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Appellant: [REDACTED], by [REDACTED]

For: Medical Assistance -- Developmental  
Disability waiver

Agency: [REDACTED] County

Docket: 211265

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**DECISION OF  
STATE AGENCY  
ON APPEAL**

On September 17, 2018, Human Services Judge Kevin T. Slator held a hearing under Minnesota Statutes, section 256.045, subdivision 3.<sup>1</sup>

The following people appeared at the hearing:

[REDACTED], appellant's mother and representative;

[REDACTED], [REDACTED], appellant's advocate;

[REDACTED], Supervisor of Aging and Assessment, [REDACTED] County;

[REDACTED], Certified MnCHOICES assessor, [REDACTED] County.

The human services judge, based on the evidence in the record and considering the arguments of the parties, recommends the following Findings of Fact, Conclusions of Law, and Order.

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<sup>1</sup>The Minnesota Department of Human Services conducts state fair hearings pursuant to Minnesota Statutes, section 256.045, subdivision 3. The Department also conducts maltreatment and disqualification hearings on behalf of the Minnesota Departments of Health and Education pursuant to Minnesota Statutes, sections 626.556, subdivision 10i; and 626.557, subdivision 9d.

## **STATEMENT OF ISSUES**

The issue raised in this appeal is:

Whether [REDACTED] County properly assessed appellant's needs in a Developmental Disabilities (DD) waiver screening document, resulting in a Consumer Directed Community Supports (CDCS) budget for appellant of \$103,284.05.

Recommended Decision:

- AFFIRM the ratings of 01 ("none") in the area of inappropriate sexual behavior (field 38E), and 09 ("not applicable") in the area of vocational (field 35);
- REVERSE the rating of 99 ("unknown") in the area of vision (field 27), and instead assign a rating of 04 ("difficulty at level of obstacles in environment"); and
- REMAND to [REDACTED] County for further consideration of the appropriate rating in the area of medical (field 26).

## **PROCEDURAL HISTORY**

1. On June 27, 2018, [REDACTED] County sent appellant a Notice of Action. *Exhibit 1, Attachment 3*. On July 10, 2018, [REDACTED] County sent appellant a second Notice of Action. *Exhibit 1, Attachment 5*. On July 31, 2018, appellant filed an appeal. *Exhibit A*.

2. On September 17, 2018, the human services judge held an evidentiary hearing on the matter by telephone conference. Following the hearing, the record was held open to allow [REDACTED] County to submit additional exhibits, and for appellant to submit a written argument, which she did on September 21, 2018. On that date, the record closed, consisting of the hearing testimony and three exhibits.<sup>2</sup>

## **FINDINGS OF FACT**

1. Appellant was born on January 7, 1989, and is 29 years old. Appellant's numerous health conditions include a developmental disability, autistic disorder, immunodeficiency, diabetes, dementia, psychosis, and fetal alcohol syndrome. *Exhibit 1, Attachments 13, 14, 15*.

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<sup>2</sup> Exhibit 1, containing Attachments 1-22 – Agency Appeal Summary. Exhibit A – Appeal. Exhibit B, containing Attachments A-G and I-M – various screenings and assessments submitted by appellant. Attachment H, correspondence from [REDACTED], PA-C, was omitted.

2. Appellant has received medical assistance services under a DD waiver with other agencies since approximately 2008. *Exhibit 1, Attachment 12*. Appellant underwent a DD screening with ██████ County for the first time on December 13, 2017, and was approved to continue to receive medical assistance services under a DD waiver on January 5, 2018.

██████ testimony; *Exhibit 1, Attachment 5*. Appellant had previously undergone screenings and assessments by ██████ County and other agencies.<sup>3</sup> *Exhibit B; Exhibit 1, Attachment 10*.

3. Appellant chose the Consumer Directed Community Supports (CDCS) budget option. Appellant's budget for 2018 was set at \$111,397.38 per year.<sup>4</sup> *Exhibit 1, Attachment 18*. Appellant planned to appeal the CDCS budget amount, but agreed to wait for the results of a new assessment that ██████ County agreed to do on June 5, 2018. ██████ testimony; *Exhibit 1, Attachment 6*.

