FEB 0 4 2000

LCRC FORM 2

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266–1946

Richard Sweet
Assistant Director
(608) 266–2982

Laura D. Rose, Interim Director
Legislative Council Staff
(608) 266–1304

One E. Main St., Ste. 401
P.O. Box 2536
Madison, WI 53701–2536
FAX: (608) 266–3830

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **00–008**

AN ORDER to amend HFS 108.02 (9) (e); and to create HFS 106.12 (9) and 108.02 (9) (f), relating to relating to discovery rights in contested case hearings involving providers under the medical assistance (MA) program.

Submitted by **DEPARTMENT OF HEALTH AND FAMILY SERVICES**

01–11–00 RECEIVED BY LEGISLATIVE COUNCIL.
02–04–00 REPORT SENT TO AGENCY.

RNS:PS:jal;rv

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

   Comment Attached YES ☐ NO ☑

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

   Comment Attached YES ☐ NO ☑

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

   Comment Attached YES ☐ NO ☑

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

   Comment Attached YES ☐ NO ☑

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

   Comment Attached YES ☑ NO ☐

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

   Comment Attached YES ☐ NO ☑

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

   Comment Attached YES ☐ NO ☑

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266–1946

Richard Sweet
Assistant Director
(608) 266–2982

Jane R. Henkel,
Acting Director
Legislative Council Staff
(608) 266–1304

One E. Main St., Ste. 401
P.O. Box 2536
Madison, WI 53701–2536
FAX: (608) 266–3830

CLEARINGHOUSE RULE 00–008

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. On the fiscal estimate cover sheet, in the third paragraph of assumptions, the reference to "Class 2" should be changed to "Class 3."

b. In s. HFS 106.12 (9) (b), the phrase "who is any of the following" should be added at the end of the (intro.) and "Who is" should be deleted from subds. 1. to 4. The semicolons and "; or" at the end of subds. 1. to 3. should be replaced by periods. Also, in subd. 4., what privilege is being referred to? The same comments apply to s. HFS 108.02 (9) (f) 4. a. to d.

1-10-00

PROPOSED ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
AMENDING AND CREATING RULES

To amend HFS 108.02 (9) (e) and to create HFS 106.12 (9) and 108.02 (9) (f), relating to discovery rights in contested case hearings involving providers under the medical assistance (MA) program.

Analysis Prepared by the Department of Health and Family Services

In Wisconsin, contested case proceedings for which state agencies must hold administrative hearings are by statute divided into three categories. Class 1 cases involve situations in which the agency has substantial discretionary authority (such as rate setting or the grant or denial of a license) but no imposition of a sanction or penalty is involved; Class 2 contested cases involve the imposition of a sanction or penalty; and Class 3 cases are those not included in Class 1 or Class 2. Under s. 227.45(7), Stats., in a Class 2 proceeding the parties have an automatic right to take and preserve evidence prior to the hearing by using discovery procedures such as depositions and interrogatories, but in a Class 1 or Class 3 proceeding the parties generally do not have the right to use discovery unless rules of the agency specifically provide for that right.

The Department of Health and Family Services does not have rules providing for discovery in a Class 1 or Class 3 contested case. Accordingly, discovery has not been available for Class 1 or Class 3 cases except with respect to certain witnesses identified in s. 227.45 (7), Stats. The Department of Administrations's Division of Hearings and Appeals handles cases delegated from this Department. Recently, a hearing examiner in the Division of Hearings and Appeals issued an order in a Medical Assistance Program Class 3 case which held that, because the Division of Hearings and Appeals has its own rules allowing discovery in all cases, those rules override the absence of any mention of discovery in the Department of Health and Family Services' rules concerning hearing rights and procedures. If other hearing examiners issue similar rulings, the Department of Health and Family Services would be subject to discovery in all cases. This means that in the absence of Department rules that provide otherwise, the process of litigation for Class 1 and Class 3 cases would be significantly prolonged for all parties and the additional administrative costs to the Department associated with that process (including the need to hire additional program staff, attorneys, and support staff to handle the depositions, interrogatories, and other discovery procedures) would be considerable.

There is a particularly high volume of Class 1 and Class 3 cases involving Medical Assistance program providers. Accordingly, these rules make clear that discovery remains unavailable in Class 1 and Class 3 Medical Assistance contested case proceedings involving providers.

Similar emergency rules were published on December 23, 1999, and were effective on that date.

The Department's authority to amend and create these rules is found in s. 49.45 (10), Stats. The rules interpret ss. 49.45 (2) and (3) and 227.45 (7) (intro.), Stats.

SECTION 1. HFS 106.12(9) is created to read:

HFS 106.12(9) DISCOVERY. (a) In this subsection, "class 1 proceeding," "class 2 proceeding" and "class 3 proceeding" have the meanings given in s. 227.01(3), Stats.

(b) In any class 2 proceeding under this section, each party shall have the right prior to the hearing to take and preserve evidence as provided in s. 227.45(7), Stats., and ch. 804, Stats. In a class 1 proceeding or class 3 proceeding, no party has a right of discovery except with respect to a witness:

1. Who is beyond reach of the subpoena of the agency or hearing examiner;

2. Who is about to go out of the state, not intending to return in time for the hearing;

3. Who is so sick, infirm or aged as to make it probable that the witness will not be able to attend the hearing; or

4. Who is a member of the legislature, if any committee of the legislature or the house of which the witness is a member is in session, provided the witness waives his or her privilege.

(c) Nothing in this subsection prohibits a party from exercising any applicable right to obtain record access or copies of records under s. 19.35 or 49.45, Stats.

SECTION 2. HFS 108.02(9)(e) is amended to read:

HFS 108.02(9)(e) *Request for hearing on recovery action.* If a provider

chooses to contest the propriety of a proposed recovery action under par. (a), the provider shall, within 20 days after receipt of the department's notice of intent to recover, request a hearing on the matter. The request shall be in writing and shall briefly identify the basis for contesting the proposed recovery. Receipt of a timely request for hearing shall prevent the department from making the proposed recovery while the hearing proceeding is pending. If a timely request for hearing is not received, the department may recover from current or future obligations of the program to the provider the amount specified in the notice of intent to recover and may take such other legal action as it deems appropriate to collect the amount specified. ~~All hearings on recovery actions by the department shall be held in accordance with the provisions of ch. 227, Stats.~~ #2 The date of service of a provider's request for a hearing shall be the date on which the department of ~~administration~~ administration's division of hearings and appeals receives the request.

Department's office of administrative hearings – strike these

Strk + underscore

SECTION 3. HFS 108.02(9)(f) is created to read:

HFS 108.02(9)(f) *Hearing on recovery action.* 1. In this paragraph, "class 1 proceeding", "class 2 proceeding" and "class 3 proceeding" have the meanings given in s. 227.01(3), Stats.

2. All hearings on recovery actions by the department shall be held in accordance with the provisions of ch. 227, Stats.

3. In any class 2 proceeding under this subsection, each party shall have the right prior to the hearing to take and preserve evidence as provided in s. 227.45(7), Stats., and ch. 804, Stats.

4. In a class 1 proceeding or class 3 proceeding under this subsection, no party has a right of discovery except with respect to a witness:

a. Who is beyond reach of the subpoena of the agency or hearing examiner;

b. Who is about to go out of the state, not intending to return in time for the hearing;

c. Who is so sick, infirm or aged as to make it probable that the witness will not be able to attend the hearing; or

d. Who is a member of the legislature, if any committee of the legislature or the house of which the witness is a member is in session, provided the witness waives his or her privilege.

5. Nothing in this subsection prohibits a party from exercising any applicable right to obtain record access or copies of records under s. 19.35 or 49.45, Stats.

The rules contained in this order shall take effect on the first day of the month following their publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2), Stats.

Wisconsin Department of Health and
Family Services

Dated:

By: _____
Joseph Leean
Secretary

SEAL:

State of Wisconsin/DIVISION OF HEARINGS AND APPEALS

David H. Schwarz, Administrator
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
TDD: (608) 264-9853
FAX: (608) 267-2744

October 5, 1999

Theresa M. Hottenroth
Whyte Hirschboeck Dudek S.C.
Suite 300
One East Main Street
P.O. Box 2996
Madison, Wisconsin 53701-2996

Jean E. Gilpin
Attorney
Office of Legal Counsel
Department of Health and Family Services
State of Wisconsin
Room 651
1 West Wilson Street
P.O. Box 7850
Madison, Wisconsin 53707-7850

Re: *Special Children Center*; (MA Recoupment) 98-DHA-068

ORDER

Dear Ms. Hottenroth and Ms. Gilpin:

This letter is the decision and Order of the Division of Hearings and Appeals (DHA) in regard to the following three issues:

(A) Does Chapter HA 1 of the Wisconsin Administrative Code (August 1995) entitled "Procedure and Practice for Contested Cases" apply to this proceeding?;

(B) Is it required that the ruling regarding the issued presented in (A), above, be issued "Proposed" so that the Secretary of the Department of Health and Family Services (DHFS) has an opportunity to pass on it?

