

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

457- Welfare Rule 47. Governing Medical Assistance

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 8/8/78 Temporary Rule _____

Resubmitted and Received _____

DUE DATE 8/28/78

a. Returned to Agency w/o filing w/Secy of State _____
b. Approved _____ Date Sent Back to Agency _____

- -

1. Rules as Adopted ✓ } Same
2. Rules as Proposed ✓ }
3. Certificate of Board's Authorizing Resolution, where applicable N.A.
4. Order for Hearing ✓
5. Notice of Hearing ✓
   (i) Sufficiency ✓
6. Secretary of State's List ✓
7. Certificate of Acquisition of Secretary of State's List ✓
8. Affidavit of Mailing ✓
   (i) At least 30 days prior to hearing ✓
9. Statement of Need and Evidence ✓
10. Hearing Examiner's Report ✓
11. Agency's Findings of Fact ✓
12. Certificate of Board's Resolution Adopting Rules, where applicable N.A
13. Order Adopting ✓
14. Report of Chief Hearing Examiner ✓
    (i) Finding of No Substantial Change ✓
    (ii) Permission to Incorporate by Reference, where applicable N.A.
15. Certificate of Compliance with Rulemaking Procedures ✓
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable N.A.
17. Petition by Public, where applicable N.A.

STATE OF MINNESOTA

COUNTY OF RAMSEY

EDWARD J. DIRKSWAGER, JR.

COMMISSIONER OF PUBLIC WELFARE

In the Matter of the Proposed Amendment to the Rules of the Department of Public Welfare Governing the Medical Assistance Program, Abortion Amendments, Rule 47.

ORDER

Docket No. 78-056-GB

The above-entitled matter came on for hearing before Hearing Examiner George A. Beck, of the State Office of Hearing Examiners at 9:00 a.m. on June 5, 1978, in Room 83 of the State Office Building, Wabasha Street (between Aurora and Fuller), in the City of St. Paul, after proper notice as required by Minn. Stat. § 15.0412, subd. 4 (amended, 1977), was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose.

At said hearing the proposed amendments to Rule 47, as published at 2 State Register 1956, were considered. The following persons testified for the Department of Public Welfare: Robert Baird and Richard Bendel, M.D. The hearing continued until all interested groups and persons had an opportunity to be heard. Pursuant to order of the Hearing Examiner, the record was held open for five (5) days for the submission of written material.

Based upon all the records and proceedings, the Hearing

Examiner made Findings of Fact, Conclusions and a Recommendation which are contained in the Report of Hearing Examiner dated June 29, 1978. Said Report is attached hereto as Exhibit A.

Pursuant to the requirements of Minn. Stat. § 15.0412, subd. 4 (amended, 1977), said Report was available to all affected persons for at least five (5) days.

Having considered all of the evidence adduced and upon the records, files and proceedings herein, and applicable statutory standards and criteria, and having confirmed the need for the above-captioned rule amendments and the reasonableness thereof

NOW THEREFORE, IT IS ORDERED, that the Findings, Conclusions and Recommendation of the Hearing Examiner as contained in the Report of the Hearing Examiner are hereby adopted and incorporated herein. In addition, the Commissioner makes the following:

FINDINGS OF FACT

1. The Department has reviewed the comments submitted on behalf of the Minnesota Catholic Conference (MCC), the Minnesota Citizens Concerned For Life (MCCL) and the Human Life Alliance (HLA), and the proposed change contained in paragraph 13 of the Hearing Examiner's report. The suggested addition reads:

E. 2. t. (c)

A signed written statement of the attending physician providing the:

aa. The age of the mother.
bb. The state of gestation of the mother.
cc. The diagnosis or description of the condition which threatens the mother's life.
dd. The prognosis following abortion.

The Department believes that the rule as written requires all the documentation necessary to administer the program and that additional documentation cannot be justified to the degree necessary to place an additional burden on the attending physician. Thus, the rule has not been amended to reflect this suggested change.

2. The Midwest Health Center for Women, the St. Louis County Aid to Victims of Sexual Assault, the Minneapolis YWCA and the Abortion Rights Council commented that a statement from the woman that her pregnancy resulted from rape or incest, and the physician's supporting statement, were unnecessary and would add to the burden and trauma of the victim. However, in light of the statutory language and the legislature's intent to pay only for abortions to terminate pregnancies resulting from sexual assault or incest, the rule has not been amended to reflect the proposed change.

3. The Department has reviewed the comments submitted by the Minnesota Association for Retarded Citizens and Patricia A. Siuta, counsel for Legal Advocacy for the Developmentally Disabled of Minnesota that the rule's requirements could adversely affect the mentally retarded. However, in light of the statutory language and the legislative intent, the rule has not been amended to allow different treatment for the mentally retarded.

4. Two members of the public, Linda Muldoon, Ramsey County Mental Health Department and Peggy Spektor, Minnesota Program for Victims of Sexual Assault, commented that an incestuous relationship ordinarily extends over a period of time and that it is unreasonable to require an incest victim to report the date of a

specific incident to the law enforcement agency. However, in light of the federal regulations governing abortion payment and the legislative intent, the rule has not been amended to reflect proposed change.

5. Paragraph 26 of the Hearing Examiner's report discusses the proposed definition of "incest", Section E. 2. t. (4) (c) of the proposed rule amendments. The Department has given consideration to the criticisms raised (see paragraph 26 of the Report of the Hearing Examiner), but believes that it was the intent of the legislature to restrict the meaning of "incest". Therefore, the rule has not been amended to define the term "incest" more broadly.

IT IS FURTHER ORDERED, that this rule identified as Rule 47, Abortion Amendments, of the Rules of the Minnesota Department of Public Welfare is adopted this 1st day of ~~July,~~ August 1978 and after this day Rule 47 shall be read in its entirety with the amendments. as published at 2 State Register 1956, pursuant to the authority vested in me, pursuant to Minn. Stat. Chapters 15 and 256B.

Dated: Aug 1, 1978

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

Edward J. Dirkswager Jr.

EDWARD J. DIRKSWAGER, JR.
Commissioner

W-78-056-GB
Exhibit A

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF PUBLIC WELFARE

In the Matter of the Proposed Adoption of Rules of the Department of Public Welfare Governing the Medical Assistance Program, Rule 47.

REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing before George A. Beck, duly appointed as Hearing Examiner in this matter at 9:00 a.m. on June 5, 1978, in Room 83 of the State Office Building, Wabasha Street (between Aurora and Fuller), in the City of Saint Paul, County of Ramsey, State of Minnesota.

This proceeding is a rule hearing held pursuant to Minn. Stat. Ch. 15 to determine whether the proposed rule should be adopted and given the force of law. Copies of this Report are available for review from the Department of Public Welfare and from the Office of Hearing Examiners. Members of the agency panel appearing at the hearing included: Robert Baird, Assistant Commissioner, Income Maintenance, Department of Public Welfare; Beverly Jones Heydinger, Special Assistant Attorney General, Department of Public Welfare; Robert Randle, Director of Medical Assistance, Department of Public Welfare; Paul Zerby, Assistant Attorney General, Department of Public Welfare; and Dr. Richard Bendel, Assistant Chief of the Department of Obstetrics and Gynecology at Hennepin County Medical Center and Associate Professor of Obstetrics and Gynecology at the University of Minnesota Medical School.

Eleven public witnesses appeared and spoke at the hearing. Fifteen timely written comments were received concerning the proposed rule and made a part of the record.

Based upon all the testimony, exhibits and written comments, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. On April 28, 1978, the Department filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules;
(b) A proposed Order for Hearing; and
(c) A proposed Notice of Hearing.

2. On May 1, 1978, a Notice of Hearing and a copy of the proposed rules were published at 2 State Register 1955.

3. On April 26, 1978, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Secretary of State for the purpose of receiving such Notice.

