

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

Our File No. 1186 05-0009-0874

RULE REVIEW CHECKLIST

DATE RULE RECEIVED 7-16-85
DATE FOR REVIEW
DATE DUE 7-30-85

Adopted w/a hearing
Adopted w/o hearing
Temporary rule ✓

Approved 7-30-85 mjc Disapproved Returned to Agency

Resubmitted Due
Approved Disapproved Returned to Agency

Date filed w/Secretary of State 7-31-85 Revisor approved 7/17/85 disapproved

---

✓ Rule as Adopted

✓ Rule as Proposed see SR.

✓ Order Adopting 7.15.85 Date

N/A Notice of Intent to Solicit Outside Opinion

✓ Order for rulemaking
N/A date of Hearing

N/A Certificate of Board's Authorizing Resolution

✓ Notice of rulemaking
✓ Sufficiency

✓ Affidavit of Mailing Notice or rulemaking
3.18.85 At least 30 days prior to ~~hearing~~/adoption
Aff. of Additional Mailing 25

✓ Mailing list Certificate

✓ Publication in State Register
3.25.85 At least ~~30~~/20 days prior to ~~hearing~~/adoption
25

N/A Hearing Examiner's Report

Chief Hearing Examiner's Report(s)
Approving H.E.'s Report
Approving agency action

✓ Agency's Findings of Fact

N/A LCRAR Report or agency Affidavit

Certificate of Board's Resolution Adopting Rules

Order Approving Incorporation by Reference

Statement of Need and Reasonableness

Petition for Adoption of a Rule

✓ Record (includes transcript or tape, exhibits, comments received by agency, requests for a hearing, and other relevant materials)

Certificate of Compliance w/Rulemaking Procedures

✓ Affidavit of Mailing Notice of Submission to Attorney General

✓ Notice of Submission to the Attorney General

✓ Comment to Atty. Gen.

→ increase in value of prop not recognized

→ want to prohibit increase in pymts solely as a result of Δ in ownership
→ does not allow Δ in depreciation, buyer is limited to purchase price which is seller's purchase price

→ concern is paying > once for same captal assets

→ freezes the basis
→ does not recognize depreciation basis

→ how would a sale primarily increase property reimbursement?

→ assets traditionally are valued at time of sale + are depreciated at buyers cost under generally accepted acctg. princpls

SF-00006-04

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT : Human Services

PHONE : 296-2794

DATE : July 15, 1985

TO : Judith Wehrwein
Office of the Attorney General

FROM : Bob Hamper, Rules Unit
BH

SUBJECT : Review of Temporary Rule 12 MCAR §§ 2.05301-2.05315

Enclosed is the rule file for 12 MCAR §§ 2.05301-2.05315 [Temporary], to be reviewed under the requirements of Minnesota Rules, part 2000.0500.

Please note that there are no changes from the proposed rule published in the State Register to the rule proposed for adoption.

Gary Van Cleve (296-2418) is the attorney representing the Department on this rule and Rosemary Chapin (297-1488) is the rulemaker on this rule.

RECEIVED
JUL 16 1985
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

SF-00006-03

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO: LEONARD LEVINE, Commissioner
Department of Human Services

DATE: 7-31-85

ATTN: BEVERLY JONES HEYDINGER
Assistant Attorney General

FROM: MARTHA J. CASSERLY MJC
Special Assistant Attorney General

PHONE: 296-4692

SUBJECT: In the Matter of the Proposed Adoption of Proposed Temporary Amendments to Rules for Determining Welfare Per Diem Rates for ICF/MR Facilities 12 MCAR 2.05301-2.05315.

The above-referenced rule has been approved as to its legality by the Attorney General on July 30, 1985.

Enclosed is the agency's copy of the approved rule. This office has already filed two copies of the approved rule with the Secretary of State, who will forward one copy to the Revisor of Statutes. The fourth copy is being retained by this division of the Attorney General's Office for its records.

Also enclosed are any petitions, requests, submission or comments received by the agency and any extra copies of documents which the agency submitted to the Attorney General.

In order for a permanent rule without a hearing to become effective, your agency must publish a notice of adoption in the State Register in accordance with Minn. Stat. § 14.27. An emergency rule becomes effective five working days after approval by the Attorney General; however, the agency must publish a notice in the State Register in accordance with Minn. Stat. § 14.34.

If you have any questions in this regard, please contact me.

MJC:sz

Enclosures

cc: Maryanne Hruby
Executive Director
Legislative Commission to Review
Administrative Rules

Duane Harves
Chief Administrative Law Judge
Office of Administrative Hearings

Department of Human Services

Adopted Temporary Rules Relating to Intermediate Care Facilities for the Mentally Retarded

Temporary Rules as Adopted

12 MCAR S 2.05302 [Temporary] Definitions.

A. to R. [Unchanged.]

S. Historical capital costs. "Historical capital costs" means:

1. [Unchanged.]

2. for a capital asset first placed in use in the medical assistance program prior to January 1, 1984, the cost incurred to construct or purchase the capital asset by the person or entity owning the capital asset on or before December 31, 1983.

T. to UU. [Unchanged.]

12 MCAR S 2.05304 [Temporary] Determination of property-related cost payment rate.

A. Depreciation. Allowable depreciation expense shall be determined as in 1.-11.

1. Basis for calculating depreciation. The basis for calculating depreciation shall be the historical capital cost of the capital assets determined under a.-c.

a. [Unchanged.]

b. For a capital asset first placed in use in the medical assistance program prior to January 1, 1984, the cost incurred to construct or purchase the capital asset by the person or entity owning the capital asset on or before December 31, 1983.

c. The historical capital cost of the capital assets shall not be adjusted for either a full or partial change of ownership or for any costs associated with replacing existing capital assets as a result of a casualty loss.

2. to 9. [Unchanged.]

10. No depreciation shall be recaptured following a sale

of an asset or termination from the medical assistance program.

11. [Unchanged.]

B. to F. [Unchanged.]

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
JUL 31 1985
Joan Anderson Growe
Secretary of State

10:10 AM

APPROVED AS TO FORM AND LEGALITY
July 30 1985
HUBERT H. HUMPHREY, III
ATTORNEY GENERAL
BY MJ Cassedy
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF THE PROPOSED ADOPTION OF PROPOSED TEMPORARY AMENDMENTS TO RULES FOR DETERMINING WELFARE PER DIEM RATES FOR ICF/MR FACILITIES 12MCAR 2.05301-2.05315

ORDER ADOPTING TEMPORARY AMENDMENTS

The above-entitled matter was published in the State Register on March 25, 1985, as proposed amendments to temporary rules pursuant to Minnesota Statutes, 1983 sections 14.29 - 14.36.

After affording interested and affected persons an opportunity to submit written data and views within 25 days of the publication date, reviewing and considering the data and views, and determining that the above-captioned amendments are needed and reasonable,

NOW, THEREFORE, IT IS ORDERED that the amendments to the rules identified as Rules for Determing Welfare Per Diem Rates for ICF/MR facilities 12MCAR 2.05301-2.05315 are adopted the 15th day of July, 1985.

