

FROM GRAY PLANT MOOTY MOOTY & BENNETT (#3) (TUE) 2.11.03 11:19/ST. 11:06/NO. 4261218187 P 2



3400 CITY CENTER
33 SOUTH SIXTH STREET
MINNEAPOLIS, MN 55402-3796

612 343-2800
Fax: 612 333-0066
www.gpmilaw.com

INCLUDING THE LAW FIRM HALL & BYERS P A
1010 WEST ST. GERMAIN STREET, SUITE 600
ST CLOUD, MN 56301

320 252-4414
Fax: 320 252-4482
www.gpmilaw.com

FEB 25 2003

Reply to Minneapolis
Sarah Duniway
612 343-5397
sarah.duniway@gpmilaw.com

February 11, 2003

Shirley Patterson
Minnesota Department of Human Services
444 Lafayette Road
St. Paul, MN 55155-3872

BY FACSIMILE AND
U.S. MAIL

Re: Waiver Rebasing Plan and Day Training and Habilitation Rates

Dear Ms. Patterson:

We are writing on behalf of the Minnesota Habilitation Coalition ("MHC") to alert you that several counties appear to be planning to impose across-the-board cuts in day training and habilitation ("DT&H") payment rates that counties do not have the authority to impose without Department of Human Services approval, and that the Department cannot approve because they fail to satisfy legal requirements regarding reductions in DT&H payment rates.

In response to the Department of Human Services recent announcement of its plan to recalculate the annual allocation to counties of funds under the home and community-based waiver for individuals with mental retardation and related conditions ("DD Waiver") effective January 1, 2003 (the "Rebasing Plan"), several counties have informed DT&H providers of their intent to impose across-the-board reductions in DT&H payment rates.

MHC recognizes the state's budget situation requires a measured and serious response. At the same time, DT&H programs provide needed services to vulnerable people, and reductions in payment rates are likely to have a direct impact on the individuals served in DT&H programs. For these reasons, the DT&H statute governing payment rates contains certain provisions limiting counties' authority to unilaterally cut DT&H payment rates and the Department's ability to approve them. Similarly, the case management rules provide individual consumers with certain rights when services are

FROM GRAY PLANT MOOTY MOOTY & BENNETT (#3)

(TUE) 2.11.03 11:19/ST. 11:06/NO. 4261218187 P 3

Shirley Patterson

Page 2

February 11, 2003

reduced or terminated. Finally, the county proposals to cut DT&H and other waived services by the same amount fails to take into consideration the diverse population and associated funding sources for DT&H programs.

We ask that the Department act quickly to ensure that counties are aware of these legal parameters and that the Department's actions in this regard comply with applicable requirements.

1. **The DT&H rate structure limits the conditions under which counties and the Department may change payment rates.**

Payment rates for DT&H services are governed by Minnesota Statutes Section 252.46, including payment rates for DT&H services under the waiver. Minn. Stat. § 252.46, subd. 1(c); Minn. Stat. § 256B.501, subd. 4.

Counties, acting through their county boards, are responsible for setting DT&H payment rates. Minn. Stat. § 252.44(a)(4), and the Commissioner of Human Services ("Commissioner") must approve those rates. Minn. Stat. § 252.43(1). The rates are then set forth in the county's contract with each DT&H provider. Minn. Stat. § 252.44(b). Counties have significant flexibility in establishing payment rates for new providers. See Minn. Stat. § 252.46, subd. 4. However, once payment rates have been set, counties cannot change payment rates -- up or down -- without meeting certain conditions and following a specified process. In particular, for current providers with existing contracts, the payment rates set by a county board for each provider must be equal to the payment rates approved by the Commissioner for that provider in effect January 1, of the previous calendar year, unless a variance is granted. Minn. Stat. § 252.46, subs. 2 & 3.

A variance may be granted by the Commissioner when the *provider requests* and the county board submits to the Commissioner a written variance request. Minn. Stat. § 252.46, subd. 6(a). A variance to the rate minimum may only be granted when (1) the county board contracts for increased services from a provider and for some or all of the individuals receiving services from the provider, lower per unit fixed costs result; or (2) the actual costs of delivering authorized services over a 12-month contract period have decreased. Minn. Stat. § 252.46, subd. 6(c).

The written variance request must include documentation that all of the following criteria have been met:

- (1) The Commissioner and the county board have both conducted a review and have identified a need for change in the payment rates and recommended an effective date for the change in the rate;

FROM GRAY PLANT MOOTY MOOTY & BENNETT (#3) (TUE) 2.11.03 11:20/ST. 11:06/NO. 4261218187 P. 4

Shirley Patterson

Page 3

February 11, 2003

(2) The provider documents efforts to reallocate current staff and any additional staffing needs cannot be met by using temporary special needs rates exceptions under Minnesota Rules 9510.1020 to 9510.1140;

(3) The provider documents that financial resources have been reallocated before applying for a variance . . . ;

(4) For variances related to loss of clientele, the provider documents the other program and administrative expenses, if any, that have been reduced;

(5) The county board submits verification of the conditions for which the variance is requested, a description of the nature and cost of the proposed changes, and how the county will monitor the use of money by the provider to make necessary changes in services; and

(6) The county board's recommended payment rates do not exceed [maximum payment levels] . . .

