

IN THE MATTER OF THE PROPOSED
ADOPTION OF AMENDMENTS TO
PERMANENT RULES GOVERNING THE
DETERMINATION OF PAYMENT RATES STATEMENT OF NEED AND
FOR NURSING HOMES PARTICIPATING REASONABLENESS
IN THE MEDICAL ASSISTANCE PROGRAM
PARTS 9549.0010 TO 9549.0080

AUTHORITY

Minnesota Rules, parts 9549.0010 to 9549.0080, govern the rates for nursing homes licensed under Minnesota Statutes, chapter 144A.04 and boarding care homes licensed under Minnesota Statutes, section 144.50. The permanent rules were developed to implement Minnesota Statutes, sections 256B.41 to 256B.502 and were promulgated according to the requirements of federal statutes 42 USC 1396 a(a)(13)(A) and federal regulations 42 CFR Part 447. They became effective on June 14, 1985 for rate years beginning on or after July 1, 1985. These permanent rules now include case mix rules (parts 9549.0050 to 9549.0059). In addition, the permanent rules were amended on May 4, 1987, for rate years beginning on or after July 1, 1987.

LEGISLATIVE HISTORY

In 1983, the Legislature stated in Minnesota Statutes, section 144A.071

that Medical Assistance expenditures are increasing at a much faster rate than the state's ability to pay. . .; that reimbursement for nursing home care and ancillary services comprises over one-half of Medical Assistance costs and, therefore, controlling expenditures for nursing home care is essential to prudent management of the state's budget. . .

Minnesota Statutes, section 256B.41 required the Commissioner of Human Services to "establish by rule, procedures for determining rates for cost of residents at nursing homes which qualify as vendors of Medical Assistance."

RULEMAKING HISTORY

A temporary rule, 12 MCAR §§ 2.05001 - 2.05016 [Temporary], was adopted in 1983 and the development of permanent rules began immediately thereafter. An advisory committee was formed including representatives of the nursing home industry, consumer groups, and those knowledgeable about nursing home finances. The Department engaged a consultant, the firm of Deloitte, Haskins & Sells, to conduct a study of property reimbursement methodology. The Department, in cooperation with the Interagency Board for Quality Assurance, contracted with Lewin & Associates for a study of a case mix system to reimburse operating costs.

In 1984, the Legislature directed the Commissioner to adopt temporary rules necessary for the implementation of operating costs payment rates as provided by Laws of Minnesota 1984, chapter 641. In effect, nursing

home payment rules were divided into two parts: (1) the provisions governing the determination of allowable costs, setting reporting requirements, establishing appeals procedures, and determining the property-related payment and payment for real estate taxes and special assessments (parts 9549.0010 to 9549.0080); and (2) the provisions establishing a case mix methodology for payment of operating costs (parts 9549.0050 to 9549.0059 [Temporary]).

The Legislature established special requirements for the development of the temporary case mix rules in Laws of Minnesota 1984, chapter 641. The temporary rule process was governed by the Administrative Procedures Act (Minnesota Statutes, section 14.29 to 14.36) which was in effect on March 1, 1984. Under Minnesota Statutes, section 256B.431, subdivision 6, the adopted temporary rules were to "have the force and effect of law and remain in effect until June 30, 1986, unless otherwise superseded by rule." The proposed temporary rules, parts 9549.0050 to 9549.0059 [Temporary] were published in the State Register on April 8, 1985, and became effective on June 14, 1985, for the rate year beginning on or after July 1, 1985.

In 1986, Under Laws of Minnesota 1986, chapter 316, the effective period for the temporary rules governing the case mix system was extended for one year to give the Departments of Health and Human Services more time to develop permanent rules. Following the adoption of the legislation extending the temporary rules, the temporary rules were amended to clarify the operating cost rate determination process to be used to determine

rates for fiscal year 1987 and to update the resident classification system used in determining operating cost payment rates. The temporary rules as amended became effective on June 14, 1986. The permanent rules establishing the case mix classification system were published in their final form in the State Register on April 27, 1987, and became effective on May 4, 1987 for rate years beginning on or after July 1, 1987. At the same time, several modifications and non-controversial amendments, including those required to ensure consistency with Laws of Minnesota 1987, chapter 403, were made to the existing permanent rule (parts 9549.0010 to 9549.0080. The amendments also were published in the State Register on April 27, 1987, and became effective on May 4, 1987.

PURPOSE OF AMENDMENTS

The Department's and the industry's experience with parts 9549.0010 to 9549.0080 since their adoption has identified a number of issues that need clarification. The amendments proposed herein address those issues. The proposed amendments do not make substantive changes in the rate determination process, but rather merely clarify existing policies.

AMENDMENT PROCESS

The Department published a "Notice of Intent to Solicit Outside Opinion" in the State Register on Monday, November 30, 1987.

