OAH 5-9049-35943

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Petition by Oak Hill Adult Services under Minn. Stat. § 14.381, subd. 1, for an Order Determining that the Minnesota Department of Human Services is enforcing a pronouncement as though it were a duly adopted rule

FINAL ORDER

This matter came before Administrative Law Judge Jim Mortenson on the petition of Oak Hill Adult Services (Petition/Petitioner). Petitioner seeks an order prohibiting "rate banding" following a manual change in the procedure codes that are used to identify particular waivered services. The Petition was filed pursuant to Minn. Stat. § 14.381 (2018).

Samuel D. Orbovich, Fredrikson & Byron, P.A., represents Petitioner. Michael Leonard, Assistant Attorney General, represents the Department.

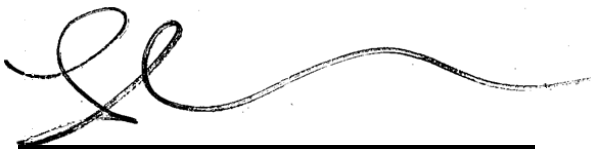
The Petition was filed on February 15, 2019. On March 1, 2019, the Department served and filed its Response to the Petition. Neither party requested oral argument, nor was it determined necessary by the Judge. The record closed on March 1, 2019.

Based upon all the filings and arguments of the parties, Minn. Stat. § 14.381, and for the reasons set forth in the memorandum that follows,

IT IS HEREBY ORDERED THAT:

The Petition is **DENIED**.

Dated: March 12, 2019



JIM MORTENSON
Administrative Law Judge

NOTICE

This decision is the final administrative decision under Minn. Stat. § 14.381. It may be appealed to the Minnesota Court of Appeals pursuant to the authority of Minn. Stat. §§ 14.44, .45 (2018). The agency is liable for all Office of Administrative Hearings costs associated with this review, pursuant to Minn. Stat. § 14.381, subd. 3. The agency may recover all or a portion of the costs from the petitioner, pursuant to Minn. R. 1400.8401 (2017), unless the petitioner is entitled to proceed in forma pauperis or the administrative law judge determines that the petition was brought in good faith and that an assessment of costs would constitute an undue hardship for the petitioner.

MEMORANDUM

I. Introduction

The issue in this matter is whether the Department of Human Services (Department or DHS) is enforcing an unadopted rule that amends statutory waiver rate-banding requirements required by Minn. Stat. §§ 256B.4913, .4914 (2018). Petitioner argues that the Department has unlawfully altered the statutory rate stabilization mechanism for paying service providers. The Department argues that it is merely enforcing the statute. The Administrative Law Judge agrees with the Department.

II. Regulatory Background

Medicaid is a jointly financed federal-state program that enables participating states to obtain reimbursement for some of the costs for providing medical services to people in need.[1] Minnesota participates in Medicaid programming to help provide medical assistance to people who qualify.[2] The U.S. Department of Health and Human Services (HHS) must approve state plans for medical assistance before federal funding is provided.[3]

Historically, Medicaid covered care provided in long-term-care facilities.[4] In 1981, however, the federal government provided states the option of creating waiver programs, which if approved by the secretary of HHS, could include payments for long-term care in home or community-based settings.[5] These home and community-based services are referred to as "waiver services" because the federal government agrees, in these limited circumstances, to waive some of the statutory and regulatory requirements for Medicaid assistance funding.[6] Waiver services are intended to allow states to innovate their

[1] 42 U.S.C. §§ 1396-1396w (2018); *Norwest Bank of N. Dakota, N.A. v. Doth*, 159 F.3d 328, 331 (8th Cir. 1998).
[2] Minn. Stat. §§ 256B.01-.85 (2018).
[3] 42 U.S.C. §§ 1396, 1396a(b).
[4] *See generally Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).
[5] 42 U.S.C. § 1396n(c).
[6] *See* 42 C.F.R. §§ 441.300, 430.25 (2018).

programs in a cost-effective manner to meet the special needs of "particular areas or groups of beneficiaries."[7]