STATE OF MINNESOTA

Albert Hanzal for

COMMISSIONER OF HUMAN SERVICES

Len Levine

STATE OF MINNESOTA

DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Temporary Rules of the State of Minnesota, Department of Human Services Governing Rates for Intermediate Care Facilities for the Mentally Retarded

ORDER FOR PUBLICATION OF TEMPORARY RULES

IT IS ORDERED this 11th day of March, 1985, that the proposed temporary rules in the above-entitled matter be published in the State Register.

IT IS FURTHER ORDERED that notice of said hearing be given to all persons who have registered their names with the State Department of Human Services for that purpose and be published in the State Register.

STATE OF MINNESOTA

LEONARD W. LEVINE, Commissioner
Department of Human Services

STATE OF MINNESOTA

DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Department of Human Services Temporary Rules Governing Rates for Intermediate Care Facilities for the Mentally Retarded

NOTICE OF INTENT TO ADOPT TEMPORARY AMENDMENTS

The State Department of Human Services proposes to adopt the above-entitled temporary amendments to rules 12 MCAR SS 2.05301 - 2.05315 [Temporary] to amend in accordance with Laws of Minnesota 1984, Chapter 640, Section 28 the temporary rules authorized by Laws of Minnesota 1983, Chapter 312.

Persons interested in these temporary amendments have until 4:30 p.m. on April 19, 1985 to submit written comments. The proposed temporary amendments may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language. Written comments should be sent to:

Rosemary Chapin
Department of Human Services
6th Floor, Space Center
St. Paul, Minnesota 55155

Upon adoption of these temporary amendments, this notice, all written comments received, and the adopted temporary rules will be delivered to the Attorney General and to the Revisor of Statutes for review as to form and legality.

Notice of the date of submission of the proposed temporary amendments to the attorney general will be mailed to any person requesting to receive this notice. The Attorney General shall approve or disapprove the proposed temporary amendments and any modifications on the tenth working day following the date of receipt of the proposed temporary amendments from the agency.

The adopted temporary amendments will not become effective without the Attorney General's approval and the Revisor of Statutes' certification of the temporary amendments' form. Temporary amendments take effect five working days after approval by the Attorney General.

As required by the Administrative Procedures Act, Minnesota Statutes, chapter 14, these temporary amendments shall be in effect for up to 180 days following their adoption and may be continued in effect for up to 180 additional days if the commissioner gives notice of continuation by publishing notice in the State Register and mailing the same notice to all persons registered with the commissioner to receive notice of rulemaking proceedings. The temporary amendments shall not be effective 360 days after their effective date without following the procedures in Minnesota Statutes, sections 14.13 to 14.20.

The purpose of the proposed amendment is to bring the provisions of 12 MCAR SS 2.05301 - 2.05315 [Temporary] into compliance with section 2314 of the Deficit Reduction Act (DEFRA) of 1984.

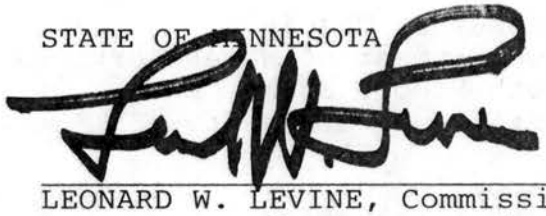
DEFRA amends the federal requirements regarding reimbursement under Medicaid and Medicare for capital related costs. The federal Medicaid revision which adds section 1902 (A) (13) (B) to the Act, specifies that a State must provide assurances satisfactory to the Secretary that the payment methodology utilized by the State for payments to hospitals, skilled nursing facilities and intermediate care facilities can reasonably be expected not to increase such payments, solely as a result of a change of ownership, in excess of the increase which would result from the application of the Medicare requirements at section 1861 (v) (1) (O) of the Act.

Rules 12 MCAR SS 2.05301 - 2.05315 [Temporary] determine welfare per diem rates for ICF/MR facilities. The temporary amendments delete those sections of the rule which are out of compliance with section 2314 of the Deficit Reduction Act of 1984.

These temporary amendments will not result in any additional state or county spending beyond the amount of funds appropriated by the legislature.

A free copy of the proposed temporary amendments may be obtained by contacting Rosemary Chapin at (612) 297-1488.

STATE OF MINNESOTA



LEONARD W. LEVINE, Commissioner
Department of Human Services

STATE OF MINNESOTA

DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF THE PROPOSED
ADOPTION OF DEPARTMENT OF HUMAN
SERVICES TEMPORARY RULES GOVERNING
RATES FOR INTERMEDIATE CARE
FACILITIES FOR THE MENTALLY RETARDED

AFFIDAVIT OF
ADDITIONAL MAILING

Ann M. Berg, being first duly sworn, deposes and says:

That on the 20th day of March, 1985, at the City of St. Paul, County of Ramsey, State of Minnesota, in addition to serving the attached Notice of Intent to Adopt Temporary Amendments to all persons and associations who have requested that their names be placed on file for the purpose of receiving notice of the proposed adoption of rules by this Department, she also served the Attached Notice by depositing in the State of Minnesota Central Mail System for first class mailing, a copy thereof, properly enveloped, with postage prepaid, to the following agencies:

-400 Intermediate Care Facilities for the Mentally Retarded and Accountants; and
-the Rule 53 Advisory Committee and other interested parties (see attached list)

Ann M. Berg

Subscribed and sworn to before me

this 20 day of March 1985.

Claudia A. Eliason

CLAUDIA A. ELIASON
NOTARY PUBLIC-MINNESOTA
WASHINGTON COUNTY
MY COMMISSION EXPIRES NOVEMBER 15, 1990

Rule 53 Advisory Committee

Bob Van Slyke, Administrator
Greenbrier Home, Inc.
941 Birmingham St.
St. Paul, MN 55106

Cliff Fox, Vice President
Lutheran Social Services
2414 Park Ave.
Mpls., MN 55404

Sharon Kannenberg
Group Homes of Winona
377 Main St.
Winona, MN 55987

W. Scott Wallace, CPA
Suite 210, Oakwood Square
2489 Rice St.
St. Paul, MN 55113

Rick Amado
2008 Villard Ave.
St. Paul, MN 55116

Mike Corman, Supervisor
Mental Retardation Services
Dakota County Social Services
357 9th Ave. N.
South St. Paul, MN 55075

Don Gullingsrud
Dept. of Economic Assistance
Hennepin County Social Services
A-900 Government Center
Mpls., MN 55487

Georgine Busch
750 Hague
St. Paul, MN 55104

Al Alexander, 2FE149
First Bank of Minneapolis
First Bank Place
Minneapolis, MN 55480

Merlyn Larson, Director
Hammer Residence, Inc.
1909 Wayzata Boulevard
Wayzata, MN 55391

Emil Angelica, Exec. Director
MN ARC
3225 Lyndale Ave. S.
Mpls., MN 55408

Mary Martin
ARRM
1102 Grand Ave.
St. Paul, MN 55105

Jon Thompson, Administrator
Jones-Harrison Home
3700 Cedar Lake Ave.
Mpls., MN 55416

Glenn Johnson
Isanti Courthouse
Cambridge, MN 55008

Minnesota Business Partnership, Inc.
IDS Center Building
80 8th St. S.
Mpls., MN 55402

Donald Strei
Sherburne County Welfare Dept.
13880 Highway 10
P.O. Box 34
Elk River, MN 55330