(C) If it is not required, is it permitted that the ruling regarding the issued presented in (A), above, be issued "Proposed" so the Secretary DHFS has an opportunity to pass on it?

These issues have been fully briefed by both parties in accordance with the schedule and procedure agreed to by both parties.

(A) APPLICABLITY OF CHAPTER HA 1 OF THE WISCONSIN ADMINISTRATIVE CODE (AUGUST 1995)

In relevant part, section 1.01 of Chapter HA 1, entitled "Application of rules" states: "These rules shall apply in all contested cases [sic] proceedings and hearings before the division of hearings and appeals under ch. 227, Stats., except as specifically provided otherwise."

This proceeding is a contested case proceeding before DHA under chapter 227 of the Wisconsin Statutes. Additionally, the hearing in this proceeding will be held before DHA under chapter 227 of the Wisconsin Statutes. There is no dispute about any of this.

Therefore, Chapter HA 1 applies to this proceeding, except as specifically provided otherwise. The Division of Health Care Financing (DHCF) has not cited anything specially providing otherwise. Moreover, I am not aware of anything specially providing otherwise. In particular, the law bringing cases such as this one under the jurisdiction of DHA specifically did not provide that currently existing DHA Administrative Code sections would not apply. It provided only that "[a]ll rules promulgated and orders issued by the department of health and family services associated with administrative hearings in effect on the effective date of this paragraph remain in effect until their specified expiration date or until modified or rescinded by the department of administration." 1995 Wis. Act 370, § 14(1)(f). No rule promulgated or order issued by DHFS associated with administrative hearings in effect on the effective date of that paragraph is inconsistent with the application of Chapter HA 1 to this proceeding. Therefore, by the plain and clear terms of the law, Chapter HA 1 applies to this proceeding.

DHCF argues that "[t]he history of the HA 1 rules and of the organizational development of the Division of Hearings and Appeals indicates that HA 1 was never intended to be applied to medical assistance provider cases." DHCF devotes a very large portion of its brief to this argument. It is well established, however, that, if the meaning of an Administrative Code section is clear and unambiguous on its face, then resort to extrinsic aids for the purpose of construction of the Code section is improper. A Code section is "ambiguous" when it is capable of being understood by reasonably well-informed persons in two or more different senses. *Hacker v. DHSS*, 197 Wis.2d 441, 454-456, 541 N.W.2d. 766 (1995); *State v. Martin*, 162 Wis.2d 883, 893-894, 470 N.W.2d. 900 (1991); See also, *Law Enforcement Standards Board v. Village of Lyndon Station*, 101 Wis.2d 472, 489, 305 N.W.2d 89 (1981) ("[I]t is generally accepted that the rules and regulations of administrative agencies are subject to the same principles of construction as apply to the construction of statutes . . .").

In this case, the Code section at issue, quoted above, is not "ambiguous" because it is not capable of being understood by reasonably well-informed persons in two or more different senses. Furthermore, DHCF does not argue that that Code section is ambiguous. Therefore, in this case, resort to extrinsic aids, such as the historical intent of the Code section, is not proper.

Furthermore, even if resort to extrinsic aids were proper in this case, the purpose of resorting to extrinsic aids is to ascertain and give effect to the intent of the legislature. *Hacker v. DHSS*, 197 Wis.2d at 454; *State v. Martin*, 162 Wis.2d at 893. When the legislature granted DHA jurisdiction over cases such as this one it specifically considered the issue of what rules and orders would apply. See, 1995 Wis. Act 370, § 14(1)(f). Chapter HA 1 existed at that time and clearly provided, as it does now, that it would apply to these types of cases -- yet the legislature was silent concerning it. Id. This silence must be interpreted to mean that the legislature has acquiesced to the application of Chapter HA 1 as provided in Chapter HA 1.

DHCF also argues that because Special Children's Center (SCC) cannot, in DHCF's view, obtain discovery in this matter pursuant section 227.45(7) of the Wisconsin Statutes it therefore follows that it also cannot obtain discovery pursuant to section 1.11 of Chapter HA 1, entitled "Preservation of testimony and

discovery". This is not correct. There is nothing in section 227.45(7) of the Wisconsin Statutes which makes that section the exclusive means of obtaining discovery. In fact, the administrator of DHA was given the express authority to promulgate rules relating to the exercise of DHA's powers and duties. Wis. Stat. § 227.43(1)(d) (1997-98).

(B) and (C) PROPOSED RULING

DHCF acknowledges that there is no requirement that the ruling on this issue be rendered in proposed form. DHCF, however, urges that the ruling, if adverse to DHCF, be issued in proposed form. DHCF cites no authority that allows for such a procedure and I am aware of none. Therefore, DHCF's request must be denied.

As previously agreed and noticed, there will be a sixth pre-Hearing telephone Conference at 9:00 A.M. on Friday morning, November 5, 1999. As also previously agreed and noticed, the hearing in this matter will begin at 9:00 A.M. on Tuesday morning, February 29, 2000.

Sincerely,

Sean P. Maloney
Hearing Officer
Division of Hearings and Appeals

WHYTE
HIRSCHBOECK
DUDEK S.C.

WHD LAW

THERESA M. HOTTENROTH
DIRECT DIAL (608) 258-7128

January 6, 2000

VIA FACSIMILE AND MAIL

Jean E. Gilpin, Esq.
Department of Health and Family Services
1 W. Wilson Street, Room 650
Madison, WI 53703

RE: Special Children Center

Dear Ms. Gilpin:

I am in receipt of your responses to Special Children Center's First Set of Interrogatories and Request for Production of Documents. It appears from those responses that the Department of Health and Family Services and its Division of Health Care Financing will attempt to avoid virtually any written discovery in this matter despite the hearing examiner's decision that Special Children Center ("SCC") was entitled to conduct discovery under the applicable rules. The purpose of this letter is to address the objections to discovery which you raised, in a good-faith effort to resolve the apparent disputes, prior to bringing a motion to compel discovery.

Interrogatory No. 3, and the associated document request, sought information regarding the study which identified SCC as a target for audit based on certain billing patterns. You objected to this interrogatory on the grounds that it was irrelevant to the issue of the validity of the audit findings and not reasonably likely to lead to the discovery of admissible evidence. It is our position that it is reasonably likely to lead to the discovery of admissible evidence on several fronts, including evidence regarding DHFS' exercise of its discretion in determining whether to recoup or to educate as a result of its findings, regarding potential bias or prejudice on the part of the persons making various decisions resulting in the recoupment sought by DHFS, and regarding otherwise arbitrary and capricious agency actions. The interrogatory is not vague, overbroad, and unduly burdensome; it is quite specific, as indicated by the deposition testimony of Mary Chucka and Wayne Mead regarding the study in question.

You also objected to Interrogatory No. 3 on the basis that it "requests a summary or compilation not presently in existence and which is therefore outside the scope of discovery." I

ONE EAST MAIN STREET SUITE 300 MADISON, WI 53703-3300 TELEPHONE: (608) 255-4440 FAX: (608) 258-7138 INTERNET: www.whdlaw.com
OFFICES IN MILWAUKEE, WI • MADISON, WI • MENOMONEE FALLS, WI • MANITOWOC, WI

am unaware of any authority which provides that only information previously in existence in a specified format may be discovered. In fact, such a proposition is seriously at odds with Wisconsin's liberal discovery rules. Moreover, your refusal to respond on this basis is at odds with the express language of sec. 804.08(3), Stats., which recognizes a party's right to discover information from another party's business records including compilations, abstracts, or summaries based thereon. That statute expressly provides that the party, in this case DHFS, may elect to produce the compilation or summary itself, or if the burden of deriving the information is substantially the same for SCC as for DHFS, you may give SCC access to the applicable DHFS records so that SCC may make its own compilations, abstracts or summaries. It does not allow you to simply decline to produce the requested information.