In 2008, counties negotiated individually with providers of home and community-based services to establish rates under disability waiver programs.[8] The federal Centers for Medicare and Medicaid Services – an office in HHS - notified the Department that its disability waivers did not comply with federal uniform rate determination methods and standards.[9] Minnesota was advised that it must implement a uniform statewide rate-setting methodology.[10]

To bring Minnesota into compliance with federal requirements, the legislature, in 2013, created the Disability Waiver Rate System (DWRS).[11] DWRS is a method to establish service payment rates.[12] The state implemented DWRS in 2014.[13] DWRS uses a formula based on average provider costs across the state that takes into account Bureau of Labor Statistics wage codes, training costs, employee benefits, employer taxes, transportation, paid time off, administrative and program costs, absence costs, and indirect time costs.[14] The formula also includes a "regional adjustment factor," which adjusts the rate based on how a region's direct care wages compare to the statewide average.[15] State law requires the commissioner of the Department to adjust the DWRS formula every five years to account for inflation.[16]

The legislature anticipated that the change from county and provider-negotiated rates to the DWRS would cause drastic changes in payments. To prevent sudden rate fluctuations that could negatively affect service access, providers, and government budgets, DWRS incorporates an adjustment period in the first years of the new system, referred to as “banding.”[17] Banding limits the amount that rates can change for certain clients and providers. About 73 percent of DWRS service funds are subject to banding.[18] A residential service rate must be banded if the service recipient was receiving the same service from the same provider on December 1, 2013, or was receiving the service on

[7] 42 C.F.R. § 430.25; *see also* 42 U.S.C. § 1396n(c)(2)(D) (providing that the per-capita expenditure on disability waiver individuals must be equal to or less than the per-capita cost of providing care in an institution).
[8] Alexandra Bartolic Affidavit (Aff.) at 1.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 2.
[12] Minn. Stat. §§ 256B.4912, .4914.
[13] Bartolic Aff. at 2; Minn. Stat. § 256B.4912-4914.
[14] Bartolic Aff. at 2; Minn. Stat. § 256B.4914, subd. 5.
[15] Minn. Stat. § 256B.4914, subds. 6(b)(4), 7(15), 8(14), 9(23), 10(f); Bartolic Aff. at 2.
[16] Minn. Stat. § 256B.4914, subd. 5(i).
[17] Minn. Stat. § 256B.4913, subd. 4a; Bartolic Aff. at 2; Exhibit (Ex.) 1.
[18] Bartolic Aff. at 2.

December 1, 2013, but changed providers after January 1, 2014.[19] The Department provides training on the system and an online instruction manual.[20]

The Department manages provider payment rates through software known as the Rate Management System (RMS).[21] Lead agencies (often counties) use RMS to determine reimbursement rates for waiver services.[22] In most cases, RMS can automatically apply banding consistent with the statutory criteria.[23] Banding is automatic if a service recipient's Patient Master Index number, the service procedure code and modifiers, and the provider's National Provider Identifier or Unique Minnesota Provider Identifier number are all the same as they were on December 1, 2013.[24]

In other situations, however, the lead agency must manually apply banding to a service recipient's rate,[25] including situations in which a recipient is receiving the same service from the same provider and at the same location as on December 1, 2013, but the service is reported under a different procedure code.[26] The Department advises lead agencies on how to identify and manually apply banding in such cases.[27]

III. Factual Background

The Department licensed Petitioner as a community residential setting authorized to provide waiver services under Minn. Stat. §§ 245D.01-.33 (2018).[28] Petitioner provided one particular client with residential services that did not change since before December 1, 2013.[29] However, on February 1, 2016, the waiver under which the services