4. The Department also mailed a Notice of Hearing to a number of other organizations and persons including all Minnesota County Welfare Departments, all Minnesota Human Service Boards, all Minnesota Area Mental Health Boards, all Minnesota State Hospitals, legal, police, and medical associations, all 87 county sheriffs, all police chiefs in cities with a population over 50,000, and a number of organizations and interest groups concerned with the question of abortion. (See, Exs. 5, 11, 12)

5. On May 11, 1978, the Department filed the following documents:

(a) The Order for Hearing;
(b) The Notice of Hearing as mailed;
(c) The Affidavit of Receipt of the Secretary of State's list;
(d) The Affidavit of Mailing;
(e) The Certificate of Delivery of the Secretary of State's list and the list;
(f) The Statement of Need;
(g) The Statement of Evidence; and
(h) An Affidavit of Additional Mailing.

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

6. The record remained open through June 12, 1978, for the receipt of written comments and statements.

7. Minn. Rule DPW 47 (12 MCAR § 2.047) governs administration of the medical assistance program in Minnesota. The medical assistance program provides eligible needy persons with medical care and services. The proposed rule amendments were made necessary by

the passage of Section 2 of Minn. Laws 1978, Ch. 508, which reads in part as follows:

> Subd. B. "Medical assistance" or "medical care" means payment of part or all of the cost of the following care and services for eligible individuals whose income and resources are insufficient to meet all of such cost:
>
> * * *
>
> (13) Abortion services, but only if one of the following conditions is met:
>
> (a) The abortion is a medical necessity. "Medical necessity" means (1) the signed written statement of two physicians indicating the abortion is medically necessary to prevent the death of the mother, and (2) the patient has given her consent to the abortion in writing unless the patient is physically or legally incapable of providing informed consent to the procedure, in which case consent will be given as otherwise provided by law;
>
> (b) The pregnancy is the result of criminal sexual conduct as defined in section 609.342, clauses (c), (d), (e)(i), and (f), and the incident is reported within 48 hours after the incident occurs to a valid law enforcement agency for investigation, unless the victim is physically unable to report the criminal sexual conduct, in which case the report shall be made within 48 hours after the victim becomes physically able to report the criminal sexual conduct; or
>
> (c) The pregnancy is the result of incest, but only if the incident and relative are reported to a valid law enforcement agency for investigation prior to the abortion.

The proposed rule amendments are intended to implement this statute and to bring the state requirements in line with recently promulgated federal regulations. [See, 42 CFR §§ 449.100 - .109 and 43 Fed. Reg. 4,832 4,844 (February 3, 1978)]

8. Several comments were received in the course of this rule hearing proceeding which were, in fact, directed toward the question of whether or not the statute, Minn. Laws 1978, Ch. 508, should have been passed. A number of comments were generally against any limitation of funding of abortions for poor people (Exs. A, B, C, F, G; Tr. p. 60), and a number were received which were opposed to any funding of abortions (Exs. I, N; Tr. pp. 52, 55). Several comments were received which were specifically opposed to the 48-hour reporting requirement in the statute and to the statutory requirement that the report be made to a valid law enforcement agency. (Exs. A, B, H, K; Tr. pp. 39, 42-45, 47, 61-62, 66-68)

9. Exhibit D and Exhibit N generally supported the proposed rule amendments as a whole.

Introductory Sections.

10. Proposed Minn. Rule DPW 47 E.1.t. adds a sentence to the list of services which are not covered under the medical assistance program and is needed to implement the state statute which provides that payment for abortion services be limited to the instances set out in the statute. The amendment is reasonable.

11. Proposed Minn. Rule 47 E.2.t. specifies the circumstances under which abortion services will be reimbursable with medical assistance funds. Throughout the rule the provider is required to submit certain documentation with each invoice for payment of abortion services. This requirement is consistent with 42 CFR § 449.106, which requires that relevant documentation be received by the state agency prior to payment for the abortion. The Department believes that the documentation required in the rule is needed to hold people accountable for the facts they assert in order to receive payment and to provide documentation should it be necessary for the state agency to verify its claims for federal financial participation.

Minn. Rule 47 E.2.t.(1.) - Abortion Necessary to Prevent Death of Mother.

12. This subsection of the proposed rule sets out the documentation necessary for payment of an abortion which is necessary to prevent the death of the mother. The subsection requires the signed written statement of two physicians stating that it was their professional judgment that the abortion was necessary to prevent the death of the mother, and a statement from the recipient indicating that she voluntarily consented to the abortion. DPW indicated that this section was consistent with the state statute, and with 42 CFR § 449.103, which permits federal funding for an abortion "when a physician has found, and so certified in writing to the applicable state agency, that on the basis of his/her professional judgment,

the life of the mother would be endangered if the fetus were carried to term". DPW stated that it is reasonable to leave the determination of medical necessity to the physician's professional judgment since this determination is most appropriately made by the physician on a case-by-case basis. The Department stated that it would be virtually impossible to specify in Rule 47 every medical complication or circumstance that could make an abortion medically necessary to prevent the death of a pregnant woman. (Tr. pp. 17-18; Ex. 9, p. 5) The State of Minnesota in establishing its medical assistance program has provided that the administration of the program must be consistent with applicable federal law (see, Minn. Stat. § 256B.18). DPW also believes that leaving the decision as to the necessity of the abortion to the professional judgment of two physicians is consistent with the decision of the Minnesota Supreme Court in Doe v. MDPW, 257 N.W.2d 816 (1977), where the Court held that the medical necessity of each applicant requesting funding of transsexual surgery must be considered individually, on a case-by-case basis.

13. At the hearing, Michael McKee suggested that this rule subsection should define when abortion is necessary to prevent the death of the mother in order to prevent the intrusion of the private beliefs of physicians or DPW from entering into the decision. (Tr. pp. 48-50) A written comment on behalf of the Minnesota Catholic Conference (MCC), the Minnesota Citizens Concerned for Life (MCCL) and the Human Life Alliance (HLA) agreed and suggested that the following additional requirement could be added to this subsection:

> A signed written statement of the attending physician providing the:
>
> aa. The age of the mother.
>
> bb. The stage of gestation of the mother.
>
> cc. The diagnosis or description of the condition which threatens the mother's life.
>
> dd. The prognosis following abortion.

Corresponding changes were also suggested for 47 E.2.t.(2.) and 47 E.2.t.(3.). (Ex. N, p. 2)

14. This rule subsection is needed to implement the corresponding statutory section. To the extent that the subsection paraphrases or duplicates language in the statute, it appears that it is crucial to the ability of a person affected by the rule to comprehend its meaning and effect within the meaning of Minn. Stat. § 15.0412, subd. 1, in that each subsection of the rule must set out the documentation required. It cannot be concluded that the language of the rule which leaves the decision of whether or not the abortion was necessary to prevent the death of the mother to the professional judgment of the two physicians is unreasonable. Such a provision appears to be consistent with the statute and DPW's decision to leave the judgment to the physician without strict guidelines is well within its discretion as a matter of policy. DPW may well wish to consider, however, whether or not the suggestion made would or would not better implement the statutory intent.

Minn. Rule 47 E.2.t.(2.) - Abortion Related to Criminal Sexual Conduct.

15. This subsection restates the statutory requirements of reporting the sexual assault to a valid law enforcement agency within 48 hours of the time the assault occurs. The section also sets out the items to be included in the statement of the law enforcement agency and requires two other statements, one from the recipient and another from the recipient's physician. DPW pointed out that the applicable federal regulation, 42 CFR § 449.105, requires that the statement from the law enforcement agency include a statement that the assault was reported within the applicable time period and a statement of the name, address and signature of the person who reported the incident. The latter information is incorporated into the information specified in the statement of the law enforcement agency in the proposed rule. The state statute limits payment for abortion services to those pregnancies which are a result of criminal sexual conduct as defined in Minn. Stat. § 609.342, clauses c, d, e(i) and f. Accordingly, the proposed rule requires a statement by the law enforcement agency that the

report of the assault alleges a violation of one of the statutory sections cited above. DPW stated that it believed the language of the statute indicated that the Legislature intended to minimize fraudulent claims by requiring a positive act in the form of a report for investigation.

16. Both this subsection and the subsection dealing with pregnancies which are the result of incest requires a statement by the recipient that the pregnancy resulted from the assault or incest and a statement by the recipient's physician that the length of the pregnancy is not inconsistent with the recipient's statement. DPW stated that the statements are necessary in order to assure compliance with the state law which permits DPW to pay for the abortion services only if the pregnancy is a result of criminal sexual conduct or incest.

