

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Amendments
to Minnesota Rules, Parts 9500.1090 to
9500.1140 Governing Payment of Inpatient
Hospital Services Provided Under Medical
Assistance (MA) and General Assistance
Medical Care (GAMC).

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

A hearing concerning the above rules was held before Administrative Law Judge Steve M. Mihalchick at 9:30 a.m. on October 12, 2001, at the Minnesota Department of Human Services Office, 444 Lafayette Road, Saint Paul, Minnesota.

The hearing held on October 12 and this Report are part of a rulemaking process that must occur under the Minnesota Administrative Procedure Act^[1] before an agency can adopt rules. The Legislature has designed that process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the Agencies may have made after the proposed rules were initially published do not result in them being substantially different from what the Agencies originally proposed. The rulemaking process also includes a hearing, when a sufficient number of persons request such a hearing. The hearing is intended to allow the Agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

David A. Rowley, Assistant Attorney General, 445 Minnesota Street, Suite 900, Saint Paul, Minnesota 55101-2127, appeared at the rule hearing on behalf of the Department of Human Services ("the Department"). Richard Tester, Inpatient and Health Services Supervisor, served as the Department's hearing panel.

Two interested persons attended the hearing and both of them signed the hearing register. Neither of them spoke at the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed amendments to these rules.

After the hearing ended, the Administrative Law Judge kept the administrative record open for five business days, until October 19, 2001, to allow interested persons and the Department an opportunity to submit written comments. During this initial

comment period the Administrative Law Judge received a written comment from Department describing its rationale for a particular effective date for certain rule amendments. No other comments were received. Following the initial comment period, Minnesota law^[2] required that the hearing record remain open for another five business days to allow interested parties and the Agencies to respond to any written comments. No reply comments were received. The hearing record closed for all purposes on October 26, 2001.

NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before the Agencies take any further action to adopt final rules or to modify or withdraw the proposed rules. During that time, this Report must be made available to interested persons upon request. After adopting the final version of the rules, the Department must then file three copies of the rules with the Secretary of State. On the day that the Department makes that filing, it must give notice to everyone who requested to be informed of that filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On January 31, 2000, the Department published a Request for Comments on planned amendments to rules governing the procedures for determining MA and GAMC rates for inpatient hospital services. The Request for Comments identified the rule (informally known as Rule 54) and noted that only two changes were anticipated from the Department's current practices. The formation of an advisory committee was also announced, including representatives from consumer and advocate groups, hospital providers, and interested associations. The Request for Comments was published at 24 *State Register* 1113.^[3]

2. On August 15, 2001, the Department requested the scheduling of a hearing date, requested approval of the Department's Additional Notice Plan, and 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 Notice of Hearing proposed to be issued; and
- (c) the Statement of Need and Reasonableness ("SONAR").

3. The Department's Additional Notice Plan was approved by the Administrative Law Judge on August 17, 2001, with the suggestion that the Notice of Hearing be posted on the Department's website.

4. On August 21, 2001, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and all persons identified in the Additional Notice Plan.^[4]

5. On August 23, 2001, the Department mailed the Notice of Hearing and a copy of the SONAR to the chairs and ranking minority members of the legislative committees that oversee health and human services financing matters.^[5]

6. On August 23, 2001, the Department mailed a copy of the SONAR to the Legislative Reference Librarian, as required by law.^[6]

7. On September 4, 2001, a copy of the proposed rules and the Notice of Hearing were published at 26 *State Register* 296.^[7]

8. On the day of the hearing, the Department placed the following documents into the record:

- (a) a copy of the proposed rule as certified by the Revisor of Statutes;
- (b) the SONAR;
- (c) the Notice of Hearing and copy of the proposed rules as mailed;
- (d) the Notice of Hearing and copy of the proposed rules as published in the *State Register*;
- (e) the list of members on the Advisory Committee for these rules;
- (f) the Department's Certificate of Mailing the Notice of Hearing to the mailing list and to those persons receiving additional notice;
- (g) an email received from the Director of Communications of the Minnesota Hospital and Healthcare Partnership;
- (h) the Governor's approval of the rulemaking;
- (i) modifications made to the proposed rules after publication in the *State Register*;
- (j) the Request for Comments published at 24 *State Register* 1113;
- (k) the Department's letters notifying legislators of this rulemaking;
- (l) the Department's letter transmitting the SONAR to the Legislative Reference Librarian;
- (m) the draft modification to the Notice of rulemaking posted on the Department's website; and
- (n) a list of the witnesses the Department intended to call at the hearing.

