medical assistance provider revocation case under the name of Developmental Therapy Associates, Case No. ML-99-0003. That final decision modifies a proposed decision of a Division of Hearings and Appeals hearing examiner and adopts the modified decision as the final order of the Department of Health and Family Services.[2]

At the time the Office of Admininistrative Hearings was transferred into the Division of Hearings and Appeals, the transfer was touted as being business as usual--a transfer of personnel having no program impact. The fiscal estimate issued by the Department of Health and Social Services with regard to 1995 Senate Bill 536 bears this out. The fiscal estimate anticipated a decrease in costs to the Department, not an increase. See the enclosed copy of that fiscal estimate, incorporated herein. As that estimate declares, "All fiscal effects have been taken into account in the bill."

That fiscal estimate is consistent with the expectation that the hearings would continue to be held in the manner previously conducted by the Office of Administrative Hearings. Logically, if it had been intended that the discovery provisions of the HA 1 rules would become applicable to medical assistance provider cases, there would have been a significant increase predicted for costs to the Department of Health and Social Services/Health and Family Services rather than a decrease. The extension of rights to depositions, interrogatories, and other discovery procedures would tie up program staff and their legal staff for enormous amounts of staff time which would otherwise not be expended on such activities. The cost of discovery for these cases could not be absorbed among existing personnel and resources. If medical assistance staff and legal staff are

[2] Revocations are, of course, Class 2 proceedings. The point, however, is that medical assistance provider

required to devote their time to processing discovery demands, it would be impossible to conduct the same level of new audits and the same level of non-discovery legal matters without hiring additional auditors, additional attorneys, and additional support staff and without acquiring the extra equipment and office space necessary for those extra personnel. There is thus a significant fiscal impact if discovery rights are extended. Accordingly, the fiscal estimate indicating an expected decrease rather than increase in Department of Health and Social Services costs is a clear signal that "business as usual" was indeed intended by the transfer--that things were expected to remain the way they were when the Office of Administrative Hearings existed.

It must be concluded, therefore, that HA 1 was not intended to control hearings such as this involving Special Children Center.

This result is consistent with the language of ch. 227, Stats. Section 227.43(1)(bu) gives the Division of Hearings and Appeals the authority to assign a hearing examiner to preside over hearings required to be conducted by the Department of Health and Family Services and which are not conducted by the Secretary of Health and Family Services. The ultimate responsibility for the hearing clearly remains with the Department of Health and Family Services. Similarly, note that s. 227.44(6)(f) distinguishes between the "agency" and the hearing examiner. Section 227.46(1) indicates that "an agency" may designate an official of "the agency" or an employee of its staff or borrowed from another agency to preside over the contested case. Sections 227.46(2) and (4) describe the procedures when the hearing examiner issues a proposed

---

cases remain under the control of the Secretary of the Department of Health and Family Services.

decision and the officials of "the agency" issue the final decision. Comparable mentions of "agency" appear throughout the contested case provisions of ch. 227. Unless some special process is explicitly declared in the statutes affecting a particular program, it is clear from the context in ch. 227 that the "agency" normally means the agency having the obligation to provide a hearing and render the final hearing decision. The agency can still delegate final decision authority to a hearing examiner, but that is the agency's choice. The "agency" controls. For medical assistance provider cases, that agency happens to be the Department of Health and Family Services, not the Division of Hearings and Appeals.

Because the "agency" is the Department of Health and Family Services, and the Department of Health and Family Services has no rules providing for discovery in Class 1 or Class 3 cases, it follows that Special Children Center has no right to discovery in the pending case. The rules of HA 1 are inapplicable.

II. IF THE HEARING EXAMINER CONCLUDES THAT DISCOVERY IS AVAILABLE TO THE PROVIDER IN THIS CASE, THE HEARING EXAMINER'S RULING ON THIS ISSUE CAN AND SHOULD BE ISSUED AS A PROPOSED RULING, WITH FINAL DECISION BY THE SECRETARY'S OFFICE OF THE DEPARTMENT OF HEALTH AND FAMILY SERVICES.

The Division of Health Care Financing acknowledges that procedural issues in contested case hearings are customarily addressed by the hearing examiner and that the Secretary of the Department of Health and Family Services does not normally become involved in a case until after a proposed hearing decision has been issued on the merits. The Division of Health Care Financing further acknowledges that there is no requirement that the ruling on this issue be rendered in proposed form. However, neither is there anything in the provisions of ch. 227, Stats., to prohibit the Secretary from addressing a

prehearing issue. Due to the major impact a ruling on the discovery dispute would have in this case, if the hearing examiner does conclude that Special Children Center has discovery rights the Division of Health Care Financing requests that this ruling be issued in proposed form, with final decision on the issue rendered by the Secretary of the Department of Health and Family Services.

If the hearing examiner decides that Special Children Center does indeed have a right of discovery, and if that ruling is not issued in proposed form, the Division of Health Care Financing will have no choice but to submit to discovery. It will likely be several months before the actual hearing on this case takes place, and even after that hearing occurs it will take additional time for the hearing examiner to render the proposed decision on the merits. By the time the Secretary's Office has been provided with a proposed decision on the merits of the case, a considerable period of time will have elapsed. Meanwhile, the hearing examiner's decision that discovery does apply will become a precedent for other hearing examiners within the Division of Hearings and Appeals and the Division of Health Care Financing will likely be ordered to allow discovery in other cases as well. Given the current volume of medical assistance appeals, discovery would impose an overwhelming burden upon the Division of Health Care Financing as well as on its attorneys, and no future ruling following a hearing on the merits could undo the expenditures of staff time and resources that would already have occurred. Accordingly, if the hearing examiner concludes that discovery is available, issuing this ruling in proposed form would be both appropriate and expeditious.

When comparable situations arise in the courts system, appellate courts do indeed allow interlocutory appeals under certain circumstances. See s. 808.03(2), Stats., granting the Court of Appeals the authority to permit appeals from non-final orders of circuit courts. Among the situations allowed for such permissive appeals are (2)(b), to "Protect the petitioner from substantial or irreparable injury" and (2)(c), to "Clarify an issue of general importance in the administration of justice."

It is true that the provisions of s. 808.03(2) control courts rather than administrative hearings. However, the concerns underlying that statute are equally pertinent to ch. 227 cases. If the ruling on the discovery issue goes against the Division of Health Care Financing, and if the Division is thereby compelled to proceed with discovery without the benefit of an interlocutory appeal to the Secretary's Office, the Division of Health Care Financing will be both substantially and irreparably harmed. The issue of discovery is a pervasive issue that would have an impact throughout the Medical Assistance Program, and clarification of the issue as rapidly as possible would benefit the administration of justice.