Public

Supplemental Mailing List

Milton Bartsch
6450 York Ave. S.
Mpls., MN 55435

Stephanie Gilman
Deloitte, Haskins & Sells
Suite 1000, 625 4th Ave. S.
Mpls., MN 55415

Luther Granquist
Legal Advocacy for Developmentally Disabled Persons in MN
222 Grain Exchange Building
Mpls., MN 55413

Ron Fine
MAHCF
2850 Metro Drive
Bloomington, MN 55420

Staff

Maria Gomez
4th Floor
COB

Chuck Osell
4th Floor
COB

David Doth
4th Floor
COB

Cindy Becker
4th Floor
COB

Lisa Rotegard
4th Floor
COB

Jane Delage

Rule 53.
Supplemental Mailing
List continuted

Michael Scandrett
123 Capitol, Senate Counsel

Dave Buelow
Legislature
121 State Capitol

Dave Giel, Senate Research
125 Capitol

Rep. John Clawson
287 State Office Building
St. Paul

Jeanne Danaher
Legislature
529 State Office

Gary Bleichner
225 State Office Building

Cathy Lamp
Legislature
17 Capitol

Roger Guennigsman
286 State Office Building

Marcie Jefferys
430B State Office

Allan Baumgarten
Office of the Legislative
Auditor
1st Floor, Veterans Service
Building

Maureen Bellis
legislature
17 Capitol

Tim Leahy
250 State Office Building

Representative Ann Wynia
249 State Office Building

Gary Van Cleve
Office of the Attorney General
5th Floor, Transportation
Building

Sue Haugen
MHFA
333 Sibley Street
St. Paul, MN 55101

Jim Horan
REM
4921 York Ave S.
Edina, MN 55435

Dr. Norman Tempel
1125 SE Sixth St.
West Central Community
Services Center
Willmar, MN 56201

STATE OF MINNESOTA

DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Department of Human Services Temporary Rules Governing Rates for Intermediate Care Facilities for the Mentally Retarded

NOTICE OF INTENT TO ADOPT TEMPORARY AMENDMENTS

The State Department of Human Services proposes to adopt the above-entitled temporary amendments to rules 12 MCAR SS 2.05301 - 2.05315 [Temporary] to amend in accordance with Laws of Minnesota 1984, Chapter 640, Section 28 the temporary rules authorized by Laws of Minnesota 1983, Chapter 312.

Persons interested in these temporary amendments have until 4:30 p.m. on April 19, 1985 to submit written comments. The proposed temporary amendments may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language. Written comments should be sent to:

Rosemary Chapin
Department of Human Services
6th Floor, Space Center
St. Paul, Minnesota 55155

Upon adoption of these temporary amendments, this notice, all written comments received, and the adopted temporary rules will be delivered to the Attorney General and to the Revisor of Statutes for review as to form and legality.

Notice of the date of submission of the proposed temporary amendments to the attorney general will be mailed to any person requesting to receive this notice. The Attorney General shall approve or disapprove the proposed temporary amendments and any modifications on the tenth working day following the date of receipt of the proposed temporary amendments from the agency.

The adopted temporary amendments will not become effective without the Attorney General's approval and the Revisor of Statutes' certification of the temporary amendments' form. Temporary amendments take effect five working days after approval by the Attorney General.

As required by the Administrative Procedures Act, Minnesota Statutes, chapter 14, these temporary amendments shall be in effect for up to 180 days following their adoption and may be continued in effect for up to 180 additional days if the commissioner gives notice of continuation by publishing notice in the State Register and mailing the same notice to all persons registered with the commissioner to receive notice of rulemaking proceedings. The temporary amendments shall not be effective 360 days after their effective date without following the procedures in Minnesota Statutes, sections 14.13 to 14.20.

The purpose of the proposed amendment is to bring the provisions of 12 MCAR SS 2.05301 - 2.05315 [Temporary] into compliance with section 2314 of the Deficit Reduction Act (DEFRA) of 1984.

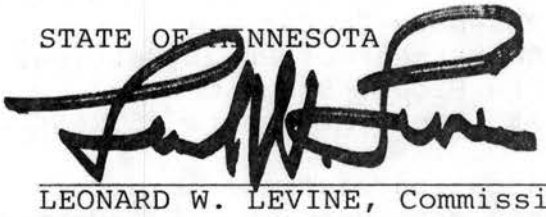
DEFRA amends the federal requirements regarding reimbursement under Medicaid and Medicare for capital related costs. The federal Medicaid revision which adds section 1902 (A) (13) (B) to the Act, specifies that a State must provide assurances satisfactory to the Secretary that the payment methodology utilized by the State for payments to hospitals, skilled nursing facilities and intermediate care facilities can reasonably be expected not to increase such payments, solely as a result of a change of ownership, in excess of the increase which would result from the application of the Medicare requirements at section 1861 (v) (1) (O) of the Act.

Rules 12 MCAR SS 2.05301 - 2.05315 [Temporary] determine welfare per diem rates for ICF/MR facilities. The temporary amendments delete those sections of the rule which are out of compliance with section 2314 of the Deficit Reduction Act of 1984.

These temporary amendments will not result in any additional state or county spending beyond the amount of funds appropriated by the legislature.

A free copy of the proposed temporary amendments may be obtained by contacting Rosemary Chapin at (612) 297-1488.

STATE OF MINNESOTA



LEONARD W. LEVINE, Commissioner
Department of Human Services

Temporary Rules as Proposed

12 MCAR S 2.05302 [Temporary] Definitions.

A. to R. [Unchanged.]

S. Historical capital costs. "Historical capital costs" means:

1. [Unchanged.]

2. for a capital asset first placed in use in the medical assistance program prior to January 1, 1984, the cost incurred to construct or purchase the capital asset by the person or entity owning the capital asset on or before December 31, 1983, ~~except as provided in 12 MCAR S 2.05304 [Temporary] A.1.d.~~

T. to UU. [Unchanged.]

12 MCAR S 2.05304 [Temporary] Determination of property-related cost payment rate.

A. Depreciation. Allowable depreciation expense shall be determined as in 1.-11.

1. Basis for calculating depreciation. The basis for calculating depreciation shall be the historical capital cost of the capital assets determined under ~~a.-d.~~ a.-c.

a. [Unchanged.]

b. For a capital asset first placed in use in the medical assistance program prior to January 1, 1984, the cost incurred to construct or purchase the capital asset by the person or entity owning the capital asset on or before December 31, 1983, ~~except as provided in d.~~

c. The historical capital cost of the capital assets shall not be adjusted for either a full or partial change of ownership or for any costs associated with replacing existing capital assets as a result of a casualty loss ~~except as provided in d.~~

~~d. The historical capital cost of the capital assets shall be adjusted for a change in ownership which occurs as a result of the death or disability of a principal owner who has a 50 percent or more ownership interest in the facility. This provision does not apply where the property is transferred to a~~

APPROVED IN THE REVISOR OF STATUTES OFFICE BY:

~~close-relative-or-a-related-organization-as-defined-in-12-MCAR-S 2.05302-bb.--Disability-means-the-situation-in-which-a-principal owner-is-mentally-or-physically-incapacitated-to-such-a-degree that-he-or-she-is-unable-to-carry-out-responsibility-as-an owner.--The-adjustment-shall-be-made-pursuant-to-regulations-in effect-on-December-31,-1983.~~

2. to 9. [Unchanged.]

