

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

In the Matter of the Proposed
Adoption of Department of Human
Services Rules Governing
Eligibility to Receive Medical
LAW JUDGE
Assistance Payment as a Provider
of Rehabilitation Agency Services
and Rehabilitative and Therapeutic
Services, Minnesota Rules, Parts
9505.0385, 9505.0386, 9505.0390
to 9505.0392, and 9505.0410 to
9505.0412.

REPORT, OF THE
ADMINISTRATIVE

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:00 a.m. on Friday, January 18, 1991 at the Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota. This Report is part of a rule hearing proceeding held pursuant to Minn. Stat. §§ 14.131 - 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable, and whether or not the rules, as modified, are substantially different from those originally proposed.

Deborah Huskins, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Minnesota Department of Human Services. Appearing and testifying in support of the proposed rules on behalf of the Department were: Kathleen Cota, Supervisor, Health Care Programs Policy Section; Larry Woods, Director, Health Care Support Division; and Eleanor Weber, Assistant Director, Rules and Bulletins Division. The hearing continued until all interested groups and persons had had an opportunity to testify concerning the adoption of the proposed rules.

The Commissioner of the Department of Human Services must wait at least five working days before taking any final action on the rules; during that

period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, she must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then she shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Commissioner files the rule with the Secretary of State, she shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On November 21, 1990, the Department 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 Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.

2. On December 17, 1990, a Notice of Hearing and a copy of the proposed rules were published at 15 State Register pp. 1398 - 1405.

3. On December 12, 1990, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. On December 21, 1990, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list,
- (d) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (e) A copy of the State Register containing the proposed rules.
- (f) All materials received following a Notice of Intent to Solicit Outside Opinion published at 12 State Register p. 513 (September 21, 1987) and a copy of the Notice.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comment and statements remained open through February 7, 1991, the period having been extended by Order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on February 12, 1991, the third business day following the close of the comment period.

Statutory Authority

6. Statutory authority to promulgate the proposed rules is found at Minn. Stat. § 256B.04, subd. 2 (1990).

Fiscal Impact Statement

7. Pursuant to Minn. Stat. §§ 3.982, 14.11 and 14.131 (1988), the Department filed a fiscal note setting forth the anticipated cost to the State and local units of government over the next two years if these proposed rules are adopted and implemented. The Department estimates that the implementation of the proposed rules will result in additional State expenses of \$49,000 in the two-year period subsequent to implementation, and no additional county expenses, as counties will no longer incur a cost for medical assistance services.

MODIFICATIONS TO THE PROPOSED RULES MADE BY THE DEPARTMENT

8. At the time of and subsequent to the hearing on this matter, and after a review of all the written submissions, the Department has modified the proposed rules additionally as follows:

9505.0385 REHABILITATION AGENCY SERVICES

9505.0385, Subpart 3. Eligibility as rehabilitation agency service; required site of service. To be eligible for medical assistance payment, a rehabilitation agency service must be provided at a site that has been surveyed

by the Minnesota Department of Health and certified according to Medicare standards; or at a site that meets the standards-of-the-State-fire-Marshall-as

Medicare certification standards; or
at
the recipient's residence.

9505.0390, Subp. 1. B. "Direction" means, notwithstanding any other definition of direction in parts 9505.0170 to 9505.0475, the actions of a physical or occupational therapist who instructs the physical therapy therapist assistant or the occupational therapy assistant in specific duties to be performed, monitors the provision of services as the therapy assistants provide the service, is on the premises not less than every sixth treatment session of each recipient when treatment is provided by a physical therapy therapist assistant or occupational therapy assistant, and meets the other supervisory requirements of parts 5601.1500 and 5601.1600.

9505.0390, Subp. 1, G. "Physical therapy therapist assistant" means a person who is qualified as specified in part 5601.0100, subpart. 3.

9505.0390, Subp. 1, K. "Specialized maintenance therapy" means a health service that is specified in the recipient's plan of care by a physician, that is necessary for maintaining a recipient's functional status at a level consistent with the recipient's physical or mental limitations, and that includes may include treatments adjunctive in addition to rehabilitative nursing services.

