

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Rate Appeal of  
Inisfail, Inc., Seventh Street Home,  
and 214 Park Avenue Home

ORDER REGARDING FACILITIES'  
MOTION FOR CLARIFICATION OF  
SUMMARY DISPOSITION RULING

The above-captioned matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice of and Order for Hearing and Prehearing Conference issued by the Deputy Commissioner of the Minnesota Department of Human Services on September 20, 1995. Both parties moved for summary disposition of the issues in this matter. An order regarding the parties' cross-motions for summary disposition was issued on November 26, 1996. The Order granted the Providers' and the Department's Motion for Summary Disposition in certain respects, but denied both parties' Motions for Summary Disposition on the issue of the imposition of the 48-bed limitation for top management salary since genuine issues of material fact remained for hearing. The Providers filed a Motion for Clarification seeking a ruling which they believed would dispose of the entire 48-bed issue for the Inisfail and Seventh Street facilities for 1992. The Department filed a response to the motion, the Providers filed a reply brief, and both parties submitted additional correspondence in lieu of oral argument on the motion. The record with respect to the motion closed on May 28, 1997.

Mary K. Martin, Attorney at Law, 2411 Francis Street, St. Paul, Minnesota 55075, appeared on behalf of Inisfail, Inc., Seventh Street Home, and 214 Park Avenue Home (hereinafter referred to jointly as the "Providers"). Steven J. Lokensgard, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department of Human Services (hereinafter referred to as the "Department" or "DHS").

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED as follows:

(1) The Providers' motion that the Administrative Law Judge clarify her summary judgment ruling by holding that, even if the provider group was greater than 48 beds, it is proper for the salary of a person who receives top management compensation to be directly identified to and reported in the administrative and program categories based on time distribution records, is DENIED.<sup>[1]</sup>

(2) A telephone conference call will be held on Monday, July 14, 1997, at 2:30 p.m. to discuss the scheduling of the hearing regarding the application of the 48-bed limitation to the Providers and the amount of the adjustments to be made with respect to the 1989 cost report of Inisfail and the 1992 cost report of Inisfail and Seventh Street. The Administrative Law Judge will initiate the call.

Dated this 26th day of June, 1997.

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BARBARA L. NEILSON  
Administrative Law Judge

### MEMORANDUM

#### Background Information

Inisfail, Inc., is a non-profit intermediate care facility for mentally retarded persons ("ICF/MR") located in Faribault, Minnesota. Seventh Street Home and 214 Park Avenue Home are proprietary ICFs/MR owned by Russel Kennedy which are also located in Faribault. These three ICFs/MR, along with several non-ICF/MR programs serving persons with development disabilities, receive management and central office services from Cenneidigh, Inc., which is another company owned by Mr. Kennedy. In July, 1992, Mr. Kennedy took responsibility for establishing management procedures and hiring both staff and management of Glendalough, Inc., a not-for-profit six-bed ICF/MR in Austin, Minnesota. Glendalough did not receive state reimbursement for its costs until October 22, 1992.

The Providers submitted cost reports to DHS for reimbursement of allowable costs incurred in providing care to residents of their ICFs/MR under the federal Medicaid Act, 42 U.S.C. § 1396a, and the state's Medical Assistance Program, Minn. Stat. Ch. 256B. The reimbursement rates at issue in this case were set under Minn. R. 9553.0010 through 9553.0080 ("Rule 53"). Rule 53 rates are set on an annual basis and are based upon costs incurred in the prior year. The Department conducts an annual "desk audit" review of a facility's cost report. Minn. R. 9553.0020, subp. 16. The Department is also authorized to conduct a more intense on-site "field audit" of a facility's books and records supporting its cost reports. *Id.*, subp. 20. Field audits may encompass the four most recent annual cost reports for which desk audits have been completed and payment rates have been established. Minn. R. 9553.0041, subp. 11(B). After the Department has conducted either a desk audit or a field audit, the facility may appeal the findings if a successful appeal would result in a change to the facility's total payment rate. Minn. Stat. § 256B.50, subd. 1; Minn. R. 9553.0080, subp. 1(A). Once an appeal is received, the Department must issue a written determination. Minn. Stat. § 256B.50, subd. 1h(b). If the facility disagrees with the Department's determination, it may request a contested case hearing to determine the proper resolution of specified appeal items. *Id.*, subd. 1h(d).