10. No depreciation shall be recaptured following a sale of an asset or termination from the medical assistance program ~~except-for-transfers-of-ownership-allowed-under-A.1.d.-Recapture of-depreciation-for-transfers-of-ownership-allowed-under-A.1.d. shall-be-calculated-according-to-rules-and-regulations-in-effect on-December-31,-1983.~~

11. [Unchanged.]

B. to F. [Unchanged.]

APPROVED BY THE REVISOR OF STATUTES OFFICE BY:

OFFICE OF THE REVISOR OF STATUTES

Proposed Rule

RD727

Agency: Department of Human Services

Division:

Agency Contact: Rosemary Chapin

Rule Numbers: 12 MCAR S 2.05302 [Temporary]
12 MCAR S 2.05304 [Temporary]

Title: Proposed Temporary Rules Relating to Intermediate Care Facilities for the Mentally Retarded

Type of Rules: Temporary

Incorporations by Reference: None

Steven C. Cross
Revisor of Statutes

Susan M. Lentsch
Assistant Revisor
Phone: 296-0956
Date: March 1, 1985

STATE OF MINNESOTA

DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF THE PROPOSED ADOPTION OF DEPARTMENT OF HUAMN SERVICES TEMPORARY RULES GOVERNING RATES FOR INTERMEDIATE CARE FACILITIES FOR THE MENTALLY RETARDED

AFFIDAVIT OF MAILING

Ann M. Berg, being first duly sworn, deposes and says:

That on the 18th day of March, 1985, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the Attached Notice of Intent to Adopt Temporary Amendments by depositing in the State of Minnesota Central Mail System for first class mailing, a copy thereof, properly enveloped, with postage prepaid, on all persons and associations who have requested that their names be placed on file with the Department of Human Services for the purpose of receiving notice of the proposed adoption of rules by this Department.

Ann M. Berg

Subscribed and sworn to before me

this 18 day of March 1985.

Claudia A. Eliason

CLAUDIA A. ELIASON
NOTARY PUBLIC-MINNESOTA
WASHINGTON COUNTY
MY COMMISSION EXPIRES NOVEMBER 15, 1990

STATE OF MINNESOTA

DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF THE PROPOSED ADOPTION
OF DEPARTMENT OF HUMAN SERVICES TEMPORARY
RULES GOVERNING RATES FOR INTERMEDIATE
CARE FACILITIES FOR THE MENTALLY RETARDED

CERTIFICATE

I hereby certify that the list of persons, associations, and other interested groups who have requested, pursuant to Minn. Stat. S. 14.14, subd. 1, that their names be placed on file with and maintained by the Department of Human Services for the purpose of receiving notice of the proposed adoption of rules by this Department is accurate and complete as of 12:00 a.m., this 18th day of March, 1985.

Ann M. Berg

Department of Human Services

Proposed Temporary Rules Relating to Intermediate Care Facilities for the Mentally Retarded

Notice of Intent to Adopt Temporary Amendments

The State Department of Human Services proposes to adopt the above-entitled temporary amendments to rules 12 MCAR §§ 2.05301-2.05315 [Temporary] to amend in accordance with Laws of Minnesota 1984, Chapter 640, Section 28 the temporary rules authorized by Laws of Minnesota 1983, Chapter 312.

Persons interested in these temporary amendments have until 4:30 p.m. on April 19, 1985 to submit written comments. The proposed temporary amendments may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language. Written comments should be sent to:

Rosemary Chapin
Department of Human Services
6th Floor, Space Center
St. Paul, Minnesota 55155

Upon adoption of these temporary amendments, this notice, all written comments received, and the adopted temporary rules will be delivered to the Attorney General and to the Revisor of Statutes for review as to form and legality.

Notice of the date of submission of the proposed temporary amendments to the attorney general will be mailed to any person requesting to receive this notice. The Attorney General shall approve or disapprove the proposed temporary amendments and any modifications on the tenth working day following the date of receipt of the proposed temporary amendments from the agency.

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The purpose of the proposed amendment is to bring the provisions of 12 MCAR §§ 2.05301-2.05315 [Temporary] into compliance with section 2314 of the Deficit Reduction Act (DEFRA) of 1984.

DEFRA amends the federal requirements regarding reimbursement under Medicaid and Medicare for capital related costs. The federal Medicaid revision which adds section 1902 (A) (13) (B) to the Act, specifies that a State must provide assurances satisfactory to the Secretary that the payment methodology utilized by the State for payments to hospitals, skilled nursing facilities and intermediate care facilities can reasonably be expected not to increase such payments, solely as a result of a change of ownership, in excess of the increase which would result from the application of the Medicare requirements at section 1861 (v) (1) (O) of the Act.

Rules 12 MCAR §§ 2.05301-2.05315 [Temporary] determine welfare per diem rates for ICF/MR facilities. The temporary amendments delete those sections of the rule which are out of compliance with section 2314 of the Deficit Reduction Act of 1984.

These temporary amendments will not result in any additional state or county spending beyond the amount of funds appropriated by the legislature.

A free copy of the proposed temporary amendments may be obtained by contacting Rosemary Chapin at (612) 297-1488.

Leonard W. Levine, Commissioner
Department of Human Services

Temporary Rules as Proposed

12 MCAR § 2.05302 [Temporary] Definitions.

A. to R. [Unchanged.]

S. Historical capital costs. "Historical capital costs" means:

1. [Unchanged.]

2. for a capital asset first placed in use in the medical assistance program prior to January 1, 1984, the cost incurred to

construct or purchase the capital asset by the person or entity owning the capital asset on or before December 31, 1983~~, except as provided in 12 MCAR § 2.05304 [Temporary] A.1.d~~.

T. to UU. [Unchanged.]

12 MCAR § 2.05304 [Temporary] Determination of property-related cost payment rate.

A. Depreciation. Allowable depreciation expense shall be determined as in 1.-11.

1. Basis for calculating depreciation. The basis for calculating depreciation shall be the historical capital cost of the capital assets determined under ~~a.-d.~~ a.-c.

a. [Unchanged.]

b. For a capital asset first placed in use in the medical assistance program prior to January 1, 1984, the cost incurred to construct or purchase the capital asset by the person or entity owning the capital asset on or before December 31, 1983~~, except as provided in d~~.

c. The historical capital cost of the capital assets shall not be adjusted for either a full or partial change of ownership or for any costs associated with replacing existing capital assets as a result of a casualty loss ~~except as provided in d~~.

~~d. The historical capital cost of the capital assets shall be adjusted for a change in ownership which occurs as a result of the death or disability of a principal owner who has a 50 percent or more ownership interest in the facility. This provision does not apply where the property is transferred to a close relative or a related organization as defined in 12 MCAR § 2.05302 LL. Disability means the situation in which a principal owner is mentally or physically incapacitated to such a degree that he or she is unable to carry out responsibility as an owner. The adjustment shall be made pursuant to regulations in effect on December 31, 1983.~~

2. to 9. [Unchanged.]