Chapter 227 does not prohibit an interlocutory ruling in proposed form. Under the circumstances presented by the instant case, if the ruling is adverse to the Division of Health Care Financing it is both reasonable and just for the ruling to be proposed rather than final.

CONCLUSION

For the above reasons, the Division of Health Care Financing urges that the discovery rights requested by Special Children Center be denied. If the Division of

Hearings and Appeals arrives at a contrary conclusion, the Division of Health Care Financing further urges that the ruling on this issue be structured in proposed form, with a final decision emanating from the Secretary's Office of the Department of Health and Family Services.

Dated this 16th day of August, 1999.

Respectfully submitted,

By: Jean E. Gilpin

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State Bar #1016621

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Gerald Whitburn
Secretary

State of Wisconsin

Department of Health and Social Services

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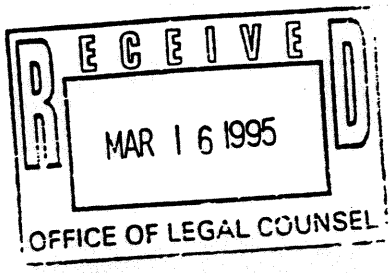
March 15, 1995



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DECISION ON MOTION FOR DISCOVERY

Re: Cameo Care Center
Case No. 94-OAH-1200

Petitioner, Cameo Care Center is a licensed nursing home. It requested a fair hearing and declaratory ruling on August 22, 1994. The request for a declaratory hearing was denied on August 30, 1994.

This matter concerns a recoupment notice concerning alleged overpayments to Cameo by the Wisconsin Medical Assistance Program as a result of a markup on over-the-counter drugs. Petitioner denies that an overpayment was made. All parties agree that this matter is a class 3 proceeding as defined by 227.01 Wis. Stats.

On January 12, 1995, petitioner served a motion to compel discovery. Petitioner seeks to depose the Bureau of Health Care Financing's (BHCF) representatives who participated in the audit of Cameo's medicaid billings and the Department representatives who participated in the decision to seek reimbursement of the alleged overbillings. The BHCF opposed the motion in a response dated February 6, 1995. Petitioner replied on February 13, 1995.

§227.45 Wisconsin Administrative Code provides that, in a Class 2 hearing, either party has the right to take and preserve evidence prior to the hearing. It also provides in relevant part:

> (7) .....In any class 1 or class 3 proceeding, an agency <u>may by rule</u> permit the taking and preservation of evidence.... (emphasis added)

The section continues to indicate four specific situations in which discovery must be permitted in a Class 1 or Class 3 proceeding. None of the four situations is relevant to this matter.

The agency has not made a rule permitting discovery in Class 1 or Class 3 actions. There is no authority for a hearing examiner to issue an order compelling discovery at the hearing stage. Therefore, I am without authority to grant petitioner's motion.

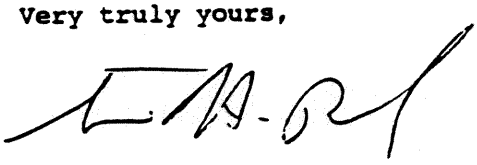
Petitioner relies in part on §227.46 Wisconsin Administrative Code in making its argument in support of its motion. It relies on the language in (d) which provides that:

> Subject to rules of the agency, examiners presiding at hearings may:
>
> (d) Take depositions or have depositions taken when permitted by law. (emphasis added)

A reliance on §227.46 is misplaced. There are no rules of the agency providing for discovery in Class 3 hearings. Discovery in class 3 hearings is not permitted by law without such regulations. Thus, §227.46 does not apply to this matter.

The clear meaning of §227.45 is that, without agency rule to the contrary, no discovery in Class 1 or Class 3 proceedings is permitted unless the matter fits under one of the exceptions listed in the section. There is no agency rule to the contrary. Thus, petitioner's motion must be dismissed

Very truly yours,



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August 10, 1999

Linda Nederlo
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P.O. Box 823
Viroqua, WI 54665-0823

Atty. Jean Gilpin
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NOTICE OF HEARING

Re: Vernon County Human Services
Case no. ML-99-0054

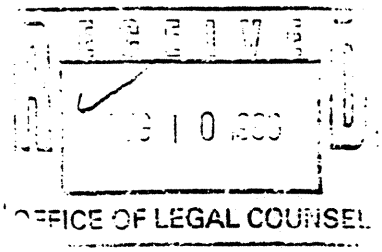
Please Take Notice that, pursuant to sec. HFS 108.02(9)(e), Wis. Adm. Code and sec. 227.44, Wis. Stats., a hearing in the above matter will be held at 10:00 a.m. on Tuesday, October 5, 1999, at the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, Wisconsin, to review a decision by the Department of Health and Family Services, Division of Health Care Financing, to seek recovery of an alleged overpayment of Medical Assistance to the above-named provider pursuant to sec. HFS 108.02(9), Adm. Code. This is a Class 3 hearing as defined by sec. 227.01(3), Wis. Stats.

Sincerely,

Brian C. Schneider, Attorney
DIVISION OF HEARINGS AND APPEALS

Bcs

DHA-15 (R10/97)



STATE OF WISCONSIN
Department of Health and Family Services

In the Matter of

Developmental Therapy Associates

DECISION

ML-99-0003

The proposed decision of the hearing examiner dated June 29, 1999 is hereby modified and as modified is adopted as the final order of the Department.

Replace the **DISCUSSION** section with the following:

DISCUSSION

Subsequent to the hearing, the Office of Inspector General of the U.S. Department of Health and Human Services excluded petitioner for at least five years from participation in all federally-funded health care programs. As a result of this action, Wisconsin is prohibited under federal law from certifying petitioner as a provider until she obtains federal approval.

In the absence of this recent federal action, the termination of petitioner's certification for at least five years by the Division of Health Care Financing would have served on its own to bar petitioner's participation in the MA program for that period of time. The hearing examiner erred in concluding otherwise.

The Department may suspend or terminate a provider for the variety of non-compliant activities listed in section HFS 106.06, Adm. Code. The applicable provision in this case is 106.06(8), entitled Criminal Conviction. It authorizes such department action when a provider has been convicted of a criminal offense relating to providing or claiming reimbursement for services under the MA program. Petitioner was convicted of two misdemeanor counts of MA fraud.