9. The Department has met all of the procedural requirements under the applicable statutes and rules.

Nature of the Proposed Rules

10. Rule 54 was first promulgated in 1985. Modifications to the rule were made in 1987, 1989, and 1993.^[8] This rulemaking proceeding was begun by the Department to incorporate legislative changes to the MA and GMAC inpatient hospital payment system and make two substantive alterations to how that system operates. In addition to conforming the rule to legislative changes, the Department proposed to require five admissions to a hospital in a base year before the hospital can use its own admissions to calculate reimbursement rates. The Department also proposed a new payment methodology to address instances where a patient's length of stay exceeds one year.

11. An Advisory Committee was convened to assist the Department in assessing the potential impact of these proposed rules. The proposed rules were reviewed by the Advisory Committee and no objections were raised to the rules.^[9] After the last Advisory Committee meeting on March 24, 2000, the Department changed two items and proposed a modified effective date for some of the rules. No comment has been received in response to those changes from the Advisory Committee.

Statutory Authority

12. Minn. Stat. § 256.9685, subd. 1, requires the Department to establish MA and GMAC payment rates. The statute states:

256.9685 Establishment of inpatient hospital payment system.

Subdivision 1. Authority. The commissioner shall establish procedures for determining medical assistance and general assistance medical care payment rates under a prospective payment system for inpatient hospital services in hospitals that qualify as vendors of medical assistance. The commissioner shall establish, by rule, procedures for implementing this section and sections 256.9686, 256.969, and 256.9695. Services must meet the requirements of section 256B.04, subdivision 15, or 256D.03, subdivision 7, paragraph (b), to be eligible for payment.

13. The sole purpose of the proposed rules is administering the prospective MA and GMAC inpatient hospital payment rates system. The Administrative Law Judge finds that the Department has the statutory authority to adopt the proposed rules.

Rulemaking Legal Standards

14. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination which must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, the Agencies may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or they may simply rely on interpretation of a statute, or stated policy preferences.^[10] The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed

amendments. The SONAR was supplemented by comments made by a Department staff member at the public hearing and in a written post-hearing submission.

15. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.^[11] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.^[12] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.^[13] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."^[14] An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.^[15]

16. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.^[16] In this matter, the Department has proposed changes to the rule after publication of the rule language in the *State Register*. Because of this circumstance, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed.^[17]

17. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (2000). The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In determining whether modifications are substantially different, the Administrative Law Judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests," whether "the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."^[18]

Impact on Farming Operations

18. Minn. Stat. § 14.111, (2000), imposes an additional notice requirement when rules are proposed that affect farming operations. In essence, the statute requires that an agency must provide a copy of any such proposed rule change to the Commissioner of Agriculture at least thirty days prior to publishing the proposed rule in the State Register. The proposed rules do not impose restrictions or have a direct impact on fundamental aspects of farming operations. The Administrative Law Judge finds that the proposed rule change will not affect farming operations in Minnesota, and thus finds that no additional notice is required.

Cost and Alternative Assessments in the SONAR

19. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule; and
- (6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

20. The SONAR includes a discussion of the analysis that was performed by the Department to meet the requirements of this statute.^[19] Those who will bear the costs of the rule requirement are hospitals, but the Department indicates that more precision in payment rates may increase payments.^[20] The other class of persons affected is identified as hospital fiscal staff. These persons are responsible for understanding the rule changes and conforming each hospital's reporting to meet the new system.

21. Because GA and GMAC rate payments are expected to go up for some hospitals and down for others, the Department does not anticipate any changes in implementation costs.^[21] To the extent that costs do change, the Department attributes the changes to statutory modifications, not the proposed rules.