10. No depreciation shall be recaptured following a sale of an asset or termination from the medical assistance program ~~except for transfers of ownership allowed under A.1.d. Recapture of depreciation for transfers of ownership allowed under A.1.d. shall be calculated according to rules and regulations in effect on December 31, 1983~~.

11. [Unchanged.]

B. to F. [Unchanged.]

ADOPTED RULES

The adoption of a rule becomes effective after the requirements of Minn. Stat. § 14.14-14.28 have been met and five working days after the rule is published in *State Register*, unless a later date is required by statutes or specified in the rule.

If an adopted rule is identical to its proposed form as previously published, a notice of adoption and a citation to its previous *State Register* publication will be printed.

If an adopted rule differs from its proposed form, language which has been deleted will be printed with strikeouts and new language will be underlined. The rule's previous *State Register* publication will be cited.

An emergency rule becomes effective five working days after the approval of the Attorney General as specified in Minn. Stat. § 14.33 and upon the approval of the Revisor of Statutes as specified in § 14.36. Notice of approval by the Attorney General will be published as soon as practicable, and the adopted emergency rule will be published in the manner provided for adopted rules under § 14.18.

Department of Commerce

Adopted Rules Governing Credit Unions

The rules proposed and published at *State Register*, Volume 9, Number 17, pages 816-822, October 22, 1984 (9 S.R. 816) and Volume 9, Number 29, pages 1606-1607, January 14, 1985 (9 S.R. 1606) are adopted as proposed.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

STATE OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF THE PROPOSED ADOPTION OF PROPOSED TEMPORARY AMENDMENTS TO RULES FOR DETERMINING WELFARE PER DIEM RATES FOR ICF/MR FACILITIES 12MCAR 2.05301-2.05315 (TEMPORARY)

FINDINGS OF FACT AND CONCLUSIONS

Notice of the Commissioner's intent to adopt proposed temporary amendments to the above-entitled temporary rules was published in the State Register on March 25, 1985, and was sent by United States mail to all persons on the list maintained by the agency pursuant to Minnesota Statutes section 14.14, subdivision 1 on March 18, 1985. After affording interested and affected persons an opportunity to submit comments for 25 days after publication, reviewing and considering the comments, and having determined that the above-captioned rule is needed and reasonable, I find the following: The proposed temporary amendments will be adopted as published in the State Register on March 25, 1985.

CONCLUSIONS

I hereby conclude that:

1. The Commissioner has statutory authority to promulgate these amendments.

2. Proper notice of the Department's intent to adopt the proposed above-captioned temporary amendments to the temporary rules was given as required by law, and all interested persons were afforded an opportunity to submit data and views on the proposed temporary amendments.

3. Any duplication in these rules of language contained in Minnesota Statutes is crucial to the ability of persons affected by the rules to comprehend their meaning and effect.

4. The temporary amendments, as modified, are necessary and reasonable.

5. The Department has complied with all applicable provisions of law and rule in the promulgation of these temporary amendments.

DATED: 7-15-85

STATE OF MINNESOTA

Albert Hangal for

LEONARD W. LEVINE, COMMISSIONER
Department of Human Services

Rule #1186 DO NOT SEND BACK TO Agency

DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration

Refer to: G9

Region V
175 West Jackson Boulevard
Chicago, IL 60604

June 24, 1985



Honorable Rudy Boschwitz
United States Senator
210 Bremer Building
419 North Robert Street
St. Paul, Minnesota 55101

Dear Senator Boschwitz:

RE: File No. 5158150007

This is in response to your inquiry on behalf of Mary K. Martin, Attorney at Law, St. Paul, Minnesota. The inquiry relates to Section 2314 of the Deficit Reduction Act (DRA) of 1984.

As noted in Ms. Martin's letter, Section 2314 of the DRA of 1984 restricts the revaluation of assets of hospitals and nursing homes upon change of ownership. This provision requires the valuation of the asset after change of ownership to be the lesser of the allowable acquisition cost of such asset to the first owner of record on or after the date of the enactment of this Section of the DRA or the acquisition of such asset to the new owner. This provision applies to all long term care facilities including institutions for the mentally retarded. The statute did not allow the Health Care Financing Administration to waive the requirements of the Section. Therefore, any modification to the statute would require a change in the law.

We appreciate your interest in the Medicaid program.

Sincerely,

Martin D. Stanton

for Barbara J. Gagel
Regional Administrator

Enclosure

cc: Robert Baird, Minnesota Dept. of Human Services

PETE V. DOMENICI, N. MEX., CHAIRMAN

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RICHARD N. BRANDON, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON THE BUDGET
WASHINGTON, D.C. 20510

June 7, 1985

Our File: 5158150007

Regional Medicare Director
Suite A-824
175 W. Jackson Blvd.
Chicago, Illinois 60604

Dear Director:

Because of the desire of this office to be responsive to all inquiries and communications, your consideration of the attached is requested.

YOUR FINDINGS AND VIEWS, IN DUPLICATE, ALONG WITH RETURN OF THIS MEMO PLUS ENCLOSURE, WILL BE APPRECIATED.

Please refer to the constituent name and file number.

Reply to:

Senator Rudy Boschwitz
210 Bremer Bldg.
419 N. Robert Street
St. Paul, MN 55101

Many thanks.

Sincerely,

Rudy Boschwitz
United States Senator

RB/bb
Enclosure

MARY K. MARTIN
ATTORNEY AT LAW
1102 GRAND AVENUE
ST. PAUL, MINNESOTA 55105

TELEPHONE 612 - 224-5079

JUN 06 1985

June 3, 1985

Senator Rudy Boschwitz
210 Bremer Building
419 Robert Street North
St. Paul, Minnesota 55101

Dear Senator Boschwitz:

I am writing on behalf of my client, Forestview Community Homes, Inc. to request your assistance regarding the scope of Section 2314 of the Deficit Reduction Act of 1984 (DEFRA).

Forestview Community Homes, Inc. has owned and operated seven six-bed ICF/MR group homes for mentally handicapped children and adults since November of 1973. Forestview is well-known throughout the State for its quality services to people with handicaps.

Two of Forestview's three owners lost their lives in the recent Galaxy Airline disaster. The two deceased stockholders played an important role in the operation of the programs. Because of this loss, the remaining owners feel they may have to sell the facilities in order to maintain the programs at their current levels.

However, the Minnesota Department of Human Services has indicated that it plans to adopt a Rule which would restrict such a sale by refusing to recognize a "step-up" in depreciation basis to a new owner.

It bases its claim on verbal directives from HCFA which suggest that Section 2314 of DEFRA (attached) applies to ICFS/MR. Section 2314 freezes the basis of nursing homes and hospitals as of its effective date.

If DHS Section 2314 extends to ICFS/MR, Forestview will be forced to sell its facilities for its costs, without recognition of the time and effort that have gone into building its programs, and without recognition of the actual increase in the value of its assets.

While I understand that Congress was trying to remedy the problem of voluntary sales designed to circumvent the reimbursement system, I hope you will distinguish involuntary sales such as the one Forestview may be facing.

I would appreciate your assistance in two areas. First, I understand that the impact of Section 2314 on ICFS/MR was never discussed in hearings. Can you either confirm this or provide me with information of the discussion?