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[19] Minn. Stat. § 256B.4913, subd. 4a(b).
[20] *Id.*, subd. 5; Petition by Oak Hill Adult Services for an Order to Cease Enforcement of Unadopted Rule at 4-5 (Feb. 13, 2019).
[21] Minn. Stat. § 256B.4914, subd. 2(j); Bartolic Aff. at 2. *See also* DHS, *Community-based Services Manual - Rate Management System*, available at http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16_180389 (visited Mar. 5, 2019).
[22] Minn. Stat. § 256B.4914, subd. 2(j); Bartolic Aff. at 2.
[23] Bartolic Aff. at 3.
[24] *Id. See also* DHS, *RMS User Manual - Quick Reference Guide on Banding and the DWRS*, available at http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16_182200# (visited Mar. 5, 2019).
[25] Bartolic Aff. at 3. *See* DHS, *RMS User Manual - Banding Scenarios*, available at http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16_182185# (visited Mar. 5, 2019).
[26] Bartolic Aff. at 3.
[27] *See* DHS, MnCHOICES Support Plan-RMS Rate Calculator Screen: Historic Rate Not Available, available at http://pathlore.dhs.mn.gov/courseware/DisabilityServices/MNSP/Camtasia/MNSP_RATES_201/MnSP_RATES_201.html (visited Mar. 5, 2019); DHS, *RMS User Manual-Banding Scenarios*, available at https://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16_182185 (visited Mar. 5, 2019) (noting that "[a] historic rate. . . may be missing if the lead agency did not match the Healthcare Common Procedure Code (HCPC) and modifier of the previously authorized service.").
[28] Petition at 2.
[29] Ex. B, Letter from Bartolic to Orbovich (Dec. 6, 2018).

were provided changed from the Community Access for Disability Inclusion (CADI) waiver to the Developmental Disability (DD) waiver.[30] Before February 1, 2016, the code used for the client's residential services was "adult corporate foster care services" procedure code S5140.[31] After February 1, 2016, the code used was "adult supported living services" procedure code T2016.[32]

As a result of the procedure code changes, the DWRS computer program could not automatically band the services, even though the actual service delivery had not changed.[33] As a result, the County manually banded the payment rate, ensuring continued compliance with state and federal law.[34] Because the services remain banded, Petitioner receives significantly less in payment than if a new service was delivered to the client.[35]

IV. Analysis

A. Arguments

Petitioner argues that the statute does not "envision or authorize [the Department] to band and combine payment rates for different waiver programs."[36] Petitioner provided no law supporting its claim in the present case. Petitioner's argument rests on the claim that the Department has a long history of violating the rulemaking requirements of the Administrative Procedure Act.[37] Petitioner cites cases where courts have reversed the Department concerning violations of rulemaking requirements over a nearly 40-year period, but that do not involve Minn. Stat. §§ 256B.4913 or .4914.[38] Petitioner also argues that the Department is acting arbitrarily and capriciously when it enforces manual banding when a service is changed from being provided under one waiver program to another waiver program. According to Petitioner, by doing this, the Department relies on factors not intended by DWRS and that "are so implausible that they cannot be explained as difference in view or the result of [Department] expertise."[39] Petitioner asserts that banding "is only applicable to similar rates with the same procedure codes," but provides no law to support this position.[40]

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[30] Filipiak Aff. at 1; Ex. A, Letter from Samuel Orbovich to Alexandria Bartolic (Nov. 21, 2018); Ex. B.
[31] Ex. B.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Petition at 2; Ex. A.
[36] Petition at 12.
[37] *Id*. at 10.
[38] *See White Bear Lake Care Center, Inc. v. Minn. Dep't. of Pub. Welfare*, 319 N.W.2d 7 (Minn. 1982); *In re Contested Case of Ebenezer Soc'y v. Minn. Dept. of Human Servs.,* 433 N.W.2d 436 (Minn. Ct. App. 1988); *In re St. Otto's Home v. Minn. Dep't of Human Servs*., 437 N.W.2d 35 (Minn. 1989); *In re Rate Appeal of Benedictine Health Ctr*., 728 N.W.2d 497 (Minn. 2007).
[39] Petition at 12, *citing In re Review of 2005 Annual Automatic Adjustment Charges*, 768 N.W.2d 112, 118 (Minn. 2009).
[40] Petition at 13.

The Department argues that under Minn. Stat. § 256B.4913, banding a service rate is required when the particular service is the same service the recipient was receiving from the same provider on December 1, 2013. According to the Department, there are no exceptions to this requirement, and the Department has never taken a different view of the statutory requirements.