22. An agency proposing rules must determine whether there are less costly or less intrusive methods to achieve the purposes of the proposed rules. The Department notes that most of the rule changes are merely to conform the rules to existing statutory procedures.^[22] The other changes are made to make the existing system more precise.^[23] No reasonable alternatives to the existing system were identified.

23. The Department concluded that there would be no additional costs to hospitals in complying with the proposed rules.^[24] Hospitals already have staff to comply with the existing GA and GMAC payment system. Most of the rule changes are complying with existing procedures set by statute. Any changes in reimbursement for GA and GMAC payments caused by the rules are limited to hospitals with fewer than five admissions in a base rate year.^[25]

24. An agency adopting rules must assess any differences between the proposed rule and existing federal regulations. The Department noted that the modifications to the system caused by state statute have been submitted for federal approval in the years of the statutory changes.^[26] The proposed changes not conforming the rules to those statutory changes were considered “not significantly different from federal regulations.”^[27] There are no conflicts between federal regulations and the proposed rules.

25. The Administrative Law Judge concludes that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules.

26. No comments were received regarding these rules from the public, either in writing or through testimony at the public hearing. Ordinarily, this Report would be limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Since no such critical comment was received, the Report will discuss briefly a few individual rule parts. The record in this matter has been carefully read and considered. Where rules were adequately supported by the SONAR or the Department’s post-hearing comment, a detailed discussion of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this Report by an affirmative presentation of facts. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

27. Where changes are made to the rules after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed.^[28] The standards to

determine if the new language is substantially different from that which was originally proposed by the Agencies are found in Minn. Stat. § 14.05, subd. 2. The only amendments were to proposed rules 9500.1100, subp. 26a; 9500.1120, subp. 2.A.; and making the effecting date January 1, 2003 for rebasing payment rate rules. Each of these changes will be discussed individually. The Administrative Law Judge finds that modifications that might be made by the Department to correct punctuation, correct a cross-reference, or eliminate a typographical error are needed and reasonable, and that any such changes would not result in a substantially different rule.

Approach to GA and GMAC Payment Calculations

28. The proposed rules implement the requirement in Minn. Stat. § 256.9685, subd. 1, that a program be established to calculate payments for services under the GA and GMAC hospital inpatient system. The approach adopted by the Legislature and the Department uses a case mix system determined by using diagnosis-related groups to establish standard units of cost.^[29] Then an average cost is determined by dividing the allowable costs by the number of admissions and then adjusting that average by the hospital's case mix.^[30] To account for the long period of time (four to five years) between the base year calculation and the rate year, Minn. Stat. § 256.969, subd. 2b, requires the Department to "obtain operating data from an updated base year" at least every two years.

29. As mentioned in the SONAR, this approach to calculating inpatient hospital costs in the GA and GMAC system is federally approved and has been relied upon by the Legislature in specifying clarifications of the system.^[31] The Department's approach to modifying the existing rules to conform them to the current system as altered by legislation has been shown to be needed and reasonable.

9500.1100 – Definitions

30. Minn. Rule 9500.1100 sets definitions for terms used throughout the rules. The rule amendments to these definitions published in the *State Register* received no comment and will not be discussed in this Report. Those definitions are found to be needed and reasonable. The Department proposed a modification to one definition after publication, but before the hearing. That definition will be discussed individually.

"Inpatient Hospital Costs"

31. Subpart 26a defines "inpatient hospital costs" as a hospital's base year allowable MA payments without MA adjustments. The Department proposed to modify the definition in subpart 26a to clarify that the MA surcharge is not included in allowable MA payments.^[32] The Department explained that the federal Medicare program made the MA surcharge an allowable cost, but the Minnesota Legislature had expressly made the cost nonallowable.^[33] The modification conforms the rule language to the express statutory requirement. The definition of "inpatient hospital costs" as modified has been shown to be needed and reasonable. The new language does not constitute a substantially different rule from the language originally published in the *State Register*.