Minn. Stat. § 252.46, subd. 6(d). The Commissioner has 60 days to accept or reject the variance request, or the request shall be deemed to have been granted. Minn. Stat. § 252.46, subd. 6(e). Once a variance requested is granted, the county must amend its contract with the provider to reflect to the new payment rate. See Minn. Stat. § 252.44(b).

Counties cannot circumvent these rules by re-contracting with existing providers in an attempt to regain their flexibility in rate-setting under the rules for new provider rates. "Nothing in this subdivision [rates for new providers] permits development of a new program that primarily results in refinancing of services for individuals already receiving services in existing programs." Minn. Stat. § 252.46, subd. 4. Further, "Transactions that have the effect of circumventing [the requirements under section 252.46] must not be considered by the Commissioner for the purpose of payment rate approval under the principle that the substance of the transaction prevails over the form." Minn. Stat. § 252.46, subd. 11.

We acknowledge there may be limited circumstances where a genuine provider request is made for a variance to the rate minimums that complies with these provisions and that the statute allows the county and Department to grant such requests. What the statute does not allow are the wholesale, across-the-board, no-choice cuts that are being presented to providers in response to the Department's Rebasing Plan.

FROM GRAY PLANT MOOTY MOOTY & BENNETT (#3)

(TUE) 2.11.03 11:20/ST. 11:06/NO. 4261218187 P 5

Shirley Patterson

Page 4

February 11, 2003

In working with counties to adjust the counties' spending levels to accommodate the Rebasing Plan, the Department must ensure the counties and the Department comply with these legal requirements.

2. DT&H services are not funded solely by the DD Waiver.

Funding for DT&H programs comes from three sources: (1) for consumers enrolled in the DD Waiver, funding comes from the county's waiver allocation; (2) for consumers residing in ICR/MR's, funding comes from the state's Medical Assistance long-term care benefit; and (3) for consumers not on the DD Waiver and not residing in an ICF/MR, funding comes from the consumer's county directly.

DT&H payment rates must be the same regardless of the funding source. Minn. Stat. § 252.46, subd. 1(c); Minn. R. 9525.1230, subp. 1(I). Accordingly, if counties reduce payment rates to adjust spending under the county's waiver allocation, it reduces the DT&H's payment rates and associated revenues for *all* consumers in the DT&H program.

The Department and individual counties must not underestimate the impact a cut on DD waiver spending and payment rates will have for DT&H programs and the individuals they serve.

3. The Case Management rules require individualized determinations before services are reduced.

The service system for people with developmental disabilities, and DT&H services in particular, are geared towards providing individualized service. The system is constructed entirely on individual service plans, which involve an individual assessment of each consumer, identification of that consumer's needs and wants, and an individual service plan consistent with those desires and needs. Each consumer agrees to and signs off on his or her plan. Minn. Stat. § 256B.092, subd. 1; Minn. R. 9525.0024, subp. 3.

To protect the individual needs and rights of each consumer, Minnesota law gives each consumer due-process-like rights when services are changed. To the extent the Rebasing Plan results in a reduction or termination of services for individual consumers, it would trigger the right to appeal to the county, the Department, and to court. Minn. Stat. § 256.045, subd. 3; Minn. Stat. § 246.045, subd. 4a. Consumers have the right to obtain a stay of action during the pendency of their appeals. Minn. Stat. § 256.045, subd. 7. This could create significant difficulties with any proposed reduction in services or rates. In addition, this further demonstrates the public policy that people with developmental disabilities need to be treated in a manner respectful of their individual needs, interests and desires.

FROM GRAY PLANT MOOTY MOOTY & BENNETT (#3)

(TUE) 2.11.03 11:21/ST. 11:06/NO. 4261218187 P 6

Shirley Patterson

Page 5

February 11, 2003

At a minimum, county case managers will have to meet with and revise the individual service plan of each individual consumer who faces a change in provider, or amount or type of service, because of this process, before any change is made. See Minn. Stat. § 256B.092, subd. 1b(4); Minn. R. 9525.0024, subp. 3(d).

For these reasons, it is absolutely critical that counties have complete information about their options and a plan that satisfies legal requirements *before* they begin a process of implementing any cuts.

MHC understands and appreciates the tremendously difficult task the Department and counties face in this budget situation. At the same time, DT&H's provide needed services to vulnerable people who are entitled to -- and deserving of -- the highest quality services possible. At a minimum, DT&H programs must ensure they have adequate staffing and supervision to ensure the health and safety of the individuals served, many of whom have significant behavioral and medical needs. To this end, and in recognition of the importance of DT&H services, Minnesota laws provide parameters around DT&H payment rates that prevent the arbitrary reduction in payment rates. These parameters require counties to work with providers and arrive at a solution together. Because of the magnitude and complexity of the task ahead, we wanted to bring these parameters to your attention.

Please call me if you have any questions or need any additional information, or if MHC can be of assistance in finding solutions to the budget challenges ahead.

Very truly yours,

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.By Sarah Duniway
Sarah Duniway VC

cc: Commissioner Kevin Goodno
Representative Fran Bradley
Representative Lynda Boudreau
Senator Linda Berglin
Senator Becky Lourey

GP:1416251 v2