B. Petition to Challenge Unadopted Rule

An agency action may be challenged when it is alleged an agency is "enforcing or attempting to enforce a policy, guideline, bulletin, criterion, manual standard, or similar pronouncement as though it were a duly adopted rule."[41] Following statutory requirements in making a determination is not rulemaking.[42] Interpretations of existing rules that "make specific the law enforced or administered by the agency," and are not either long-standing positions of the agency or within the plain meaning of the statute, are deemed to be "interpretative rules."[43]

A rule is defined as "every agency statement of general applicability and future effect . . . adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure."[44] This definition does not include "rules concerning only the internal management of the agency or other agencies that do not directly affect the rights of or procedures available to the public[.]"[45] For example, inspection procedures are not generally regarded as "rules" under Minn. Stat. § 14.02 (2018), because these internal operating methods do not directly affect the rights of the public or the procedures available to the public.[46]

An administrative law judge from the Office of Administrative Hearings hears challenges to allegedly unadopted rules.[47] If the administrative law judge finds that the agency is enforcing an unadopted rule, the judge will direct the agency to stop enforcing the unadopted rule.[48]

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[41] Minn. Stat. § 14.381, subd 1(a).
[42] *Id.*, subd. 1(b) ("An agency determination is not considered to be an unadopted rule when the agency enforces a law or rule by applying the law or rule to specific facts on a case-by-case basis.")
[43] *See, e.g., Mapleton Community Home, Inc. v. Minnesota Dep't of Human Services*, 391 N.W.2d 789, 801 (Minn. 1986) ("[a]n agency interpretation that 'make[s] specific the law enforced or administered by the agency' is an interpretive rule that is valid only if promulgated in accordance with the [Minnesota Administrative Procedures Act]") (quoting *Minnesota-Dakota Retail Hardware Ass'n v. State*, 279 N.W.2d 360, 364 (Minn. 1970)); *Cable Communications Bd. v. Nor-West Cable Communications P'ship*, 356 N.W.2d 658, 667 (Minn. 1984) ("Generally, if the agency's interpretation of a rule corresponds with its plain meaning, or if the rule is ambiguous and the agency interpretation is a long-standing one, the agency is not deemed to have promulgated a new rule.").
[44] Minn. Stat. § 14.02, subd. 4.
[45] Minn. Stat. § 14.03, subd. 3(a)(1) (2018).
[46] *In re Assessment Issued to Leisure Hills Health Care Center*, 518 N.W.2d 71, 74 (Minn. Ct. App. 1995), *pet. for rev. denied* (Minn. 1994).
[47] Minn. Stat. § 14.381.
[48] *Id.*, subd. 2.

C. Minn. Stat. § 256B.4913 requires payment rate banding based on the service provided, not the waiver under which the service is provided

This challenge centers on whether Minn. Stat. § 256B.4913 requires banding for a particular service, or banding for a service paid for under a particular waiver program. If the former, then the Department's requirement to manually adjust service rates when the waiver under which the service is paid for is not an unadopted rule. If the latter, then the Department's requirement to manually adjust the payment rate in the manner it did here may be an unadopted rule and may be subject legitimate challenge.

After reviewing the statutory scheme and regulations, it is clear the statute requires banding for particular services. The particular waiver is not relevant. As a result, the Department's requirement that lead agencies must manually adjust certain automatic determinations to account for changes in procedure codes resulting from services provided under a different waiver program is simply enforcing the statute and is not an unadopted rule.

i. Current statutes and rules support a distinction between services and waivers

At first blush, it appears that the definition of DWRS under Minn. Stat. § 256B.4914 supports Petitioner's argument. Under the statute, "'Disability waiver rates system' means a statewide system that establishes rates that are based on uniform processes and captures the individualized nature of *waiver services* and recipient needs."[49] However, a thorough review of the applicable statutes and rules reveals that the phrase "waiver services" is general and descriptive. That is, it refers to any kind of service provided under any of the federal waiver programs (e.g., DD and CADI waivers).[50]

There is no distinct service called a waiver service. Minn. Stat. § 256B.4914, subd. 3, lists authorized services. These services are not tied to particular waivers.[51]

There are additional lists of services under state and federal law.[52] The definition of "home or community-based services" under 42 C.F.R. § 440.180(a) is "services, not otherwise furnished under the State's Medicaid plan, that are furnished *under a waiver* granted under the provision of part 441, subpart G of this chapter."[53] The service names used in association with the procedure codes for RWS are not identical to the various waiver-fundable home or community-based services listed at 42 C.F.R. § 440.180(b).