9505.0390, Subp. 2. Covered service; occupational therapy and physical therapy. To be eligible for medical assistance payment as a rehabilitative and therapeutic service, occupational therapy and physical therapy must be:

B. provided by a physical or occupational therapist or by a physical therapy therapist assistant or occupational therapy assistant who, as appropriate, is under the direction of a physical or occupational therapist;

D. specified in a plan of care that is reviewed, and revised as medically necessary, by the recipient's attending physician at least once every 60 days unless the service is a Medicare Covered service and is to a recipient who also is eligible for Medicare and the service is a Medicare covered service, the plan of care must be reviewed at the intervals required by Medicare and the recipient must be visited by the physician or by the physician delegate as required by Medicare.

9505.0390, Subp. 3. Covered service; speech-language service. To be eligible for medical assistance payment as a rehabilitative and therapeutic services, a speech-language service must be:

D. specified in a plan of care that is reviewed, and revised as medically necessary by the recipient's attending physician at least once every 60 days unless the service is a Medicare covered service and is to a recipient who also is eligible for Medicare. If the service is to a recipient who also is eligible

for Medicare and the service is a Medicare covered service, the plan of care must be visited by the physician or by the physician delegate as required by Medicare.

9505.0390, Subp. 4. Covered service; audiology. To be eligible for medical assistance payment as a rehabilitative and therapeutic service, an audiology service must be:

D. specified in a plan of care that is reviewed, and revised as medically necessary, by the recipient's attending physician at least once every 60 days unless the service is a Medicare covered service and is to a recipient who also is eligible for Medicare. If the service is to a recipient who also is eligible for Medicare and the service is a Medicare covered service, the plan of care must be reviewed at the intervals required by Medicare and the recipient must be visited by the physician or by the physician delegate as required by Medicare.

9050.0390, Subp. 5. Covered service; specialized maintenance therapy.
To be eligible for medical assistance payment, specialized maintenance therapy must be :

B. specified in a plan of care that is reviewed, and revised as medically necessary, by the recipient's physician at least once every 60 days unless the service is a Medicare covered service and is to a recipient who also is eligible for Medicare. If the service is to a recipient who also is eligible for Medicare and the service is 4 Medicare Covered service, the plan of care must be reviewed at the intervals required by Medicare and the recipient must be visited by the physician or by the physician delegate as required by Medicare; and

9505.0390, Subp. 7. Payment limitation; therapy assistants and aides.
To be eligible for medical assistance payments on a fee for service basis, health services provided by therapy assistants must be provided under the direction of a physical or occupational therapist. Services of a therapy aide in a long-term facility are not separately reimbursable on a fee for service basis. and-,hall

Services of a therapy aide in a setting other than a long-term care facility are not reimbursable.

9505.0390, Subp. 8. Excluded restorative and specialized maintenance therapy services. Restorative and specialized maintenance therapy services in items A to K are not eligible for medical assistance:

A. physical or occupational therapy that is provided without a written order-from prescription of a physician;

B. speech-language or audiology service that is provided without a written referral from a physician;

C. services provided by a long-term care facility that are included in the costs covered by the per diem payment under parts 9549.0080 and 9553.0010

to 9553.0080 including:

(1) services for contractures that are not severe and do not interfere with the recipient's functional status or the completion of nursing care as required for licensure of the long-term care facility;

(3) services for conditions of chronic degenerative-joint pain that does not interfere with the recipient's functional status and that can be managed by routine nursing measures;

(4) services for Maintenance-of activities of daily living when performed by the therapist, therapist assistant or therapy aide; and

G. service specified in a plan of care that is not reviewed, and revised as medically necessary, by the recipient's attending physician as provided without-the-physician-review required in subparts 2 to 5;

H. service that is not designed to improve or maintain the functional status of a recipient with a physical impairment

K. service that is provided by a rehabilitation agency as defined in part 9505.0385, subpart 1, item 8 and that takes place in a sheltered workshop, developmental achievement center as defined in part 9525.1210, subpart 8, or service at a residential group home. which is an affiliate of that-is affiliated-with-a the rehabilitation agency.

9505.0410 LONG-TERM CARE FACILITIES; REHABILITATIVE AND THERAPEUTIC SERVICES TO RESIDENTS

9505.0410, Subp. 3. Payment for restorative therapy and specialized maintenance therapy. Medical assistance payment for restorative therapy and specialized maintenance therapy may be made

provided-in according to part 9505.0445, item 0, or as provided in parts 9549.0010 to 9549.0080 or 9553.0010 to 9553.0080, or as specified in thy contract between the department and a prepaid health plan in accordance with part 9505.0285.

