

IN THE MATTER OF THE PROPOSED
AMENDMENTS TO RULES OF THE
DEPARTMENT OF HUMAN SERVICES
GOVERNING REIMBURSABLE MEDICAL
ASSISTANCE TRAINING AND
HABILITATION SERVICES FOR ICF/MR
CLIENTS, Minnesota Rules, parts
9525.1210 to 9525.1250

STATEMENT OF NEED
AND REASONABLENESS

INTRODUCTION

This statement of need and reasonableness addresses proposed amendments to Minnesota Rules, parts 9525.1210 to 9525.1250, governing Medical Assistance reimbursement for training and habilitation services for clients of ICF/MRs (intermediate care facilities for the mentally retarded). These amendments distinguish such services from educational and vocational services funded by other programs.

BACKGROUND AND AUTHORITY

Under current statutes and rules, the Minnesota Medical Assistance program reimburses day service providers for day training and habilitation services, including "work activity". In September, 1985, the Health Care Finance Administration (HCFA) of the U.S. Department of Health and Human Services issued guidelines distinguishing between educational services and habilitation training. These guidelines resolved earlier problems concerning Medicaid reimbursements of educational or vocational training services. In September, 1986, HCFA issued clarifying guidelines defining the vocational services exclusion.

The proposed amendments to parts 9525.1210 to 9525.1250 addressed by this statement of need and reasonableness were developed after consultation with HCFA to conform to the Social Security Act, sections 1905(a)(6) and 1902(a)(25), and the guidelines of the HCFA State Medicaid Manual, part 4, section 4397 (Transmittal 21, dated September, 1986, copy attached as Appendix A). These amendments are necessary because the modifications were part of the corrective action plan approved by HCFA in response to that agency's recommendations regarding Minnesota's training and habilitation agencies, known as developmental achievement centers (DACs). In correspondence to HCFA dated November 27, 1985 (Appendix B), the Minnesota Department of Human Services stated:

The state of Minnesota will modify its rules and regulations regarding the medical assistance funding of therapeutic work activity to fully comply with any forthcoming regulation changes or transmittals from the Department of Health and Human Services, as necessary. These regulation changes or transmittals clarifying Medicaid reimbursement for ICF/MR vocational services were promised in the letter from Richard P. Kusserow, Inspector General, to Senator Lowell P. Weicker on April 26, 1985.

The proposed amendments will provide for Medical Assistance reimbursement of prevocational services and exclude education or vocational training in accordance with the Medicaid Manual transmittal.

These amendments are made under authority of Minnesota Statutes, section 256B.501, subdivisions 5 to 10.

RULE PARTS

Part 9525.1210 DEFINITIONS.

Subpart 12a. **Prevocational services.** It is necessary to define "prevocational services" and replace the former term, "work activity", to make the distinction between prevocational training and education or vocational training. The definition of "prevocational services" is reasonable because it identifies skills, knowledge and activities which are important to functioning in a work environment, but do not constitute training or education for placement in any specific employment or sheltered workshop, and is consistent with the Federal guidelines in the State Medicaid Manual, part 4, section 4397 (Appendix A). The definition makes clear that wages may be paid to a client, although not required.

Subpart 15. **Work activity.** It is necessary to repeal the definition of "work activity" because the term has been made obsolete by the Federal clarifications and is replaced by "prevocational services", defined in subpart 12a.

Part 9525.1250 REIMBURSABLE SERVICES.

Subpart 1, item A. It is necessary to replace "work activity" as a reimbursable service with "prevocational services" to limit reimbursement to services which do not lead to specific employment, as required by the guidelines discussed above.

It is reasonable to require that prevocational services not be designed to place clients in competitive employment within one year because other programs are available for that purpose. It also is the nature of prevocational services that ongoing supervision is provided. These criteria are implied in the HCFA State Medicaid Manual, part 4, section 4397 (Appendix A) and were confirmed in discussion with HCFA and in the information memorandum dated June 16, 1987 from HCFA (Appendix C) regarding these proposed amendments.

Subpart 2, item F. Under this rule, day training and habilitation services are reimbursable by Medical Assistance. In order to clearly distinguish between prevocational and vocational training services, it is necessary to explicitly require that reimbursable day training and habilitation services not include educational or vocational services funded under other Federal programs, as required by Minnesota Statutes 1987, section 252.41, subdivision 3. The prohibition of Medical Assistance funding for vocational and educational services otherwise available to eligible

individuals through the Education of the Handicapped Act and section 110 of the Rehabilitation Act of 1973 is necessary to further comply with HCFA's requirements as stated in sections 4396 and 4397 of the Medicaid Manual. It is reasonable to require use of generic educational services or rehabilitation services when persons are eligible for those services to maximize expenditures under the Medical Assistance Program to persons otherwise unable to receive needed services.