17. Several organizations including the Midwest Health Center for Women (Ex. J), the St. Louis County Aid to Victims of Sexual Assault (Ex. H), the Minneapolis YWCA (Ex. F), and the Abortion Rights Council (Ex. K; Tr. p. 35) stated that requiring women in this situation to sign a statement and to have their doctor prepare a statement adds to the trauma, is needlessly burdensome, and invades the privacy of the individual. State Representative Robert Searles stated that the demeaning formalities of the rule are unjust in their effect upon a woman assaulted or humiliated by incest (Tr. pp. 27-28). The Midwest Health Center for Women also suggested that a time limit such as 48 hours be placed in the rule for preparation of the statement by a law enforcement agency.

18. Several comments were received by organizations representing retarded persons. The Minnesota Association for Retarded Citizens (Ex. M; Tr. pp. 37-38) and Patricia A. Siuta, counsel for Legal Advocacy for the Developmentally Disabled of Minnesota, pointed out that the 48 hour reporting requirement discriminates against mentally retarded women since parents or guardians of mentally retarded women may not realize until late in a pregnancy that an incident has occurred. It was also stated that the failure to include Minn. Stat. § 609.342, clause e(ii) discriminated against

mentally retarded people. Ms. Siuta stated that since the federal regulations do not exclude mentally retarded persons, the state cannot be more restrictive in its rule without violating 45 CFR § 249.10, a.5.i. These arguments are persuasive. It appears that for some reason, however, that the Legislature decided to delete that portion of the first degree criminal sexual conduct statute dealing with sexual penetration with a person who is mentally defective, mentally incapacitated or physically helpless. The Department's rules are, accordingly, bound by this legislative decision. The suggestion by the Minnesota Association for Retarded Citizens that an exception to the 48 hour reporting requirement be provided in the rule not only for victims physically unable to make a report, but also for victims "mentally incapable of reporting the incident due to mental retardation", would appear to be contrary to legislative intent.

19. It is concluded that this subsection is needed and reasonable. The Department has shown that some type of documentation by way of statements from the recipient and her physician is needed and reasonable in order to ensure that the statutory language is enforced in accordance with legislative intent. It would be within the discretion of DPW to make that requirement less burdensome based upon the comments in that regard during this rulemaking proceeding. The statements from the recipient and her physician do not appear to be specifically mandated by statute or regulation. The repetition of statutory language is crucial to the ability of a person affected by the rule to comprehend its meaning.

Minn. Rule DPW 47 E.2.t.(3.) - Abortion Services to Terminate a Pregnancy Resulting from Incest.

20. The session law at Sec. 2, Subd. (b)(13)(c) of Chapter 508 requires that a pregnancy which is the result of incest must be reported to a valid law enforcement agency for investigation prior to the abortion, together with the name of the relative involved. The federal regulation, 42 CFR § 449.105, requires a signed statement from the law enforcement agency and requires that the report of the incest include the name, address and signature of the

person reporting the incest.

21. Linda Muldoon, a licensed consulting psychologist with the Ramsey County Mental Health Department stated that requiring the date of the alleged incest would result in an unworkable rule since the lack of a specific date is too common to require it as a precondition for a child's terminating a pregnancy resulting from incest (Ex. E). Peggy Specktor, Director of the Minnesota program for Victims of Sexual Assault, stated that most incestuous relationships last for approximately two years and assigning a specific date is difficult (Tr. pp. 62-63).

22. This subsection is needed and reasonable as proposed, however, the Department should consider rewording 3(b) in the subsection to make it consistent with the realities of how incest occurs as stated by Ms. Muldoon and Ms. Specktor. This subsection also attracted comments directed toward the statements by a recipient and her physician which is discussed in Findings No. 16 and 19.

Definitions.

23. The definitions of abortion services excludes two items, namely (1) drugs or devices which prevent implantation of the fertilized ovum, and (2) medical procedure necessary for the termination of an ectopic pregnancy.

24. DPW stated that an ectopic pregnancy is an abnormal condition in which gestation occurs outside the uterus. An ectopic pregnancy can rarely continue to term, but is an abnormality that must be medically treated. Drugs and devices to prevent implantation of the fertilized ovum are modes of treatment used before the fact of pregnancy is established and are clearly different from abortion procedures, according to the Department. The federal regulation, 42 CFR § 449.107, explicitly allows federal financial participation for these two exceptions. The analysis of the federal regulation at 43 Fed. Reg. 4,837 (1978), supports this interpretation. Dr. Richard Bendel testified that the most common ectopic pregnancy was an implantation in a fallopian tube. This occurs once in approximately every 200 pregnancies. About 99 percent of ectopic pregnancies

involved an implantation in the fallopian tube. The majority of these pregnancies begin to bleed and rupture from six to twelve weeks after conception and present an acute gynecological-obstetrical emergency. Dr. Bendel stated that it would be extremely rare for an ectopic pregnancy to be able to go to term and almost unheard for a pregnancy in the fallopian tube to proceed to term (Tr. pp. 30-34).

25. One person, Michael McKee, stated that the idea that implantation is the beginning of a pregnancy is strictly a matter of opinion (Tr. p. 51). Based upon the testimony, the state statute and the federal regulation, this definition is needed and reasonable.

26. The definition of "incest" drew a good deal of comment. A definition in the proposed rule essentially restates the definition contained in the criminal statute, Minn. Stat. § 609.365. All of the comments, except one, expressed the belief that the definition was too narrow (Ex. F) and should be broadened to include stepbrothers, stepfathers and others in positions of authority over the child (Tr. p. 63; Ex. J, p. 2). A speaker for the Coalition for Freedom of Choice pointed out that in the current social context, families very often comprise offspring that are not related by blood at all, yet they do constitute a legally and socially defined kinship (Tr. pp. 46-47). Linda Muldoon stated that the proposed definition ignores the psychological parenthood of long-established stepparents, adoptive parents and foster parents (Ex. E, p. 2). The Midwest Health Center for Women pointed out that a realistic definition was important because otherwise a victim would have to show "fear of imminent great bodily harm" to qualify for assistance and this would typically be difficult in the case of incest (Ex. J, p. 2). The MCC, MCCL and HLA stated that they believed that the legislative intent was to restrict the definition to that contained in the statute (Ex. N, pp. 1-2).

27. Although the proposed definition does appear to ignore some common modern family relationships, it cannot be said to be unreasonable since it is reasonable for the Department to assume

that the Legislature was referring to the criminal definition in its use of the term incest in Ch. 508.

28. The definition of valid law enforcement agency is adopted from that used in the applicable federal regulations, drew no comment, and is needed and reasonable.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS

1. That the Department of Public Welfare gave proper notice of the promulgation of the proposed rule.

2. That the Department of Public Welfare has statutory authority to promulgate the proposed rule.

3. That the Department of Public Welfare has fulfilled all relevant, substantive and procedural requirements of law or rule.

4. That the Department of Public Welfare has demonstrated the need for and the reasonableness of the proposed rule by an affirmative presentation of facts in the record.

5. That the paraphrasing or duplication of statutory language within the proposed rule is crucial to the ability of a person affected by the rule to comprehend its meaning and effect within the meaning of Minn. Stat. § 15.0412, subd. 1.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

RECOMMENDATION

It is recommended that the proposed rule be adopted by the Department of Public Welfare with consideration given to the comments in the Findings of Fact herein.

Dated: June 29, 1978.

GEORGE A. BECK
Hearing Examiner

N O T I C E

Pursuant to Minn. Stat. § 15.0412, subd. 4, this Report shall be available for review to all affected individuals upon request for at least five days.

The Commissioner of the Department of Public Welfare shall, if he proposes to adopt the rules as originally proposed or amended, submit the complete hearing record, including its Findings and Order, to the Chief Hearing Examiner no earlier than five days subsequent to the receipt of this Report. This submission shall clearly indicate any changes made to the rules as originally proposed, preferably in the format that will be submitted to the State Register for publication. The Chief Hearing Examiner shall complete his review and submit his report to the Commissioner on the issues of substantial changes in the rule and compliance with Minn. Stat. § 15.0412 within ten calendar days. Thereafter, the Commissioner shall be responsible for filing the rules with the Attorney General and for notifying persons who have indicated that they wish to be notified of such filing.