Your final objection to Interrogatory No. 3 was that disclosure of the requested records would "impede and obstruct ongoing and future investigations" of other providers and would thereby "be of overriding harm to the public interest." This is not a basis on which to refuse discovery. If public disclosure of the information is a concern, then the appropriate step is to request a protective order restricting further disclosure of the information. Moreover, you have not referenced any applicable privilege or cited to any statute or regulation which would indicate that this information is confidential information.

With respect to Interrogatory Nos. 4 and 5, you cleverly seized upon an obvious typographical error – a reference to "the study referenced in Interrogatory No. 1" wherein the "1" should nave been a "3" – and used this as a basis to avoid any response, despite the fact that any straightforward reading of the interrogatories makes it clear that the study referenced in Interrogatory Nos. 4 and 5 is the study about which information was requested in Interrogatory No. 3. Let me take this opportunity to correct the earlier error and be as clear as possible that the study referenced in Interrogatory Nos. 4 and 5 is the study referenced in Interrogatory No. 1 and discussed at length during the depositions of Mary Chucka an Wayne Mead. See, e.g., Chucka Dep. at pp. 27-34; Mead Dep. at pp. 12-14. However, even with this clarification, I assume that you would raise the same objections to Interrogatory Nos. 4 and 5 as you raised to Interrogatory No. 3. If such is the case, then my comments above regarding the objections to Interrogatory No. 3 apply here as well.

You objected to Interrogatory No. 6 on the basis that the requested information was not reasonably likely to lead to the discovery of admissible evidence because it does not go to the issue of the validity of the SCC audit findings. However, it does go to the manner in which the Department exercised its discretion to select certain providers for audits or investigations and its discretion to seek recoupments. This is a highly relevant issue since, as discovery to date has shown, whether the Department abused its discretion and acted arbitrarily and capriciously with respect to SCC is an issue at the heart of this case. You also state that the interrogatory is vague, overbroad, and unduly burdensome in that it requests "every audit, financial review, and other investigation record or conversation of the Wisconsin Medical Assistance Program during a 7-

year period be itemized." I do not believe that this is a reasonable reading of the interrogatory, which requests a breakdown, by provider type, of the "field audits, financial reviews, or other investigations of Medicaid providers and billing and/or recordkeeping practices which had the potential to result in formal audit findings and notices of recoupment." If there is a narrower categorization or description which you believe addresses the issue, I am certainly open to reviewing your good-faith response. With respect to the objection that it requests a summary or compilation not presently in existence, such an objection is without merit, as discussed above with respect to Interrogatory No. 3.

With respect to Interrogatory Nos. 7, 8, and 9, to which you raised identical objections, I believe those objections are likewise without merit for the reasons noted with respect to Interrogatory Nos. 3 and 6. In particular, I disagree with your premise that information regarding the Department's criteria, policies, and practices for deciding when to educate providers without seeking recoupment, versus when to seek recoupment, is not relevant. That information is highly relevant to the question whether the Department abused its discretion and acted arbitrarily and capriciously in this case.

The above comments likewise apply to your objections to SCC's First Request for Production of Documents.

I hope that you will reconsider your responses and make a good-faith effort to comply with Wisconsin's discovery requirements as soon as possible, so that we can avoid a motion to compel discovery and a motion for costs and sanctions. (Please note that pursuant to sec. 804.08(1)(a), Stats., an evasive or incomplete answer is to be treated as a failure to answer. An "evasive" answer is one that does not "comport with the duty of cooperation and disclosure" but rather appears "framed to impede discovery rather than to facilitate it." Airtex Corp. v. Shelley Radiant Ceiling Co., 536 F.2d 145, 155 (7th Cir. 1976).) Meanwhile, please be advised that I intend to ask that the hearing date for this matter be rescheduled in light of the delay in obtaining adequate discovery responses.

Should you wish to meet to discuss these and any other discovery issues, I will of course be happy to do so.

Sincerely yours,

Theresa M. Hottenroth

cc: Nancy Lawton-Shirley
DeDe Wanzek

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of)
SPECIAL CHILDREN CENTER) Case No. 98-DHA-068

DIVISION OF HEALTH CARE FINANCING'S
RESPONSE TO PETITIONER'S FIRST SET OF INTERROGATORIES
AND REQUEST FOR PRODUCTION OF DOCUMENTS

TO: Theresa M. Hottenroth
Whyte Hirschboeck Dudek S.C.
One East Main Street, Suite 300
Madison WI 53703-3300

The respondent Department of Health and Family Services' Division of Health Care Financing hereby answers Special Children Center's First Set of Interrogatories and Request for Production of Documents, which were served upon the respondent on November 24, 1999.

The respondent reserves the right to supplement these answers in the event additional information is discovered. Neither the furnishing of these answers nor any of the information or documents contained or presented therein shall be deemed to be an admission of the relevance, materiality, or admissibility of any such information or documents, and the respondent expressly reserves the right to object to the admission of any information or documents in these answers on the grounds of relevance, materiality, privilege or otherwise.

INTERROGATORIES

INTERROGATORY NO. 1: Identify each person who supplied or gathered

information for inclusion in your answers to any of these interrogatories, specify the interrogatory for which each such person supplied or gathered information, state whether the information supplied or gathered was based on personal knowledge of such person, or where upon information and belief, identify the sources of the information.

ANSWER: Jean E. Gilpin, Attorney
Office of Legal Counsel
Department of Health and Family Services
One West Wilson Street
P. O. Box 7850
Madison WI 53707-7850.

Mary Chucka, Occupational Therapy Consultant
Bureau of Health Care Program Integrity
Division of Health Care Financing
Department of Health and Family Services
One West Wilson Street
P. O. Box 309
Madison WI 53701-0309

All objections have been supplied by Jean E. Gilpin, in reliance on statutes and rules which are in the public domain and on information supplied by Mary Chucka. Information supplied by Mary Chucka is based upon her personal knowledge or her knowledge of the audit concerning Special Children Center. Respondent objects to any portion of this interrogatory that would request identification of individual documents used as sources of information. Such a request is vague, overbroad, and unduly burdensome, and requests a summary or compilation not presently in existence and which is therefore outside the scope of discovery.

INTERROGATORY NO. 2: State whether you have read the Definitions and Instructions to be used in answering these interrogatories. If your answer is anything

other than an unqualified "yes," state all reasons why you have not done so.

ANSWER: Yes.

INTERROGATORY NO. 3: Describe all elements of the design of the study of Medicaid claims for physical therapy, occupational therapy, and speech therapy which study resulted in the identification of Special Children Center as a Medicaid provider to be audited. In your description, identify the types of services and/or providers which were studied, the groupings into which claims were categorized, the indices upon which claims were assessed, and the criteria for identifying abnormal or atypical claim submissions and billing patterns. In answering this interrogatory, provide, without limitation, the following information:

(a) Identify all documents that describe, refer to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, in answering this interrogatory or from which any of your answer to this interrogatory may be derived;

(b) Identify all persons who have knowledge of, or who can provide information concerning, any of the information you set forth in your answer to this interrogatory; and

(c) Identify all oral communications that describe, refer, pertain to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, as the basis for any of your answers to this interrogatory.

ANSWER: Respondent objects. The Department of Health and Family

Services has authority by statute and rule to audit any provider at any time for any reason, and to pursue recovery of overpayments determined in the course of that audit. See, for example, s.49.45, Stats., and rules HFS 106.02(9) and HFS 108.02(9), Wis. Admin. Code. The reasons for selecting Special Children Center to be audited are irrelevant to the issue of the validity of the audit findings, and are not reasonably likely to lead to the discovery of admissible evidence. Respondent further objects to this interrogatory on the grounds that it is vague, overbroad, and unduly burdensome. Respondent further objects to this interrogatory on the grounds that it requests a summary or compilation not presently in existence and which is therefore outside the scope of discovery. Respondent also objects to this interrogatory on the grounds that, to the extent the disclosure calls for production of records concerning providers other than Special Children Center, the disclosure of the requested records would impede and obstruct ongoing and future investigations of those providers and would thereby be of overriding harm to the public interest.

INTERROGATORY NO. 4: Identify each individual involved in the design of the study referenced in Interrogatory No. 1, identify the employer of each individual, and described each individual's role in the study design. In answering this interrogatory, provide, without limitation, the following information:

(a) Identify all documents that describe, refer to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, in answering this interrogatory or from which any of your answer to this

interrogatory may be derived;

(b) Identify all persons who have knowledge of, or who can provide information concerning, any of the information you set forth in your answer to this interrogatory; and

(c) Identify all oral communications that describe, refer, pertain to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, as the basis for any of your answers to this interrogatory.