DHS conducted Rule 53 field audits of the Providers' facilities that encompassed calendar years 1991 and 1992 and desk audits that encompassed calendar years 1989 and 1992. As a result of these desk audits and field audits, a variety of costs were reclassified and some were disallowed. A number of these adjustments were appealed by the Providers. After the parties filed cross-motions for summary disposition, the Administrative Law Judge issued a ruling on November 26, 1996, granting the parties' motions in certain respects but holding that a hearing would be necessary regarding the imposition of the 48-bed limitation for top management salary and the amount of the adjustments to be made to Mr. Kennedy's 1989 Inisfail compensation and his 1992 Inisfail and Seventh Street compensation due to the erroneous inclusion of fringe benefits and payroll taxes since genuine issues of material fact had been raised with respect to these issues. During a status conference held following the issuance of the order on the cross-motions for summary disposition, counsel for the Providers requested and was granted an opportunity to file a Motion for Clarification of the ruling on the 48-bed issue.

Russel Kennedy is the Executive Program Director for Inisfail, 214 Park, Seventh Avenue Home, and Glendalough. Kennedy Deposition at 4. In 1992, Mr. Kennedy owned the central office, Cenneidigh, Inc., as well as 214 Park and Seventh Street. Kennedy Deposition at 4. He received W-2 forms from Inisfail and Cenneidigh, Inc., in 1992. Ex. 700. Cenneidigh, Inc., billed 214 Park, Seventh Street, and Inisfail for Mr. Kennedy's services. Mr. Kennedy was an employee of the central office and provided management services to the separate facilities. Mr. Kennedy's time records at each facility indicate that he performed services directly for the central office. See Exs. 401, 501, 601.

The issues involved in this Motion for Clarification relate to the allowability of compensation Mr. Kennedy received from Inisfail and Seventh Street during the reporting year ending December 31, 1992. The Department made disallowances and adjustments to Mr. Kennedy's claimed compensation during a desk audit of the cost reports submitted for Inisfail, 214 Park, and Seventh Street for the reporting year ending December 31, 1992.

Mr. Kennedy's compensation was reported on three different lines of the cost report submitted for Inisfail (\$3,522 on line 6111, relating to Program Director salary within the Program Operating Cost Category; \$8,640 on line 6171, relating to Program Consultants within the Program Operating Cost Category; and \$4,730 on line 6811, relating to Administrator Salary within the Administrative Operating Cost Category). Because the Department auditor determined that the provider group was greater than 48 licensed beds, Mr. Kennedy's compensation was required to be reported in the administrative cost category. As a result, the auditor reclassified Mr. Kennedy's compensation by decreasing the amounts that had been reported on line 6111 and 6171 and increasing the amount reported on line 6811. Mr. Kennedy's compensation was reported on two different lines of the cost reports submitted for Seventh Street (\$16,695 on line 6171, relating to Program Consultants within the Program Operating Cost Category, and \$5,272 on line 6813, relating to "Other Top Management Salaries/Fees" within the Administrative Operating Cost Category). Exs. 401-02, 601-02. The Department auditor determined that the provider group was greater than 48 licensed beds<sup>[2]</sup> and reclassified the portion of Mr. Kennedy's compensation that had not been previously reported in the

administrative cost category to that line on the cost report. As a result, the auditor adjusted the cost report by decreasing the amounts reported on line 6171 and increasing the amount reported on line 6813. Id.

After reclassifying Mr. Kennedy's compensation to the administrative cost category on each cost report (and making certain adjustments to the number of hours worked at each facility that are not involved in the present Motion for Clarification), the desk auditor calculated each facility's compliance with the top management compensation limit by dividing the number of hours actually worked at each facility by 2080 to arrive at a percentage of full-time work performed by Mr. Kennedy at each facility, then multiplying those percentages by the top management compensation limit for the 1992 reporting year to arrive at a maximum allowable compensation for Mr. Kennedy at each facility. The amount of the difference between the amount reported and the maximum allowable compensation was disallowed on each facility's cost report. Exs. 400, 500, and 600.<sup>[3]</sup>

At the time that the Motions for Summary Disposition were considered, the Providers contended that the Department's adjustments were inappropriate because Glendalough was not part of the Cenneidigh provider group and argued that, in any case, some apportionment was appropriate where there were fewer than 48 beds prior to October 22, 1992. The Administrative Law Judge determined in her ruling on the cross-motions that, based upon all of the evidence provided by the parties, there was a genuine issue of material fact regarding the extent to which the Cenneidigh provider group could be said to "control" Glendalough. The Judge determined that there were insufficient facts developed in the record of the summary disposition motions to assess whether the Department should be estopped from applying the 48-bed limit to the Providers and held that a hearing would be necessary to resolve this issue. Accordingly, the parties' Motions for Summary Disposition were denied with respect to the application of the 48-bed limitation.