The policy of the Division of Health Care Financing is to impose a five-year termination of provider certification for a Medicaid fraud conviction. If the numerous prohibitions listed in sec. 106.06 were arranged on a continuum from those deserving the least severe to the most severe penalties, fraud would certainly be among the offenses deserving the harshest penalties. Threatening the integrity of the MA program, fraud is a very serious offense regardless of magnitude. Imposition of a five-year termination for any act of fraud is a rational and proper exercise of discretion under 106.06.

Replace the **CONCLUSIONS OF LAW** section with the following:

CONCLUSION OF LAW

The Division of Health Care Financing decision was a proper exercise of its discretion under section 106.06, Adm. Code.

Replace the **ORDERED** section with the following:

NOW THEREFORE, it is **ORDERED**

That the decision of the Division of Health Care Financing, terminating petitioner's MA provider certification and excluding her from the program for at least five years is lawful and proper, and is therefore affirmed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The appeal must be served on the Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this 12 day of August, 1999.

Richard Lorang, Deputy Secretary

1995 Session

LRB or Bill No./Adm. Rule No.: SB536 (-5069)

Amendment No. if Applicable:

FISCAL ESTIMATE

DOA-2048 (R 11/90)

☒ ORIGINAL ☐ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

Subject: Administrative Hearings

Fiscal Effect

State: ☐ No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation

☐ Increase Existing Appropriation ☐ Increase Existing Revenues
☒ Decrease Existing Appropriation ☐ Decrease Existing Revenues
☐ Create New Appropriation

☐ Increase Costs - May be possible to Absorb Within Agency's Budget ☐ Yes ☐ No

☐ Decrease Costs

Local: ☐ No local government costs

1. ☐ Increase Costs ☐ Permissive ☐ Mandatory
2. ☐ Decrease Costs ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenues ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenues ☐ Permissive ☐ Mandatory
5. Types of Local Governmental Units Affected: ☐ Towns ☐ Villages ☐ Cities ☐ Counties ☐ Others_____ ☐ School Districts ☐ VTAE Districts

Fund Sources Affected: ☒ GPR ☒ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S

Affected Ch. 20 Appropriations: 20.435(8)(a),8)(n),1)(bm),(1)(p),(3)(a),(3)(n)

Assumptions Used in Arriving at Fiscal Estimate

SB536 provides authority for the Department of Administration's Division of Hearings and Appeals (DHA) to hold hearings for the Department of Health and Family Services (DHFS) and the Department of Industry, Labor, and Job Development (DILJD) and to charge the two agencies for the costs incurred. The bill transfers the appropriate administrative hearings staff to DOA's Division of Hearings and Appeals effective July 1, 1996.

In addition, the bill transfers $170,000 GPR from DHFS to DILJD to reflect the expected administrative hearings workload in each department. This transfer adjusts the funds transferred in the 1997-99 biennial budget bill for this purpose. This adjustment is supported by the heads of DOA, DHFS, and DILJD and is based on the determination of a DHFS/ DILJD/DOA interagency workgroup that the amount transferred in the biennial budget bill did not accurately reflect the division of cases between the two agencies after the statutory responsibility for income maintenance transfers from DHFS to DILJD. Because income maintenance administrative hearings are funded partially by federal funds, the DHFS budget will decrease by $173,000 FED since the Department will no longer generate the matching federal funds associated with the $170,000 GPR transferred.

Finally, the bill transfers funds within DHFS to enable the DHFS program divisions to contract with DOA for administrative hearings services.

All fiscal effects have been taken into account in the bill.

Long-Range Fiscal Implications

Agency/Prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
DHSS/OPB Fredi Bove 266-2907	Richard Lorang 266-9622	02/23/96

1995 Session

FISCAL ESTIMATE WORKSHEET

Detailed Estimate of Annual Fiscal Effect
DOA-2047(R 11/90)

☒ ORIGINAL ☐ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

LRB or Bill No/Adm.Rule No.	Amendment No.
SB 536	

Subject: Administrative Hearings

I. One-time Costs or Revenue Fluctuations for State and/or Local Government (do not include in annualized fiscal effect):

II. Annualized Costs:	Annualized Fiscal Impact on State funds from: Increased Costs	Decreased Costs
A. State Costs by Category		
State Operations - Salaries and Fringes	(FTE)	(10.8 FTE)
(FTE Position Changes)		343,300*
State Operations - Other Costs		
Local Assistance		
Aids to Individuals or Organizations		
TOTAL State Costs by Category	$	$
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	$	$ 170,000*
FED		173,300*
PRO/PRS		
SEG/SEG-S		
III. State Revenues- Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fees, etc.)	Increased Rev.	Decreased Rev.
	$	$
GPR Taxes		
GPR Earned		173,300*
FED		
PRO/PRS		
SEG/SEG-S		173,300
TOTAL State Revenues		

NET ANNUALIZED FISCAL IMPACT

	STATE	LOCAL
NET CHANGE IN COSTS	$ (170,000)*	$
NET CHANGE IN REVENUES	$	$

*Note: DILHR's budget will be increased by these amounts.

Agency/Prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
DHSS/OPB Fredi Bove 266-2907	Richard Lorang 266-9622	02/23/96

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

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

PREHEARING REPLY BRIEF OF DIVISION OF HEALTH CARE FINANCING

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

The facts of the case are as stated in the Division's initial brief.

ADDITIONAL ARGUMENT

I. THE STATUTE CONTROLLING DISCOVERY IS 227.45(7), NOT 227.43. MOREOVER, THE RULEMAKING LANGUAGE OF 227.43 DID NOT MAKE THE HA 1 RULES APPLICABLE TO MEDICAL ASSISTANCE PROVIDER CASES.

With regard to the central issue of applicability of the discovery language in ch. HA 1, Wis. Admin. Code, Special Children Center's initial brief focuses entirely on a broad rulemaking reference concerning the Division of Hearings and Appeals contained in s. 227.43(1)(d), Stats. That generic reference, however, is superseded by specific language elsewhere in ch. 227 controlling particular aspects of the conduct of contested case hearings. Section 227.43 is devoid of any mention of discovery, and its generalized language cannot override the explicit wording of s. 227.45(7), Stats., directly addressing discovery in contested case proceedings.

Special Children Center has ignored the history of the HA 1 rule chapter, discussed in the Division of Health Care Financing's initial brief. Note that, at the time the HA 1 rules were created in 1985, s. 227.43 and its rulemaking language dealt exclusively with Division of Hearings and Appeals activities on behalf of the Department of Natural Resources. See s. 227.43, Stats., as printed in the 1985-86 Wisconsin Statutes. When the HA 1 rules were most recently amended in 1995, s. 227.43 still made no mention of what was then the Department of Health and Social Services, and medical assistance provider hearings were still being held by the Office of Administrative Hearings rather than the Division of Hearings and Appeals. At the time the HA 1 rules were most recently amended in 1995, s. 227.43 mentioned only the Department of Natural Resources and the Department of Transportation. See s. 227.43, Stats., as published in the 1993-94 Wisconsin Statutes.