The Department will not introduce any testimony of expert witnesses at the hearing.

11/13/87
Date


82 SANDRA S. GARDEBRING
Commissioner

state medicaid manual
Part 4 — ServicesDepartment of Health
and Human Services
Health Care Financing
Administration

Transmittal No. 21

Date SEPTEMBER 1986

NEW MATERIALREVISED PAGESREPLACED PAGESTable of Contents
Sec. 43972 pp.
2 pp.2 pp.
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CLARIFICATION—EFFECTIVE DATE: Not Applicable

Section 4397, Application of the Vocational Services Exclusion in ICFs/MR.—Guidelines defining educational services were published in September 1985. This is a parallel instruction relating to vocational services.

4397. APPLICATION OF THE VOCATIONAL SERVICES EXCLUSION IN ICFs/MR

The vocational training exclusion flows from two basic interpretations of the Medicaid statute. First, that services paid for under the program must be "medical or remedial" within the meaning of the Act. Second, that Medicaid will not pay for services for which a different State or Federal program is obligated to pay. (See §§1905(a)(6) and 1902(a)(25) of the Act.)

The Vocational Rehabilitation Act (Public Law 93-112) does not mandate the provision of vocational services to all handicapped persons. It authorizes funds for the States to provide a broad spectrum of evaluation, training, job placement, and other work-related services to qualified persons. Historically, many persons with mental retardation living in residential facilities (including ICFs/MR) have been served by vocational rehabilitation programs, but these programs do not include all adult mentally retarded persons in ICFs/MR who are involved in vocational training and work-related programs. Clients living in ICFs/MR often work in off-site vocational rehabilitation programs or worksites. Some clients may work in programs at the ICF/MR that are provided by the facility. Other programs at the facility may be sponsored by the State's vocational rehabilitation unit. Thus, it may not be possible to use the funding source or the location of the services as the sole test of whether the services are vocational training services.

For persons under the age of 22, it will not generally be necessary to distinguish vocational training separately because the education services exclusion also applies to these services (see §4396). Department of Education regulations (34 CFR 300.14) implementing Public Law 94-142 specifically include "vocational education" in their definition of "Special Education." These regulations define vocational education as:

". . . organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree."

Thus, for many clients under age 22 the question of whether services may be separately characterized as "vocational training" is resolved when it is determined that the services are education services. If services are provided for under State or Federal education law or regulations or are reflected in the client's Individualized Education Plan, they are not eligible for Federal Financial Participation (FFP). Also, States may not receive FFP if services must be provided pursuant to another State or Federal program.

In the case of clients to whom Federal and State education requirements do not apply (generally those who are over age 21 or, if under 21, have entered the labor force) further distinctions are necessary. In such cases, to determine whether service costs should be excluded under the "vocational training" exclusion, the following principles must be applied:

o No FFP is available if the services are required or funded under a State or Federal vocational training program, whether or not the clients are compensated for the work;

o If the services are provided by the ICF/MR, no FFP is available when the activity in which the client is engaged is also for the purpose of teaching the client the skills to perform tasks in an employment situation.

The test of whether the purpose would relate to an "employment" situation does not relate solely to a determination about the usefulness of the activity or to whether the client is paid for the work. The test is whether the services are provided with the reasonable expectation that the client would be able to participate in a sheltered workshop or in the general work force within one year. In reviewing the activity program, the compensation level of the client, the nature of the activity, and the level of supervision necessary for the client as well as the programmatic objectives in the plan of care should be considered in making a determination as to the purpose of the program for the particular client.

Determine whether the services being provided are directly related to preparing the client for paid or unpaid employment or are instead provided to increase the overall level of functioning of the individual. For example, a number of services which consist of skills training (sometimes called "prevocational" services) may be aimed at a more general result. These include teaching a client such concepts as compliance, attending, task completion, problem solving, and safety. These services are eligible for FFP for clients over age 21 when provided pursuant to the plan of care unless included under another program funded or required under State or Federal law.



STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE
CENTENNIAL OFFICE BUILDING
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OFFICE OF THE
COMMISSIONER
612/296-2701

GENERAL
INFORMAT
612/296-611

November 27, 1985

Ms. Judith Stec
Associate Regional Administrator
Division of Program Operations
Health Care Financing Administrator
Region V
175 West Jackson Boulevard
Chicago, IL 60604

C

Re: Review of Developmental Achievement Centers (DACs)

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Dear Ms. Stec:

This letter is to respond to your request of September 19, 1985, for Minnesota's corrective action plan to the findings and recommendations of your review of Minnesota Developmental Achievement Centers.