## Motion for Clarification

### Relevant Statutory and Rule Provisions

The Motion for Clarification turns on the interplay between the statutory and rule provisions that govern ICF/MR reimbursement and the extent to which the rule provisions have continued validity after enactment of a statutory amendment. Rule 53 was adopted in 1985, effective for rate years beginning on or after October 1, 1986. 10 State Reg. 1298 (Dec. 9, 1985). The provisions of Rule 53 that are at issue in this matter address the proper treatment and classification of salary costs.

Minn. R. 9553.0020, subp. 45 (1993), defines "top management personnel" to mean "owners, corporate officers, general, regional, and district managers, board members, administrators, the facility administrator, and other persons performing executive functions normally performed by such personnel, whether employed full time, part time, or as a consultant. The facility administrator is the person in charge of the

overall day-to-day activities of the facility.” The parties apparently do not dispute that Mr. Kennedy was included in the “top management personnel” classification.

Minn. R. 9553.0035, subp. 14, which sets forth a limitation on the total compensation to be paid to individuals who are top management personnel, provides in relevant part as follows:

A. In no case shall the total compensation reimbursed according to parts 9553.0010 to 9553.0080 to an individual, any portion of whose compensation is reimbursed as top management compensation, exceed \$53,820. [This limitation is indexed for inflation in accordance with subp. 14(F).] A person who is included in top management personnel who performs necessary services for the facility or provider group on less than a full-time basis, may receive as allowable compensation no more than a prorated portion of \$53,820 based on time worked.

B. If a person compensated for top management functions in a facility or organization is compensated for providing consultant services to that facility or organization, the compensation for consultant services however designated shall be subject to the top management compensation limitation.

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E. An individual compensated for top management services on a less than full-time basis for a facility or provider group may be compensated for performing other necessary services which the individual is qualified to perform. Compensation for another necessary service must be at the pay rate for that service except that the total compensation paid to an individual cannot exceed the limit in item A.

Nothing in this rule provision addresses the allocation of a top management employee’s compensation between cost categories.

Minn. R. 9553.0030 directly relates to cost classification and allocation procedures. Subpart 1(A) generally indicates that providers “shall classify costs using direct identification of costs, without allocation, by routine classification of transactions when costs are recorded in the books and records of the facility” and specifies that the “classification of costs must be made according to the cost categories defined in part 9553.0040.” Subpart 1(C) provides in pertinent part that, “[e]xcept as provided in item D, the compensation of persons who have top management responsibilities may be classified to a cost category other than administrative operating costs to the extent justified in time distribution records showing the actual time spent, or an accurate estimate of time spent on various activities.” Subpart 1(D) provides that “[t]he compensation of a person who is classified as top management personnel and who performs any service for the central,

affiliated, or corporate office must be allocated to the facility's administrative cost category in accordance with subpart 4, item C if the facility or provider group serviced by the central, affiliated, or corporate office has more than 48 licensed beds." The pertinent provisions of Minn. R. 9553.0030, subp. 4, state as follows:

Cost allocation for central, affiliated, or corporate offices shall be governed by items A to F.

A. Central, affiliated, or corporate office salary expense representing services of consultants required by law or regulation in areas including dietary, pharmacy, program, or other resident care related activities may be allocated to the appropriate cost category, but only to the extent that those salary expenses are directly identified by the facility.

B. Central, affiliated, or corporate office costs representing services of consultants not required by law in the areas of program, quality assurance, medical records, dietary, other care related services, and plant operations may be allocated to the appropriate operating cost category of a facility according to subitems (1) to (5).

(1) Only the salary, fringe benefits, and payroll taxes associated with the individual performing the service may be allocated. No other costs must be allocated.

(2) The allocation must be based on direct identification and to the extent justified in time distribution records which show the actual time spent by the consultant performing services in the facility.