9500.1120 – Determination of Hospital Cost Index

32. The standards that must be used by the Department in determining the hospital cost index are set out in Minn. Rule 9500.1120, subp. 2.A. The existing rule lists areas of cost changes, such as wages and salaries, that are to be used in calculating adjustment rates. The Department noted that Minn. Stat. 256.969, subd. 1(a) requires that “The hospital cost index shall be the change in the Consumer Price Index-All Items (United States city average) (CPI-U) forecasted by Data Resources, Inc.”^[34] To conform the language of subpart 2.A. to the statutory requirement, the Department deleted the list of items and incorporated the reference to the Consumer Price Index in the item.^[35] The modification of the item conforms the rule to the statutory standard and is needed and reasonable. The new language does not constitute a substantially different rule from the language originally published in the *State Register*.

Effective Date of Rebasing Rule Changes

33. At the hearing, the Department proposed to have the amendments to some portions of Minn. Rules 9500.0016, 9500.1115, 9500.1122, and 9500.1124 have an effective date of January 1, 2003.^[36] The Department described the reason for the effective date as preventing a change to the rebasing formula “in the middle of the current rebasing period.”^[37] Minn. Stat. § 256.969, subd. 2b, requires the Department to update the base year at least every two years. The Department noted that the most recent rebasing was effective January 1, 2001. Setting the effective date for the rebasing provisions to January 1, 2003 is needed and reasonable for administrative efficiency. The proposed effective date is consistent with the authority provided to the Department under Minn. Stat. § 256.969, subd. 2b. The change to the effective date does not constitute a substantially different rule from the language originally published in the *State Register*.

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

CONCLUSIONS

1. The Minnesota Department of Human Services gave proper notice in this matter.
2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 (1998) and all other procedural requirements of law or rule.
3. The Department has demonstrated its statutory authority to adopt the proposed rules, and have 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) (2000).

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii) (2000).

5. The additions and amendments to the proposed rules suggested by the Department after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minnesota Stat. §§ 14.05, subd. 2, and 14.15, subd. 3 (2000).

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

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts as 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 amended rules be adopted.

Dated this 8th day of November, 2001.

_____/s/ Steve M. Mihalchick_____
STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Jane E. Schollmeier
Kirby A. Kennedy & Associates
Transcript Prepared, One Volume

- [1] Minn. Stat. §§ 14.131 through 14.20 (2000).
- [2] Minn. Stat. § 14.15, subd. 1 (2000).
- [3] Exhibit 10.
- [4] Exhibit 6.
- [5] Exhibit 11.
- [6] Exhibit 12. The mailing requirements are found at Minn. Stat. § 14.131 and Minn. R. 1400.2220, subp. 1(E).
- [7] Exhibit 4.
- [8] Transcript, at 7.
- [9] SONAR, at 5.
- [10] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
- [11] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).
- [12] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).
- [13] *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Minnesota Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
- [14] *Manufactured Housing Institute*, 347 N.W.2d at 244.
- [15] *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).
- [16] Minn. R. 1400.2100.
- [17] Minn. Stat. § 14.15, subd. 3 (2000).
- [18] Minn. Stat. § 14.05, subd. 2 (2000).
- [19] See SONAR at 6-7.
- [20] SONAR at 6.
- [21] *Id.*
- [22] *Id.*
- [23] SONAR, at 6.
- [24] SONAR, at 7.
- [25] SONAR, at 7.
- [26] SONAR, at 7.
- [27] *Id.*
- [28] Minn. Stat. § 14.05, subd. 3.
- [29] SONAR, at 3.
- [30] *Id.* at 4.
- [31] SONAR, at 7.
- [32] Exhibit 9.
- [33] Tr. at 11-12; Exhibit 9. The session law modifying Minn. Stat. § 256.9657, subd. 2, to render the surcharge nonallowable is found at Laws of Minn. 2001, First Sp. Sess. Chap. 9, Art. 2, Sec. 12).
- [34] Tr. at 12.
- [35] Exhibit 9.
- [36] Exhibit 15.
- [37] *Id.*