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This response will follow the same format as your review.

Services and Providers

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1. Recommendation: It is recommended that the state stop claiming FFP for the vocational component of DAC clients whose IPP shows vocational activity as the first priority.

State Responses: Minnesota will do on-site program audits of selected day training and habilitation programs to insure that Title XIX reimbursement is not made for clients whose activities do not meet the requirements of the definition of work activity stated in Minnesota Rules, part 9525.1210, subdivision 15.

The State of Minnesota will modify its rules and regulations regarding the Medical Assistance finding of therapeutic work activity to fully comply with any forthcoming regulation changes or transmittals from the Department of Health and Human Services, as necessary. These regulation changes or transmittals clarifying Medicaid reimbursement for ICF/MR vocational services were promised in the letter from Richard P. Kuuserow, Inspector General, To Senator Lowell P. Weicker on April 26, 1985.

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Done

Corrective Action: The Department of Human Services will conduct on-site program audits of 10 to 15 training and habilitation agencies (10 percent sample) based on a current analysis of the 1984 DAC Survey (see enclosed pages) beginning March 15, 1986. These surveys constitute a mechanism by which the Department can annually determine program and administrative characteristics warranting further investigation. Further, a Commissioner's bulletin informing DACs of their approved 1986 MA rates will operationally define MA reimbursable "work activity" to be consistent with the applicable rule parts. Further, the bulletin will clarify that vocational services, defined as activities that result in productive or competitive work activity (in accordance with Minnesota Rules, parts 9525.1200 to 9525.1330) will not be reimbursed by Medical Assistance. A copy of this bulletin will be sent to you when it is issued (January 1, 1986). *Done*

Minnesota continues to await further clarification of MA reimbursable vocational services as promised.

2. Recommendation: It is also recommended that the state encourage specialization among DACs where there are more than one in the area and expand availability of work slots of which there is a shortage. Additional efforts may be required to mobilize the community and employers to create work opportunities, including sheltered employment, for the handicapped who are ready for it.

*In progress
OSEERS*

State Response: The Department will review the interagency agreement with the Division of Vocational Rehabilitation to address the increased availability of work services and the mobilization of employers to create work opportunities and supported work programs.

Corrective Action: Commitments made in the existing interagency agreement have been reviewed and will be updated as part of the Supported Work Initiative entered into jointly by the Division for Vocational Rehabilitation, the Department of Human Services, and the Developmental Disabilities Council. See the enclosed OSEERS grant award letter and proposal.

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The Department is also a member of the State Interagency Transition Committee authorized in the last legislative session whose purpose is to promote the availability of work and appropriate transitional services to post secondary aged disabled students through local cooperative planning and services. (Draft of cooperative agreement will be available in May - meetings are ongoing.)

Recommendation: The ICF/MRs and DACs should be reminded of the client evaluation requirements and their proper documentation.

State Response: The state agency will do program audits of ICF/MR and DAC programs which will evaluate these programs on the basis of the

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requirements stated in the agreements required in Minnesota Rules, parts 9525.1200 to 9525.1330, parts 9525.0015 to 9525.0145 and proposed parts 9525.1500 to 9525.1650, as well as federal ICF/MR regulations.

Corrective Action: Audits which evaluate programs based on the required three-party agreements mentioned in the above rule parts and federal regulations will occur on a sample of programs beginning March 15, 1985, (and on a statewide basis upon promulgation of Rule 38 governing licensure of training and habilitation services (see enclosed Rule 38 and time line).

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4. Recommendation: The weaknesses and deficiencies in the rules and their implementation under Review Findings a) through g) above should be remedied and monitored.

State Response:

- a. The state agency will conduct program audits of DACs to insure that the work activities provided can be funded under the Medical Assistance Program, and are in accord with the limitations established in current state rules.
- b. The state agency definition of vocational services will be modified, if necessary, to be consistent with any forthcoming regulations or policy transmittals which clarify Title XIX reimbursement in the area of vocational services as promised to Senator Weicker by the Inspector General.
- c. The state agency will do program audits to insure that each agency involved in provision of ICF/MR service is fulfilling its responsibilities to persons with mental retardation.
- d. The state agency will promulgate new licensing regulations governing the provision of day training and habilitation services.
- e. The state agency will amend its rule governing the funding of day training and habilitation to prohibit Title XIX reimbursement of persons determined by a qualified person to be capable of productive or competitive employment.
- f. The state agency will include the requirements for active treatment and the involvement of qualified mental retardation professionals in the new licensing rule governing the provision of day training and habilitation services to persons with mental retardation.
- g. The proposed licensing rule will require all day training and habilitation agencies to be in compliance with Section 504 of the 1973 Rehabilitation Act.