STATEMENT OF NEED AND REASONABLENESS FOR SPECIFIC RULE PROVISIONS

The specific provisions of parts 9540.0010 to 9540.0080 which are to be amended are affirmatively presented by the Department in the following narrative as required by the Minnesota Administrative Procedures Act, Minnesota Statutes, section 14.05.

TREATMENT OF NURSING HOMES WITH NOMINAL LEASES

1. Part 9549.0060, subpart 9, item E. New Rule Language.

Page 44, after item D, insert new item E as follows:

E. The phrase "operating lease" does not include a nominal lease. For purposes of this subpart, a lease that meets the following conditions shall be considered a nominal lease:

- (1) The annual lease payment in comparison to the rental value of the physical plant and depreciable equipment is a nominal amount, usually one dollar per year;

- (2) The length of the lease, including renewal provisions, reflects the intent of the lessor and lessee to lease the physical plant and depreciable equipment for the remainder of their useful lives;
- (3) The lease agreement imposes a duty upon the lessee to make necessary improvements and to properly maintain the nursing home;
- (4) The lease agreement has no restrictions on the free use of the nursing home by the lessee other than it must be used as a licensed nursing home; and
- (5) The lease agreement must not require the furnishing of any indirect benefits to the lessor.

A nursing home leased with a nominal lease shall have its building capital allowance computed as in subpart 8. This item shall be effective for rate years beginning on or after July 1, 1988.

This section of the rule deals with a building capital allowance for nursing homes with operating leases and states that the building capital allowance must be the lesser of the operating lease expense divided by 96 percent of capacity days, or the allowable appraised value multiplied by the rental factor and then divided by 96 percent of capacity days.

This section of the rule was designed for lease payments which approximate the value of the assets leased and does not anticipate leases for a nominal amount (\$1.00). However, a number of providers lease their facilities from municipalities at a nominal rental, usually for \$1.00 per year, with the lease generally covering the useful life of the facility. Under most lease arrangements, the lessee maintains the property and pays the cost of any improvement or addition to the facility. When such an improvement or addition is made, the lessee may properly amortize its cost and include the amortization allowance as an allowable cost. It is the general practice of the provider to include in its costs an amount to cover depreciation on the leased facilities. Therefore, most third parties who reimburse providers on the basis of cost allow depreciation (but not interest) on facilities that have been leased for a nominal rental.

Part 9549.0060, subpart 9E excludes a nominal lease from the phrase operating lease. It is necessary to add subpart 9E since the concept of a nominal lease is a reality in the nursing home industry and therefore, for purposes of clarity, the rule should be modified to indicate how those leases should be treated in determining a nursing home's property rate. It is not reasonable to use a nominal value such as \$1.00 in the calculation of the nursing home's building capital allowance because treating a nominal lease like an operating lease may result in a building capital allowance per diem of zero. Also, for purposes of consistency, it

is reasonable to use as a guideline the definition of nominal lease as defined in Sections 112 and 112.1 of the Medicare Provider Reimbursement Manual, HCFA Publication 15-1, as published by the U.S. Department of Health and Human Services, Health Care Financing Administration (see attached).

RESIDENT ACCESS TO ASSESSMENTS AND DOCUMENTATION

2. Part 9549.0059, subpart 9.D. Amendment to existing language.

Page 57, item D lines 4 and 5, change "one working day" to "three working days" and change "written or verbal request" to "written request." The revised item D should read as follows:

D. The nursing home must provide each nursing home resident or the resident's authorized representative with a copy of the assessment form and any other documentation provided to the Department of Health in support of the assessment within three working days of receipt of a written request from the resident or the resident's authorized representative.

Minnesota Rules, part 9549.0059, subpart 9, deals with resident access to assessments and documentation. During the 1987 legislative session, Minnesota Statutes, section 144.0722, dealing with "Resident Reimbursement Classifications; Procedures for Reconsideration," was amended in the following manner:

Subdivision 3a. Access to Information. "Upon written request, the nursing home or boarding care home must give the resident or the resident's representative a copy of the assessment form and the other documentation that was given to the department to support the assessment findings. A copy of any requested material must be provided within three working days of receipt of a written request for the information. If a facility fails to provide the material within this time, it is subject to the issuance of a correction order and penalty assessment under sections 144.653 and 144A.10."

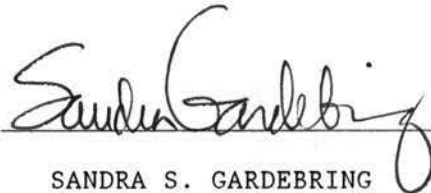
It is necessary and reasonable to amend subpart 9 of the rule so that the rule is consistent with the cited statutes.

Expert Witnesses

If this rule should go to public hearing because of 25 public requests for hearing, the Department does not plan to have an expert witness testify on its behalf at the hearing.

1-22-87

DATE



SANDRA S. GARDEBRING

Commissioner