Second, if indeed Section 2314 does apply to ICFS/MR, I would like to discuss the possibility of amending the Statute to make a limited hardship exception to allow transfer when the transfer is caused by the death or disability of a principal owner.

I would be pleased if you would be able to provide a response by June 13, 1985.

Please call me if I can be of further assistance.

Sincerely,

Mary K. Martin

MKM/mlm

Rule # 1186

Ag's response:

BACKGROUND

Rule 53 (12 MCAR S 2.05301-2.05315-temporary) is the rule which governs payments to Intermediate Care Facilities for the Mentally Retarded (ICFs/MR.) The payment rate is composed of two components: an operating rate and a property rate. The property rate consists primarily of a depreciation component based on the operator's historical cost, and the owner's interest cost on capital debt. The Rule currently prohibits a "step-up" in depreciation basis for voluntary sales or transfers. It does allow a limited exception allowing a "step-up" in basis for involuntary sales in two situations: death of an owner of a controlling interest in a facility, or the disability of a principal owner or owners. The proposed amendment removes the death or disability exception and prohibits an increase in basis under any circumstances. The net effect of the proposed amendment is to artificially hold down the selling price of a facility.

policy

Two shareholders who together had a controlling interest in Forestview Community Homes, Inc. died recently in the untimely Galaxy Airline disaster. The controlling interest in Forestview is now in the estates of Robert Miggins and Bill Koski. Both partners were active in the management of Forestview and were in part responsible for its success. Due to the sudden death of the controlling owners, Forestview may face an involuntary transfer of ownership in the future.

SUMMARY OF ISSUES

Forestview Community Homes opposes the change on the following grounds:

1. Federal law does not authorize extension of DefRA limitations to ICFs/MR;

2. The proposed amendment is overly broad, and thus is an unconstitutional violation of equal protection;

3. The proposed amendment is an impairment of contract;

4. The proposed amendment violates due process and constitutes a taking of property without compensation;

5. The proposed amendment violates Minn. Stat. 256.501;

6. The proposed amendment violates Minnesota probate law.

ARGUMENT

1. Federal law does not authorize extension of DefRA limitations to ICFs/MR. DHS relies on the Deficit Reduction Act of 1984 (DefRA) for the proposed change. However, Section 2314 of the Deficit Reduction Act of 1984 (DefRA) does not extend to ICFs/MR. Section 2314, titled "Revaluation of Assets" amends the Medicare statutes to limit a step up in basis "with respect to an asset of a hospital or skilled nursing home." (Emphasis added.)

1st issue, does not covers ICF/MR - response: 6.24.85 letter Fed govmt interprets its own laws

Subdivision (b)(3), which relates to the Medicaid statutes, goes on to say:

"(B) that the state shall provide assurances satisfactory to

the Secretary that the payments methodology utilized by the State for payments to hospitals, skilled nursing facilities, and intermediate care facilities can reasonably be expected not to increase such payments, solely as a result of a change of ownership, in excess of the increase which would result from the application of section 1861(v)(1)(O);" (emphasis added.)

As you can see, ICFs/MR are not mentioned in the new statute. They were not mentioned in testimony before the committee, and they are not mentioned in the legislative history. Therefore, it is clear that Congress did not intend to include these facilities within the provisions of the law.

Extensive research into Congressional hearings and reports has revealed no indication that any provision of the Deficit Reduction Act of 1984 (DefRA) was intended to apply in any way to ICFs/MR. The Subcommittee on Health and the Subcommittee on Oversight of the House Ways and Means Committee, H.R. Serial 98-35, 98th Cong. 1st Sess. (Sept. 28, 1983), took testimony concerning Sec. 2314 of the Deficit Reduction Act of 1984, PL 98-369, which amended section 1861 (v) (1) of the Social Security Act to provide that hospitals and nursing homes may use only the historical basis of the asset for depreciation purposes. Below are excerpts from the hearings:

* A press release of Friday January 27, 1983, announcing the hearings, mentions that "the hearing will also review steps taken by States in limiting capital reimbursement for facilities-including nursing homes and hospitals-where such facilities change ownership." Chairman Jacobs, in his opening remarks refers only to the ownership of hospitals.

* Douglas A. Fraser, National Chairman of the Health and

Security Action Council, testified about the Health Care Cost Control Act of 1983, and testified that the legislation there covers the principal elements which affect costs: hospitals, physicians, and other professionals, laboratory and x-ray services, health maintenance organizations, and new procedures and technology. He also mentioned that nursing homes would be included in the bill, if feasible. Representative Barbara Mikulski, in her testimony, repeated almost verbatim only the items mentioned in Mr. Fraser"s remarks.

* Most of the testimony indicated that the law would affect only hospitals and nursing homes. Representative Bill Gradison of Ohio spoke before the subcommittee, and in his testimony referred only to hospitals and facilities for the elderly, not ICFs/MR.

* Michael Zimmerman, Associate Director of Health Financing Programs, Human Resources Division of U. S. General Accounting Office stated that his testimony would describe some of the ways States under Medicaid reimburse capital costs for nursing homes after acquisitions. In his statement Mr. Zimmerman discussed the Hospital Corporation of America controversy, stating that HCA bought hospitals, nursing homes medical office buildings, and other corporate entities such as hospital management companies. Mr. Zimmerman also discussed several states' policies, and referred only to hospitals and nursing homes.

* Richard P. Kusserow, Inspector General of Department of Health and Human Services, spoke to the subcommittee, and while repeatedly mentioning hospitals and nursing homes, never mentioned ICFs/MR. The Inspector General's written report, also submitted to the Subcommittees, mentions ICF nursing homes twice without mentioning ICFs/MR.

* David Bausch, County Executive of Lehigh County, Pennsylvania, and Vice Chair of the Health and Education Steering Committee of the National Association of Counties, discussed proprietary hospitals, nursing homes, and investor owned health care chains such as rodent control and rape prevention facilities. His statements make no mention of ICFs/MR.

* Ms. Patrice Feinstein, Associate Administrator for Policy, Health Financing Administration, Department of Health and Human Services, mentions hospitals, skilled

nursing facility and home health agencies in her testimony. She does not mention ICFs/MR.

* Paul Willging, Executive Vice President of the National Council of Health, discusses the difference between hospitals and nursing homes. ICFs/MR are not mentioned.

In a further review of the legislative history of DefRA, there is no other mention of ICFs/MR. The Committee Report states:

> The conference agreement also limits State Medicaid reimbursement for the costs associated with the sale or transfer of a hospital or nursing home. States would be required to assure the Secretary that the methodologies used to establish rates paid to hospitals, SNF's, or ICF's can reasonably be expected not to increase those rates more than they would increase under Medicare policy as the result of a change of ownership of a facility. The State must demonstrate generally that the statutory standard will be met in the aggregate, although it is not the intention of the conferees that States supply a detailed accounting of how that aggregate is achieved. In evaluating the States's assurances, the Secretary may require the State to demonstrate the application of its methodology in a limited number of instances. (Emphasis added.)
>
> U. S. Code Congressional and Administrative News, 1985, Volume 6B, p. 1333.

It is clear from this provision that the Congress did not intend to include ICFs/MR, since the report explicitly refers to hospitals and nursing homes only.