In fact, no mention of either the Department of Health and Social Services or the Department of Health and Family Services ever appeared in s. 227.43 until 1995 Wis. Act 370, published on June 11, 1996 with an effective date of July 1, 1996. Act 370 was the enactment which transferred the Office of Administrative Hearings into the Division of Hearings and Appeals. Act 370 also amended s. 227.43. Act 370, however, had no impact on the discovery dispute. See the discussion in the Division of Health Care Financing's initial brief.

Special Children Center has disregarded the fact that a Class 3 discovery right, if any, must derive from "agency" rules referenced in s. 227.45(7), Stats. The Division of Health Care Financing stands by the analysis in its earlier brief concluding that the

"agency" in this context is the Department of Health and Family Services, not the Division of Hearings and Appeals, and that only rules of the Department of Health and Family Services could validly convey discovery in a Class 3 proceeding.

A recent decision of the Polk County Circuit Court buttresses the Health Care Financing conclusion that the usage of the word "agency" in ch. 227, Stats., is intended to refer to the Department of Health and Family Services. See the enclosed copy of In the Matter of Jackson B.[1] v. Department of Health and Family Services, No. 98-CV-84 (Wis. Cir. Ct. Polk County July 27, 1999), incorporated herein. In that case, the circuit court reviewed a final fair hearing decision issued by a Division of Hearings and Appeals hearing examiner in a prior authorization dispute stemming from the Medical Assistance Program. The circuit court decision discusses the judicial review provisions of s. 227.57, Stats. Note that the language of s. 227.57 refers in multiple places to the "agency". In this slip opinion, particularly at page 2, the court explicitly declares that the "agency" under s. 227.57 is the Department of Health and Family Services. "Agency" should be similarly interpreted in the discovery provisions of s. 227.45(7).

II. A PROPOSED RULING ON THE DISCOVERY DISPUTE WILL NOT VIOLATE CASE LAW AND WILL NOT BE DISRUPTIVE TO THE SYSTEM.

With regard to the procedure to be used in addressing the discovery issue, Special Children Center relies on the case of State Public Intervenor v. DNR, 177 Wis.2d 666, 503 N.W.2d 305 (Ct. App. 1993), for the proposition that it is impossible to issue an interlocutory ruling in proposed form. That reliance is misplaced. First of all, Special

Children Center fails to mention that the Court of Appeals decision it cites was later reversed by the Wisconsin Supreme Court. See State Public Intervenor v. DNR, 184 Wis.2d 407, 515 N.W.2d 897 (1994). The Court of Appeals holdings are therefore of questionable precedential value. Second, the underlying Department of Natural Resources situation in the case does not appear to have involved the type of procedure envisioned by the Division of Health Care Financing.

In the DNR case, the hearing examiner apparently issued a decision in final--not proposed--form. The Secretary of the Department of Natural Resources nonetheless performed a review of the hearing examiner's final decision, and various disputes arose from that process. What the Division of Health Care Financing is requesting in the case at hand, however, is the same process used by statute for issuing proposed decisions on the merits of cases: that the hearing examiner prepare proposed findings of fact, proposed conclusions of law, proposed order, and proposed opinion with regard to the discovery issue. Such a process would not contradict the provisions of ch. 227.

The Division of Health Care Financing does not argue that there is an appeal of right to the Health and Family Services Secretary's Office on interlocutory matters. Rather, what the Division advocates is that a permissive appeal be allowable under circumstances comparable to permissive appeals of interlocutory matters in the court system. The Secretary's Office could choose to accept a permissive, interlocutory appeal and address the matter at that time, or decline the permissive appeal and await a proposed decision on the merits of the case before addressing all objections at once.

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[1] The full name of the medical assistance recipient appeared in the actual court decision. However, to

The court process is not disrupted by the existence of a permissive appeal process for non-final circuit court orders, and there would be no greater disruption in a ch. 227 environment if a comparable permissive process were to take place administratively. Obviously, the Secretary's Office would deny an unreasonable request for a permissive appeal, just as the Court of Appeals denies leave to appeal non-final circuit court orders when the petition is unwarranted.

The Division of Health Care Financing nevertheless recognizes that Special Children Center is opposed to the issuance of a proposed ruling regardless of which party prevails on the discovery issue. Accordingly, if the hearing examiner concludes that the Division of Health Care Financing is correct and Special Children Center has no right of discovery, the Division of Health Care Financing will not object to accommodating Special Children Center by having the hearing examiner issue that ruling in final rather than proposed form. The Division of Health Care Financing asks only that, if the hearing examiner's ruling is adverse to the Division of Health Care Financing, the ruling be issued in proposed form so that the Division will be protected from irreparable harm.

CONCLUSION

For the above reasons, the Division of Health Care Financing continues to urge that the discovery rights requested by Special Children Center be denied and that, if the Division of Hearings and Appeals arrives at a contrary conclusion, the ruling on this issue be structured in proposed form, with final decision by the Secretary's Office of the

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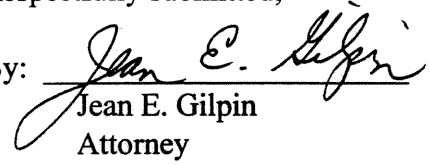
protect the recipient's confidentiality, part of the name has been redacted here and in the enclosure.

Department of Health and Family Services.

Dated this 23rd day of August, 1999.

Respectfully submitted,

By: 

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JUL 29 1999

STATE OF WISCONSIN CIRCUIT COURT POLK COUNTY

In the Matter of:
Jackson B[redacted]
by Thomas B[redacted]

Petitioner

DECISION

vs.

Department of Health and
Family Services,

Respondent

File No.: 98 CV 84

This action requests judicial review (pursuant to Chapter 227 Wis. Stats.) of the February 19, 1998 decision of the Division of Hearings and Appeals for the Department of Health and Family Services ("DHFS"). That decision affirmed the denial of Medical Assistance ("MA") payments for twice-weekly private physical therapy for Jackson B[redacted] ("Jackson") on the basis that the school system is already providing twice-weekly therapy for Jackson and on the basis that additional sessions would be duplicative.

The scope of judicial review and the standards which this court is to apply in conducting a judicial review are set forth in §227.57 Wis. Stats.