STATEMENT OF COMPLIANCE WITH

MANUAL OF RULE MAKING PROCEDURES

I, Special Assistant Attorney General Beverly Jones Heydinger, do hereby declare that I have examined the proposed rules and all related documents and that, based on them and my personal familiarity with the applicable procedures, the Manual of Rule Making Procedures has been followed. Any exceptions are noted below.

Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Special Assistant
Attorney General

Dated: August 7, 1978

FEDERAL AGENCY RULINGS

New Decisions, Orders, Regulations, Administrative Interpretations

Eminent Domain

FEDERAL CONDEMNATION—

Section 322 of Economy Act, which bars Government from entering into lease wherein annual rental exceeds 15 percent of property's fair market value, precludes Government's initiation of condemnation proceedings to acquire leasehold interest when condemnation award would exceed 15 percent limitation.

The question arises out of the need of the General Services Administration for continued occupancy of space in a New York office building for assignment to the Drug Enforcement Administration. The original lease for the space has expired and a dispute has arisen between the contracting officer and the landlord concerning the fair rental value of the space. GSA states that no viable alternative to continued occupancy exists, and has proposed that a leasehold interest be acquired by eminent domain pursuant to the Declaration of Taking Act, 40 U.S.C. §258a et seq. Under that Act, the Government acquires title when the declaration is filed and is irrevocably committed to pay the judicially-fixed compensation eventually awarded. In practical terms, what is actually being paid, regardless of whether the lease is acquired on a voluntary or involuntary basis, is an amount that represents rent and as such is subject to the ceiling imposed by the Economy Act, 40 U.S.C. §278a. Section 3 of the Declaration of Taking Act clearly prohibits an agency from initiating proceedings when it anticipates that the condemnation award will exceed any congressionally imposed limits on the funds available to acquire the interest being condemned. Accordingly, condemnation proceedings may not be initiated under the Declaration of Taking Act unless GSA believes that the resulting award will not exceed any applicable statutory limitation.

Section 322 of the Economy Act prohibits the Government from entering into a lease wherein the annual rental to be paid exceeds 15 percent of the fair market value of the property. GSA's estimate of the fair rental value of the space to be leased in the building exceeds 15 percent of the fair market value of the leased space, and thus there is no question that a voluntary lease of the premises at the estimated fair rental would be prohibited by the Economy Act.

The precise question of whether condemnation actions taken pursuant to the Declaration of Taking Act to acquire a leasehold interest are limited by Section 322 of the Economy Act has not previously been considered. There is nothing in the statutory language or in the legislative history of the Act to indicate that the drafters specifically considered condemnation awards. GSA, however, relies on a prior decision holding that Section 322 was not applicable to condemnation proceedings instituted under Section 201 of the Second War Powers Act, see 22 Comp. Gen. 1112 (1943), as applying to all leasehold condemnation actions. That previous decision is not controlling here since it dealt only with an involuntary taking authorized under the Second War Powers Act. Moreover, it dealt with the question of whether a condemnation award following a taking could be subject to the restrictions imposed by the Economy Act; here the question is not whether an award can be statutorily limited, but whether an agency can resort to condemnation proceedings when it believes that the award will exceed 15 percent of the fair market value of the leased premises.

The question must be answered in the negative. One purpose of the Economy Act is to limit Government expenditures in connection with the rental of buildings. While the Act literally limits only rental payments and not "just compensation" for the taking by eminent domain of a leasehold interest, the measure of compensation for the taking of a leasehold interest is its fair rental value. This conclusion is buttressed by Section 3 of the Declaration of Taking Act, which precludes condemnation when the condemnation award is expected to exceed a congressionally mandated spending ceiling. Obviously, Congress intended to make applicable to the taking procedure whatever spending limitations might exist with respect to the acquisition of an interest in real property through more conventional means.

Although condemnation proceedings are subject to the provisions of Section 322 of the Economy Act, the facts here present a particular problem. Failure to acquire the space in the building by condemnation will result in increased Government expenditures. Moreover, it is likely that the fair rental of alternative locations would also exceed the Economy Act limitations. Thus there may be no way to comply with the statutory limitation if DEA is to retain space in the New York City area. This situation is not unusual and other similar circumstances exist. It appears that application of Section 322 is not always viable and that amendment of the law to take into account these modern-day circumstances would be appropriate. Remedial legislation should receive expeditious consideration.

—Economy Act Application to Condemnation Proceedings; Comp. Gen., 7/12/78.

Public Health

ABORTIONS—

Regulations governing federal financial participation in expenditures for abortions funded through various Department of Health, Education, and Welfare programs are promulgated.

[Text] Federal financial participation is available in expenditures for an abortion when a physician has found, and so certified in writing to the applicable State agency, that on the basis of his/her professional judgment, the life of the mother would be endangered if the fetus were carried to term. The certification must contain the name and address of the patient.

Federal financial participation is available in expenditures for an abortion when two physicians have found, and so certified in writing to the applicable State agency, that on the basis of their professional judgment, severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term. The certification must contain the name and address of the patient. At least one of the two physicians must also certify that he/she is not an "interested physician," as defined in the next succeeding sentence. For purposes herein, an "interested physician" is one: (a) Whose income is directly or indirectly affected by the fee paid for the performance of the abortion; or (b) who is the spouse of, or another relative who lives with, a physician whose income is directly or indirectly affected by the fee paid for the performance of the abortion.

Federal financial participation is available in expenditures for medical procedures performed upon a victim of rape or incest if the State agency has received signed documentation from a law enforcement agency or public health service stating: (a) That the person upon whom the medical procedure was performed was reported to have been the victim of an incident of rape or incest; (b) the date on which the incident occurred; (d) the name and address of the victim and the name and address of the person making the report (if different from the victim); and (e) that the report included the signature of the person who reported the incident. Federal financial participation is also available in ex-

penditures for abortions for victims of rape or incest under the circumstances described in [the above two paragraphs] without regard to the requirements of the preceding sentence. [End Text]

—HEW; Rules and Regs. amended, 7/14/78.

Taxation

BAD DEBTS—

Basis of accounts receivable transferred by sole proprietor to his newly formed corporation is equal to face amount less reserve for bad debts for purposes of determining transferor's basis in stock received and corporation's basis in accounts receivable.

The sole proprietor had used the accrual method of accounting and the reserve method of treating bad debts, and the assets he transferred to his newly formed corporation included accounts receivable. No gain or loss was recognized on the transfer pursuant to Section 351(a) of the Internal Revenue Code. The sole proprietor had gained a tax benefit in prior years from the additions to the bad debt reserve. The value of the stock received for the accounts receivable was equal to the net value of the receivables.

In line with the supreme Court's decision in Nash v. U.S., 398 U.S. 1 (1970), the transfer of the accounts receivable in this case did not result in a recovery that is taxable to the sole proprietor under the tax benefit rule.

Section 358(a)(1) equates the basis of the stock received from a newly formed corporation with the basis of the property given in exchange. Section 362(a) likewise provides that the newly formed corporation's basis in the property received shall be the same as the basis of the property in the hands of the transferor of the property. In short, the sole proprietor's basis in the accounts receivable in this case determines the basis in the stock received from the newly organized corporation and the corporation's basis in the transferred receivables. The sole proprietor's basis in the accounts receivable must be reduced by the amount of the bad debt reserve in order to prevent a double deduction with respect to the reserve, first by the transferor and then by the transferee. Thus, the transferor's basis in his stock and the corporation's basis in the receivables is the net value of the receivables.

If the transferee corporation uses the reserve method of treating bad debts, it must establish a bad debt reserve with respect to the transferred accounts receivable equal to the difference between their face amount and their basis as determined under Section 362(a). The establishment of such reserve, however, is not considered an addition that can be deducted. The collection of the accounts receivable will not require the inclusion in income of the excess of collections over the basis as determined under Section 362(a), and the inability to collect an amount equal to that basis will not entitle the corporation to specific charge-offs. Rather, these transactions will be reflected in the taxpayer's determination of a reasonable reserve for bad debts in future periods.