4. The second assessment had four major changes from the December 13, 2017, assessment, three of which were in appellant's favor: codes for cerebral palsy and epilepsy were added, and the rating for expressive communication was changed from 05 ("combines signs and/or gestures to communicate") to 06 ("uses single signs or gestures to express wants and needs").<sup>5</sup> However, ██████ County also corrected the rating for runs away from 05 ("severe") to 01 ("none") to be consistent with the assessment of appellant's mobility. Appellant is no longer a risk to run away, as she "basically doesn't walk on her own anymore" and cannot propel her wheelchair by herself.<sup>6</sup> ██████ testimony; ██████ testimony; *Exhibit 1, Attachments 5, 6, 21, 22*. Appellant did not challenge these revised ratings in this appeal. ██████ testimony.

5. ██████ County sent appellant a Notice of Action on June 27, 2018, to inform her that she remained eligible for a DD waiver, and her personal care assistance time had increased to 12 per hours day "due to the addition of wound care" to appellant's special treatments. ██████ County also checked a box indicating "no change to your current programs or services." *Exhibit A, Attachment 3*. Appellant did not challenge the correct amount of PCA hours in this appeal.

6. After ██████ County received appellant's new CDCS budget from DHS, it sent appellant a second Notice of Action dated July 10, 2018. ██████ County checked a box to indicate "reduction in services or budget" effective July 1, 2018. The notice stated that

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<sup>3</sup> See, e.g., Exhibit B, Attachments A-M.

<sup>4</sup> CDCS budgets are set by DHS, and not the county agencies, based on the screening document. The assessors do not have access to the CDCS budget.

<sup>5</sup> DHS DD Screening Document Codebook.

<sup>6</sup> "Elopement" is referred to as "runs away" ("person purposefully leaves without telling others or departs from the supervision of staff unexpectedly") in the DD screening document. ██████ County changed appellant's rating from 05 ("very severe") to 01 ("none"). "Wandering/elopement" is also addressed in appellant's MnCHOICES assessment.

appellant's CDCS budget was reduced "because of a change in [appellant's] assessed needs as reported by her legal representative on 6/5/18." *Exhibit 1, Attachment 4.*

7. [REDACTED] contacted [REDACTED] County after receiving the second Notice of Action and disputed the screening assessment in five areas: mobility, inappropriate sexual behavior, vocational, expressive communication, and medical. [REDACTED] County agreed to revise the ratings in mobility (to 07, indicating that appellant cannot propel her wheelchair),<sup>7</sup> and in expressive communication, from 05 to 06, due to appellant's limited ability to communicate with sign language and her use of unique signs that might be unrecognizable to others. [REDACTED] County also agreed to consider changing the vocational rating, but later determined, based on an opinion from DHS, that volunteering is correctly categorized as "leisure and recreation" rather than "vocational." [REDACTED] *testimony; Exhibit 1, Attachment 9.*

8. [REDACTED] County declined to change appellant's rating in sexual behavior of 01, citing a lack of documentation of inappropriate sexual behavior during the preceding year that was the subject of the assessment. [REDACTED] County also declined to change appellant's medical rating because of a lack of evidence to indicate that a rating of 03 was inaccurate. [REDACTED] *testimony; Exhibit 1, Attachments 5, 6.*

9. In late July 2018, [REDACTED] County submitted the changes it agreed to (mobility and expressive communications) to DHS and awaited a revised CDCS budget. In the meantime, [REDACTED] County received an updated diagnosis of psychosis from appellant's psychiatrist, which was also submitted to DHS. A new CDCS budget, which would be retroactive to July 1, 2018, was not expected from DHS until after September 1, 2018. Because of the changes, [REDACTED] County's Notice of Action issued on July 10, 2018, was no longer current or accurate. [REDACTED] *testimony.*

10. DHS issued appellant's new CDCS budget of \$103,284.05 on September 6, 2018. *Exhibit 1, Attachment 20.* [REDACTED] testified that she believed the reduction in the budget from \$111,397.38 was caused mainly by the change to the runs away/elopement rating. [REDACTED] *testimony.*

11. Following the June 5, 2018, screening, appellant and [REDACTED] County agreed on all but three ratings in appellant's screening document: medical, vision, and sexually inappropriate behavior.<sup>8</sup> [REDACTED] *testimony.* Regarding the vocational rating of 09 ("not applicable"), [REDACTED] County took the position that it was correct based on [REDACTED]'s statement that she was not interested in having appellant pursue employment. *Exhibit 1, Attachments 5, 6; [REDACTED] testimony.*

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<sup>7</sup> See Exhibit 1, Attachment 7.