(3) The cost in subitem (1) for each consultant must be allocated to only one operating cost category in the facility. If more than one facility is served by a consultant, all facilities shall allocate the consultant's cost to the same operating cost category.

(4) Top management personnel shall not be considered consultants for purposes of this item.

(5) The consultant's entire job responsibility is to provide the services identified in this item.

C. Except as provided in items A and B, central, affiliated, or corporate office costs must be allocated to the administrative cost category of each facility within the group served by the central, affiliated, or corporate office according to subitems (1) to (5).

(1) All costs that can be directly identified with a specific facility must be classified to that facility.

(2) All costs that can be directly identified with a specific operation unrelated to the facility's operation must be allocated to that unrelated operation.

(3) After the costs that can be directly identified according to subitems (1) and (2) have been allocated, the remaining central, affiliated, or corporate office costs must be allocated between facility operations and unrelated operations based on the ratio of expenses.

(4) Next, operations which have facilities both in Minnesota and outside of Minnesota must allocate the central, affiliated, or corporate office costs to Minnesota based on the ratio of total resident days in Minnesota facilities to the total resident days in all facilities.

(5) Finally, the facility related central, affiliated, or corporate office costs must be allocated to each facility based on resident days.

The issue in this motion is what, if any, effect the enactment of Minn. Stat. § 256B.432 has on the application of the above rule provisions. Minn. Stat. § 256B.432 was enacted in 1990 and originally applied to the treatment of central, affiliated, or corporate office costs of long-term care facilities (defined to include both nursing facilities and ICFs/MR) for rate years beginning on or after July 1, 1990. 1990 Minn. Laws, Ch. 568, Art. 3, § 73. The provision was amended in 1995 to delete references to ICFs/MR and render the provision applicable only to nursing facilities. See 1995 Minn. Laws, Ch. 207, Art. 7, §§ 27-31. In 1992, the year to which the Providers' appeal pertains, Minn. Stat. § 256B.432 provided in pertinent part as follows:

**Subd. 3. Allocation; direct identification of costs of nursing facilities; management agreement.** All costs that can be directly identified with a specific long-term care facility that is a related organization to the central, affiliated, or corporate office, or that is controlled by the central, affiliated, or corporate office under a management agreement, must be allocated to that long term care facility.

**Subd. 4. Allocation; direct identification of costs to other activities.** All costs that can be directly identified with any other activity or function not described in subdivision 3 must be allocated to that activity or function.

**Subd. 5. Allocation of remaining costs; allocation ratio.** (a) After the costs that can be directly identified according to subdivisions 3 and 4 have been allocated, the remaining central, affiliated, or corporate office costs

must be allocated between the long-term care facility operations and the other activities or facilities unrelated to the long-term care facility operations based on the ratio of expenses.

Minn. Stat. § 256B.432 (1992). Minn. Stat. § 256B.432 thus addresses the allocation of an employee's compensation between facilities, not between cost categories.

### Legal Analysis

In their Motion for Clarification, the Providers take issue with the Department's assertion that Mr. Kennedy's compensation costs may only be reported in the administrative cost category. The Providers argue that, even assuming for the purposes of the motion that the Cenheidigh provider group in fact exceeded 48 beds, it is proper under the applicable statutory and rule provisions for Mr. Kennedy's time to be directly identified to both the program and administrative cost categories based on time distribution records. The Providers thus, in essence, seek entry of partial summary judgment on the 48-bed issue.

The Providers assert that Mr. Kennedy worked in a central office and provided both administrative "top management" services and program services as a consultant to a provider group of more than 48 beds, and indicate that Mr. Kennedy kept time distribution records which reflect the amount of time devoted to these two types of activities by facility. Based on those records, the Providers directly identified Mr. Kennedy's time to the administrative and program cost categories on the 1992 cost report. The Providers contend that there is no support for the Department's position that Mr. Kennedy's compensation cost is a "central, affiliated, or corporate office cost" because that term is undefined in the governing statute and rules and because such treatment is inconsistent with the portion of Rule 53 that the Providers argue is applicable. The Providers assert that Mr. Kennedy's compensation was primarily for his services as a Qualified Mental Retardation Professional ("QMRP") consulting with his facilities as required by federal ICF/MR regulations, that he has time records to support the allocation of his time, and that he thus falls under the exception contained in Minn. R. 9553.0030, subp. 4(A). That rule provision permits central office salary expense representing the services of consultants required by law or regulation in program or resident-care-related activities to be allocated to the appropriate cost category to the extent that those salary expenses are directly identified by the facility. The Providers argue that subp. 4(A) was not superseded by Minn. Stat. § 256B.432, subds. 3-6. They contend that Minn. Stat. § 256B.432 and the rule provisions are ambiguous due to the lack of any definition of any of the key terms and assert that the interpretation they urge is reasonable. The Providers further argue that the statute and rules support the direct identification of "central office" costs when there is supporting documentation, that direct identification is available here, and that Mr. Kennedy's compensation costs properly fall under Minn. R. 9553.0030, subp. 1(C), which they contend permits the compensation costs of a top management person to be spread to the program category if there are time distribution records. They contend that Minn. R.