If the transferee corporation uses the specific charge-off method of treating bad debts, the amount of the basis being recovered and gain recognized upon collection of each account receivable will be determined by reference to the same ratio that the total basis of all accounts receivable, as determined under Section 362(a), bears to the total face amount.

—IRS; Rev.Rul. 78-280, 7/24/78.

Complete liquidation of accrual method subsidiary, to which nonrecognition provisions of Internal Revenue Code Sections 332(a) and 336 apply for gain realized by subsidiary and distributee parent, results in income to subsidiary to extent that fair market value of accounts receivable, which is also distributee parent's basis in such receivables, exceeds face amount less reserve for bad debts.

The subsidiary was completely liquidated in a transaction in which the subsidiary and the distributee corporation recognized no gain or loss pursuant to Sections 336 and 332(a), respectively. The subsidiary had used the accrual method of accounting and the reserve method of treating bad debts. The basis of assets received by the distributee corporation in the liquidation, including accounts receivable, was determined under Section 334(b)(2), i.e., by reference to the adjusted basis of the subsidiary's stock in the hands of the transferee corporation, and the basis of the accounts receivable in this case was equal to fair market value. That amount exceeded the net value of the receivables, i.e., face amount less the amount of the reserve for bad debts. The additions to the reserve for bad debts had resulted in tax benefits in prior years.

The "tax benefit rule" applies to a transaction that is nontaxable under Sections 332, 334(b)(2), and 336. Where the consideration received in exchange for the transfer of the accounts receivable is equal to the net value of the accounts receivable, there is no recovery within the meaning of the tax benefit rule. Where the consideration received, however, is in excess of the net value of the receivables, the taxpayer has the burden to show that the amount of the excess is not a recovery of a tax benefit but rather is attributable to economic factors such as appreciation in value of interest bearing accounts receivable resulting from changes in prevailing interest rates. In this case, there is a recovery includable in the subsidiary's gross income to the extent that the consideration received exceeded the net value of the receivables.

—IRS; Rev.Rul. 78-278, 7/24/78.

Sale by accrual method corporation of accounts receivable pursuant to plan of complete liquidation under Section 337 of Internal Revenue Code results in income to extent amount received exceeds face amount of receivables less amount of reserve for bad debts.

The Supreme Court held in Nash v. U.S., 398 U.S. 1 (1970), that, where the consideration received in exchange for the transfer of accounts receivable by a taxpayer using the accrual method of accounting is equal to the net value of the accounts receivable (face amount less reserve for bad debts), there is no recovery within the meaning of the tax benefit rule. The Supreme Court in Nash agreed with the decision of the U.S. Court of Appeals for the Ninth Circuit in Estate of Schmidt v. Comr., 355 U.S. F.2d 111 (9th Cir. 1966), wherein the Ninth Circuit stated, in part, "We think that whether the sale be for cash or for stock, no income is received, unless the consideration received exceeds the net amount of the receivables." It is consistent with the Nash and Schmidt decisions to find a recovery where the consideration received for the accounts receivable is in excess of their net value.

—IRS; Rev.Rul. 78-279, 7/24/78.

NEWS IN BRIEF

Specialized Areas Of The Law Reviewed

The following summaries of decisional and other materials have been prepared for Law Week by the editors of BNA's specialized legal, labor, and environment and safety services. For a more detailed coverage, refer to the appropriate BNA service, as cited.

Antitrust and Trade Regulation

Agency Agenda. Following the spirit of President Carter's program of openness, the Federal Trade Commission for the first time has unveiled its semiannual agenda of expected reports and rules to emerge from the agency. 874 ATRR A-11, G-1.

0148-8139/78/$00.50

DRW-78-056-GB

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF PUBLIC WELFARE

In the Matter of the Proposed Adoption of Rules of the Department of Public Welfare Governing the Medical Assistance Program, Rule 47.	REPORT OF THE CHIEF HEARING EXAMINER

WHEREAS, a hearing was held on June 5, 1978, before George A. Beck, a Hearing Examiner of the State Office of Hearing Examiners, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, subd. 3, was issued to the Department of Public Welfare on June 29, 1978; and

WHEREAS, the Department of Public Welfare has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Department of Public Welfare has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, subd. 4, and Rule HE 107; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Department of Public Welfare has met all requirements of Minn. Stat. § 15.0412, subd. 4.

NOW, THEREFORE, upon receipt of this Report, the Department of Public Welfare has the responsibility of submitting the complete hearing record and the rules as adopted by the Department to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. § 15.0412, subd. 4.

Dated: August 4, 1978.

DUANE R. HARVES
Chief Hearing Examiner

DPW EXHIBIT NO. 14

DATE 6-5-78

NANCY J. DUEHN

AMENDMENT TO DEPARTMENT OF PUBLIC WELFARE
RULE 47 - MEDICAL ASSISTANCE

E. Services under the medical assistance program.

1. The following services are not covered under the MA program:

* * *

t. Abortion services unless specifically provided in subsection E 2 t of this rule.

* * *

2. The following services are covered under the MA program:

* * *

t. The cost of abortion services shall be paid only when the conditions under (1), (2), or (3) are met:

(1) The abortion is necessary to prevent the death of the mother. The cost of the abortion shall be covered only if the following documentation accompanies the provider's invoice to the state agency:

(a) The signed written statement of two physicians that it was their professional judgment that the abortion was necessary to prevent the death of the mother; and

(b) The signed written statement of the recipient that she voluntarily consented to the

abortion. In the event that the recipient is physically or legally incapable of providing informed consent, consent may be obtained as is otherwise provided by law.

(2) The abortion is to terminate a pregnancy which is the result of a sexual assault. The cost of the abortion shall be covered only if a report of the assault was made to a valid law enforcement agency within 48 hours of the time the assault occurred and a signed statement from the law enforcement agency accompanies the provider's invoice to the state agency. In the event the recipient was physically unable to make the report within 48 hours of the assault, the report must have been made within 48 hours after the recipient became physically able to make the report.

The statement of the law enforcement agency shall include the following information:

(a) The name of the victim; and
(b) The date of the alleged incident; and
(c) The date the report was made to the law enforcement agency; and
(d) The name and address of the person who signed the report to the law enforcement agency; and
(e) A statement by the law enforcement agency that the report alleges at least one of following:

(i) Circumstances existing at the time of the assault caused the recipient to have a reasonable fear of imminent great bodily harm to herself or to another.

(ii) The assailant was armed with a dangerous weapon or an article used or fashioned in a manner which led the recipient to reasonably believe it to be a dangerous weapon, and used or threatened to use the weapon or article to cause the complainant to submit.

(iii) The assailant caused personal injury to the complainant and used force or coercion to accomplish sexual penetration.

(iv) The assailant was aided or abetted by one or more accomplices and either:

(aa) An accomplice used force or coercion to cause the recipient to submit; or

(bb) An accomplice was armed with a dangerous weapon or an article used or fashioned in a manner to lead the complainant reasonably to believe it to be a dangerous weapon and used or threatened to use the weapon or article to cause the recipient to submit.

The provider's invoice shall also be accompanied by a statement, signed by the recipient, that her pregnancy resulted from the sexual assault reported, and a statement, signed by the recipient's physician, that in his/her professional opinion the length of the pregnancy at the time of the abortion was not inconsistent with the recipient's statement.

(3) The abortion is to terminate a pregnancy which is the result of incest. The cost of the abortion

shall be covered only if a report of incest was made to a valid law enforcement agency prior to the time of the abortion and a signed statement from the law enforcement agency accompanies the provider's invoice to the state agency. The statement shall include the following information:

(a) The name of the victim; and
(b) The date of the alleged incident; and
(c) The date the report was made to the law enforcement agency; and
(d) The name and address of the person who signed the report to the law enforcement agency; and
(e) A statement by the law enforcement agency that the name of the relative who allegedly committed incest with the victim appears in its report.

The provider's invoice shall also be accompanied by a statement, signed by the recipient, that her pregnancy resulted from the incest reported, and a statement, signed by the recipient's physician, that in his/her professional opinion the length of the pregnancy at the time of the abortion was not inconsistent with the recipient's statement.

