

STATE OF MINNESOTA

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DATE: February 18, 2005

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SUBJECT: ***Masterman/ARC v. Goodno Settlement Request for Advice***

This memorandum responds to the Department of Human Service's request for legal advice regarding Minnesota's Home and Community-Based Service waiver for persons with mental retardation or related conditions ("MR/RC").¹ The specific legal question you ask is:

Can a county reduce a waiver recipient's services, deny a request to increase services needed due to a change in a recipient's condition, or deny access to waiver services based solely upon the county's inability to provide the service within *its* allocated budget, or is the county also required to consider whether reducing the service or denying an increase in services will negatively affect the health, safety, and welfare of the recipient?

In particular, your legal question arises in the context of fair hearings under Minnesota Statutes section 256.045, subdivision 4, and rulings in these hearings regarding the counties' responsibility. You reference two sources of Minnesota law that the Disability Law Center ("the Center") believes are being used by counties to justify reductions or denials of increased services to recipients without any consideration of the recipient's condition: Minnesota Rule 9525.1930, subpart 5B and Minnesota Statutes section 256B.092, subdivision 4(c). The Center is concerned

¹ We understand that your request is related to the settlement agreement reached in *Masterman et al. v. Goodno*, Civ. No. 03-2939 (JRT/FLN) (D. Minn. filed April 2003). This memorandum presents this office's advice in response to your question and does not purport to be a formal Attorney General Opinion. See Minn. Stat. § 8.05.

that Department referees may be accepting these "absolute defenses" without considering whether the needs of the recipients are being met.

The legal question posed in your memorandum suggests an "either-or" dichotomy regarding budget and health and welfare considerations. Our review, however, suggests that budget considerations, as well as considerations of a recipient's health and welfare are both key considerations in managing the waiver and delivering necessary services to recipients.² As discussed below, neither of the cited provisions appears to provide the broad "absolute defense" that the Center believes some counties contemplate. Rather, consideration of the recipient's condition as well as budget considerations must be taken into account by counties in making funding decisions.

I. MINNESOTA RULE 9525.1930, SUBP. 5B APPEARS TO APPLY TO ISSUES CONCERNING INITIAL ACCESS TO THE WAIVER.

According to the Center, some counties take the position that Minnesota Rule 9525.1930, subpart 5B permits them to reduce services or deny requested increases in services in a broad range of circumstances. The counties' apparent argument is that the rule provides an absolute defense to reductions or denials of increased services when their budget allocations cannot cover current or requested services.

Minnesota Rule 9525.1930, subpart 5B appears to be limited to initial applications for access to the waiver, and not to appeals from reductions in services or denials of requested increases in services. Moreover, it must be interpreted to be consistent with other relevant state and federal statutes and rules governing the waiver.

Rule 9525.1930 works in conjunction with the provisions that it cross-references. Minnesota Rule 9525.1930, subpart 5B appears in a portion of the rules pertaining to the funding and administration of home and community-based services. Subpart 5, titled "Appeals by Individuals," provides:

B. It is an absolute defense to an appeal under item A, subitem (1) [relating to a "fail[ure] to follow the written procedures and criteria established under part 9525.1830, subpart 2"], if the county board proves that it followed the established written procedures and criteria and determined that home and community-based services could not be provided to the person within the county board's allocation of home and community-based services money.³

² In preparing our response, we reviewed the pertinent federal and state statutes, regulations and other materials detailed in your letter seeking advice, as well as Minnesota's Home and Community-Based Service waiver.

³ Minn. R. 9525.1930, subp. 5B.

On its face, this defense applies only in response to a claim that a county failed to follow the written procedures and criteria of Minnesota Rule 9525.1830, subpart 2. Minnesota Rule 9525.1830, subpart 2 requires, in relevant part, that a county board "establish written procedures and criteria for making determinations under [Rule 9525.1830,] subpart 1, item A."

Rule 9525.1830, subpart 1 states that a county shall provide or arrange for home and community-based services to those eligible for such services so long as six conditions are met as outlined in items A through F. Item A requires that the county board determine whether it can provide home and community-based services to a person within its budget allocation. This item and the nature of the subpart's other items indicate that it applies to granting or denying initial access to waiver services, not to situations involving adjustments to existing waiver budgets.

Item A includes a limited "safety valve" provision permitting a county to request additional DHS funds when it cannot provide services within its current allocation. Counties may request additional funding for five categories of persons who are not already enrolled in the waiver. The categories include persons who are about "to be discharged" from treatment centers and nursing facilities; are participating in demonstration projects; are receiving community-based services under an emergency license; are discharged from ICF/MR facilities involuntarily placed in receivership; or, who need community-based services on a temporary basis because of an emergency situation.⁴

These five categories suggest that the provision for additional funding is for persons who would be initially enrolled in waiver services. Subpart 1, item A, thus is not concerned with those already on the waiver who are being denied increases in services or those faced with reductions in services.