ANSWER: No study was referenced in Interrogatory No. 1. Accordingly, it is impossible to provide information of the sort requested in this interrogatory.

INTERROGATORY NO. 5: Identify each individual involved in recommending or determining which Medicaid providers would be audited as a result of the study referenced in Interrogatory No. 1, identify the employer of each individual and describe each individual's role in making such recommendations or determinations. In answering this interrogatory, provide, without limitation, the following information:

(a) Identify all documents that describe, refer to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, in answering this interrogatory or from which any of your answer to this interrogatory may be derived;

(b) Identify all persons who have knowledge of, or who can provide information concerning, any of the information you set forth in your answer to this interrogatory; and

(c) Identify all oral communications that describe, refer, pertain to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, as the basis for any of your answers to this interrogatory.

ANSWER: No study was referenced in Interrogatory No. 1. Accordingly, it is impossible to provide information of the sort requested in this interrogatory.

INTERROGATORY NO. 6: Identify, by providing a listing of, the field audits, financial reviews, or other investigations of Medicaid providers and billing and/or recordkeeping practices which had the potential to result in formal audit findings and notices of recoupment during each of the state fiscal years 1990, 1991, 1992, 1993, 1994, 1995, and 1996. In answering this interrogatory, provide the requested information for each year by Medicaid provider type (e.g., occupational therapists; physicians; hospitals; clinics; nursing homes; specialized medical vehicles; physical therapists; pharmacists; etc.). For each year and each provider type, describe the different types of field audits, financial reviews, or other investigations of billing and/or recordkeeping practices undertaken and identify the number of each which was undertaken, the number of each which resulted in a formal audit finding, the number of each which resulted in a notice of recoupment, the total amount of recoupment sought as reflected in preliminary notices of intent to recover, the total amount of recoupment sought as reflected in revised notices of intent to recover, and the total amount recouped after exhaustion of providers' administrative remedies. In answering this interrogatory, provide, without limitation, the following information:

(a) Identify all documents that describe, refer to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, in answering this interrogatory or from which any of your answer to this interrogatory may be derived;

(b) Identify all persons who have knowledge of, or who can provide information concerning, any of the information you set forth in your answer to this interrogatory; and

(c) Identify all oral communications that describe, refer, pertain to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, as the basis for any of your answers to this interrogatory.

ANSWER: Respondent objects. The Department of Health and Family Services has authority by statute and rule to audit any provider at any time for any reason, and to pursue recovery of overpayments determined in the course of that audit. See, for example, s.49.45, Stats., and rules HFS 106.02(9) and HFS 108.02(9), Wis. Admin. Code. Audits, financial reviews, or investigations of providers other than Special Children Center are irrelevant to the issue of the validity of the Special Children Center audit findings and are not reasonably likely to lead to the discovery of admissible evidence. Respondent further objects to this interrogatory on the grounds that it is vague, overbroad, and unduly burdensome. In effect, the appellant has requested that every audit, financial review, and other investigation record or conversation of the Wisconsin Medical Assistance Program during a 7-year period be itemized. Respondent further objects to this interrogatory on the grounds that it requests a summary or compilation not

presently in existence and which is therefore outside the scope of discovery.

INTERROGATORY NO. 7: Describe the process by which the Department decided, during 1996, whether to seek recoupment for certain claims or services, or whether to educate a provider regarding issues or errors identified in the course of a field audit, or investigation, or review of billing and/or recommend recordkeeping practices, changes in the provider's practices without seeking to recoup payments for past services. In your description, identify the individuals involved in this process and describe each individual's role. In answering this interrogatory, provide, without limitation, the following information:

(a) Identify all documents that describe, refer to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, in answering this interrogatory or from which any of your answer to this interrogatory may bederived;

(b) Identify all persons who have knowledge of, or who can provide information concerning, any of the information you set forth in your answer to this interrogatory; and

(c) Identify all oral communications that describe, refer, pertain to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, as the basis for any of your answers to this interrogatory.

ANSWER: No audit findings or notices of recoupment were issued to Special Children Center in this case during 1996. Respondent objects. The Department of

Health and Family Services has authority by statute and rule to audit any provider at any time for any reason, and to pursue recovery of overpayments determined in the course of that audit. See, for example, s.49.45, Stats., and rules HFS 106.02(9) and HFS 108.02(9), Wis. Admin. Code. Recovery of overpayments was indeed sought in this case. The information sought in this interrogatory is irrelevant to the issue of the validity of the Special Children Center audit findings and is not reasonably likely to lead to the discovery of admissible evidence. Respondent further objects to this interrogatory on the grounds that it is vague, overbroad, and unduly burdensome. Respondent further objects to this interrogatory on the grounds that it requests a summary or compilation not presently in existence and which is therefore outside the scope of discovery.

INTERROGATORY NO. 8: Identify, by providing a listing and description of, the criteria used in 1996 to determine whether the Department would seek recoupment of prior claim payments, or would educate the provider regarding changes in the provider's billing and/or recordkeeping practices without seeking recoupment. Identify the source or sources of each of these criteria, identify the individuals involved in proposing or selecting the criteria, and describe each individual's role. In answering this interrogatory, provide, without limitation, the following information:

(a) Identify all documents that describe, refer to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, in answering this interrogatory or from which any of your answer to this interrogatory may be derived;

(b) Identify all persons who have knowledge of, or who can provide information concerning, any of the information you set forth in your answer to this interrogatory; and

(c) Identify all oral communications that describe, refer, pertain to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, as the basis for any of your answers to this interrogatory.

ANSWER: No audit findings or notices of recoupment were issued to Special Children Center in this case during 1996. Respondent objects. The Department of Health and Family Services has authority by statute and rule to audit any provider at any time for any reason, and to pursue recovery of overpayments determined in the course of that audit. See, for example, s.49.45, Stats., and rules HFS 106.02(9) and HFS 108.02(9), Wis. Admin. Code. Recovery of overpayments was indeed sought in this case. The information sought in this interrogatory is irrelevant to the issue of the validity of the Special Children Center audit findings and is not reasonably likely to lead to the discovery of admissible evidence. Respondent further objects to this interrogatory on the grounds that it is vague, overbroad, and unduly burdensome. Respondent further objects to this interrogatory on the grounds that it requests a summary or compilation not presently in existence and which is therefore outside the scope of discovery.

INTERROGATORY NO. 9: Identify and describe the changes made by the Department from 1996 to the present in the procedures and criteria used by the Department to decide whether to seek recoupment from a provider, or to educate a

provider without seeking recoupment when the Department identifies errors or flaws in a provider's compliance with Medicaid requirements. In answering this interrogatory, provide, without limitation, the following information:

(a) Identify all documents that describe, refer to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, in answering this interrogatory or from which any of your answer to this interrogatory may be derived;

(b) Identify all persons who have knowledge of, or who can provide information concerning, any of the information you set forth in your answer to this interrogatory; and

(c) Identify all oral communications that describe, refer, pertain to or contain any of the information set forth in your answer or upon which you rely, in whole or in part, as the basis for any of your answers to this interrogatory.

ANSWER: No audit findings or notices of recoupment were issued to Special Children Center in this case during 1996. Respondent objects. The Department of Health and Family Services has authority by statute and rule to audit any provider at any time for any reason, and to pursue recovery of overpayments determined in the course of that audit. See, for example, s.49.45, Stats., and rules HFS 106.02(9) and HFS 108.02(9), Wis. Admin. Code. Recovery of overpayments was indeed sought in this case. The information sought in this interrogatory is irrelevant to the issue of the validity of the Special Children Center audit findings and is not reasonably likely to lead to the discovery of admissible evidence. Respondent further objects to this interrogatory on the

grounds that it is vague, overbroad, and unduly burdensome. Respondent further objects to this interrogatory on the grounds that it requests a summary or compilation not presently in existence and which is therefore outside the scope of discovery.

FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

REQUESTS

REQUEST NO. 1: All documents identified or described in response to any of the interrogatories set forth in SCC's first set of interrogatories, submitted herewith.

ANSWER: Not applicable.

REQUEST NO. 2: All documents relating to the study of Medicaid claims which resulted in the identification of SCC as a provider to be audited, including, but not limited to, internal DHFS memoranda regarding the need for the study, the use to which the study would be put, and the design of the study; correspondence with outside contractors or consultants regarding the need for the study, the use to which the study would be put, and the design of the study; and the study and any reports therein prepared by DHFS personnel or by outside contractors or consultants.

