

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Contested Case of
REM-Bemidji, Inc., et al.,
REQUEST

ORDER REGARDING

OF REM RESIDENTS

TO FILE
V.
ARGUMENT

BRIEF AND PROVIDE

WITH RESPECT TO

MOTION FOR
Minnesota Department of Human Services.
DISPOSITION

PARTIAL SUMMARY

The above-captioned matter is pending before the undersigned Administrative Law Judge pursuant to a Notice of and Order for Hearing and Prehearing Conference dated September 28, 1988. John L. Kirwin, Assistant Attorney General, and Alison E. Colton, Special Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155, have appeared on behalf of the Minnesota Department of Human Services ("the Department"). Thomas Darling, Nancy R. Menzel, and Gregory R. Merz, Gray, Plant, Mooty, Mooty & Bennett, 3400 City Center, 33 South Sixth Street, Minneapolis, Minnesota 55402, and Mary K. Martin, Mary Martin & Associates, 60 East Marie Avenue, Suite 204, West St. Paul, Minnesota 55118-5910, have appeared on behalf of REM-Bemidji, et al. ("REM" or "the REM Facilities"). Mary K. Martin has also appeared on behalf of the Association of Residential Resources in Minnesota ("ARRM"), which has a pending petition for intervention in this matter. John W. Lundquist, Thompson & Lundquist, Ltd., 2520 Park Avenue South, Minneapolis, Minnesota 55404, has appeared on behalf of a group of mentally retarded residents of REM facilities and their parents, guardians and next friends ("the REM Residents").

By order of Administrative Law Judge Jon L. Lunde dated February 10, 1989,
the REM Residents' motion to intervene as a party in this contested case

proceeding was denied. Judge Lunde did, however, rule that the REM Residents would be permitted to file a brief at the conclusion of the hearing and participate in the hearing under Minn. Rule 1400.6200, subp. 5. By letter dated March 27, 1990, the REM Residents requested that they be permitted to file a short position paper in opposition to the Department's pending motion for partial summary disposition and give a ten-minute oral presentation at the argument of the motion. The Department filed a letter objecting to the proposed participation of the REM Residents on April 2, 1990. On April 9, 1990, counsels' oral argument on the REM Residents' request was heard at a status conference held in this case. The REM Facilities indicated at the conference that they had no objection to the requested participation of the REM Residents in the motion for partial summary disposition.

Based on all the files, records and proceedings herein, and for the reasons set forth in the memorandum attached hereto,

IT IS HEREBY ORDERED:

1. That the request of the REM Residents to file a brief not to exceed ten pages and provide ten minutes' of oral argument with respect to the Department's motion for partial summary disposition is GRANTED.

2. That the REM Residents' brief shall be filed and served by delivery on the Department on or before May 16, 1990, and the Department's response shall be filed on or before May 23, 1990.

3. That the brief and oral argument to be submitted by the REM Residents shall be limited to a discussion of equitable concerns relating to the impact of the proposed disallowances upon resident care. The REM Residents will not be permitted to raise new issues of fact absent petition and further order of the undersigned Administrative Law Judge.

Dated this day of May , 1 9 90.

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

This contested case proceeding involves the propriety of proposed cost adjustments made by the Department to the Medical Assistance rates of various intermediate care facilities for the mentally retarded operated by REM. The adjustments were made following field audits of the REM Facilities' records for cost reporting years ending during 1981 through 1985. In the field audit reports at issue in this proceeding, the Department made more than forty-five distinct types of adjustments involving numerous REM facilities. The Department seeks affirmance of its field audit adjustments and rates, and recovery of the disallowed costs. The REM Facilities request that the adjustments and rates be reversed.