(4) For the purposes of this subsection E 2 t only, the following definitions apply:

(a) "Abortion services": medical service performed for the purpose of terminating a pregnancy. This shall not be construed to include:

(i) drugs or devices which prevent implantation of the fertilized ovum; or

(ii) medical procedures necessary for the termination of an ectopic pregnancy.

(b) "Assailant": person who allegedly committed the sexual assault reported to the law enforcement agency.

(c) "Incest": sexual intercourse with another nearer in kin than first cousin, of the whole or half-blood.

(d) "Valid law enforcement agency": an agency charged under applicable law with enforcement of the general penal statutes of the United States, or of any state or local jurisdiction.

APPROVED AS TO FORM AND LEGALITY

AUG. 29 1978 19____

WARREN SPANNAUS, ATTORNEY GENERAL

BY Lee E. Shuby

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
AUG 29 1978
Joan Anderson Growe
Secretary of State

GAM

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

RECEIVED
APR 28 1978
OFFICE OF HEARING
EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE MEDICAL ASSISTANCE PROGRAM, RULE 47

ORDER FOR HEARING

IT IS HEREBY ORDERED that a public hearing on the above-captioned rule be held in the State Office Building, Room 83, Wabasha Street (between Aurora and Fuller, St. Paul, Minnesota, 55155, on June 5, 1978, commencing at 9:00 A.M. and continuing until all persons have had an opportunity to be heard.

IT IS FURTHER ORDERED that a Notice of Hearing be mailed to all persons or representatives of associations or other interested groups who have registered their names with the Secretary of State for that purpose.

IT IS FURTHER ORDERED that the Notice of Hearing be published in the State Register.

Edward J. Dirkswager Jr.

EDWARD J. DIRKSWAGER, JR.
Commissioner

Dated: April 13, 1978

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APR 28 1978
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE MEDICAL ASSISTANCE PROGRAM, RULE 47

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a public hearing in the above-entitled matter will be held in the State Office Building, Room 83, Wabasha Street (between Aurora and Fuller), St. Paul, Minnesota, 55155, on June 5, 1978, commencing at 9:00 A.M. and continuing until all persons have had an opportunity to be heard.

All interested or affected persons will have an opportunity to participate. Statements may be made orally and written materials may be submitted at the hearing. In addition, written materials may be submitted by mail to George Beck, Office of Hearing Examiners, 1745 University Avenue, St. Paul, Minnesota, 55104, (612) 296-8108, either before the hearing or within five working days after the public hearing ends, or for a longer period not to exceed 20 days if ordered by the hearing examiner.

The proposed amendments to Minn. Rule DPW 47 provide for Medical Assistance program payment for abortion services only when certain conditions are met. The proposed amendments, if adopted, would allow payment for abortion services only if the abortion is a medical necessity to prevent the death of the mother, if the pregnancy is the result of certain criminal sexual conduct, or if the pregnancy is the result of incest. The proposed amendments are needed in order to implement the limitations on Medical Assistance program payment for abortion services imposed by Ch. 508 Minn. Laws of 1978 and by 42 CFR §§ 449.100 through 449.109.

Copies of the proposed rule are now available and one free copy may be obtained by writing to Robert Randle, Director, Medical Assistance Program, 690 North Robert, St. Paul, Minnesota, 55164, (612) 296-8517. Additional copies will be available at the door on the date of the hearing. The agency's authority to promulgate the proposed rule is contained in Minn. Stat. § 256B.04. A "statement of need" explaining why the agency feels the proposed rule is necessary and a "statement of evidence" outlining the testimony they will be introducing will be filed with the Hearing Examiners Office at least 25 days prior to the hearing and will be available there for public inspection.

Please be advised that Minn. Stat. Chapter 10A, requires each lobbyist to register with the Ethical Practices Board within five days after he commences lobbying. Lobbying includes attempting to influence rule making by communicating or urging others to communicate with public officials. A lobbyist is generally any individual who spends more than $250 per year for lobbying or any individual who is engaged for pay or authorized to spend money by another individual or association and who spends more than $250 per year or five hours per month at lobbying. The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota, 55155, phone number (612) 296-5615.

EDWARD J. DIRKSWAGER, JR.
Commissioner

Dated: April 6, 1978

DPW Exhibit No. 7
File No. DPW-78-056-GD
HAO Date 6/5/78

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

RECEIVED
MAY 11 1978
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE MEDICAL ASSISTANCE PROGRAM, RULE 47

CERTIFICATE OF DELIVERY
SECRETARY
OF STATE'S
LIST

I hereby certify that the attached 487 labels, 4 sheets constitute the complete list of persons, associations, and other interested groups who as of 2:00 o'clock P .M. this 24th day of April, 1978, have requested pursuant to M. S. 1976 Sec. 15.0412, that their names be placed on file with the Secretary of State for the purpose of receiving notice of public hearing on proposed rules on the subject captioned above.

SECRETARY OF STATE

BY Cheri L. Mattson

DPW Exhibit No. 4
File No. DPW-78-056-6D
HAB Date 6/5/78

RECEIVED
MAY 11 1978
OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE MEDICAL ASSISTANCE PROGRAM, RULE 47

AFFIDAVIT OF RECEIPT OF THE SECRETARY OF STATE'S LIST

Diane Lynn Henderson, being duly sworn on oath deposes and says:

1) That she is an employee of the Special Services Division of the Department of Public Welfare for the State of Minnesota.

2) That on the 24 day of April, 1978, she went to the Secretary of State's office for the State of Minnesota and requested a current list of all representatives of associations or other interested groups or persons who had registered their names with the Secretary of State for the purpose of obtaining notices of public hearings relating to the promulgation of rules pursuant to M.S. 15.0412.

3) That on the 24 day of April, 1978, in response to the above request, the Secretary of State provided her with such a list, a copy of which is attached hereto and incorporated by reference.

Further affiant sayeth not.

Diane Henderson

Subscribed and sworn to before me

this 26 day of April

1978.

Margaret Holt

MARGARET HOLT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Sept. 22, 1984

DPW Exhibit No. 3
File No. DPW-78-056-GD
HWB Date 6/5/78

RECEIVED
MAY 11 1978
OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE MEDICAL ASSISTANCE PROGRAM, RULE 47

AFFIDAVIT OF MAILING

Diane Lynn Henderson, being first duly sworn, deposes and says:

That on the 26 day of April, 1978, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing by depositing in the United States mail at said City of St. Paul, a true and correct copy thereof, properly enveloped, with postage prepaid, to all persons and associations at the addresses listed on the attached Certificate of the Secretary of State.

Diane Henderson

Subscribed and sworn to before me this
26th day of April, 1978

Notary Public,
Ramsey County, Minnesota
My Commission expires Sept 22, 1984
Margaret Holt

MARGARET HOLT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Sept. 22, 1984

DPW Exhibit No. 5
File No. DPW-78-056-6B
HWD Date 6/5/78

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MAY 11 1978
OFFICE OF HEARING EXAMINERS

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE MEDICAL ASSISTANCE PROGRAM, RULE 47

AFFIDAVIT OF ADDITIONAL MAILING

Diane Lynn Henderson, being first duly sworn, deposes and says:

That on the 26 day of April, 1978, at the City of St. Paul, County of Ramsey, State of Minnesota, in addition to mailing the attached Notice of Hearing to all persons and associations listed on the Secretary of State's list, she also served the attached Notice of Hearing by depositing in the United States mail at said City of St. Paul, a true and correct copy thereof, properly enveloped, with postage prepaid to the following agencies:

All Minnesota County Welfare Departments
All Minnesota Human Service Boards
All Minnesota Area Mental Health Boards
All Minnesota State Hospitals
Legal, Police and Professional Medical Associations

Diane Henderson

Subscribed and sworn to before me
this 26th day of April
1978.