ANSWER: Respondent objects. The Department of Health and Family Services has authority by statute and rule to audit any provider at any time for any reason, and to pursue recovery of overpayments determined in the course of that audit. See, for example, s.49.45, Stats., and rules HFS 106.02(9) and HFS 108.02(9), Wis. Admin. Code. The reasons for selecting Special Children Center to be audited are irrelevant to

the issue of the validity of the audit findings, and are not reasonably likely to lead to the discovery of admissible evidence. Respondent also objects to this request on the grounds that, to the extent the request calls for production of records concerning providers other than Special Children Center, the disclosure of the requested records would impede and obstruct ongoing and future investigations of those providers and would thereby be of overriding harm to the public interest. Notwithstanding the foregoing, any portion of the records in Request No. 2 that are pertinent to the Special Children Center will be supplied in response to Request No. 4.

REQUEST NO. 3: All work papers relating to the audit of SCC, identifying each individual preparing the papers and the date the papers were prepared.

ANSWER: The requested records will be supplied.

REQUEST NO. 4: All documents relating to the audit of SCC, including but not limited to internal memoranda, correspondence from or to Medicaid patients and/or their parents or guardians, correspondence from or to EDS-Federal, Meridian Resource Group, or other outside contractors or consultants, and correspondence from or to state legislators or legislative staff.

ANSWER: The requested records will be supplied.

REQUEST NO. 5: All telephone logs and related records of telephone conversations between any SCC personnel and any of the following individuals: Mary

Chucka, Pamela Hoffman, and Wayne Mead, for the period from January 1, 1994 through February 15, 1997.

ANSWER: The Division of Health Care Financing has no formal process for logging telephone conversations. However, to the extent the requested records exist, they will be supplied.

REQUEST NO 6: All correspondence between DHFS and EDS-Federal regarding SCC, without limitation as to subject matter, for the period from January 1, 1994, to present.

ANSWER: The requested records will be supplied.

Jean E. Gilpin, attorney for the respondent Department of Health and Family Services' Division of Health Care Financing, being first duly sworn on oath, says that she is the person who prepared and reviewed the answers and objections to the foregoing interrogatories and requests for records and that they are true and correct to the best of her knowledge and belief.

Dated at Madison, Wisconsin this 16th day of December, 1999.

Jean E. Gilpin

Jean E. Gilpin, Attorney
State Bar No. 1016621
Office of Legal Counsel
Department of Health and Family Services
One West Wilson Street
P. O. Box 7850
Madison WI 53707-7850

Subscribed and sworn to before me
this 16 day of December, 1999.
Paul Y. Harris
Notary Public, State of Wisconsin
My commission: IS PERMANENT.

Mary Chucka, being first duly sworn on oath, says that she has read the foregoing answers to interrogatories and requests for documents and that the information supplied in the answers, other than objections, is true to the best of her knowledge and belief.

Mary Chucka

Mary Chucka, Occupational Therapy Consultant
Bureau of Health Care Program Integrity
Division of Health Care Financing
Department of Health and Family Services
One West Wilson Street
P. O. Box 309
Madison WI 53701-0309

Subscribed and sworn to before me
this 16th day of December, 1999.

Notary Public, State of Wisconsin
My commission: IS PERMANENT

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of
SPECIAL CHILDREN CENTER **Case No. 98-DHA-068**

PRE-HEARING BRIEF OF SPECIAL CHILDREN CENTER ON APPLICABILITY OF CHAPTER HA 1, WISCONSIN ADMINISTRATIVE CODE, TO PROCEEDING

INTRODUCTION

At the pre-hearing telephone conference held on June 11, 1999, the parties discussed whether discovery in this proceeding was controlled by the provisions of Chapter HA 1, Wisconsin Administrative Code, or by the absence of regulations promulgated by the Department of Health and Family Services (in effect precluding certain discovery). Special Children Center's position is that Chapter HA 1, and the discovery provisions therein, govern this proceeding; the Department of Health and Family Services contends that Chapter HA 1 does not control. The parties were instructed to brief three issues: (1) whether Chapter HA 1 applies to this proceeding; (2) whether the hearing examiner's ruling on question (1) must be issued as a "Prepared Decision" that the Secretary of DHFS has an opportunity to pass on it; and (3) whether the ruling on question (1) may be issued as a "Proposed Decision" even if such is not required. In this brief, Special Children Center responds to these issues; for convenience and brevity, issues (2) and (3) have been addressed as one issue.

ARGUMENT

I. Does Chapter HA 1 of the Wisconsin Administrative Code (August 1995) entitled "Procedure and Practice for Contested Cases" apply to this proceeding?

Answer: Yes.

A. This proceeding is being conducted by the Division of Hearings and Appeals pursuant to sec. 227.43(1)(bu), Stats., and is subject to the Division's rules governing hearings under sec. 227.43.

This proceeding is a contested case hearing on a proposed recoupment of alleged Medical Assistance overpayments made by the Department of Health and Family Services ("DHFS") to Special Children Center and its associated individual providers (collectively, "Special Children Center"). On May 21, 1998, DHFS issued a "Notice of Intent to Recover" to Special Children Center, in which DHFS cited as its authority to recover the alleged overpayment sec. 49.45(2)(a)10, Stats., and HFS 108.02(9)(a), Wis. Admin. Code. In that same Notice of Intent to Recover, DHFS informed Special Children Center of its right to request an administrative hearing if it disagreed with the proposed recoupment and stated that the request for hearing must be submitted to the Division of Hearings and Appeals ("DHA") of the Department of Administration ("DOA"). On June 15, 1998, Special Children Center filed with DHA its Request for Hearing on Notice of Intent to Recover. On August 4, 1998, the DHA issued a Notice of Pre-Hearing Telephone Conference in this matter, which DHA captioned "*Special Children's Center*; (MA recoupment); 98-DHA-068." There can be no doubt that this matter is anything other than a hearing on a Medical Assistance ("MA") recovery, or recoupment, action, requested by the provider from whom the recoupment was proposed by DHFS, and that it falls squarely under the provisions of HFS 108.02(9), "Departmental Recovery of Recoupments" -- as, indeed, DHFS acknowledged when it began

the recoupment action. Nor can there be any question that DHFS acknowledged from the outset that any hearing to which the provider was entitled would be conducted by the Division of Hearings and Appeals, as stated in DHFS' own Notice of Intent to Recover, and must be held in accordance with the provisions of Chapter 227, Stats., as provided not only by Chapter 227 itself but also by HFS 102.08(9)(e) ("All hearings on recovery actions by the department shall be held in accordance with the provisions of ch. 227, Stats.").

The reason this proceeding is being conducted by the Division of Hearings and Appeals (which, as noted, is part of the Department of Administration, not part of DHFS) is found in sec. 227.43(1), Stats., which provides in part as follows:

> **227.43 Division of hearings and appeals. (1)** The administrator of the division of hearings and appeals in the department of administration shall:
>
> * * * * *
>
> (bu) Assign a hearing examiner to preside over any hearing of a contested case that is required to be conducted by the department of health and family services and that is not conducted by the secretary of health and family services.
>
> (d) Promulgate rules relating to the exercise of the administrator's and the division's powers and duties under this section.

Sec. 227.43(1), Stats.

This matter is before DHA pursuant to sec. 227.43(1)(bu), Stats., because it is a matter for which DHFS is required to provide a contested case hearing and that contested case hearing is not being conducted by the secretary of health and family services. The rules promulgated pursuant to sec. 227.43(1)(d), Stats., clearly apply to the conduct of hearings which come before DHA as a result of the application of sec. 227.43(1)(bu). Those rules are

found, in part, in Chapter HA 1, "Procedure and Practice for Contested Cases," Wis. Admin. Code.

B. The plain language of Chapter HA 1 and of the applicable DHFS administrative rules make it clear that HA 1 governs these proceedings.

The clear statutory directive of sec. 227.43(1)(bu), which is part of an overall statutory scheme placing responsibility in DHA for the conduct of contested case hearings originating from matters before a variety of other state agencies, and charging DHA with promulgating rules for handling those hearings, provides ample authority on its own for the application of Chapter HA 1 to this proceeding. But we need not stop there; the same conclusion is compelled by the plain language of the applicable rules of both agencies, DHA and DHFS.