9553.0030, subp. 1(D), only applies where there are no costs that are directly identified, based upon the use of the term “allocated” in subpart 1(D).

In response, the Department asserts that the Providers have misrepresented or misunderstood its position on this issue. The Department admits that the misunderstanding may have been the result of the Department’s determination in this matter, but points out that the determination is of no effect once a facility demands a contested case hearing. Minn. Stat. § 256B.50, subd. 1h(d). Contrary to the Providers’ arguments, the Department states that it has allowed the Providers to directly identify Mr. Kennedy’s compensation to particular facilities in accordance with time records he maintained. However, since Mr. Kennedy also works for Cenneidigh, Inc. (the central office), the Department determined that Rule 53 requires that his compensation be reported in the administrative cost category of each facility’s cost report. The Department contends that its auditor’s adjustments are supported by the plain language of Minn. R. 9553.0030, subp. 1(D) (1995). The Department initially argued that the central office cost allocation rule provisions set forth in Minn. R. 9553.0030, subp. 4, were superseded in their entirety by Minn. Stat. § 256B.432, which became effective approximately five years after the adoption of Rule 53, and that the provisions set forth in subpart 4 thus were irrelevant to the resolution of this issue. In correspondence filed after the Administrative Law Judge requested clarification of the parties’ positions, the Department, relying on the Commissioner’s Order in In the Matter of the Rate Appeal of Lutheran Social Services of Minnesota, OAH Docket No. 55-1800-10357-2 (Commissioner’s Order Feb. 4, 1997),<sup>[4]</sup> revised its position to concede that there is no conflict between Minn. Stat. § 256B.432 and 9553.0030, subp. 4(A) and (B), because the statute only governs the allocation of costs between facilities and does not address the cost category in which the costs should be reported on that facility’s cost report.

In its response to the Judge’s request for clarification, the Department filed an affidavit of Greg TaBelle, the Department’s Acting Audit Manager, indicating that it has been the practice of the Department since the enactment of Minn. Stat. § 256B.432 in 1990 to allow costs associated with consultants employed by the central office of an ICF/MR to be reported in cost categories other than the administrative cost category if adequate document exists. If the provider group has less than 48 licensed beds or if an individual classified as top management personnel performs no services for the central office, then the Department’s practice has been to allow the compensation costs of that individual to be reported in other cost categories on the basis on time distribution records in accordance with Minn. R. 9553.0030, subp. 1(C). However, if the provider group has more than 48 licensed beds, the Department adheres to Minn. R. 9553, subp. 1(D) and requires that all compensation costs of top management personnel who perform any service for a central office to be reported in the administrative cost category. The Department thus contends that its application of Minn. R. 9553.0030, subp. 1(D), in the present case is consistent with the Department’s past practice.

After careful consideration of the arguments of the parties, the Administrative Law Judge has concluded that the Providers’ Motion for Clarification must be denied. It is evident that the compensation costs of consultants employed by the central office may be

reported in categories other than the administrative cost category under appropriate circumstances. The present case, however, is not an appropriate circumstance for application of Minn. R. 9553.0030, subps. 1(C) or 4(A) or (B) because it is assumed for purposes of this motion that Inisfail and Seventh Street are served by a central office that has more than 48 licensed beds. Because Mr. Kennedy performed executive functions, he is appropriately classified as top management personnel. He owned the central office (Cenneidigh, Inc.) in 1992 and clearly performed some services directly for the central offices. See Exs. 401, 501, and 601. In such a case, the explicit language of Minn. R. 9553.0030, subp. 1(D), must be deemed to be controlling and Mr. Kennedy's compensation must be reported only in the administrative cost category for each facility in the provider group. In the context of subpart 1(D), it is evident that the term "allocated" is used in the sense of requiring costs to be reported in the administrative cost category, not in the sense of an approximation where no direct identification is possible, as urged by the Providers.