Margaret Holt

MARGARET HOLT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Sept. 22, 1984

ADMIN. 1000

STATE OF MINNESOTA

DEPARTMENT Attorney General

Office Memorandum

TO : George Beck, Hearing Examiner
Room 300, 1745 University Avenue

DATE: April 26, 1978

RECEIVED
APR 27 1978
OFFICE OF HEARING EXAMINERS

FROM : Beverly Jones Heydinger
Special Assistant Attorney General

SUBJECT: Notice of Hearing - Rule 47, Abortion Amendments

A Notice of Hearing and a copy of the proposed amendments regarding abortion funding have been sent to:

Minnesota Citizens Concerned for Life, Inc.
4803 Nicollet Avenue South
Minneapolis, Minnesota 55409

Women's Advocates
584 Grand Avenue
Minneapolis, Minnesota 55102

Midwest Health Center for Women
825 South Eighth Street
Minneapolis, Minnesota 55404
Attention: Administration

The Welfare Recipients Alliance is already on the Secretary of State's list and will receive a Notice of Hearing in the regular course of mailing. Perhaps these additional notices will help inform the public of the hearing and the regulations proposed.

BJH

/ph

RECEIVED
MAY 16 1978
OFFICE OF HEARING
EXAMINERS

These have been sent a copy of rule 47:

Minnesota Citizens Concerned for Life, Inc.
4803 Nicollet Avenue South
Minneapolis, Minnesota 55409

Women's Advocates
584 Grand Avenue
Minneapolis, Minnesota 55102

Midwest Health Center for Women
825 S. 8th Street
Minneapolis, Minnesota 55404
Attn: Administrator

DPW Exhibit No. 10
File No. DPW-78-056-GB
HAD Date 6/5/78

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MAY 11 1978
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE MEDICAL ASSISTANCE PROGRAM, RULE 47

STATEMENT OF EVIDENCE

In addition to the "Statement of Need" which is available for inspection or purchase at the office of Hearing Examiners, 1745 University Avenue, St. Paul, Minnesota 55104 and in support thereof, the Department of Public Welfare will introduce the following evidence:

Testimony will be presented explaining the legislative authorization for this amendment and the need for the proposed Rule.

We may call one or more of the following expert witnesses to testify:

Edward J. Dirkswager, Jr.
Commissioner
Department of Public Welfare

Robert C. Baird
Assistant Commissioner
Department of Public Welfare

Ronald C. Young, M.D.
(or his designee)
Medical Director
Department of Public Welfare

Robert G. Randle
Director
Medical Assistance Program
Department of Public Welfare

The above-named experts may explain the provisions of the proposed Rule and why these provisions are necessary and reasonable. Dr. Young or his designee may answer any questions on the medical aspects of the amendments. The Hearing Officer shall be immediately provided with the name of the designee if one is chosen to appear on behalf of Dr. Young.

We intend to introduce the following evidence:

State statutes and rules:

Minn. Stat. § 256B (amended, 1977)
Minn. Stat. § 609.342 (1976)
Minn. Stat. § 609.365 (1976)
Chapter 508, Minn. Laws of 1978
DPW Rule 47

State case law:

Doe v. Minnesota Department of Public Welfare, ___ Minn. ___, 257 N.W.2d 816 (Aug. 19, 1977)

McKee v. Likins, ___ Minn. ___, 261 N.W.2d 566 (Sept. 23, 1977)

Federal statutes and regulations:

Public Law 95-205
42 C.F.R. §§ 449.100 - .109
43 Fed. Reg. pp. 4832-4844 (Feb. 3, 1978)

Federal case law:

Beal v. Doe, ___ U.S. ___, 97 S.Ct. 2366, 53 L.Ed.2d 464 (June 20, 1977)

Maher v. Roe, ___ U.S. ___, 97 S.Ct. 2376 53 L.Ed.2d 484 (June 20, 1977)

Other:

Explanation of the Medicaid "By Report" Claims

Explanation of Medicaid Centralized Payments System

Dated: May 10, 1978

Edward J. Dirkswager, Jr.
Commissioner

DPW Exhibit No. 6
File No. DPW-78-056-GB
HAO Date 6/5/78

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

RECEIVED
MAY 25 1978
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE MEDICAL ASSISTANCE PROGRAM, RULE 47

SUPPLEMENT TO STATEMENT OF EVIDENCE

The Statement of Evidence dated May 10, 1978 and filed with the Office of Hearing Examiners 25 days before the hearing contains the following statement:

> "Dr. Young or his designee may answer any questions on the medical aspects of the amendments. The Hearing Officer shall be immediately provided with the name of the designee if one is chosen to appear on behalf of Dr. Young."

Below is listed the name of the designee who will appear on behalf of Dr. Young.

Dr. Richard Bendel
Department of Obstetries and Gynecology
Hennepin County Medical Center

DATED: May 23, 1978

EDWARD J. DIRKSWAGER, JR.

DPW Exhibit No. 9
File No. DPW-78-056-GR3
Date 6/5/78

RECEIVED
MAY 11 1978
OFFICE OF HEARING EXAMINERS

AMENDMENT TO DEPARTMENT OF PUBLIC WELFARE
RULE 47 - MEDICAL ASSISTANCE

STATEMENT OF NEED

The above-captioned rules are amendments to existing rules of the Department of Public Welfare. The last time the above-captioned rule was amended was March 13, 1978 (effective date).

The need to adopt the amended rule arises because of recent court decisions and changes in state and federal laws on abortion funding. On September 23, 1977, the Minnesota Supreme Court decided in McKee v. Likins, --- Minn. ---, 261 N.W.2d 566, that the policy of the Department of Public Welfare to fund therapeutic and non-therapeutic abortions was beyond its authority. The Court stated that the legislature was the proper forum to determine the conditions under which a woman's abortion would be covered by state Medical Assistance funds. From that time until the present the Department of Public Welfare has withheld payment for abortions to be covered by state funding.

The State Legislature passed new legislation for funding abortions with Medical Assistance funds and the bill was signed by Governor Perpich on March 21, 1978, effective July 1, 1978, Chap.

508 Minn. Law (1978). In part the new legislation amends the Medical Assistance Law, Chap. 256B of Minnesota Statutes. The proposed amendments to Rule 47 are necessary to insure that county agencies, Medical Assistance recipients and health care providers are familiar with the new restrictions and with the requirement for documentation necessary to establish that the abortion costs fall within the guidelines set by the Legislature. These amendments are necessary to insure that the Legislature's intent is carried out and that the health care provider entitled to funding knows what procedures must be followed prior to seeking reimbursement.

In addition, the amendments are necessary to bring the state requirements in line with the federal regulations promulgated by the United States Department of Health, Education and Welfare, which first appeared in the Federal Register on February 2, 1978. This will maximize the federal funds available to off-set the State's cost for such abortions. The Commissioner of Public Welfare is required by statute to:

> "(c)ooperate with the federal department of health, education and welfare in any reasonable manner as may be necessary to qualify for federal aid in connection with the medical assistance program, including the making of such reports in such form and containing such information as the department of health, education and welfare may, . . . require".

Sections E 1 a through s of Rule 47 list those services which are not reimbursable under the MA program. When Rule 47 was adopted in September 1977, all legal abortion services were reimbursable under the MA program. Because of the court rulings and legislative acts taken, payment for abortion services is to be restricted. It is therefore necessary to add proposed Section E 1 t to Rule 47 in order to specify that payment for abortion services is not available except in certain limited circumstances. See, Ch. 508 Minn. Laws of 1978, § 3.

Proposed subsection E 2 t specifies the circumstances under which abortion services will be reimbursable with MA funds. It requires that the provider submit documentation with each invoice for payment of abortion services. See subsections E 2 t (1), (2), and (3). This requirement is consistent with applicable Federal regulations which mandate that relevant documentation be received by the State Agency prior to payment for the abortion. 42 C.F.R. § 449.106. The requirement is also consistent with established procedures by which all Medical Assistance providers submit invoices directly to the State Agency. The documentation serves two purposes. First, it provides statements from persons who may be held accountable for the facts they assert in order to receive payment. Second, the documentation will be on file

with the State Agency if it is necessary for the Agency to verify its claims for federal financial participation. It is administratively most effective to require that those who wish to be reimbursed submit the documentation necessary for the purpose. The proposed procedure will insure that payment to the provider hinges on the provider's compliance with the procedures outlined in the amended rule, rather than on compliance by the county agency or individuals.