The petitioner in this case asserts two arguments in support of his request that the February 19, 1998 decision be set aside or modified:

1) That the doctrine of res judicata required the hearing examiner to reach the same decision as the decision reached by a different hearing examiner on an earlier application by the petitioner for MA authorization; and

2) That the record on which the hearing examiner in this case reached his decision dated February 19, 1998 supports the grant of MA authorization for four physical therapy sessions per week (two by the school district plus two by an MA authorized provider).

With regard to the first issue, this court concludes that the holding in Gould v. DHSS, 216 Wis. 2d 355,364-69, 576 N.W.2d 292 (Ct. App. 1998) is dispositive. Each request for prior authorization requires a new determination based on the relevant facts and circumstances then existing. The DHFS is not bound to or by the decision(s) on prior requests for MA authorization even insofar as they relate to a particular individual. The medical needs and condition of an individual such as Jackson may indeed be subject to substantial change over time. This premise is

indeed recognized by the provision that the requests for prior authorization are submitted for six month intervals thereby effectively requiring review of the patient's medical needs and condition on a semi-annual basis.

Resolution of the petitioner's second argument requires this court to review the record on which the decision on which judicial review is requested is based. In his decision dated February 19, 1998 Attorney O'Brien made five specific findings of fact. The petitioner apparently contests findings three, four, and five.

This court might well be tempted to substitute its own judgment for that of Attorney O'Brien particularly with regard to findings four and/or five. However, the specific language of the first sentence of §227.57(6) prohibits this court from substituting "its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact".

Further, the second sentence of §227.57(6) provides that before this court could set aside the agency's (DHFS) action or remand the case to the agency (DHFS), the court must find that the agency's action depends on a finding of fact that is not supported by substantial evidence in the record. This court's review and examination of the entire record, the evidence considered by Attorney O'Brien, and the reasonable inferences arising therefrom, leads to the conclusion that a reasonable person, acting reasonably did indeed have a basis to reach the decision reached by Attorney O'Brien dated February 19, 1998.

The Administrative Code definition of "medically necessary" set forth in §HFS 101.03(96m) requires that the health care service requested (the two additional physical therapy sessions per week) be required to treat the recipient's disability and that said service is not duplicative with respect to other services being provided to the recipient. This is a two-pronged test and both prongs must be met. The record before Attorney O'Brien does indeed adequately support his findings with regard to both prongs of this medical necessity definition.

The petitioner's parents understandably want the best and most frequent treatment available for their son. However, this is not a de novo review. This court is bound by the standards of review and provisions of §227.57(6) Wis. Stats. as applied to the record before the original decision maker (O'Brien).

The February 19, 1998 decision is affirmed. The petitioner's request that this court modify or set aside the February 19, 1998 decision is denied.

The respondent's attorney is directed to draft an order consistent with this decision and submit it to this court for signature within ten (10) days.

Dated: July 27, 1999.

BY THE COURT:

R. H. Rasmussen

Robert H. Rasmussen
Circuit Judge - Branch 2

cc: *Thomas [redacted] B[redacted]*
Maryann Sumi

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

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

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

INTRODUCTION

DHFS' brief does not, indeed it cannot, rely on statutes, administrative rules or case law to support not applying HA 1 to this proceeding. The plain language of the statutes and rules dictate that HA 1 must be applied to this proceeding.

ARGUMENT

I. THE DHFS BRIEF AVOIDS THE HEARING EXAMINER'S DIRECT QUESTION OF WHETHER HA 1 APPLIES TO THIS PROCEEDING; THE DHFS ARGUMENT RELIES ON DHFS TRADITION AND EXPECTATIONS RATHER THAN THE CLEAR LANGUAGE OF THE STATUTE AND ADMINISTRATIVE RULES.

In its pre-hearing brief in this matter, DHFS attempts to avoid the central question correctly posed by the hearing examiner as a result of the parties' disagreement over discovery rights: does Chapter HA 1, Wis. Admin. Code, apply to the conduct of this proceeding, or does it not? If it does, then the discovery rights afforded under Chapter HA 1 are available to the parties. It if does not, then according to DHFS discovery rights in Class 1 and Class 3

proceedings[1] are available only if DHFS has promulgated specific rules allowing such discovery, which DHFS has not done.

The crucial question is whether Chapter HA 1 applies to this proceeding. DHFS ducks this question and instead attempts to reframe the issue to ask whether the discovery rights afforded by Chapter HA 1, or the absence of discovery rights in Class 1 and Class 3 proceedings stemming from the absence of DHFS rules allowing such discovery, should apply. DHFS cannot have it both ways: either Chapter HA 1 applies, in its entirety, or it does not. DHFS cannot pick and choose only certain provisions of Chapter HA 1, as it apparently wishes to do. Much as DHFS may wish to suggest to the hearing examiner and to others that the hearing examiner's decision addresses only discovery rights in Medicaid recoupment actions, DHFS' contention is that as a matter of law, Chapter HA 1 does not apply to Medicaid recoupment actions (and perhaps does not apply to other contested cases arising in DHFS and heard by DHA).[2]

In support of its contention that Chapter HA 1, Wis. Admin. Code, does not apply to this proceeding or to Medicaid recoupment actions generally, DHFS offers essentially two intertwined arguments. First, DHFS points to sec. 227.45(7), Stats., which provides that

---

[1]DHFS contends that this is not a Class 2 proceeding. While Special Children Center does not concede this point, particularly in light of the fact that DHFS is attempting to impose a penalty through its application of discretionary sanctions, that issue is not before the hearing examiner at this time and accordingly, Special Children Center has not addressed it in its briefs.

[2]DHFS takes the position that since Chapter HA 1 predated the Legislature's transfer of certain Chapter 227 hearings from DHFS to DHA, including Medicaid recoupment hearings, it does not apply to Medicaid recoupment hearings. Not only does DHFS utterly fail to offer any authority for this novel proposition; it also fails to acknowledge that under this proposition, no contested cases heard by DHA pursuant to sec. 227.43(1)(bu), Stats., could be governed by DHA rules.

discovery rights are afforded in Class 1 and Class 3 contested case hearings only if the "agency's" rules so provide. Relying on this statute and on the fact that DHFS has not promulgated rules authorizing discovery in recoupment actions, DHFS ignores the other relevant statutes as well as the plain language of Chapter HA 1 to reach its conclusion that because the "agency" issuing the final decision is DHFS, the absence of DHFS rules authorizing discovery precludes application of Chapter HA 1.