The nature of the other conditions of subpart 1 also supports the interpretation that it only pertains to applications for initial access to the waiver, not to situations in which a person already enrolled in the waiver faces a service reduction or requests a service increase. For example, subpart 1, item B requires that, to receive home and community-based services, "the screening team has recommended home and community-based services instead of ICF/MR services for the person." A screening team makes such a recommendation when a person is first requesting services, not after the person is already enrolled in services.⁵ Similarly, item D requires that, to receive home and community-based services, "the person or the person's legal representative has agreed to the home and community-based services determined by the screening team to be appropriate for the person." Such agreement logically occurs at the point of initial access to the waiver, instead of when there is a reduction or requested increase in waiver services.⁶ The nature

⁴ Minn. R. 9525.1830, subp. 1, item A (1) through (5).

⁵ See Minn. Stat. § 256B.092, subds. 7 and 8 (describing the composition and duties of screening teams).

⁶ See 42 U.S.C. § 1396n(c)(2)(C) (requiring that individuals determined to be likely to require an institutional level of care be informed of feasible alternatives to institutional care).

of these other subpart 1 conditions in items B-F reinforces the conclusion that item A concerns initial access situations.

While the defense provided by Rule 9525.1930, subpart 5B is likely valid in defending county decisions concerning initial access to the waiver,⁷ it does not appear to be available in an appeal from a reduction in services or from a denial of a requested increase in services. Such a defense, of course, must be consistent with the waiver and federal statutes and regulations governing the waiver.⁸

II. MINN. STAT. SECTION 256B.092, SUBD. 4(C) APPEARS SIMPLY TO PROHIBIT PAYMENTS TO INDIVIDUALS IN EXCESS OF WHAT A COUNTY HAS AUTHORIZED.

The second possible "defense" provision that you reference, Minnesota Statutes section 256B.092, subdivision 4(c), states in relevant part:

Home and community-based resources for all recipients shall be managed by the county of financial responsibility within an allowable reimbursement average established for each county. Payments for home and community-based services provided to individual recipients shall not exceed amounts authorized by the county of financial responsibility.

The first sentence establishes the overall nature of the fiscal allocation given to counties by the state; it does not speak directly to individual service reductions or denials of increased services. The second sentence, which you highlight, could arguably be read to place a cap on an individual recipient's aggregate services, enabling those services to be reduced or frozen when a county projects that its total budget allocation is exceeded. Such an interpretation, however, may conflict with the requirements of a recipient's Individual Service Plan if the cap or reduction would result in denial of services identified as necessary in the plan.⁹ The requirement that counties manage overall services within their budget allocations cannot be reasonably read to

⁷ Under the waiver, a state is not required to provide access to services to all who may be eligible for the program. See 42 U.S.C. § 1396n(c)(9) and (10). In fact, Minnesota's waiver allows Minnesota to limit the number of waiver recipients to the lesser of the number indicated in the waiver itself or the number authorized by the state legislature for that time period. Renewal of the Home and Community-Based Service Waiver for People with Mental Retardation or Related Conditions (MR/RC) (hereinafter "Waiver") Appendix G-1 (July 1, 2002). The approved waiver allows Minnesota to serve up to 16,233 "unduplicated individuals" in the first year of the waiver (beginning in July 1, 2002) increasing to 18,155 in the fifth year of the waiver. *Id.*

⁸ See Minn. R. 9525.1830, subp. 2.

⁹ An Individual Service Plan incorporates the federally required personal plan of care for waiver recipients and describes the "residential, day and support services necessary to meet the person's individual needs and assure health and safety." Waiver, Appendix E-2.

provide counties an absolute defense in the context of individual cases for individual reductions or denials.

In addition, reducing individual services solely because of the county's total budget allocation, without considering the recipient's condition, also runs afoul of the safeguards established by Minnesota Statutes section 256B.092, subdivision 5(c). It provides:

When a county is evaluating denials, reductions, or terminations of home and community-based services under section 256B.0916 for an individual, the case manager shall offer to meet with the individual or the individual's guardian in order to discuss the prioritization of service needs within the individualized service plan. The reduction in the authorized services for an individual due to changes in funding for waived services may not exceed the amount needed to ensure medically necessary services to meet the individual's health, safety, and welfare.

This safeguard prohibits a county from denying or reducing services to an individual in an amount that would deprive the individual of medically necessary services.

Given the potential conflicts caused by interpreting section 256B.092, subdivision 4(c) as an "absolute defense" to county waiver decisions, a more reasonable interpretation of the subdivision's second sentence may be that it simply prohibits payments for services or supports for individual recipients in excess of what a county has authorized. The sentence does not relate to what factors should be considered either in initially making authorizations or in denying requests for increased services.

In summary, the "absolute defenses" cited in your request for legal advice do not appear to allow counties to reduce waiver services or to deny proposed increases in waiver services without consideration of the effect of such decisions on a recipient's health and welfare. Moreover, the defense provided by Rule 9525.1930, subp. 5B appears to pertain exclusively to denials of requests to access the waiver.

Please contact us if you have further questions.