The reference in Minn. R. 9553.0030, subp. 1(D) to subp. 4(C) of the same rule provision only gives direction on how to report costs between facilities, not between cost categories. Because Minn. R. 9553.0030, subp. 4(C) is in direct conflict with Minn. Stat. § 256B.432, the statute takes precedence over the rule provision during the year at issue in the Providers' appeal. As the Minnesota Supreme Court has noted, "It is elemental that when an administrative rule conflicts with the plain meaning of a statute, the statute controls." Special School District No. 1 v. Dunham, 498 N.W.2d 441, 445 (Minn. 1993), relying on Ingebritson v. Tjernlund Manufacturing Co., 289 Minn. 232, 237, 183 N.W. 2d 552, 554-55 (1971). Even if subpart 4(C) could properly be applied, Rule 53 would not permit Mr. Kennedy's compensation to be reported in categories other than the administrative cost category by virtue of the express language of Minn. R. 9553.0030, subp. 1(D).<sup>[5]</sup>

Minn. Stat. § 256B.432 merely addresses how to allocate costs among facilities. The statute does not permit Mr. Kennedy to report his compensation on different lines of each facility's cost report. The statute requires that costs that can be directly identified to a particular facility be reported on that facility's cost report, but simply does not address the issue of the cost category in which the facility should report its costs. The statutory provisions are not in conflict with subp. 1(D) and thus do not supersede subp. 1(D). Since Mr. Kennedy apparently kept records of the number of hours he worked at each facility, his compensation can be directly identified to each facility, in accordance with Minn. Stat. § 256B.432, subd. 3.

Because Mr. Kennedy is classified as top management personnel, he cannot be deemed to be a "consultant" within the meaning of Minn. R. 9553.0030, subp. 4(B)(4). Subpart 4(A) and (B), although not superseded by Minn. Stat. § 256B.432, do not apply where the provider group served by the central office has more than 48 licensed beds and the top management individual performed some service for the central office. The specific language applying to compensation costs contained in Minn. R. 9553.0030, subp. 1(D), prevails over the broad language applying to costs in general which is contained in Minn. R. 9553.0030, subps. 4 (A), (B), and (C). See Minn. Stat. § 645.26, subd. 1.

Accordingly, the Providers' Motion for Clarification has been denied. A conference call will be held on July 14, 1997, at 2:30 p.m. to discuss the scheduling of the hearing regarding the application of the 48-bed limitation to the Providers and the amount of the adjustments to be made regarding the 1989 cost report of Inisfail and the 1992 cost report of Inisfail and Seventh Street.

B.L.N.

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<sup>[1]</sup> This motion is, in essence, a motion by the Providers for partial summary judgment on this issue.

<sup>[2]</sup> The auditor determined that the provider group had increased from 45 beds to 51 beds when Glendalough began operating as a six-bed ICF/MR on October 22, 1992.

<sup>[3]</sup> The Providers contend that the calculations made by the Department in its determination letter dated September 30, 1994, relating to Inisfail and Seventh Street contained clerical errors. The Department is directed to review its calculations and notify the Administrative Law Judge prior to the hearing whether it agrees that there are any errors. If there continues to be disagreement between the parties on this point, evidence and argument may be offered at the hearing.

<sup>[4]</sup> In the Lutheran Social Services case, the Commissioner of Human Services held that, while Minn. R. 9553.0030, subp. 4, was not repealed by implication when Minn. Stat. § 256B.432 was enacted, the statute "controls over Minn. R. 9553.0030, subp. 4, to the extent there is a conflict." Order at 5. The Commissioner concluded that the provider should not be allowed to allocate costs to its facilities in accordance with a federally approved cost allocation plan. The Order was based upon the Commissioner's determination that the rule provision allowing the allocation (Minn. R. 9553.0030, subp. 4(F)) conflicted with Minn. Stat. § 256B.432 since the statute contained no exception allowing costs to be allocated in that fashion.

<sup>[5]</sup> The language of Minn. R. 9553.0030, subp. 1(C), does not change this analysis. Subpart 1(C) expressly does not apply in situations where subpart 1(D) applies.