Chapter HA 1 begins with a clear statement of its applicability to the various proceedings coming before DHA:

> **HA 1.01 Application of rules.** These rules shall apply in all contested cases [sic] proceedings and hearings before the division of hearings and appeals under ch. 227, Stats., except as specifically provided otherwise. Agencies for which the division conducts proceedings, such as the departments of natural resources and justice, may have specific regulations which govern the conduct of those proceedings.

HA 1.01, Wis. Admin. Code. Thus, because this matter is a contested case proceeding before DHA, HA 1.01 commands that the provisions of Chapter HA 1 apply to these proceedings "except as specifically provided otherwise." Id.

In short, Chapter HA 1 governs the conduct of this proceeding unless DHFS has adopted specific regulations which govern the conduct of this proceeding.[1] DHFS has not

[1]Other statutory provisions specifically governing the conduct of recoupment hearings would, of course, trump the application of Chapter HA 1, but no such statutory provisions

adopted any such regulations governing the conduct of MA recoupment proceedings under HFS 108.02(9); all that DHFS has said in its regulations governing such proceedings is that they "shall be held in accordance with the provisions of ch. 227, Stats." HFS 108.02(9)(e), supra. This is not merely a conclusion based on the absence of more specific regulations; elsewhere, DHFS has set forth in great detail the procedures which are to govern other hearings before DHA involving administrative actions taken by DHFS affecting MA providers. See HFS 106.12, Wis. Admin. Code. DHFS has specifically excluded from the application of those regulations the very type of recoupment action which is the subject of this proceeding.

> **HFS 106.12 Procedure, pleadings and practice. (1)** SCOPE. The provisions of this section shall govern the following administrative actions by the department:
>
> * * * * *
>
> **(1m)** APPLICATION. The provisions of this section do not apply to either of the following:
>
> (a) Hearings to contest recoveries by the department of overpayments to providers. Requests for hearings and hearings under these circumstances are governed exclusively by s. HFS 108.02(9)(e); or
>
> (b) Contests by providers of the propriety of the amount of payment received from the department. . . .

HFS 106.12, Wis. Admin. Code (emphasis added).

An argument that DHFS in the past conducted recoupment hearings using procedures different than those set forth in Chapter HA 1, or somehow intended that DHA apply other

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have been identified either by Special Children Center or by DHFS.

procedures to recoupment hearings than those set forth in Chapter HA 1, is unavailing in light of the clear and unambiguous language of these administrative rules. Administrative rules "are subject to the same principles of construction as apply to the construction of statutes. . . ." Law Enforce. Stds. Bd. v. Lyndon Station, 101 Wis. 2d 472, 489, 305 N.W.2d 89 (1981). It is a cardinal rule of statutory or administrative rule construction that "first resort must be to the language of the [rule] itself." State v. Martin, 162 Wis. 2d 883, 893, 470 N.W.2d 900 (1991). "If the meaning of the [rule] is clear and unambiguous on its face, resort to extrinsic aids for the purpose of [rule] construction is improper." Id. (citations and internal quotations omitted). Where the plain language is not ambiguous, then the inquiry as to its meaning need not -- indeed, cannot -- go any further. Id.; see also UFE Inc. v. LIRC, 201 Wis. 2d 274, 281-82, 548 N.W.2d 57 (1996).

Both the applicable statute and administrative rules are clear and unambiguous. This proceeding is a contested case hearing before the Division of Hearings and Appeals pursuant to sec. 227.43(1)(bu), Stats., and HFS 108.02(9), Wis. Admin. Code. HA 1.01 clearly and unambiguously provides that Chapter HA 1 applies to all contested case proceedings before DHA unless a statute or a DHFS regulation specifically governs the conduct of the proceedings in question. DHFS has failed to promulgate any regulations specifically governing the conduct of recoupment hearings arising under HFS 108.02(9); has affirmatively provided that such proceedings are exclusively governed by the provisions of HFS 108.02(9) rather than by HFS 106.12; and has stated in HFS 108.02(9) merely that such proceedings "shall be held in accordance with the provisions of ch. 227, Stats.," which brings us right

back to sec. 227.43(1), Stats., and the rules promulgated to implement that section -- Chapter HA 1.

II. May the ruling regarding the issue presented in (I) above be issued "Proposed" so that the Secretary of the Department of Health and Family Services has an opportunity to pass on it?

Answer: No.

There is no provision either in Chapter 227, Stats., or in the administrative rules of either DHA or DHFS whereby a procedural ruling issued by a hearing examiner in the course of a contested case hearing may be reviewed, and affirmed or reversed, by the final agency decisionmaker, as an interlocutory agency-level appeal. In the absence of any such provision, there is neither a requirement nor indeed the authority to issue a "Proposed Decision" on this procedural question, on which the DHFS Secretary could then rule, prior to completion of the hearing and issuance of at least a proposed decision on the case as a whole.

Section 227.46(3), Stats., gives state agencies three methods, and only three methods, of issuing decisions in contested cases. State Public Intervenor v. DNR, 177 Wis. 2d 666, 673-74, 503 N.W.2d 305 (Ct. App. 1993).

> **(3)** With respect to contested cases except a hearing or review assigned to a hearing examiner under s. 227.43(1)(bg), an agency may by rule or in a particular case may by order:
>
> (a) Direct that the hearing examiner's decision be the final decision of the agency;
>
> (b) Except as provided in sub. (2) or (4), direct that the record be certified to it without an intervening proposed decision; or

> (c) Direct that the procedure in sub. (2) be followed, except that in a class 1 proceeding both written and oral argument may be limited.

Sec. 227.46(3), Stats. Subsection (3)(b) is inapplicable here because subsection (2) sets forth specific provisions to be followed where a majority of the officials of the agency who are to render the final decision are not present for the hearing. Accordingly, any Proposed Decision in this proceeding must be issued pursuant to the procedure set forth in 227.46(2), which provides in part as follows:

> [T]he hearing examiner presiding at the hearing shall prepare a proposed decision, including findings of fact, conclusions of law, order, and opinion, in a form that may be adopted as the final decision in the case. The proposed decision shall be a part of the record and shall be served by the agency on all parties.

Sec. 227.46(2), Stats. (emphasis added). This procedure leaves no room for the submission of intermediate rulings to the agency prior to the hearing examiner's preparation of a Proposed Decision on the case in its entirety. To the contrary, it clearly contemplates that both the factual and legal conclusions of the hearing examiner are submitted to the ultimate agency decisionmaker only upon completion of the entire case, not in some piecemeal fashion.

The absence of any statutory authority to forward intermediate rulings to an agency decisionmaker, for what is in essence an interlocutory appeal, prohibits the issuance of a Proposed Decision solely on this procedural issue before the merits of the case have been reached. As noted in State Public Intervenor v. DNR, supra, an administrative agency may not develop methods of deciding matters in contested cases that are not explicitly authorized by statute. To assume that the hearing examiner may submit to the Secretary of DHFS, and the Secretary of DHFS may rule upon, a Proposed Decision addressing only a procedural

issue, and without the findings of fact, conclusions of law, order and opinion in a form that may be adopted as the final decision in the case, "runs squarely into the supreme court's caution that 'any reasonable doubt as to the existence of an implied power in an agency should be resolved against the exercise of such authority.'" State Public Intervenor v. DNR, 177 Wis. 2d at 675 (citation omitted; emphasis in original). Because there is at least a reasonable doubt as to the authority of DHA to submit to DHFS, and the authority of DHFS to rule on, procedural matters before reaching a Proposed Decision on the merits, the law compels the conclusion that no such authority may be exercised.