<sup>8</sup> Appellant's September 19, 2018, letter/argument to human services judge, copied to [REDACTED] County.

## Medical

12. [REDACTED] County rated appellant 03, which is defined as follows:

**Needs on-call medical attention.** This is unplanned and not regular in nature and is typically not provided to people living in the community. *Example: Person requires trained personnel to be available in case of status seizure activity or an insulin reaction.*

13. [REDACTED] asserts that the correct medical rating is 04, which was the rating [REDACTED] County gave in previous screenings completed in 2014, 2015, and 2016. *Exhibit B, Attachments A, B, C.* A rating of 04 is defined as follows:

**Needs on-site medical attention, but less than 24 hours per day.** Requires regular and planned medical attention from trained personnel. *Example: Person requires a registered nurse (RN) or licensed practical nurse (LPN) to provide daily insulin injections, needs GI tube cleaning or periodic catheterization.*<sup>9</sup>

14. In support of a medical rating of 03, [REDACTED] County cited Exhibit 1, Attachments 8 (the DD Screening Document Codebook), 11, and 13-17. However, most of these documents were created more than one year before the operative assessment conducted in June 2018. For example, Attachment 11 is a letter dated January 6, 2011, from Dr. [REDACTED] to appellant's parents and caregivers. Attachment 12 is an Individual Service Plan prepared for appellant by [REDACTED] County on August 11, 2016. Attachments 13 and 14 are letters or an "after visit summary" from [REDACTED], PA-C, regarding appellant from September and October 2016. Attachment 15 is a letter from Dr. [REDACTED] dated April 15, 2016. Attachment 16 is a combination of records of appellant's visit to [REDACTED] on February 22, 2017, and a Report of Adaptive Testing by [REDACTED], LMSW, dated April 3, 2017. Attachment 17, a letter from [REDACTED], PC-C, is undated. Appellant's exhibits also do not contain recent medical records or information regarding appellant.

15. Appellant's care is provided by her mother, [REDACTED], who is an LPN, and other non-nurse caregivers. [REDACTED] provides appellant's care overnight and on weekends because the CDCS budget is not high enough to hire enough additional caregivers. [REDACTED] testified that caregivers "cannot leave appellant's side," and at least a 3-to-1 staff-to-appellant ratio is required 24 hours per day, but preferably 2-to-1 ratio. A nurse is always needed to be present for "a lot of assessment and decision-making," because appellant loses control of body temperature and blood temperature, faints, gets infections, etc. [REDACTED] testimony.

16. Appellant's longtime treating physician, [REDACTED], M.D., wrote in April 2016 that appellant required 5-8 hours of "one-on-one" nursing care every day from registered

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<sup>9</sup> DD Screening Document Codebook, field 26 (medical).

nurses. Dr. [REDACTED] noted that [REDACTED] provided much of appellant's medical care, but cannot be expected to provide all of it. *Exhibit 1, Attachment 14; Exhibit B, Attachment D.*

17. [REDACTED], a physician assistant, wrote in September 2016 that appellant needed "nursing support trained individuals at all times." [REDACTED] noted that most of appellant's nursing care was provided by [REDACTED] because other staff was not trained or prepared to do so. *Exhibit 1, Attachment 13.* [REDACTED] wrote in October 2016 that appellant needed "nursing staff on site... to take care of her complex medical needs." *Exhibit 1, Attachment 13.*

18. In an undated letter, physician assistant [REDACTED] noted that appellant has "done well with home nursing services in the past along with care from her mother." [REDACTED] opined that appellant "requires 24/7 care from skilled nurses and capable trained individuals." *Exhibit 1, Attachment 17.*