In January of 1989, the REM Residents filed a petition seeking to intervene as a party in the contested case in order to protect their right to adequate care. The REM Facilities supported the petition. The Department opposed the petition to the extent that the Residents sought to intervene as a party, but indicated that it did not object to the Residents' participation if the Residents were limited to filing a written brief without acquiring the status of a party. Administrative Law Judge Jon L. Lunde, who then presided in the case, denied the REM Residents' petition to intervene as a party in

February of 1989 based upon a determination that "the Petitioners' legal rights are not directly affected by most of the adjustments in dispute, and . . . REM will adequately represent Petitioners' interests on issues where their legal rights may be determined or affected." Order Granting Limited Intervention at 6 (February 10, 1990). Judge Lunde noted that the Department did not oppose the Residents' submission of a written brief in the matter, and ruled that the Residents would be allowed to file a brief and participate in the hearing under Minn. Rule 1400.6200, subp. 5. That rule provides as follows:

Subp . 5. Participation by public. The judge may, in the absence of a petition to intervene, nevertheless hear the testimony and receive exhibits from any person at the hearing, or allow a person to question witnesses, but no person shall become, or be deemed to have become, a party by reason of such participation. Persons offering testimony or exhibits may be questioned by parties to the proceeding.

in October of 1989, the Department filed a motion for partial summary disposition in this matter with respect to the disallowance of the owners' compensation, the reallocation of the compensation of "program directors" to the "top management compensation" cost category, and the disallowance of REM's allocated central office costs. The motion thus involves the three largest adjustments made in the field audits that underlie the contested case proceeding. The Department served a copy of its motion and supporting memorandum on counsel for the REM Residents on October 26, 1989. The REM Facilities have filed a memorandum in opposition to the motion, the Department has filed a reply memorandum, and REM and the Department will submit additional briefs later this month. Oral argument on the motion is scheduled for June 1, 1990.

On March 28, 1990, the REM Residents filed a letter requesting that they be permitted to submit a brief and argument in opposition to the Department's motion for summary disposition. At the status conference at which the request was discussed, counsel for the Residents expressed an intent to focus his brief and argument upon the "fundamental" and "equitable" concerns of the residents, rather than arguing the technical issues involved in the motion. The Department has objected to the Residents' request on the grounds that the Residents are not directly affected by the types of adjustments at issue, the REM Facilities will adequately represent the Residents' interests with respect to these adjustments, it would be inappropriate and prejudicial to allow an initial memorandum from the Residents at this stage In the briefing process, and the participation of the Residents would add confusion and delay to the pending summary disposition motion.

The Administrative Law Judge agrees that the REM Residents will not be directly affected by the adjustments at issue in the motion for partial summary disposition and that the REM Facilities can be expected to adequately represent their interests with respect to these adjustments. For these reasons, as Judge Lunde ruled, intervention by the Residents as a party in this proceeding would not be proper. The decision regarding whether the

Residents should be allowed to submit a brief and present argument pursuant to Minn. Rule 1400.6200, subp. 5, however, is placed within the Judge's discretion and is not preconditioned upon a showing that the case will determine the Residents' rights, duties or privileges, or have a direct effect upon the Residents.

After extensive consideration, the Administrative Law Judge has concluded that it is appropriate to allow the Residents to submit a brief and oral argument with respect to the motion for partial summary disposition pursuant to Minn. Rule 1400.6200, subp. 5. If the Department had not filed the motion, the REM Residents would have been permitted under Judge Lunde's order to file a brief and participate in the ultimate hearing in this matter. Because the order did not impose any limitations concerning the nature of the issues that could be addressed by the Residents, they presumably could have addressed in

their brief and (to the extent permitted) in the hearing the three issue areas that are now under consideration in the motion for summary disposition. They should not be deprived of their ability to discuss the most significant adjustments proposed by the Department in this case simply because a motion has been filed involving those issues.

In addition, because the interests of the Residents are not identical to those of the REM Facilities, a presentation of the Residents' equitable concerns regarding the impact of the proposed disallowances upon mentally retarded residents of the REM Facilities would be beneficial in reaching a decision on the motion. Counsel for the Residents noted at the status conference that the brief and argument would focus upon such equitable concerns, and the Residents' submissions thus should be limited to a discussion of such concerns. Moreover, because the Residents' counsel emphasized that he could file the brief in an expeditious fashion and proceed with his argument on the date scheduled for oral argument, there should be no prejudice or delay associated with the Residents' participation in the motion. If the Department requires additional time to respond to the Residents' brief, it may file an appropriate request. As a further safeguard against delay, the Residents will not be permitted to raise new issues of fact in their brief or argument in the absence of a petition and further order of the Administrative Law Judge.

B.L.N.