Second, while acknowledging that responsibility for conducting contested case hearings on Medicaid recoupment actions rests within a different agency, the Division of Hearings and Appeals of the Department of Administration, DHFS argues that when that responsibility was transferred to DHA it was somehow "not intended" that Chapter HA 1 apply. Instead, according to DHFS, DHFS' own post hoc description of legislative intent should supersede the plain language of the applicable statutes and administrative rules. Both of these arguments violate cardinal principles of statutory and administrative rule construction, and fly in the face of the clear language of the statutes as well as the clear statutory scheme governing the relative roles of DHA and the other agencies for whom DHA conducts contested case proceedings under ch. 227, Stats.

A. DHFS' Position Violates Numerous Rules of Statutory Construction.

DHFS' first argument, that the applicability of Chapter HA 1 to this proceeding is somehow overridden by sec. 227.45(7), Stats., fails on several grounds. The argument is unsupported by the language of sec. 227.45 itself: DHFS only cites to one sentence in sec. 227.45(7), Stats., ignoring the language of the entire section which makes it clear that the "agency" referenced throughout sec. 227.45, including subsection (7), is the agency conducting

the contested case proceeding, not necessarily the agency from whence the contested case originates. Section 227.45, Stats., is titled **"Evidence and official notice,"** deals in its entirety with the conduct of a contested case hearing, and repeatedly refers to "an agency or hearing examiner" or "the agency or hearing examiner" in a context which clearly refers to the agency conducting the proceedings. It would make no sense to read the word "agency" as referring to DHFS throughout sec. 227.45 when the contested case proceeding in question is being conducted by DHA. For example:

> (1) . . . The agency or hearing examiner shall admit all testimony having reasonable probative value . . . . The agency or hearing examiner shall give effect to the rules of privilege . . . .
>
> (3) An agency or hearing examiner may take official notice of any generally recognized fact . . . .
>
> (4) An agency or hearing examiner shall take official notice of all rules which have been published . . . .

Sec. 227.45, Stats. Under the interpretation urged by DHFS, "agency" in the current case would refer to DHA throughout sec. 227.45, Stats., with the sole exception of one sentence in subsection (7), where it would suddenly refer back to DHFS as the agency giving rise to the action, rather than the agency conducting the proceedings. This interpretation violates "a basic rule of statutory construction: the language of one subsection should be construed so as to be consistent with identical language in other subsections of the same statute." State v. Williams, 198 Wis. 2d 479, 491, 544 N.W.2d 400 (1996) (citations omitted).

> When Wis. Stat. § [227.45(10)] refers to "[agency]," it is presumably referring to the same ["agency"] that appears throughout the rest of Wis. Stat. § [227.45].

Id.

> [DHFS] would have us focus exclusively on the language [of subsec. 227.45(10)]. We cannot ignore words in a statute to achieve a desired construction. Rather, a statute should be construed to give effect to its leading idea, and the entire statute should be brought into harmony with its purpose.

State v. Okray Produce Co., Inc., 132 Wis. 2d 145, 150, 389 N.W.2d 825 (Ct. App. 1986), review denied 132 Wis. 2d 485 (1986), review denied State v. Thomas, 132 Wis. 2d 485 (1986).

Moreover, even if there were a question as to whether the "agency" referred to in sec. 227.45(7), Stats., referred to the agency conducting the proceeding or the agency wherein the case originated, that question is answered by sec. 227.43(1)(d), which calls for DHA to promulgate rules governing DHA's exercise of its powers and duties under sec. 227.43 to conduct contested case hearings on matters originating in various other agencies. Not surprisingly, DHFS scarcely acknowledges the existence of sec. 227.43(1) and makes no attempt to reconcile the provisions of that statute, especially sec. 227.43(1)(d), with DHFS' position that DHA's rules promulgated pursuant to sec. 227.43(1)(d) do not control at least some hearings conducted by DHA pursuant to sec. 227.43(1)(bu). No such reconciliation is possible under DHFS' interpretation; instead, DHFS' reading of the statutes renders sec. 227.43(1)(d) completely superfluous, violating "the cardinal rule of statutory interpretation that statutes should be so construed that no word or clause shall be rendered surplusage." Cook v. Industrial Comm., 31 Wis. 2d 232, 240, 142 N.W. 2d 827 (1966). Since under sec. 227.43 DHA conducts hearings on matters originating in other agencies, the rules required by sec. 227.43(1)(d) must apply to hearings on matters originating in other agencies (including DHFS), in order to comply with the requirement of statutory construction that "a statute should be construed to give effect to its leading idea, and the entire statute should be brought into harmony with its purpose." Okray

Produce Co., 132 Wis. 2d at 150. The "leading idea" and overall purpose of sec. 227.43 is that DHA should conduct contested case hearings arising in a number of different state agencies, and should promulgate rules governing the conduct of those hearings–which DHA has indeed done.

Even DHA has declined to recognize DHFS' novel argument that the absence of DHFS rules on discovery (or indeed any other procedural issues) in Medicaid recoupment actions, or other contested cases heard by DHA, supersedes DHA's own rules, as demonstrated both by the very existence of Chapter HA 1 and by its plan language. If it were only the rules of the agency where a case originated – or the absence of certain rules – which governed the conduct of DHA's hearings on contested cases arising in other agencies, then there would be no need for Chapter HA 1. Certainly there would be no need for the language in HA 1 specifying that the rules in HA 1 control proceedings unless the agency where the case originates has adopted more specific rules. And above all there would be no reason for HA 1 to even address the issue of discovery, since according to DHFS, discovery would only be allowed in DHA proceedings if the agency where the case originated had promulgated specific rules allowing such discovery.[3]

B. DHFS' Description of Its Intent Cannot Override the Plain Language of the Statutes and Administrative Rules.

DHFS' second argument is that despite the plain language of the statutes and of Chapter HA 1, it was somehow not intended that Chapter HA 1 apply to Medicaid recoupment actions. DHFS bases this contention on a discussion of the history of Medicaid recoupment hearings prior

[3]While discovery would still be available in Class 2 contested case proceedings, pursuant to sec. 227.45, Stats., no administrative rules would be needed to restate this clear statutory directive. The only reason for any administrative rules to be promulgated, by any agency, regarding discovery is to address the procedures in Class 1 and Class 3 hearings.

to their assignment to DHA as a result of legislative action, and on its assertion that DHFS never foresaw that Chapter HA 1 would apply to these proceedings. While this retrospective review may be interesting, it is certainly not dispositive, since it consists entirely of an impermissible resort to extrinsic aids to construe unambiguous rules and statutes. State v. Martin, 162 Wis. 2d 883, 893, 470 N.W.2d 89 (1981). Nowhere in its brief does DHFS make the case that the statutes and rules in question are ambiguous, nor does it attempt to provide any authority–as indeed it cannot–for the proposition that legislative intent should somehow be divined from DHFS' current description of what it believes was meant to be.