Moreover, there is nothing in either the statutes or regulations to differentiate between an interlocutory agency decision on this procedural question, and an interlocutory agency decision on any other intermediate ruling by the hearing examiner. If the hearing examiner's ruling on this matter can be submitted to the DHFS Secretary in the form of a Proposed Decision, with the DHFS Secretary then having the authority to issue a Final Decision, then logically any other intermediate rulings of the hearing examiner can be submitted as Proposed Decisions and made the subject of Final Decisions. Such rulings would include, for example, rulings on offers of proof and on the relevance of proffered evidence, sec. 227.46(1)(c), Stats.; rulings on other procedural matters, sec. 227.46(1)(g), Stats.; and rulings on various motions throughout the proceedings, such as a denial of a motion for summary judgment or for judgment on the pleadings which has the effect of continuing the proceedings before the hearing examiner. If intermediate rulings can in some circumstances (such as this) be submitted to the agency decisionmaker in the form of a Proposed Decision, and can thus become the subject of a Final Decision, then there must be some basis for determining when,

and which, rulings are subject to an interlocutory agency appeal. May any intermediate ruling be appealed to the Secretary, by any party? If not, what criteria differentiate an appealable ruling from a non-appealable ruling -- and can those criteria be established on an ad hoc basis by the agency, rather than by statute or administrative rule? The provisions of Chapter 227, Stats., and the tenets of administrative law generally, require that this latter question be answered in the negative. With no statutory authority and no administrative rules which speak to interlocutory agency appeals, much less which address when such appeals may and may not be taken from intermediate rulings of a hearing examiner, this is an all-or-nothing proposition. Either the hearing examiner's decision on this matter is an intermediate ruling, and the parties must await the hearing examiner's Proposed Decision on the case in its entirety before challenging this ruling, or virtually any ruling or decision of the hearing examiner made during the course of the proceedings can be issued as a Proposed Decision at the request of any party. The latter scenario is surely not one contemplated by state agencies or by the legislature in its adoption of Chapter 227, Wisconsin's Administrative Procedure Act. More importantly, it is not one that is authorized by statute, and in the absence of such statutory authorization neither DHA nor DHFS may at this point invent a new procedure for interlocutory review of hearing examiners' intermediate rulings.

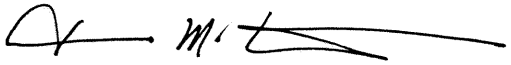
CONCLUSION

For the foregoing reasons, Special Children Center respectfully requests that the hearing examiner find that Chapter HA 1 of the Wisconsin Administrative Code, including the discovery provisions therein, applies to these proceedings, and that there is no authority for

issuing the hearing examiner's finding as a Proposed Decision prior to reaching the merits of the case.

Dated this 16th day of August, 1999.

Respectfully submitted,

By: 

Theresa M. Hottenroth
State Bar I.D. No. 1025578

WHYTE HIRSCHBOECK DUDEK S.C.
One East Main Street, Suite 300
Madison, WI 53703-3300
(608) 255-4440
(608) 258-7138 (fax)

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STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of)
SPECIAL CHILDREN CENTER) Case No. 98-DHA-068

PREHEARING BRIEF OF
DIVISION OF HEALTH CARE FINANCING

On behalf of the Division of Health Care Financing, I am hereby submitting this brief concerning the discovery issues raised in the prehearing conference of June 11, 1999.

STATEMENT OF FACTS

This is a recoupment case stemming from a Wisconsin Medical Assistance Program audit of the Special Children Center and its associated therapy providers. The Medical Assistance Program is also known as Medicaid or Title XIX. The program is operated pursuant to federal requirements in Title XIX of the Social Security Act, federal regulations adopted thereunder, Wisconsin statutes codified beginning at s. 49.43, Stats., and rules set forth in the Wisconsin Administrative Code in chs. HFS 101 through HFS 108. The program is administered at the state level by the Department of Health and Family Services' Division of Health Care Financing and its fiscal agent, EDS. The Department of Health and Family Services was formerly known as the Department of Health and Social Services, and the Division of Health Care Financing was formerly known as the Bureau of Health Care Financing.

Pursuant to s. 49.45(2)(a)10. of the Wisconsin Statutes and rule HFS 108.02(9)(a) of the Wisconsin Administrative Code, Health Care Financing issued a May 21, 1998 Notice of Intent to Recover alleging that Special Children Center and its associated therapy providers had received overpayments of medical assistance reimbursement. The notice sought to recoup the alleged overpayments. The notice was appealed pursuant to rule HFS 108.02(9)(e). Prehearing activities are now taking place before the Department of Administration's Division of Hearings and Appeals.

Special Children Center has requested formal discovery. Specifically, Special Children Center wishes to depose staff of the Division of Health Care Financing. The Division of Health Care Financing has acknowledged that Special Children Center can obtain access to records pursuant to provisions of Wisconsin's public records statutes; however, the Division has declined the request for depositions, believing that the discovery statutes are inapplicable to this case.

At a prehearing conference held on June 11, 1999, Special Children Center asserted that discovery rights under ch. 804, Stats., are available pursuant to administrative rules set forth in ch. HA 1, Wis. Admin. Code. The Division of Health Care Financing, however, argued that the ch. HA 1 rules do not apply to medical assistance provider hearings, and that no other provision of law compels the Division of Health Care Financing to allow discovery. A briefing schedule was established to address the issue.

ARGUMENT

I. DISCOVERY IS GENERALLY AVAILABLE FOR CH. 227 CONTESTED CASE PROCEEDINGS ONLY FOR CLASS 2 CASES OR WHEN RULES OF THE "AGENCY" PROVIDE FOR DISCOVERY. CHAPTER HA 1 IS NOT A RULE OF THE "AGENCY" INSOFAR AS THIS CASE AND SIMILAR CASES ARE CONCERNED.

In Wisconsin, with limited exceptions, state agency contested case hearings are controlled by ch. 227, Stats. The category of case becomes important because somewhat different procedures apply depending on the particular class of the contested case. The crucial language applicable to the discovery dispute is found in s. 227.45(7), Stats., which declares:

> (7) In any class 2 proceeding, each party shall have the right, prior to the date set for hearing, to take and preserve evidence as provided in ch. 804. Upon motion by a party or by the person from whom discovery is sought in any class 2 proceeding, and for good cause shown, the hearing examiner may make any order in accordance with s. 804.01 which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. In any class 1 or class 3 proceeding, an agency may by rule permit the taking and preservation of evidence, but in every such proceeding the taking and preservation of evidence shall be permitted with respect to a witness:
>
> (a) Who is beyond reach of the subpoena of the agency or hearing examiner;
>
> (b) Who is about to go out of the state, not intending to return in time for the hearing;
>
> (c) Who is so sick, infirm or aged as to make it probable that the witness will not be able to attend the hearing; or
>
> (d) Who is a member of the legislature, if any committee of the same or the house of which the witness is a member is in session, provided the witness waives his or her privilege.

The parties are in agreement that the situations described in (7)(a) through (7)(d) do not exist in this case. The introductory language of s. 227.45(7) therefore controls.

A. THIS IS NOT A CLASS 2 CONTESTED CASE.

Although Class 2 proceedings are guaranteed discovery rights under s. 227.45(7) in all circumstances, this is not a Class 2 proceeding. Contested cases are categorized as Class 1, Class 2, or Class 3. The three classes are defined in s. 227.01(3), Stats., as follows:

> (a) A "class 1 proceeding" is a proceeding in which an agency acts under standards conferring substantial discretionary authority upon it. "Class 1 proceedings" include rate making, price setting, the granting of a certificate of convenience and necessity, the making, review or equalization of tax assessments and the granting or denial of a license.
>
> (b) A "class 2 proceeding" is a proceeding in which an agency determines whether to impose a sanction or penalty against a party. "Class 2 proceedings" include the suspension or revocation of or refusal to renew a license because of an alleged violation of law. Any proceeding which could be construed to be both a class 1 and a class 2 proceeding shall be treated as a class 2 proceeding.
>
> (c) A "class 3 proceeding" is any contested case not included in class 1 or class 2.

The recoupment case involving Special Children Center most closely matches the definition of a Class 3 case. Clearly, it is not a Class 2 proceeding. The Division of Health Care Financing is not attempting to suspend, revoke, or refuse to renew a license or other form of permit or certification. There is no forfeiture, fine, or other "penalty" or "sanction" at stake. There is no attempt to punish the provider. Rather, this is a contract dispute. As required by s. 49.45(2)(a)9., Stats., medical assistance providers enter into a contract in the form of a provider agreement in which the provider agrees to abide by the reimbursement conditions of the program. Providers are eligible for reimbursement only if they comply with those conditions. See HFS 107.02(a) and HFS 106.02(4), Wis. Admin. Code. In this case, as in other medical assistance provider audit cases, the Division of Health Care Financing is alleging that the audit determined the provider did

not fulfill medical assistance reimbursement requirements and that the provider had thus received reimbursement to which it was not entitled. The Division of Health Care Financing therefore wants its money back. This is a Class 3 situation, not a Class 2.

Consistent with this, see the enclosed copies of an Office of Administrative Hearings March 15, 1995 Decision on Motion for Discovery in the case of Cameo Care Center, Case No. 94-OAH-1200, and a Division of Hearings and Appeals August 10, 1999 Notice of Hearing in the case of Vernon County Human Services, Case No. ML-99-0054, both incorporated herein by reference, for examples of medical assistance recoupment cases formally labeled as Class 3 contested cases.