### Inappropriate Sexual Behavior

19. Inappropriate Sexual Behavior is defined as follows:

Person expresses himself/herself in a sexual manner that is socially unacceptable, offensive or injurious to self or others. *Example: Person masturbates in public, exposes private body areas to others, forces others to participate in sexual acts.*<sup>10</sup>

20. [REDACTED] County did not find that appellant engages in inappropriate sexual behavior because it was not identified during the screenings, and there was no detail about it in "MMIS" (Medicaid Management Information System). [REDACTED] testimony; [REDACTED] testimony.

21. [REDACTED] noted that [REDACTED] was asked to submit any documentation she had regarding appellant's inappropriate sexual behavior. Among documents submitted were a Community Support Plan and a Risk Management Assessment and Plan for 2018, discussed above. *Exhibit 1, Attachments 18, 19.* Neither document discusses appellant's current inappropriate sexual behavior. The Risk Management Plan states that appellant "*has demonstrated being overly friendly... with strangers,*" and that "*historically, [appellant] has displayed behaviors such as touching herself or others inappropriately*" (Emphasis supplied). *Exhibit 1, Attachment 19.*

22. DD screening documents from [REDACTED] County dated March 11, 2014, March 24, 2015, and March 3, 2016, all gave appellant a 03 ("moderate") rating for inappropriate sexual behavior. *Exhibit B, Attachments A, B, C.* Screening notes from 2014 and 2015 state the following: "In the past has lifted her shirt and mooned people however since the stroke she increased behaviors of grabbing staff's genital or crotch or breast area." ([REDACTED] testified

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<sup>10</sup> "Definitions of Challenging Behavior Scales," DD Screening Document Codebook, field 38E.

that appellant's suffered several strokes in 2008). [REDACTED] testimony. Complete screening notes from 2016 were not provided.<sup>11</sup>

23. [REDACTED] noted that DD screenings or assessments in 2017 by [REDACTED] County and [REDACTED] found "increased behaviors of grabbing staff's genital or crotch area as well as breast area," "socially offensive behaviors of touching genitals," and "touching others too much" by appellant. *Exhibit 1, Attachment 10*. Although unfortunately a copy of a January 26, 2017, assessment by [REDACTED] County was not submitted for the appeal record, [REDACTED] County pointed out that appellant was rated 01 (none) for inappropriate sexual behavior. A MnCHOICES assessment conducted by [REDACTED] County at the same time also noted no inappropriate sexual behavior. *Exhibit 1, Attachment 10*.

24. A "Report of Adaptive Behavior Testing" conducted by [REDACTED], dated April 3, 2017, noted that appellant had "very serious problem behaviors," but contains no mention of inappropriate sexual behavior. *Exhibit B, Attachment E*.

25. [REDACTED] testified that, in the past, appellant's caregiver staff who were not trained properly sometimes tolerated and laughed at appellant's inappropriate sexual behavior. [REDACTED] also testified that appellant's sexually inappropriate behavior has continued to the present time and occurs daily, including when she is in the community, consisting of grabbing other people's genitals, breasts, and bottoms. Appellant's inappropriate sexual behavior has lessened somewhat, however, as her mobility has lessened. [REDACTED] testimony.

### Vision

26. [REDACTED] testified that appellant has cataracts, wears "+300" eyeglasses, and is legally blind in both eyes. [REDACTED] testimony. [REDACTED] County noted that appellant likes to watch videos and is able to sign with other people, so a rating of 5 (no useful vision), as suggested by [REDACTED], is not appropriate. [REDACTED] County gave appellant a rating of 99 (unknown). *Exhibit 1, Attachments 5, 6*.

27. Screening notes from [REDACTED] County dated March 23, 2016, indicated "Blind in left eye; inoperable cataract in right eye; no useful vision; problems with depth perception." *Exhibit B, Attachment C*.

## **CONCLUSIONS OF LAW**

1. ***Jurisdiction***. The Commissioner of Human Services has jurisdiction over appeals involving matters listed in Minnesota Statutes, section 256.045, subdivision 3(a).

