OAH 82-9000-37454
Revisor R-4548

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Department of Health Possible Amendment to Minn. R. 4764, Rules Governing Health Care Homes, Revisor's ID No. R-4548	**ORDER ON REVIEW OF RULES WITHOUT HEARING UNDER MINN. STAT. § 14.26**

The Minnesota Department of Health (Department) seeks review and approval of the above-entitled rules, which were adopted by the agency pursuant to Minn. Stat. § 14.26 (2020). On June 18, 2022, the Office of Administrative Hearings (OAH) received the documents that must be filed by the Department under Minn. Stat. § 14.26 and Minn. R. 1400.2310 (2021). Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons in the Memorandum that follows,

IT IS HEREBY DETERMINED:

1. The Department has the statutory authority to adopt the rules.

2. The rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14 (2020), and Minnesota Rules, Chapter 1400 (2021).

3. The following proposed rules contain defects and are **DISAPPROVED**:

    1) 4764.0070, subps. 4, 5; and
    2) 4764.0030, subps. 5, 5a

IT IS HEREBY ORDERED:

Proposed Minnesota Rules 4764.0070, subparts 4, 5, and 4764.0030, subparts 5, 5a are **DISAPPROVED** for the reasons stated in that attached Memorandum. All other proposed rule parts are **APPROVED.**

Dated: July 1, 2022

BARBARA J. CASE
Administrative Law Judge

MEMORANDUM

I. Background

The Health Care Homes program is a voluntary program intended to improve patient care outcomes at primary care clinics.[1] The program is a medical home or patient-centered model of primary care delivery. The program has two main functions: (1) to certify primary care clinics and clinicians as health care homes; and (2) to provide learning opportunities for primary care clinic personnel and their partners.[2]

The Department states that it is modifying the rules related to the program to conform with changes in the enabling statute.[3] The changes in the statute and rule are intended to support health care models that are cost effective, coordinated to improve patient outcomes and to improve health equity.[4]

Two sets of public comments were filed regarding these rules. The first comments, from Rainbow Health, prompted the Department to make modifications with which the Administrative Law Judge took no issue. The other comments, from Ian Lewenstein, were not substantively addressed by the Department and are discussed below.

II. The Department's Proposed Modifications

Phil Duran commented on behalf of Rainbow Health Minnesota (Rainbow Health) regarding the rules' use of the word "family." Rainbow Health urged that the word family be considered from the perspective of the patient regarding whom they consider to be family. Rainbow Health also proposed several changes to the proposed rules to assure that lesbian, gay, bi-sexual, transgender and queer (LGBTQ) communities be considered among a person's cultural and social needs and considered in the collection of information on patient characteristics. Rainbow Health further suggested that where information on gender is collected, gender be patient-defined and not restricted to historic, binary designations.

The Department replied to Rainbow Health's suggestions by making responsive revisions to the proposed rules. The first revision adds language to the definition of "whole person care" to include "needs related to communities with which patients self-identify." The second requires that patient registries identify patients' gender identity as opposed to just gender. The Department also explained why it believes the proposed rules engender care that is responsive to patient preferences and needs, including the concerns raised by Rainbow Health.

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[1] Statement of Need and Reasonableness (SONAR) at 4.
[2] *Id*.
[3] *Id*. at 16. *See* 2016 Minn. Laws ch. 163, art. 3, § 7 (changing frequency of recertification under Minn. Stat. § 62U.03, subd. 4(a)), from annual to once every three years).
[4] *Id*. at 16-18.

The modifications proposed by the Department in response to Rainbow Health's concerns do not render the rule substantially different than the originally proposed rules and they fall within the scope of the matter announced in the Notice of Intent to Adopt.[5]

III. Defective Rules

The second set of comments were submitted by Ian Lewenstein. Mr. Lewenstein takes issue with the Department's use of the words "can", "may" and "will." Mr. Lewenstein states that the use of "can" and "may" allow the Department unbridled discretion, or are unduly vague, as to whether it will grant recertification to a Health Care Home applicant. He asserts that rule language stating that the commissioner "may choose to grant health care home certification" is arbitrary, and does not meet the definition of a rule because the rule has no future effect. He faults the use of the word "will" for similar reasons.

The Department responded by stating that it reviewed the comments and did not believe it is necessary to make modifications.[6] The Department did not address the substance of Mr. Lewenstein's critique, so the Administrative Law Judge reviewed the SONAR to discern the Department's reasoning for the use of "can" in rule part 4764.0070, subp. 4 regarding the reinstatement of Health Care Home certification and "may" in rule part 4764.0070, subp. 5, regarding the recognition of certification programs or accrediting bodies from other state or national bodies. The SONAR provides no explanation of the Department's choices as to these provisions.