DHFS' historical review is instructive in one respect, however. DHFS demonstrates that it knew at the time responsibility for these hearings was transferred to DHA, and presumably knows today, that the way to assure that the procedural status quo was maintained was to promulgate administrative rules governing those procedures. In fact, the nonstatutory provision of 1995 Wisconsin Act 370, which transferred hearing responsibility to DHA, made clear that existing administrative rules and orders of DHFS associated with administrative hearings would remain in effect until modified or rescinded by the Department of Administration, which houses DHA. The nonstatutory provision did not, nor could it, provide that DHFS practice in the absence of administrative rules or orders would continue notwithstanding any conflict with the administrative rules of DHA.

> All rules promulgated and orders issued by the department of health and family services associated with the 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, section 14(f).

There were no rules or orders in effect concerning MA recoupment hearings at the time of the Act. Without rules or orders to modify or rescind, HA 1 became the controlling administrative rule for Medicaid recoupment hearings. If DHFS wished to assure that procedures other than those provided by HA 1 applied, DHFS needed only to promulgate administrative rules governing the conduct of recoupment hearings–as explicitly provided by HA 1. DHFS could do so today if it chose. Alternatively, DHFS could request that DHA promulgate rules which would apply procedures other than those now found in HA 1 to Medicaid recoupment proceedings. It has done neither, and it cannot now avail itself of the protection that would be afforded by a properly promulgated administrative rule.[4]

II THERE IS NO BASIS FOR AN INTERLOCUTORY APPEAL OF A PROCEDURAL RULING.

DHFS acknowledges that there is no authority permitting procedural rulings to be issued as proposed decisions for review by the Secretary of DHFS, and thence as final decisions, but relies on the absence of a statutory prohibition as implied permission for such an interlocutory appeal. There is simply no basis for an agency to act based on the absence of a statutory prohibition; instead, the reverse is true.

> Few principles of law are as well established as the proposition that administrative agencies, as entities created

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[4]That both DHFS and DHA know precisely how to do this is amply demonstrated by the fact that DHA is currently in the process of promulgating procedural rules for administrative hearings previously conducted by DHFS concerning food stamps, Medicaid recipients, and other public assistance issues. CR 98-119, proposed HA 3, Wis. Admin. Code. The proposed rules would assure that the procedures formerly used by DHFS would continue to apply when these matters are heard by DHA, in lieu of the procedures afforded by HA 1.

> by the legislature as part of the executive branch of government, have only such powers as are expressly granted to them by the legislature, or as may be necessarily implied from the applicable statutes. In determining the nature and scope of an agency's powers, its enabling statutes are to be "strictly construed to preclude the exercise of a power not expressly granted," and "[a]ny reasonable doubt as to the existence of an implied power should be resolved against the agency."

DOR v. Hogan, 198 Wis. 2d 792, 816, 543 N.W.2d 825 (Ct. App. 1995) (quoting State Public Intervenor v. DNR, 177 Wis. 2d 666, 671, 503 N.W.2d 305 (Ct. App. 1993), rev'd on other grounds, 184 Wis. 2d 407, 515 N.W.2d 897 (1994)). The fact that interlocutory appeals are allowed in some circumstances from circuit court rulings, under the Rules of Civil Procedure, is not authority for the application of a set of counterpart rules in administrative actions.[5]

DHFS' argument that it will suffer irreparable harm if it is not allowed to appeal to the Secretary of DHFS an adverse procedural ruling by the hearing examiner is, at best, disingenuous. As noted above, DHFS has–and has always had–a remedy for the dilemma it now finds itself in. That remedy is to promulgate administrative rules governing discovery in Medicaid recoupment actions, or to ask DHA to do so.

Finally, allowing an interlocutory appeal on this procedural issue will only serve to delay these proceedings still further. If an interlocutory appeal is allowed, then the Secretary of DHFS must issue a final decision on this procedural issue, which in turn must be appealable to circuit court. From the position asserted by DHFS in its brief, it can only be assumed that the Secretary

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[5]Ironically, while DHFS' entire argument regarding the inapplicability of HA 1 is premised on its position that parties should not be subject to the Rules of Civil Procedure insofar as discovery in administrative actions is concerned, DHFS here decides that access to the Rules of Civil Procedure in the absence of any conflicting statutory directive would be a good thing.

of DHFS would reverse any decision of the hearing examiner holding that Chapter HA 1, and its discovery procedures, applied to this proceeding. Special Children Center would then be entitled to appeal that decision to circuit court pursuant to Chapter 227 and would also be entitled to seek a stay of the further proceedings at the agency level pending the court's ruling on the Secretary's decision.

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 23rd day of August, 1999.

Respectfully submitted,

By: _____

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ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
CREATING EMERGENCY RULES

FINDING OF EMERGENCY

The Department of Health and Family Services finds that an emergency exists and that the adoption of the rules included in this order is necessary for the immediate preservation of the public peace, health, safety or welfare. The facts constituting the emergency are as follows:

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 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.

This Department believes that an emergency exists. 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 are issued to make clear that discovery remains unavailable in Class 1 and Class 3 Medical Assistance contested case proceedings involving providers.

ORDER

Pursuant to authority vested in the Department of Health and Family Services by ss. 49.45(10) and 227.24(1), Stats., the Department of Health and Family Services hereby creates rules interpreting s. 49.45(2) and (3), Stats., as follows:

SECTION 1. INITIAL APPLICABILITY.

The rules created by this order apply to contested case proceedings filed on or after the effective date of this order and to pending contested case proceedings already in progress on the effective date of this order.

SECTION 2. 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 3. HFS 108.02(9)(f) is created to read:

HFS 108.02(9)(f) *Discovery.*

1. In this paragraph, "class 1 proceeding", "class 2 proceeding" and "class 3 proceeding" are as defined in s. 227.01(3), Stats.

2. 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.

3. 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.

4. 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 as emergency rules upon publication in the official state newspaper as provided in s. 227.24(1)(c), Stats.