According to the report, the concern is that "medicare has been paying for the same capital assets more than once." (p. 1333, supra.) However, a step up in basis for Minnesota ICFs/MR does not involve paying for the same assets twice. In facilities that are less than 35 years old and that have not yet reached the end of their first depreciate cycle, a step up in basis does not in

any way pay for the same asset twice. It is merely a recognition for the first time of increases in the value of the asset that have occurred since the facility was purchased or built. This is a critical difference between older hospitals and nursing homes and the ICFs/MR, which are generally newer facilities.

Even assuming arguendo that the statute does extend to ICFs/MR, the proposed rule goes farther than the statute allows. The Conference Report goes on to say that the state must demonstrate, generally, that the statutory standard will be met in the aggregate, and that costs may not increase "more than they would increase under Medicare policy as a result of a change of ownership of a facility." Conference Report, supra. This implies that some individual increases are allowable, even under Medicare policy, so long as the net cost does not increase. The projected decrease of 500 state hospital and community ICFs/MR beds in the next 18 months will decrease aggregate expeditures sufficiently to allow a stepped-up basis for hardship cases.

Finally, we are aware of no written document, directive, or ruling from the Health Care Finance Administration (HCFA) to DHS which requires that the statute be applied to ICFs/MR. DHS has not furnished us with any such directive. Absent any federal directive, DHS is clearly misinterpreting DefRA by attempting to extend it to ICFs/MR.

2. The proposed amendment is overly broad and thus is an unconstitutional violation of equal protection. As stated above,

the state's interpretation of the law is overly broad because it takes a problem - the so called "trafficking" in nursing homes, - and applies the solution, freezing the basis, in all cases. A regulatory scheme imposed by the state is required to have a rational basis for the regulation imposed. In this case, there is not a single shred of evidence to suggest that the solution is related to either a problem in the ICF/MR industry or to sales caused by death or disability of principal owners.

The proposed regulation emcompasses, in its broad sweep, even those whom Congress did not intend to include. Thus, the interpretation is invalid.

The leading case in this area, Hempstead General Hospital v. Wahlen, 474 F. Supp. 398 (E.D.N.Y. 1979), aff'd without opinion 622 F2d 573 (2d Cir. 1980) denied a stepped up basis on substantially different facts. That case involved a voluntary sale of a hospital, which is a very different case than the involuntary transfer of an ICF/MR presented here.

3. The proposed Rule is an impairment of contract. The United States Constitution prohibits any law which constitutes an impairment of contract. When Forestview entered the Medicaid Program, there was no indication that Forestview would be restricted in selling its facility.

An ICF/MR, like any other venture, requires investment of either private or public capital. The investor, whether a private

individual or the purchaser of a state bond, requires a reasonable return on the investment. Often, the return to the bond holder is greater than to the private investor because the state may exempt interest paid on the bonds from taxes, making th bonds attractive to citizens with larger incomes.

In ICFs/MR, the return bears no relationship to the actual investment to the owner. Under Rule 53 (temporary), the current reimbursement rule, the return is not based on either investment or value, but on a formula based on the percentage of capital debt retired. Thus, a 6-bed facility worth $50,000.00 or $200,000.00 which has retired 10% of its debt receive a "return" of $.50 per resident a day in either case - a 2% pre-tax return in the first case, and a .5% return in the second case.

Since there is literally no return while a facility is operated, the only time a facility could realize a re turn is upon sale. The proposed amendment shuts off this opportunity. it thus denies the implied contract for a reasonable return and is unconstitutional.

Although the court held that nursing home participation in Medicare is voluntary in Minnesota in MAHCF v. DPW, 742 F.2d 442 (8th Cir. 1984.), this is a fundamentally different case because more than 99% of ICF/MR residents are on Medical Assistance. While there are a number of "private pay" nursing homes in Minnesota, there is not a private pay ICF/MR, and it is not feasible for even a single private pay ICF/MR to exist.

4. The proposed provision violates due process and constitutes a taking of property without compensation. The Fourteenth Amendment to the United States Constitution provides that no person will be deprived of property without due process of law. The Minnesota Constitution contains a similar provision. The proposed rule change violates the Fourteenth Amendment because it deprives the seller of a portion of the value of his property without any recourse either before or after sale.

The rule artificially holds down the value of the property. However, once a sale is completed, rates become the problem of the buyer. If in the future, the state implements a rental concept for property reimbursement, the buyer will reap the benefits of the increased reimbursement, but the seller will not at that time be able to go back and collect the increase in value that occurred during the period he held the property. Thus the proposed change unjustly enriches a present buyer, and deprives the seller of the value of the property that accrued while he held the property.

Further, there is no process by which the seller can appeal a DHS decision to not recognize an increased depreciation basis. The decision must occur at the time of the sale. A buyer will purchase only at less than fair market value because the seller has no way to know in advance whether a proposed rate increased will be accepted. There is no process by which this problem can

be appealed prospectively. It is thus a taking of property interest with no opportunity to be heard.

5. The proposed Amendment violates Minn. Stat. 256B.501. Rule 53 was adopted pursuant to Minn. Stat. 256B.501, Subd. 3. The statute requires reimbursement procedures for community ICFs/MR which include:

> (a) cost containment measures that assure efficient and prudent management of capital assets and operating cost increases which do not exceed increases in other sections of the economy;
>
> (b) limits on the amounts of reimbursement for property, general and administration, and new facilities;
>
> (c) requirements to ensure that the accounting practices of the facilities conform to generally accepted accounting principles; and
>
> (d) incentives to reward accumulation of equity.

The proposed change violates all four of these provisions.

First, Subd. 3(a) requires "efficient and prudent management of capital assets." Since facilities are managed by their administrators, the responsibility to comply with this provision is placed on the facility, not the Commissioner. Therefore, proper construction of the law requires the facility to act prudently within guidelines set by the Commissioner. However,

the Commissioner's actions must encourage efficient and prudent business management. The proposed freeze on basis requires sales which no business could call prudent.

but is efficient operated cost-reasonable

In fact, such a prohibition on sales could work to the detriment of the state. For example, when a controlling interest passed to an estate, the heirs or the personal representatives may not have the program knowledge, financial expertise, or interest to run the facility(s) in an efficient, prudent way. The heirs may even be minors. Without that expertise, a sale to an outside party may be the only way to avoid licensure and certification deficiencies that could jeopardize the health and safety of residents. If that is the case, a sale may be in the best interests of the State. The proposed amendment, by prohibiting such a sale may actually work against the State's interest because it makes the rule overly broad and thus in conflict with state law.

Second, although Subd. 3(b) requires limits on the amount of reimbursement for property costs, in no way does a "limit" on property cost <u>prohibit</u> the death or disability exception.

policy

It is important to distinguish voluntary sales, made primarily for the purpose of increasing property costs, from involuntary sales, made due to circumstances beyond the seller's control.

policy

The February 11, 1983 report of the Legislative Auditor was

concerned about the future sale of facilities for the purpose of increasing property reimbursement, and Rule 53 was designed to prevent deliberate sales which sought primarily to increase property reimbursement. They must be distinguished from this case where the transfer is an involuntary one due to circumstance beyond the sellers' control.