9505.0410, Subp. 4. Payment for rehabilitative nursing services. Medical assistance payment for rehabilitative nursing services may shall be made enly

as provided in parts 9549.0010 to 9549.0080 or 9553.0010 to 9553.0080, as applicable. However, payment for a rehabilitative nursing service will not by made on a fee for service basis.

9505.0412 REQUIRED DOCUMENTATION OF REHABILITATION AND THERAPEUTIC SERVICES

A. The service must be specified in the recipient's plan of care that is reviewed and revised as medically necessary by the recipient's physician at least once every 60 days. However, if the service is to a recipient who is also eligible for Medicare and the service is a Medicare covered service, the plan of care must be reviewed at the intervals required by Medicare and the recipient must be visited by a physician or by the physician delegate as

required by Medicare.

The above modifications were made to eliminate ambiguous language, to clarify the intent and purpose of the proposed rules, and in response to public comments which are a part of the record in this matter. With the exception noted below in Finding 12, the Administrative Law Judge finds that the need for and reasonableness of these modifications has been demonstrated and that none constitute a substantial change from the rules as initially proposed.

NATURE OF THE PROPOSED RULES

9. The proposed amendments clarify requirements about the provision of rehabilitative and therapeutic services under medical assistance. The amendments update the requirements to be consistent with applicable federal and state laws and regulations. Consistency assures that the same services under the medical assistance program will be implemented statewide in a uniform

manner as required by Minn. Stat. § 256B.04, subd. 2. Consistency with federal regulations is required to receive federal financial support for the medical assistance program. These proposed rule amendments have been developed in consultation with an advisory committee composed of persons representing consumers, consumer advocates, long-term care facilities, rehabilitation agencies and therapists' associations.

10. Some of the proposed rule provisions received no negative public comment and were adequately supported by the Statement of Need and Reasonableness. The Judge will not specifically address those provisions in the discussion below and specifically, finds that the need for and reasonableness of those rules has been demonstrated!' Some of the public comments raised issues beyond the scope of the proposed rule amendments or were legislative-type suggestions designed to improve the rule. Several of the concerns raised by the public have been addressed by the modifications to the proposed rules set forth above. The remainder of this Report will only address substantive issues of need, reasonableness or statutory authority.

DISCUSSION OF THE PROPOSED RULES

11. Rule 9505.0385, subp. 1, item A and subpart 2 -- Subpart 1, item A of the proposed rule define "physical impairment" as "physical disabilities including those physical disabilities that result in cognitive impairments." Subpart 2 of the rule states that in order "to be eligible for medical assistance payment, the services . . . must be related to the recipient's physical impairment, and must be designed to improve or maintain the functional status of a recipient with a physical impairment

Care Providers of Minnesota suggest that the term "functionally impaired" should be used in place of the term "physical impairment" as defined in subpart 1, item A above. Care Providers contends that the term "functionally impaired" would be more appropriate and internally consistent with the language and purpose of the proposed rules. Providers argues that its proposed language

would reflect the current policy of measuring the overall functional status of a resident.

United Health, Inc. states that the term "physical impairment" is unnecessary in subpart 2. Rather, United Health suggests that the rule be rewritten to use only the term "functional status" and delete the term "physical impairment" from subpart 2. United Health argues that its proposed language more closely addresses the impairment of psychosocial functions a resident in a longterm care facility may experience.

In order for an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. *Broen Memorial Home v. Minnesota Department of Human-Services*, 364 N.W.2d 436, 440 (Minn. App. 1985). Those facts may either be adjudicative facts or legislative facts. *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. *Manufactured Housing Institute* at 246.

The Department states that the terminology proposed in the rule will cover rehabilitation agency services provided to recipients who have cognitive impairments with a physiological basis if the services meet the remaining rule requirements. Additionally, the Department contends that the term 'functional status' implies a continuum of functional abilities but must be read within the meaning of the requirement of a "physical impairment". The Department contends that these limitations are fully within the discretion permitted pursuant to Minn. Stat. § 256B.04, subd. 12 which allows the Commissioner to "place limits on the types of services covered by medical assistance

The Judge finds that the need for and reasonableness of Rule 9505.0385, subpart 1, item A and subpart 2 have been demonstrated by an affirmative presentation of facts. These are legislative-type facts but constitute a rational basis for the proposed rule.