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Corrective Action:

- a. See "Corrective Action (1)."
- b. See "Corrective Action (1)."
- c. See "Corrective Action (3)."
- d. See enclosed timetable and draft of Rule 38.
- e. See enclosed draft amendment to Minnesota Rules, parts 9525.1200 to 9525.1330. It will take approximately three months to amend the rule parts.
- f. See enclosed draft of Rule 38 (specifically page 20).
- g. See enclosed draft of Rule 38 (specifically pages 20, 25, and 49). Also, all DAC programs must be in compliance with the rules governing administration of social service funds. These rules require compliance with federal accessibility standards as stated in the enclosed contract.

Billing and Reimbursement

1. Recommendations: It is recommended that the state establish a reimbursement methodology for DACs which is uniform, reasonable, and not based on historical randomness.

State Response: The state agency is committed to study other reimbursement methods for day training and habilitation services. The Department is currently discussing alternative rate methods which would be based on proposed program rules, and federal regulations and guidelines.

Corrective Action: See the enclosed letter awarding Lowin and Associates, Inc., a contract to study case-mix reimbursement of ICF/MRs, DACs, and waived services.

2. Recommendation: The state should cease treating DACs as independent Title XIX providers and leave the billing responsibility to the ICFs/MR. (HCFA is presently evaluating the legitimacy of reassignment of payment to the single state agency.)

State Response: An ICF/MR provider may assign payments to a government agency according to 42 U.S.C.A. 1396 (a) (32) and 42 CFR 447.10 (e). The State of Minnesota is a government agency; therefore, it is clearly consistent with federal regulations to have ICF/MRs, which are providers, make such assignments. The state agency believes it is fully in

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Ms. Judith Stec
November 27, 1985

compliance with federal regulations regarding the assignment for payment methodology it now employs for day training and habilitation services.

12/85 amended files
Corrective Action: We acknowledge receipt of your letter dated November 21, 1985 and will address this issue in a separate correspondence.

All documents referred to in this letter but not yet enclosed will be forwarded to you as they are written.

Please advise if further action or documentation is needed.

Sincerely,

Al Hanzal
Assistant Commissioner

SFM/69

Enclosures

Refer to: FQA-715

Memorandum*Judy/Patt*

Date JUN 16 1987

From Director
Bureau of Eligibility, Reimbursement and Coverage

Subject Reimbursement of Prevocational Services in Minnesota—INFORMATION

To Regional Administrator
Chicago
Attn: Associate Regional Administrator
Division of Program Operations

This is in response to your memorandum of May 4, 1987, requesting our comments regarding Minnesota's proposed rule amendments governing Medicaid coverage of prevocational services for residents of ICFs/MR. Specifically, you are asking that we comment on the State's response of April 13, 1987 to suggestions you had made concerning the proposed amendments. We have the following comments.

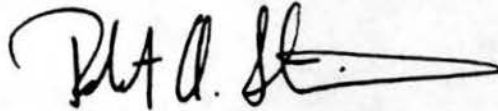
1. Your first suggestion was that in defining prevocational services, the State should make a distinction between those under and over age 22, as the State Medicaid Manual does in describing how to determine the availability of FFP for vocational services. The State in its response indicated that only persons not of school age are eligible for these prevocational services. We believe the State means by this statement that FFP for these services would not be available for persons under age 22 because the Education of the Handicapped Act (EHA) requires that these services be provided by the State as part of a free and appropriate education. If this is the State's meaning, it is correct. Thus, this does not appear to be a comparability question, since the State seems to be merely indicating that for those under age 22 these types of services are provided as educational services rather than as Medicaid services.
2. Your second suggestion is that, since remunerative productive activity, in accordance with the State Medicaid manual, does not fit the definition of prevocational services, the State may not want to refer to the client being compensated for productivity. The State has responded that remunerative productive activity is allowed in accordance with Medicaid guidelines.

We believe the State's response generally reflects the provisions of the guidelines at section 4397 of the State Medicaid manual pertaining to the vocational services exclusion in ICFs/MR. In accordance with the guidelines, the State is precluding FFP for activities that would result in or are in preparation for employment in the general workforce or sheltered employment

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within a year. Also, the State correctly indicates that in determining whether FFP is available for an activity, it is necessary to consider the nature of the activity, the level of supervision required, and the programmatic objectives in the person's plan of care as well as the compensation level.

If you have questions concerning our comments, please call Walter Rutenmueller at FTS 934-9837.



Robert A. Streimer