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<sup>11</sup> Page 2 of the 2016 screening notes is actually from 2015. *Exhibit B, Attachment C*.

2. Unless federal or Minnesota law specifies a different time frame in which to file an appeal, an individual or organization specified in this section may contest the specified action by submitting a written request for a hearing to the state agency within 30 days after receiving written notice of the action or within 90 days of such written notice if the person shows good cause why the request was not submitted within the 30 day time limit. *Minn. Stat. § 256.045, subd. 3(i)*. The individual filing the appeal has the burden of proving good cause by a preponderance of the evidence. *Id.* This appeal is timely and the Commissioner of Human Services has jurisdiction over this appeal under Minnesota Statutes, section 256.045, subdivision 3.

3. ***Burden of persuasion.*** The burden of persuasion is governed by specific state or federal law and regulations that apply to the subject of the hearing. If there is no specific law, then the participant in the hearing who asserts the truth of a claim is under the burden to persuade the human services judge that the claim is true. *Minnesota Statutes, section 256.0451, subdivision 17*. Because the screening under review in this case was the first such screening conducted by [REDACTED] County, appellant bears the burden of persuasion as to why [REDACTED] County's conclusions were incorrect.

4. ***Medical assistance waivers.*** The Minnesota Department of Human Services has authorization from the federal government to offer services exceeding the scope and limitations of the standard Minnesota Medicaid program, known as Medical Assistance. *Minnesota Statutes, section 256B.49; United States Code, title 42, sections 1396 et seq.* The authorized federal waivers are intended to avoid institutionalization, to not exceed the cost of institutionalization, and to make broader services available to address recipient needs unmet by Medical Assistance. *Id.* These home and community-based waiver programs include the DD waiver program that appellant participates in.

5. ***Assessment and community support plan required.*** If a person is diagnosed as having a developmental disability, the county of financial responsibility is required to (1) conduct (or arrange for) a needs assessment by a certified assessor, (2) develop a community support plan according to section 256B.0911, and (3) authorize services identified in the person's coordinated service and support plan developed according to subdivision 1b. *Minnesota Statutes, section 256B.092, subdivisions 1, 7(a)*.

6. ***Analysis and conclusion.***

A. ***Medical.*** The most recent patient records submitted by either appellant or [REDACTED] County was physician's assistant [REDACTED]'s "after visit summary" dated February 2, 2017 (Exhibit 1, Attachment 16). However, it is a record of a visit that occurred 16 months before the operative DD screening that was conducted on June 5, 2018, and it sheds little light on the issue of whether appellant needs "on-call medical attention" (an 03 rating, as



found by [REDACTED] County), or whether “on-site medical attention, but less than 24 hours per day” (an 04 rating, as urged by appellant) is sufficient. The rest of the medical records in the appeal record are of limited value, as they are between 2 and 7 years old. Because of the lack of current and useful medical records, this issue must be remanded to [REDACTED] County for further consideration.

B. **Inappropriate sexual behavior.** [REDACTED]’ testimony that appellant continues to engage in inappropriate sexual behavior every day, including in public, was not consistent with the record. Although copies of [REDACTED] County’s January 2017 DD screening document and MnCHOICES assessment were not submitted for the appeal record, [REDACTED] credibly reported that the screening document included a rating of 01 (“none”) for inappropriate sexual behavior, and the MnCHOICES assessment found no inappropriate sexual behavior. The April 2017 report by [REDACTED] did not mention inappropriate sexual behavior. Finally, [REDACTED] County twice assessed appellant, in December 2017 and May 2018, and received no indications of current inappropriate sexual behavior. The evidence does not support a conclusion that [REDACTED] County’s rating of 01, indicating no inappropriate sexual behavior, was incorrect.

