

Testimony before the Administrative Rules Committee

Senator Jerry Klein, Chairman

March 9, 2010

Chairman Klein, members of the Committee, I am Julie Leer, Director, Legal Advisory Unit for the Department of Human Services. I am here today to provide information on penalty provisions in administrative rules adopted by the Department of Human Services, and on application of standards from other than state or federal law which have not been adopted as administrative rules.

Penalty Provisions in Administrative Rules

The following questions were asked:

With regard to rules provisions imposing penalties which have been adopted by your agency, please provide answers and explanations for the following questions:

1. Has your agency imposed penalties against individuals or organizations by applying provisions in the North Dakota Administrative Code? If so, has the action been by court proceedings or by administrative agency adjudicative proceedings?

Department Response: The Department has not enforced criminal penalties by applying provisions in the Administrative Code. Not all divisions or programs within the Department have penalty provisions in the administrative code, however, the Department does have administrative code provisions adopted

by some divisions which provide penalties for non-compliance with licensure or with program requirements:

- Penalties for non-compliance may range from fiscal sanctions for licensees (a per day dollar amount for each day of operation while noncompliant) to licensure revocation.
- Failure to comply with program requirements may result in a loss of benefits for recipients under some programs.
- Providers may be sanctioned for failing to follow billing and documentation requirements.
- Facilities may be sanctioned for being out of compliance with certification requirements or for failure to file cost reports on a timely basis.
- For licensees a provisional or restricted license may be issued allowing a licensee to operate pending compliance with all licensure requirements, or to operate under restricted circumstances.

None of the sanctions or penalties are initially imposed via court action or administrative adjudicative proceeding, but the sanctions and penalties may be appealed in which case, the appeal is first heard before an administrative law judge and may be appealed subsequently to the district or supreme court.

2. Has the validity of rules adopted by your agency imposing penalties been challenged?

Department Response: Department staff do not recall any challenges to the validity of the rules described in paragraph 1.

3. Do you believe it would be useful to transfer penalty provisions from administrative rules to statutory provisions? If so, please

identify any rules provisions imposing penalties which you believe should be transferred to statutory provisions.

Department Response: The Department does not believe it would be useful to transfer penalty provisions from administrative rules to statute. In some cases, it may result in the delayed synchronization of state law with federal changes to penalties for some of the programs the Department administers such as Medical Assistance and Temporary Assistance for Needy Families.

Application of Standards from Other than State or Federal Laws

The difficulty in providing a response to this question is that the Department has some requirements for program participation for various programs that have not been adopted as law or rule by the State and have not been adopted by the federal government. The requirements have been put into place to administer programs funded by the federal government through State Plan documents for the programs. In that regard, the requirements are not created by a national association, commission, or other group. The contents of State Plans and State Plan Amendments or State Plan Waivers are subject to approval by the federal agency charged with oversight for the program. Examples of programs administered by the Department pursuant to a State Plan are Medical Assistance, Vocational Rehabilitation, Temporary Assistance for Needy Families (TANF), Low Income Home Energy Assistance Program (LIHEAP), and Supplemental Nutrition Assistance Program (SNAP). Greater detail relative to the use of state plans for these programs and of other standards for other programs administered by the Department are as follows:

Medical Assistance: State Plan Amendments (SPAs) may be pursued based on state legislative action or may be initiated by the state to address an identified need. The number of SPAs per biennium varies, but the Department submitted 28 SPAs in 2009, in part due to legislative action during the 2009 Legislative Session. (In 2008, 18 SPAs were submitted; so far in 2010, 3 SPAs are in the works.) While there is a notice requirement for SPAs which change reimbursement methodology, or which increase or decrease payments, there is no provision for public comment or hearing; the notice is to let providers know of the impending change. All SPAs must be approved by the Centers for Medicare and Medicaid Services (CMS), the federal agency with oversight for the Medical Assistance program. CMS has 90 days to review a SPA and the 90 days may be extended through a request for additional information. There is typically at least one Request for Additional Information from CMS to the State prior CMS approval. Some of the requirements for medical assistance eligibility identified in the State Plan are included in Title 75 of the North Dakota Administrative Code.

Vocational Rehabilitation: The State Plan reiterates federal requirements. There is opportunity for public input when changes are being proposed. The plan is required to be updated annually and approved through the Rehabilitation Services Administration, a federal agency. The Department does have program requirements for the Vocational Rehabilitation Program in Title 75 of the North Dakota Administrative Code.

Temporary Assistance for Needy Families: The block grant under which the TANF program is administered contains federal requirements on certain components such as benefits, citizenship, hearings, and lifetime limits, but the plan also provides detail on the State's program. The State Plan may be modified to meet the unique needs of the State's population. The TANF

State Plan does have a public hearing component before the plan is submitted for renewal. The Department has adopted rules on the TANF program that include both federal and state requirements. These rules are found in Title 75 of the North Dakota Administrative Code.

Low Income Home Energy Assistance Program: The LIHEAP State plan is flexible in allowing the Department to meet the needs of the State's population. One aspect of the plan requires the Department to provide timely and meaningful public participation in the development of the plan which is accomplished in much the same way as notice and public comment are completed under the Administrative Agencies Practices Act. To satisfy the public participation requirement for the LIHEAP state plan, the Department:

- a. Has a public comment period each year, describing the changes to the plan, and advertises it by a public notice in the state's eight largest newspapers,
- b. Holds a public hearing on the plan each year, advertised in the same public notice referred to above, and
- c. Sends the same notice to interested advocacy groups and agencies.

Supplemental Nutrition Assistance Program: There is a federal requirement for the Department to complete a State Plan of Operations annually which includes providing budget documents, plans for Employment and Training, Family Nutrition, and a Quality Control Sample Plan among others, and copies of agreements we have entered with other agencies such as the Social Security Administration and Immigration Services. The Department does not have administrative rules for SNAP as they were essentially a reiteration of federal law.

Aging Services: In 2005, the administrative rules for the programs administered by our Aging Services Division were repealed for the following reasons:

- a. The requirements of the Older Americans Act programs and services are set forth in federal law and regulations.
- b. Policies and procedures, service standards, and contract language specify the requirements of service provision.
- c. The above reference documents have been historically used as the primary guidance in the administration of the Older American's Act programs.

Mental Health and Substance Abuse Services: The Mental Health and Substance Abuse Services Division has requirements for the use of evidence-based programs and practices. The evidence-based programs and practices in use are approved by and registered with the Substance Abuse and Mental Health Services Administration, a division of the United States Department of Health and Human Services.

Children and Family Services: There are two plans required by federal sources to receive funding. The IV-B plan is updated annually and created around a submitted 5-year Child and Family Services Plan. There is also a IV-E plan. The plans are created in the format identified by the federal government and the plans may be amended upon approval of the federal government. The Department does have some latitude in building the plans to meet local issues as long as the plan meets the requirements of the Program Issuance detailing the requirements to access the funding.

In addition to the state plan requirements to access federal funding for Child and Family Services, there are activities within the Children and Family

Services Division that are conducted through the use of policy and national guidelines. Adoption program activities use guidelines from both governmental and private sources. Child protection services program activities also use national guidelines, some from government-sponsored national resource centers and some from private sources.

This concludes my testimony. I will try to answer any questions you have.

Thank you.