Wisconsin Department of Health and Family Services

Dated: **December 16, 1999**

By: _____
Joseph Leean
Secretary

SEAL:

FISCAL ESTIMATE FORM — **1999 Session**

☐ ORIGINAL ☐ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

LRB #
INTRODUCTION #
Admin. Rule # **HFS 106 & 108**

Subject

MEDICAL ASSISTANCE PROGRAM: DISCOVERY RIGHTS IN CONTESTED CASE HEARINGS

Fiscal Effect

State: ☐ No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

☐ Increase Existing Appropriation ☐ Increase Existing Revenues
☐ Decrease Existing Appropriation ☐ Decrease Existing Revenues
☐ Create New Appropriation

☐ Increase Costs - May be possible to Absorb Within Agency's Budget ☐ Yes ☐ No

☐ Decrease Costs

Local: ☒ No local government costs

1. ☐ Increase Costs ☐ Permissive ☐ Mandatory
2. ☐ Decrease Costs ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenues ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenues ☐ Permissive ☐ Mandatory
5. Types of Local Governmental Units Affected: ☐ Towns ☐ Villages ☐ Cities ☐ Counties ☐ Others ____ ☐ School Districts ☐ WTCS Districts

Fund Sources Affected
☐ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate:

This order amends two chapters of the Department's rules for the Medical Assistance Program to specify that neither party in a Class 1 or Class 3 contested case proceeding for which an administrative hearing is to be held has the right to use discovery procedures such as depositions and interrogatories.

Class 1, 2 and 3 proceedings in relation to contested case hearings are distinguished in s. 227.01 (3), Stats. Under s. 227.45 (7), Stats., the parties in a Class 2 proceeding have an automatic right to take and preserve evidence prior to the hearing by using discovery procedures, that is, one party can request the other party to furnish facts, documents and other things which the second party alone knows or possesses. Class 2 proceedings include the suspension or revocation of or refusal to renew a license or other approval because of an alleged violation of law. Also under s. 227.45 (7), Stats., the parties generally have not had the right to use prehearing discovery procedures in Class 1 or 3 proceedings unless rules of the agency specifically authorize discovery.

The Department does not currently have Medical Assistance Program rules that authorize use of discovery procedures for Class 1 and Class 2 contested case proceedings. Recently, a hearing examiner with the Department of Administration's Division of Hearings and Appeals (DHA) issued an order which held that DHA rules authorizing discovery in all cases are controlling in the absence of any mention of discovery in the Department of Health and Family Services (DHFS) rules. If other DHA hearing examiners were to issue similar rulings, DHFS would be subject to discovery in all cases and this would result in a significant increase in state government expenditures and the prolonging of litigation for all parties.

These rule changes are preemptive. They will prevent a significant increase in legal, program and support staff workload and, therefore, in Department expenditures for attorney, program and support staff, resulting from authorization of discovery in all cases. In the first 11 months of CY 1999 there were 77 contested case proceedings relating to the Medical Assistance Program, almost all of which were Class 1 or 3 proceedings. The amount of the expenditure increase that will be prevented by these rules cannot be ascertained.

Long-Range Fiscal Implications:

Prepared By: / Phone # / Agency Name	Authorized Signature / Telephone No.	Date
DHFS/Daniel Stier, 266-1404	John Kiesow, 266-9622	12-16-99

FISCAL ESTIMATE WORKSHEET Detailed Estimate of Annual Fiscal Effect **1999 Session**

☐ ORIGINAL ☐ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

LRB #

INTRODUCTION #

Admin. Rule # **HFS 106&108**

Subject

MEDICAL ASSISTANCE PROGRAM: DISCOVERY RIGHTS IN CONTESTED CASE HEARINGS INVOLVING PROVIDERS

I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

II. Annualized Costs:	**Annualized Fiscal impact on State funds from:**	
	Increased Costs	**Decreased Costs**
A. State Costs by Category State Operations - Salaries and Fringes	$	$ -
(FTE Position Changes)	(FTE)	(- FTE)
State Operations - Other Costs		-
Local Assistance		-
Aids to Individuals or Organizations		-
TOTAL State Costs by Category	$	$ -
B. State Costs by Source of Funds	**Increased Costs**	**Decreased Costs**
GPR	$	$ -
FED		-
PRO/PRS		-
SEG/SEG-S		-
State Revenues Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	**Increased Rev.**	**Decreased Rev.**
GPR Taxes	$	$ -
GPR Earned		-
FED		-
PRO/PRS		-
SEG/SEG-S		-
TOTAL State Revenues	$	$ -

NET ANNUALIZED FISCAL IMPACT

	STATE	LOCAL
NET CHANGE IN COSTS	$ See text	$ None
NET CHANGE IN REVENUES	$	$

Prepared By: / Phone # / Agency Name	**Authorized Signature/Telephone No.**	**Date**
DHFS/Daniel Stier, 266-1404	John Kiesow, 266-9622	12-16-99

DEC 27 1999

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Tommy G. Thompson
Governor

Joe Leean
Secretary

State of Wisconsin

Department of Health and Family Services

December 21, 1999

The Honorable Judy Robson, Co-Chairperson
Joint Committee for Review of Administrative Rules
Room 15 South, State Capitol
Madison, Wisconsin

The Honorable Glenn Grothman, Co-Chairperson
Joint Committee for Review of Administrative Rules
Room 15 North, State Capitol
Madison, Wisconsin

Dear Senator Robson and Representative Grothman:

This is notification that tomorrow the Department will publish an emergency rulemaking order to amend two chapters of its rules for the Medical Assistance Program to specify that neither party in a Class 1 or Class 3 contested case proceeding involving a health care provider may use discovery procedures such as depositions and interrogatories. A copy of the emergency order is attached to this letter.

Discovery has traditionally not been permitted in Class 1 and 3 proceedings. Under s. 227.45 (7), Stats., it is permitted in Class 2 proceedings. The same statute states that an agency may, by rule, permit the general use of discovery in any Class I or Class 3 proceeding. The Department does not have rules that permit discovery in those proceedings. Recently, however, a hearing examiner in the Department of Administration's Division of Hearings and Appeals permitted discovery in a Class 3 proceeding Medical Assistance case, based on rules of the Division of Hearings and Appeals. This has resulted in a big workload increase for Department attorneys and MA program auditors, managers and support staff.

The finding of an emergency is based the need to preserve the public welfare. Allowing discovery in all cases would significantly increase demands on the time of DHFS staff and therefore either divert staff from carrying out other responsibilities or require the hiring of more staff to respond to requests of various kinds and to enable the Department to also use discovery procedures, with the result that litigation would be prolonged for all parties.

If you have any questions about this emergency rulemaking order, you may contact Jean Gilpin of the Department's Office of Legal Counsel at 266-5445.

Sincerely,

Paul E. Menge
Administrative Rules Manager

Attachment