B. NO RULES OF THE "AGENCY" PROVIDE FOR DISCOVERY. HA 1 DOES NOT APPLY.

Because this is not a Class 2 contested case and because the special statutory circumstances of s. 227.45(7)(a) through (7)(d) do not apply, discovery rights are conveyed by s. 227.45 only if an "agency" has by rule permitted the taking and preservation of evidence as provided in ch. 804, Stats.

This is the heart of the dispute. The Division of Hearings and Appeals has a set of rules published as ch. HA 1, Wis. Admin. Code. Rule HA 1.11 broadly authorizes any party to any proceeding to obtain discovery pursuant to ch. 804, Stats. In contrast, the rules of the Department of Health and Family Services concerning medical assistance contain no mention of discovery, and nothing in ch. 49, Stats., concerning medical assistance addresses discovery rights.

Special Children Center contends that the "agency" mentioned in the introductory language of s. 227.45(7) is the Division of Hearings and Appeals, and that the HA 1 rules

thereby impart discovery rights to the Special Children Center. The Division of Health Care Financing, however, believes that the "agency" mentioned in s. 227.45(7) is the Department of Health and Family Services insofar as medical assistance provider cases are concerned and that, because the Department of Health and Family Services has no discovery rules for such cases, the plain wording of s. 227.45(7) denies discovery in Class 1 and Class 3 cases.

The history of the HA 1 rules and of the organizational development of the Division of Hearings and Appeals indicates that HA 1 was never intended to be applied to medical assistance provider cases. At the time the HA 1 rules were created, the Division of Hearings and Appeals was not performing hearings for such provider cases, and no subsequent organizational changes have made the HA 1 rules applicable.

The origin of what is now the Division of Hearings and Appeals was the Division of Nursing Home Forfeiture Appeals, created in 1977 as part of a major revision of enforcement statutes affecting nursing homes. Chapter 170, Laws of 1977 created statutes ss. 15.101(9) and 15.103(1), attaching the Division of Nursing Home Forfeiture Appeals to the Department of Administration for a limited purpose. The same enactment also created s. 50.04(5)(e), Stats., explicitly assigning the new Division the task of presiding over appeals from nursing home forfeiture assessments imposed by what was then the Department of Health and Social Services. The Administrator of the Division of Nursing Home Forfeiture Appeals was given the statutory authority to issue the final hearing decision in forfeiture cases.

It is noteworthy that the hearing authority given to the Division of Nursing Home Forfeiture Appeals stemmed exclusively from nursing home programs operated under ch. 50, Stats. The Medical Assistance Program, however, operated then and continues to operate under ch. 49, Stats., not ch. 50. Cases concerning ch. 49 were handled within the Department of Health and Social Services.

Later in the 1977-1978 legislative session, a new Division of Natural Resources Hearings was created in ss. 15.101(1m) and 15.103(2), Stats., by Chapter 418, Laws of 1977. Like the earlier Division, it was attached to the Department of Administration for a limited purpose. As the name of the Division implied, however, it handled hearings involving the Department of Natural Resources, not hearings of the Department of Health and Social Services. The Division had no connection with medical assistance cases.

In 1982, the nursing home enforcement system was again revised, this time by Chapter 121, Laws of 1981. In that enactment, the Division of Nursing Home Forfeiture Appeals was renamed the Division of Nursing Home Appeals, and the renamed Division was assigned hearing authority over additional varieties of nursing home licensure cases under ch. 50, Stats. As before, however, the renamed Division had no authority over ch. 49 medical assistance cases. Those cases continued to be handled by the Department of Health and Social Services, which by then had already created its own unit of hearing examiners, known initially as the Office of Administrative Hearings and Rules and later as the Office of Administrative Hearings[1].

[1] The Office of Administrative Hearings and Rules was created in 1978 to supply hearing examiners for contested case proceedings and to handle rulemaking hearings and related functions. The rulemaking activities were removed from the office in 1980, at which point the Office was renamed as the Office of Administrative Hearings.

In 1983, the Division of Natural Resources Hearings joined with the Division of Nursing Home Appeals. 1983 Wis. Act 27 combined those separate Divisions into a single Division of Hearings and Appeals. See in particular §§ 39, 40, 42, 43 and 2001(3) of the enactment. Once again, however, no authority over ch. 49 medical assistance cases was assigned to the new Division. Such cases continued to be handled by the Office of Administrative Hearings within the Department of Health and Social Services.

In 1985, the Division of Hearings and Appeals promulgated its ch. HA 1 rules, replacing those created by the defunct Nursing Home Foreiture Appeals system. As indicated in the annotations currently published in the Wisconsin Administrative Code with ch. HA 1, the new rules took effect on September 1, 1985. At the time HA 1 was created, the Division of Hearings and Appeals still had no authority to hold hearings in medical assistance cases under ch. 49, so there could not possibly have been any intent for the rules to apply to such cases.

The Division of Hearings and Appeals subsequently acquired the authority to hold probation and parole hearings for a newly-created Department of Corrections. See 1989 Wis. Act 107, creating the Department of Corrections effective January 1, 1990. Once again, however, that change had no impact on medical assistance cases involving ch. 49. Moreover, a separate chapter of rules was promulgated to address the corrections hearings. See ch. HA 2, Wis. Admin. Code.

Effective July 1, 1996, the structure of Wisconsin's state agencies was extensively reorganized by 1995 Wis. Act 27, published on July 28, 1995. The Department of Health and Social Services became the Department of Health and Family Services. Although

some of its programs were transferred to other agencies, medical assistance provider activities remained in the renamed Department. The Office of Administrative Hearings finally split off from the Department of Health and Social Services/Health and Family Services and transferred into the Division of Hearings and Appeals effective July 1, 1996 pursuant to 1995 Wis. Act 370, published on June 11, 1996. That same legislation also transferred hearing examiners from yet another agency into the Division of Hearings and Appeals.

The Division of Hearings and Appeals' HA 1 rules have been amended somewhat since their 1985 creation, but the annotations published with the rules indicate the most recent amendments occurred effective September 1, 1995. On that date, hearings concerning medical assistance matters under ch. 49, Stats., were still being handled by the Office of Administrative Hearings, and the Office of Administrative Hearings was still very much a part of the old Department of Health and Social Services. Indeed, at the time the HA rules were last amended in 1995, the legislation which ultimately transferred the Office of Administrative Hearings into the Division of Hearings and Appeals had not yet even been introduced. 1995 Wis. Act 370, which accomplished the transfer, was initially known as 1995 Senate Bill 536, and that Senate Bill was introduced on February 9, 1996--approximately five months after the HA 1 rules were last amended.

In short, when the HA 1 rules were created and amended, there was no intent whatsoever that they be applied to medical assistance provider cases. Those cases were under the jurisdiction of the Office of Administrative Hearings, not the Division of Hearings and Appeals. The Office of Administrative Hearings had no rules of its own.

All rules were issued by the Department of Health and Social Services. The medical assistance rules created by the Department of Health and Social Services in what were then chs. HSS 101 through HSS 108 (now HFS 101 through HFS 108), Wis. Admin. Code, contained no provisions authorizing discovery.

In the only Office of Administrative Hearings instance in which a formal ruling ever appears to have been issued addressing discovery authority in medical assistance recoupment cases, the hearing examiner ruled that no discovery right existed because the case was not a Class 2 case and no rules of the agency authorized discovery. See the enclosed copy of the Office of Administrative Hearings March 15, 1995 Decision on Motion for Discovery in the case of Cameo Care Center, Case No. 94-OAH-1200, previously cited and incorporated.

The transfer of the Office of Administrative Hearings to the Division of Hearings and Appeals does not alter that result. The medical assistance program remains in the Department of Health and Family Services. Unlike certain nursing home licensing statutes which explicitly grant final decision authority to the Division of Hearings and Appeals, there is no statute language assigning the Division of Hearings and Appeals final authority over medical assistance provider cases. Unless the Secretary's Office of the Department of Health and Family Services delegates final decision authority to the hearing examiner for a particular case or category of cases, hearing examiner decisions in medical assistance provider cases are issued in proposed form with final hearing decision issued by the Secretary's Office of the Department of Health and Family Services. As evidence of this, see the enclosed copy of an August 9, 1999 final decision issued in a