12. Rule 9505.0385, subpart 3 -- This proposed rule has been modified as set forth above in Finding 8 and is designed to regulate where therapy services can be provided so that Medicare reimbursement will be obtained from the federal government. As set forth, the rule has been modified to require "Medicare certification standards" for sites at which services are provided. As initially proposed, the rule required that a site meet State Fire Marshal standards only. The Department has justified this change in the proposed rule by stating that the Minnesota Department of Health has questioned whether services will be reimbursable at sites which do not meet Medicare certification standards. The Department of Human Services cites 42 C.F.R. §§ 405.1723 to 405.1725 which specify standards related to a rehabilitation agency's service site that must be met as a condition of participation in Medicare.

Achievement Rehab, a provider of physical therapy and other related services which is based in the Twin Cities and serves most areas in the State, contends that the modification made by the Department will unnecessarily and unjustifiably prohibit the provision of services to recipients at sites where those services most need to be provided. Achievement offers therapy services

to nursing home patients and provides mentally retarded individuals with occupational therapy services at day activity centers and sheltered workshops, sites which are most appropriate for teaching functional skills to recipients. If the proposed rule is adopted, as modified, Achievement will no longer be able to provide services at day activity centers or sheltered workshops because those sites do not meet Medicare certification standards. Consequently, there is no eligibility for payment. Achievement argues that the federal regulations cited by the Department do not require that all sites meet specific Medicare certification standards. Achievement states that the federal regulations do provide for the provision of out-patient services in a less than Medicare certified location and, additionally, the rule permits services to be provided at a recipient's residence. See, 42 C.F.R. § 405.1737.

The Judge has reviewed both the Minnesota authorizing statutes and the federal regulations cited by the Department and has been unable to find any requirement that restricts offering out-patient physical therapy services only at locations which meet Medicare certification standards. The regulations cited by the Department, 42 C.F.R. §§ 405.1723 - 405.1725, set standards for the "building housing the organization" which provides the physical therapy services. The term "organization" is defined as "a clinic, rehabilitation agency, or public health agency." However, the regulations do not mandate that all services be provided in the "building housing the organization" or that any

other location at which services are provided meet the same standards.

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C.F.R. § 405.1737, which covers services provided by physical therapists in independent practice, only requires that the "physical environment of the office . . . afford a functional, sanitary, safe and comfortable surrounding for patients, personnel and the public." There is no requirement of Medicare certification.

The Judge finds that the need for and reasonableness of the proposed modification to Rule 9505.0385, subpart 3 has not been demonstrated by the Department of Human Services. Rather, the Judge agrees with the original Statement of Need and Reasonableness with regard to that section which states:

It is reasonable to require the agency to document that its site meets the standards of the fire marshal as the document is evidence of compliance. Not all rehabilitation agencies choose to provide services in a Medicare certified site. Therefore, it is necessary to clarify the standard for such agencies. The standards of the state fire marshal are designed to protect the safety of the persons occupying a public building such as the service site. Requiring the agency's service site to meet the standards of the state fire marshal is reasonable because the standards protects a person's safety while at the service site.

In order to correct the defect noted, the agency must retract the proposed modification and retain the rule as originally published. However, the Judge is not in a position to speak for the federal government with respect to the interpretation of the regulations addressed above. Consequently, if the federal government does interpret their regulations as do the Departments of Health and Human Services in this case, an alternative rule should be available to meet that contingency. Consequently, the Department could add a provision to the rule as initially proposed which reads substantially as follows:

If the federal government denies reimbursement for services provided at non-Medicare certified sites, because the sites are not Medicare certified, then the eligibility for rehabilitation agency services shall be restricted to sites which meet the Medicare certification standards.

As modified, the Judge finds that the need for and reasonableness of proposed Rule 9505.0385, subpart 3 has been demonstrated.

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

CONCLUSIONS

1. That the Minnesota Department of Human Services gave proper notice of the hearing in this matter.

2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. That the Department has demonstrated its statutory authority to adopt the proposed rules and has 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) (ii).

4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Finding 12.

5. That the amendments and additions to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. I and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion 4 as noted at Finding 12.

7. That due to Conclusion 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts 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 rules be adopted except where specifically otherwise noted above.

Dated this 7 day of March, 1991.

PETER C. ERICKSON
Administrative Law Judge