A. Legal Standards

"A rule, like a statute, is void for vagueness, if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement."[7] Additionally, under Minn. R. 1400.2100(D), a rule must be disapproved if it grants the agency discretion beyond that allowed in its enabling statute or other applicable law. Discretionary power may be granted to administrative officers:

> [i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.[8]

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[5] *See* Minn. Stat. § 14.05, subd. 2.
[6] *Id*. at 99-100.
[7] *In re N.P.*, 361 N.W. 2d 386, 394 (Minn. 1985), *citing Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972).
[8] *Lee v. Delmont*, 228 Minn. 101, 112, 36 N.W.2d 530, 538 (Minn. 1949); *see also Anderson v. Comm'r of Highways*, 267 Minn. 308, 312, 126 N.W.2d 778, 780-81 (Minn. 1964) (noting exceptions to the requirement that a rule contain an express standard to guide the exercise of discretion by agency officials "where it is impracticable to lay down a definite comprehensive rule-such as, where the administration turns upon questions of qualifications of personal fitness, or where the act relates to the administration of a police regulation which is necessary to protect the general health, welfare, and safety of the public."). These exceptions do not apply here.

B. 4764.0070, subparts 4 and 5

Subpart 4 of this rule governs a provider's reinstatement after surrendering certification and subpart 5 pertains to applications received from jurisdictions outside Minn. R. 4764.0070, subp. 4, states, in relevant part, that "[h]ealth certification can be reinstated upon receipt of the application and will be held in a provisional status until the health care's home's recertification." As written, the proposed rule is vague[9] and grants unfettered discretion[10] to the Department to "reinstate," or not, a particular provider. This level of discretion is a defect in the proposed rule. The Department may correct the defect by substituting the word "must" for "can." If the Department intended that the rule allow the Department to reinstate in some circumstances and not others, then the Department must identify the standards for each decision and the provider's recourse in the event of a denial of reinstatement. The Administrative Law Judge is unable to understand the Department's intended process without further explanation by the agency.

Rule 4764.0070, subpart 5 states, in relevant part, that the "commissioner may choose to grant health care home certification to providers who have achieved certification or accreditation from other state or national bodies if doing so is in alignment with health care home standards and program goals." This rule too is overly vague and grants the Department unfettered discretion. The use of the word "may" does not allow the applicant or public to know when the Department will, or will not, grant the certification. The standard proposed of an applicant "being in alignment with health care home standards and program goals" does not provide a clear explanation of which standards and goals will be applied. The Department may correct the defect by substituting the word "must" for "may" and by striking "if doing so is in alignment with health care home standards and program goals" and replacing that language with reference to, for example, the certification standards in Rule 4764.0030.

C. 4764.0030, subparts 5 and 5a.

Without explanation in the SONAR, the Department struck language directing applicants to "submit a letter" to request certification. Instead, the rule now states that the applicant "must indicate its intent to be recertified no later than…" The prior rule language made clear how a health care home triggered the recertification process, but the new language does not. The phrase "indicate its intent" does not inform an applicant of what form of communication is acceptable. Without an explanation in the SONAR, the Administrative Law Judge could not determine the Department's purpose for this change. If the Department's intent is to accept forms of communication other than letters, the defect may be cured by listing the other acceptable forms. In the alternative, the Department could cure the defect by stating that "the applicant must indicate its intent to

be recertified in the manner prescribed by the commissioner…" as it does elsewhere in the rules.[11] This defect is repeated in subpart 5a of the rule.

IV. Conclusion

An agency may reserve discretion for itself in the promulgation and enforcement of administrative rules. As noted by the Court of Appeals:

> "The government cannot operate without agencies that exercise discretionary power. . . . Nonetheless, conferring too much discretion on an individual or an institution creates the potential for harm attributable to the abuse of discretion. The challenge is to balance the need for discretion with the need for checks on discretion at each level of decision making. Rules are an effective limit both on agency discretion and on the discretion of agency personnel, and the most powerful form of a rule is the legislative rule, which is adopted though a formal rulemaking process such as chapter 14; when valid, it can bind courts, members of the public, and the agency itself."[12]

In the rules found here to be defective, the Department has afforded itself undue discretion by proposing rules that set no clearly defined limits on the exercise of authority, and that do not apprise regulated parties of the standards that may apply to them.

B. J. C.

[11] Minn. R. 4764.0040, subd. 10, A.
[12] *Coalition of Greater Minnesota Cities*, 765 N.W.2d at 165-66 (internal citations and quotations omitted).