The Agency considered requiring the physician or woman to seek a prior authorization from the state or county before the abortion could be performed. This alternative was discarded because the prior authorization system is designed to check the desirability of a requested medical procedure rather than to check factual statements made in support of a provider's invoice.

Proposed subsections E 2 t (1), (2), and (3) specify the factual bases necessary for reimbursement with MA funds. Subsection t (1) provides for payment of abortion services when necessary to prevent the death of the mother. This subsection is consistent with applicable federal regulations, 42 C.F.R. § 449.103, and with Minn. Stat. Ch. 256B as amended by Ch. 508 Minn. Laws of 1978, § 2. Subsection E 2 t (1) (a) of the proposed rule requires that the signed written statements of two (2) physicians accompany each invoice submitted for medically necessary abortion

services. Each doctor shall state that in his/her opinion the abortion was necessary to prevent the death of the mother. The requirement is specifically authorized by Ch. 508 Minn. Laws of 1978, § 2. It is reasonable to leave this determination of medical necessity to the physicians' professional judgment. It would be virtually impossible to specify in Rule 47 every medical complication or circumstance that could make an abortion medically necessary to prevent the death of a pregnant woman. This determination is most appropriately made by the physician on a case-by-case basis, and is consistent with the decision of the Minnesota Supreme Court in Doe v. MDPW, --- Minn. ---, 257 N.W.2d 816 (1977). Subsection t (1) (b) requires that a signed written statement by the recipient showing her consent to the abortion procedure accompany each invoice submitted for medically necessary abortions. Such a signed statement is specifically required by Ch. 508 Minn. Laws of 1978, § 2, and is therefore a necessary amendment to Rule 47.

Proposed subsection t (2) provides for payment of abortion services when the pregnancy is the result of sexual assault. Payment to terminate such pregnancies is authorized by 42 C.F.R. § 449.105 and by Ch. 508 Minn. Laws of 1978, § 2. To be reimbursable, both federal regulations and state law require that the sexual assault be reported within 48 hours of its occurrence. Subsection

t (2) is therefore necessary and reasonable in order to comply with state law. In addition, applicable federal regulations require that the signed statement from the law enforcement agency indicate that the assault was reported within the applicable time period, and include the name, address and signature of the person who reported the incident. These requirements are contained in subsections (a), (b), (c), and (d) of subsection t (2) and are necessary to comply with federal regulations. State law also requires that the sexual assault be reported "for investigation". Subsection t (2) as proposed contains this requirement and is therefore reasonable and necessary. Note that the victim does not have to make the report herself, but the report must be made within 48 hours of the time when the victim is able to report. Thus, if the woman has been injured or is physically unable to report the incident, she has 48 hours from the time she becomes able to report or to tell others of the assault which may be reported on her behalf.

A statement by a valid law enforcement agency shall accompany the provider's invoice. The new state statute limits payment for sexual assault to those cases which would, if proven in a court of law against a known defendant, constitute criminal sexual conduct in the first degree. The proposed amendment does not require that the assailant be convicted of the alleged crime

in order for the abortion services to be reimbursable. The rule requires instead that the facts alleged, if proven, would constitute criminal sexual conduct as defined in Minn. Stat. § 609.342 (c), (d), (e), (i), or (f).

Note that "personal injury" as defined in Minn. Stat. § 609.341 (1976) is: "bodily harm . . ., or severe mental anguish or pregnancy." Therefore a woman who was forced to submit to a sexual assault resulting in pregnancy would have been the victim of criminal sexual conduct as required by the statute.

The statement by the law enforcement agency is necessary to verify the patient's request in order to prevent fraudulent claims. The woman who has been victimized should not hesitate to report the assault. If she makes the report in good faith she is entitled to payment for an abortion under the provision of the law. Similarly, the law enforcement agency need only verify that the report was made and is not to be held accountable should no criminal conviction result for criminal sexual conduct, first degree. It seems from the language of the statute that the legislature intended to minimize fraudulent claims by requiring a positive act in the form of a report for investigation. This section is needed to implement the law, and is not intended to burden the victim or the law enforcement agency any more than is required by the law.

Subsection t (3) is proposed in order to provide payment for abortion services when pregnancy is the result of incest. Payment in such circumstances is authorized by 42 C.F.R. § 449.105 and by Ch. 508 Minn. Laws of 1978, § 2. State law requires that the report be made prior to the abortion procedure.

In the case of either sexual assault (t (2)) or incest (t (3)), the proposed amendment requires that the provider submit statements signed by the recipient and her physician, stating their belief that the pregnancy was the result of the reported incident of sexual assault or incest. These signed statements are necessary in order to comply with state law which permits DPW to pay for abortion services if the pregnancy "is the result of" criminal sexual conduct or incest. It is not unreasonable to require the physician to offer a professional medical opinion that the approximate length of pregnancy is not inconsistent with the date the alleged sexual assault or incident of incest took place. The physician cannot establish conclusively that the pregnancy did result from the reported incident, hence no such conclusion is necessary. The opinion requested from the physician is that the length of pregnancy is consistent with the patient's statement. This will provide a reasonable degree of assurance that the pregnancy was the result of the sexual assault or incest reported.

Proposed subsection E 2 t (4) contains definitions necessary to clarify the meaning of the amended rule. The definitions are applicable to abortion funding only and are placed in this subsection to insure clarity.

The term "abortion services" does not include drugs or devices used to prevent implantation of the fertilized ovum, or medical procedures necessary to terminate an ectopic pregnancy. An ectopic pregnancy is an abnormal condition in which gestation occurs outside the uterus. An ectopic pregnancy can never continue to term but is an abnormality that must be medically treated. Drugs and devices to prevent implantation of the fertilized ovum are modes of treatment used before the fact of pregnancy is established and are clearly different from abortion procedures. Neither such drugs and devices, nor medical procedures necessary to terminate an ectopic pregnancy, are included within the scope of this proposed amendment and payment for them is not restricted by this subsection.

The definition of "abortion services" conforms to the definition contained in applicable federal regulations. Those regulations explicitly provide for continued funding for drugs or devices to prevent implantation of the fertilized ovum and for medical procedures necessary for the termination of an ectopic pregnancy, 42 C.F.R. § 449.107. The "Analysis" of the federal

regulation states:

> These items grouped together in a separate sentence, are clearly not abortions, but are merely matters related to pregnancy as to which Congress meant to indicate that the abortion ban did not extend.

43 Fed. Reg. 4837 (1978). Also a letter from the Attorney General of the United States, Griffin Bell, to Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, implies that such drugs and devices and procedures terminating ectopic pregnancies are " . . . non-abortion services for which Federal funding is available". 43 Fed. Reg. 4835 (1978).

Therefore, proposed subsections t (4) (a) (i) and (ii) are reasonable and necessary in order to clarify that payment for such non-abortion services is not affected by this proposed amendment to Rule 47.

The definition of "valid law enforcement agency" in subsection t (4) (b) is adopted from that used in applicable federal regulations.

The definition of "incest" is intended to reflect the criminal statute, Minn. Stat. § 609.365 (1976).

Each provision of this rule has been proposed with the intention of implementing the new legislation. The proposal is very detailed because of the complexity of the statute and the

need to document payments made by the state. The Agency has attempted to clarify as much as possible the unresolved issues raised by the statutory language. The Agency's intent is to pay for only the abortions falling within the limitations of the statute but, within those limitations, to pay for all abortions permitted by the statutory terms.

The Department of Public Welfare is fully aware of the burden the proposed rule will place on the patient, the provider, and to some extent on law enforcement agencies. The provisions are necessary, however, if the Agency is to make payment only under the circumstances approved by the legislature. The Agency believes it has an obligation to widely disseminate the requirements of the rule, if approved, in order to insure that those who may be eligible receive timely notice of the steps necessary to receive Medical Assistance funds. In addition, several law enforcement agencies have received a copy of the proposed amendments so that they will have the opportunity to comment on the administrative burden, if any, placed on them by the proposed provisions.

Dated: May 10, 1978

Edward J. Dirkswager, Jr.
Commissioner