Third, the proposed rule violated generally accepted accounting principles required by Subd. 3(c). Assets traditionally are valued at the time of sale and are depreciated at the buyer's cost under generally accepted accounting principles. Freezing the basis in all cases thus works against the notion of GAAP and thus invalidates the proposed amendment.

Fourth, the proposal violates the return on equity principle in Subd. 4. Increases in the value of property that are recognized upon sale are equity. In failing to recognize these changes in equity, the proposed change violates this provision because it fails to recognize a great portion of the owners' equity at all. As discussed above, there is no reasonable return on equity in the reimbursement formula.

Since there was clearly no Congressional intent to regulate, the federal preemption doctrine does not apply here and the only governing law is state law.

In summary, it is clear that State reimbursement law does not

6. The proposed amendment violates other provisions of Minnesota law, particularly the Probate Code. The personal representative has power over property of the estate "in trust however, for the benefit of the creditors and others interested in the estate." (See Minn. Stat. 524.3-711.) If the personal representative breaches his or her fiduciary duty, then (s)he is liable "to the same extent as a trustee of an express trust." (See Minn. Stat. 524.3-712.)

If the hardship provisions, which would allow a sale of the facilities are eliminated, the personal representative is faced with several undesirable options:

1) Keeping the business running with heirs who are unwilling to run the business, or who may not have the skills of the deceased, which means the quality of the programs will suffer;

2) Selling the business at less that fair market value. As with any real estate and business investment, a buyer will only pay a price which reflects a reasonable return on the buyer's investment. If no change in depreciation is allowed, a buyer is thus limited to a purchase price which is the seller's purchase price. If the property has been held for a significant period of time, it may have appreeciated significantly. The personal representative thus will breach his fiduciary duty by selling the business for less than it is worth. Under Minnesota law, the

personal representative incurs personal liability for such activity.

In the case of an ICF/MR, a step-up in basis is not paying more than once for assets, but is merely a recognition of the change in value of assets.

3) Closing the operations and selling the real estate as single family dwellings. While this course is the one most likely to satisfy his fiduciary obligations, it has undesirable consequences in the long and short run. The state loses a valuable, experienced provider and is faced with the and faces the prospect of finding alternative services for these residents. These new services will be more costly, precisely because of the change in market conditions. The new alternative services are still likely to be more expensive than Forestview's even with the step-up in basis. Therefore, allowing a step-up in basis is probably the best and least expensive option open to the State.

Again, since there was no Congressional intent to regulate the doctrine of federal pre-emption does not apply and state law governs.

REQUEST FOR RELIEF

Forestview believes that consideration of these arguments will require that the proposed change be withdrawn. Federal law, State law, Constitutional considerations, and fundamental fairness require it. The proposed change is totally unsupported.

DHS has furnished absolutely no documentation to support its position. Absent any justification, the amendment must be withdrawn.

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

IN THE MATTER OF THE PROPOSED ADOPTION OF DEPARTMENT OF HUMAN SERVICES TEMPORARY RULES GOVERNING RATES FOR INTERMEDIATE CARE FACILITIES FOR THE MENTALLY RETARDED

STATEMENT OF COMPLIANCE WITH RULEMAKING PROCEDURES

I, ~~Gary Van Cleve~~ Beverly Jones Heydinger, do hereby declare that I have examined the rules and all related documents and that, based on my examination and my personal familiarity with the applicable procedures, the Administrative Procedures Act, the rules of the Office of Administrative Hearings, and the rules of the Attorney General have been followed. Any exceptions are noted below.

Beverly Jones Heydinger

~~Gary Van Cleve~~

~~Special~~ Assistant Attorney General

Date: July 15, 1985

STATE OF MINNESOTA

DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF THE PROPOSED ADOPTION OF DEPARTMENT OF HUMAN SERVICES TEMPORARY AMENDMENTS TO TEMPORARY RULES FOR DETERMINING WELFARE PER DIEM RATES FOR ICF/MR FACILITIES, 12 MCAR §§ 2.05301 - 2.05315

AFFIDAVIT OF MAILING THE NOTICE OF SUBMISSION OF TEMPORARY RULE TO THE ATTORNEY GENERAL

STATE OF MINNESOTA)
)ss.
COUNTY OF RAMSEY)

Ann M. Berg, being first duly sworn, deposes and says:

That on the 16th day of July, 1985, in the City of St. Paul, County of Ramsey, State of Minnesota, I mailed the attached Notice of Submission to the Attorney General by depositing in the State of Minnesota Central Mail System for United States mailing at said City of St. Paul, a copy thereof, with postage prepaid, to all persons and associations who requested notice that the rule in the above-entitled matter has been submitted to the Attorney General.

Ann M. Berg

Subscribed and sworn to before me

this 16 day of July, 1985.

Margaret Holt

MARGARET HOLT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
MY COMMISSION EXPIRES SEPTEMBER 26, 1990

STATE OF MINNESOTA

DEPARTMENT OF HUMANS SERVICES

IN THE MATTER OF THE PROPOSED ADOPTION OF DEPARTMENT OF HUMAN SERVICES TEMPORARY AMENDMENTS TO TEMPORARY RULES FOR DETERMINING WELFARE PER DIEM RATES FOR ICF/MR FACILITIES, 12 MCAR SS 2.05301 - 2.05315

NOTICE OF SUBMISSION OF TEMPORARY RULE TO THE ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, section 14.32;

PLEASE TAKE NOTICE that the above-captioned rule as adopted and the required supporting documents have been submitted to the Office of the Attorney General on this date, July 16, 1985, for review as to legality and form to the extent form relates to legality.

The rule must be approved or disapproved by the Attorney General on the tenth working day following date of receipt of rules. You may submit written comments to the Attorney General. Any written comments must be submitted within six working days of the date of this notice. Your comments must address only the issue of legality of the rule or specific parts or subparts of the rule. Your comments must be directed to:

The Office of the Attorney General
204 Administration Building
50 Sherburne Avenue
St. Paul, Minnesota 55155
Telephone: (612) 296-1288

Any written comments submitted to the Attorney General must be submitted simultaneously to this agency.

Al Hamzal

LEONARD W. LEVINE, Commissioner
Department of Human Services

Dated: July 16, 1985

MARY K. MARTIN
ATTORNEY AT LAW
1102 GRAND AVENUE
ST. PAUL, MINNESOTA 55105

TELEPHONE 612 - 224-5079

July 24, 1985

HAND DELIVERED

Judith Wehrwein
The Office of the Attorney General
204 Administration Building
50 Sherburne Avenue
St. Paul, Minnesota 55155

Re: In the Matter of the Proposed Adoption of Department of Human Services Temporary Amendments to Temporary Rules for Determining Welfare Per Diem Rates for ICF/MR Facilities, 12 MCAR SS 2.05301 - 2.05315

Dear Ms. Wehrwein:

Enclosed please find comments on the above-captioned amendments submitted on behalf of Forestview Community Homes, Inc.

We believe the amendments may not be adopted because the agency lacks legal authority to adopt them.

A copy of our arguments was submitted to the agency today.

Feel free to call if you have questions. Please forward a copy of your decision to me when it is made.

Sincerely,

Mary K. Martin

Mary K. Martin
Attorney at Law

MKM/mlm

cc: Al Hanzal, Assistant Commissioner

RECEIVED
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