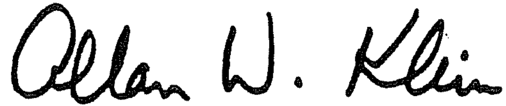
9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage DHS from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed 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, except as otherwise noted.

Dated this 19th day of January, 1995.



ALLAN W. KLEIN
Administrative Law Judge

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