C. **Vision.** Documentation in the record regarding appellant’s vision is also not as current or complete as it might be. [REDACTED] County disputes [REDACTED]’ claim that appellant has “no useful vision” (05 rating), citing the fact that she is able to watch videos and have sign language conversations with others. However, [REDACTED] County’s rating of “unknown” is also unsupported, as there is evidence in the record clearly indicating appellant has impaired vision. A rating of 03 is as follows:

**Difficulty at level of print, graphics or small objects**

*Example: Even with correction, person has difficulty seeing newspaper print or small objects, correction is not a viable option and the person has difficulty seeing newspaper print.<sup>12</sup>*

The evidence indicates appellant’s vision problem is not limited to reading fine print or seeing small objects, as she is “legally blind” in one eye and likely has an inoperable cataract in the other. Appellant’s vision impairment more closely matches a rating of 04, which is as follows:

**Difficulty at level of obstacles in environment**

*Example: Even with correction, person has difficulty seeing a bicycle on the sidewalk, person has restricted areas of vision such as tunnel vision, difficulty with depth perception, difficulty moving from between light and dark areas.<sup>13</sup>*

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<sup>12</sup> “Field 27: Vision,” DD Screening Document Codebook.

<sup>13</sup> *Id.*

D. **Vocational.** Based on DHS’s interpretation of “work” in the “vocational” area of the DD screening document to mean employment and not volunteering, and based on [REDACTED]’ statement to the assessor that she does not wish to have appellant engage in employment, [REDACTED] County’s rating of 09 (“not applicable”) is appropriate and correct.<sup>14</sup>

### **RECOMMENDED ORDER**

Based on all of the evidence, I recommend that the Commissioner of Human Services:

- AFFIRM the ratings of 01 (“none”) in the area of inappropriate sexual behavior (field 38E), and 09 (“not applicable”) in the area of vocational (field 35), in appellant’s June 5, 2018, DD screening document;
- REVERSE the rating of 99 (“unknown”) in the area of vision (field 27), and instead assign a rating of 04 (“difficulty at level of obstacles in environment”);
- REMAND to [REDACTED] County for further consideration of the appropriate rating in the area of medical (field 26).

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KEVIN T. SLATOR  
Human Services Judge

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Date

### **ORDER**

On behalf of the Commissioner of Human Services and for the reasons stated above, I adopt the recommended Findings of Fact, Conclusions of Law, and Recommended Order as the final decision of the Department of Human Services.

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Date

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<sup>14</sup> “Field 35: Vocational,” DD Screening Document Codebook.



cc:

[REDACTED], by [REDACTED]  
[REDACTED] County  
[REDACTED], DHS-0967

### **FURTHER APPEAL RIGHTS**

**This decision is final unless you take further action.**

Appellants who disagree with this decision should consider seeking legal counsel to identify further legal action. If you disagree with this decision, you may:

- **Request the appeal be reconsidered.** The request must state the reasons why you believe your appeal should be reconsidered. The request may include legal arguments and may include proposed additional evidence supporting the request. If you propose additional evidence, you must explain why the evidence was not provided at the hearing. **The request must be in writing and be made within 30 days of the date this decision was issued by the co-chief human services judge.** You can mail the request to: Appeals Division, Minnesota Department of Human Services, P.O. Box 64941, St. Paul, MN 55164-0941. You can also fax the request to (651) 431-7523. **You must send a copy of the request to the other parties.** To ensure timely processing of your request, please include the name of the human services judge assigned to your appeal and the docket number. The law that describes this process is Minnesota Statutes, section 256.0451, subdivision 24.
- **Start an appeal in the district court.** This is a separate legal proceeding that you must start **within 30 days of the date this decision was issued by the co-chief human services judge.** You start this proceeding by: 1) serving a written copy of a notice of appeal upon the Commissioner of Human Services and upon any other adverse party of record; and 2) filing the original notice and proof of service with the court administrator of the county district court. The law that describes this process is Minnesota Statutes, section 256.045, subdivision 7.<sup>15</sup>

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<sup>15</sup> County agencies do not have the option of appealing decisions about Supplemental Nutrition Assistance Program (SNAP), Minnesota Family Investment Program (MFIP), or Diversionary Work Program (DWP) benefits to district court under 7 Code of Federal Regulations, section 273.15(q)(2), and Minnesota Statutes, section 256J.40. A prepaid health plan may not appeal this order under Minnesota Statutes, section 256.045, subdivision 7.