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[49] Minn. Stat. § 256B.4914, subd. 2(e) (emphasis added).
[50] DD and CADI waivers are the two waiver programs referenced in this matter. A variety of waiver programs exist under 42 C.F.R. ch. IV (2018).
[51] *See* Minn. Stat. § 256B.4914.
[52] *See* Minn. Stat. § 256B.092; Minn. R. 9505.0170-.0475 (2017); 42 C.F.R. § 440.180.
[53] 42 C.F.R 440.180(a) (emphasis added).

State rules adopted under Minn. Stat. § 256B.04 also reveal that services are distinct from the waivers that authorize their delivery in community settings. Minn. R. 9505.2165, subp. 10, defines "recipient" as "an individual who has been determined eligible to receive health services under a *program*."[54] A "program" includes, among other things, "home and community-based services under a waiver from" the federal government, or another health service program administered by the Department.[55] The Administrative Law Judge found no rules that prioritize a link between waiver programs and the payment rates over the services.

ii. Codes used for data entry are not determinative of banding

Petitioner's argument relies on the fact that RMS is designed to distinguish between waivers used for funding. RMS uses different codes (and names) for the same service when different waiver programs fund that service. This does not establish that the differences in data-entry codes are determinative for payment rate banding.

The criteria for establishing payment methodologies are in state statute. Minn. Stat. § 256B.4912, subd. 2(a), requires the Commissioner to:

> establish, as defined under section 256B.4914, statewide payment methodologies that meet federal waiver requirements for home and community-based services for individuals with disabilities. The payment methodologies must abide by the principles of transparency and equitability across the state. The methodologies must involve a uniform process of structuring rates for each service and must promote quality and participate choice.[56]

Whether the state's payment system meets these requirements is not before the Administrative Law Judge. However, the Department's training for users of RMS makes clear that manual adjustments may need to be made to ensure proper banding and compliance with state and federal law.[57]

Petitioner submitted an affidavit from a person with experience working with DWRS who believes an error was made by the Department in this case.[58] However, the affiant also states that to her knowledge, the Department "never adopted any administrative rule that allows it to band one DWRS payment rate to another, if the waiver services are different and have different procedure codes."[59] In this case, the Department is not banding payment rates where the services are different. It is because the services

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[54] Minn. R. 9505.2165, subp. 10 (emphasis added).
[55] *Id.*, subp. 8.
[56] Minn. Stat. § 256B.4912, subd. 2(a).
[57] *RMS User Manual - Banding Scenarios*, available at http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16_182185#. Banding is not required by federal law. However, there are federal requirements on spending, the details of which are not relevant here.
[58] Aff. of Barb Turner (Feb. 13, 2019).
[59] *Id.* at 2.

are the same that they remain banded across procedure codes in accordance with Minn. Stat. § 256B.4913. In fact, there is already a rule in place to enforce this concept. Minn. R. 9505.0450 addresses billing procedures.

> [A] provider must enter on the claim the diagnosis and procedure codes required by the department and submit the claims on forms or in the format specified by the department . . . . Further, the provider shall submit with the claim additional records or reports requested by the department as necessary to determine compliance with parts 9505.0170 to 9505.0475.[60]

The Department's requirement that manual adjustments be made to ensure continued banding for services when only the waiver has changed is simply ensuring proper compliance and is consistent with state statute and rule.

V. Conclusion

The statutory scheme for payment for services under the state medical assistance program requires banding for recipient services that have not changed since December 1, 2013, and that have been provided by the same provider during that period. Which waiver program a service is provided under is not material, but does require manual adjustments to the billing and payment system. This ensures compliance with Minn. Stat. § 256B.4913. Thus, the Department is not engaged in unadopted rulemaking in violation of the Administrative Procedure Act. Therefore, the Petition is **DENIED**.

J. R. M.

[60] Minn. R. 9505.0450, subp. 5.