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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IOWA SPEECH AND HEARING ASSOCIATION and ACADEMY OF OTOLARYNGOLOGY,

Petitioner-Appellee,

vs.

IOWA DEPARTMENT OF SOCIAL SERVICES,

Respondent-Appellant.

Filed August 26, 1980

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2-63960

Appeal from Polk District Court - Gibson C. Holliday, Judge.

Respondent appeals district court's judgment in favor of petitioner invalidating departmental rule 78.14, 770 I.A.C. § 78, as amended, governing evaluations of hearing loss and resultant sales of hearing aids to hearing impaired individuals. AFFIRMED.

Thomas J. Miller, Attorney General of Iowa; John G. Black, Special Assistant Attorney General; Stephen C. Robinson, Assistant Attorney General; for appellant.

Robert F. Holz, Jr., and Steven L. Nelson of Davis, Hockenberg, Wine, Brown & Koehn, Des Moines, Iowa, for appellee.

Marcia J. Hellum of Dreher, Wilson, Adams, Jensen, Sayre & Gribble, Des Moines, Iowa, amicus curiae.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Respondent-agency, Iowa Department of Social Services, appeals district court's judgment in favor of petitioner, Iowa Speech and Hearing Association, invalidating departmental rule 78.14, as amended, 770 I.A.C. section 78.14, governing evaluations of hearing loss and resultant sales of hearing aids to hearing impaired individuals under Title XIX. 42 U.S.C. §§ 1396 and 1396a-d (Supp. 1979). See also §§ 249A.1-.12, The Code 1979. We affirm.

Pursuant to the rulemaking provisions of section 17A.4, The Code 1977, respondent, by publication of Notice of Intended Action on April 11, 1978, proposed to adopt an amended rule in lieu of prior rule 78.14, regulating medicaid assistance for the purchase of hearing aids by qualifying hearing-impaired individuals. In order to receive medicaid assistance under the prior rule, a hearing-impaired individual, before purchasing a hearing aid from a dealer, had to obtain: (1) an examination by a physician to determine no organic condition existed that would contraindicate the use of a hearing aid and (2) an evaluation of the need for a hearing aid from a clinical audiologist.[1] As amended, the rule permitted an eligible person seeking a hearing aid to acquire one upon: (1) examination by a physician establishing the need for a hearing aid and (2) evaluation by a physician, a licensed audiologist, or a licensed hearing aid dealer[2] as to the appropriate brand or model. Essentially, the amended rule eliminated the requirement a person seeking a hearing aid under Title XIX obtain an evaluation of need from a licensed clinical audiologist.

A public hearing on the proposed rule was held before the agency on July 11, 1978. Arguments were set forth at that time both for and against its adoption. As required by section 17A.4(1)(b), The Code 1977, petitioner requested a statement of the agency's principal reasons for and against adoption of the rule.

On September 1, 1978, respondent adopted the rule, stating "[t]he principal reasons for adopting the rule are it will allow more individuals to test people to determine who needs a hearing aid under the Title XIX program and more approximate the practice of the general public in obtaining hearing aids." Respondent further con-

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[1] To obtain a license as a clinical audiologist, one must (1) possess a master's degree or its equivalent, (2) complete not less than 275 hours of supervised clinical training, (3) complete nine months of clinical experience under the supervision of a licensed audiologist, following receipt of a master's degree, and (4) pass an examination. § 147.153, The Code 1979.

[2] To obtain a license as a hearing aid dealer, one must (1) successfully pass a qualifying examination, (2) be free of contagious or infectious disease, and (3) pay the necessary fee set by the Board pursuant to section 154A.17. § 154A.10, The Code 1977.

cluded it should not administratively determine licensed hearing aid dealers are not qualified to practice their trade. The rule was filed September 12, 1978, and published in the Iowa Administrative Bulletin on October 4, 1978.

In response, petitioner, on October 27, 1978, filed this action for judicial review and an application for stay to delay the effective date of the amendment. Hearing was held in Polk County District Court on the application for stay on November 7, 1978, which was denied. The amended rule became effective on November 8, 1978. Hearing on the petition for judicial review was held January 30, 1979. Briefs were submitted and arguments were presented by the parties on May 4, 1979.

On July 24, 1979, district court decreed amended rule 78.14 invalid and of no force and effect because the agency had failed to comply substantially with the requirements of section 17A.4(1)(b) in two major respects: 1) in failing to consider fully all written and oral submissions regarding the proposed rule; and 2) in failing to issue a concise statement of the principal reasons for and against adoption of the proposed rule, including incorporation of reasons for overruling considerations urged against the rule. District court further found the agency's action in adopting amended rule 78.14 arbitrary, capricious, and unreasonable because (1) the record was filled with substantial reasons in opposition to the rule, (2) the agency disregarded the facts and circumstances of the case, (3) the record revealed no substantial reasons in support of the rule, and (4) the rule actually adopted by the agency did not accomplish the goals intended by its adoption. In conclusion, district court determined prior rule 78.14 was never amended properly, stricken, or repealed, and thus continued in effect.

On appeal, respondent urges all actions taken were in substantial compliance with the statutory provisions of the IAPA, Chapter 17A, The Code 1977. Respondent also argues district court erred in (1) determining the adopted rule exhibited an unreasonable, arbitrary or capricious abuse of discretion, (2) vacating agency action without finding substantial rights of the petitioner had been violated, and (3) reinstating the prior agency rule. These contentions are reasserted in brief by amicus curiae Iowa Hearing Aid Society.[3]

I. Scope of Review. "Judicial review of administrative proceedings is a right conferred by statute." Kerr v. Iowa Public Service Co., 274 N.W.2d 283, 287 (Iowa

[3] Unless otherwise indicated, all further references to arguments by respondent will include those set forth in brief by amicus curiae.

1979). Consequently, our examination of district court's judgment is at law. Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300, 302 (Iowa 1979); City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311 (Iowa 1978). Our review is not limited to the record made before the agency as in contested cases. See Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 176 (Iowa 1979); Davenport Community School District v. Iowa Civil Rights Commission, 277 N.W.2d 907, 909 (Iowa 1979); Hoffman v. Iowa Department of Transportation, 257 N.W.2d 22, 25 (Iowa 1977). Because district court was free to receive and consider such additional evidence as it felt appropriate, in addition to that offered before the agency, our review of the record thus consists of evidence presented both to the agency and the district court. Community Action Research Group v. Iowa State Commerce Commission, 275 N.W.2d 217, 219 (Iowa 1979). A remedy is available only upon our determination petitioner's substantial rights have been prejudiced because the agency action violates one of the seven section 17A.19(8) criteria. Schmitt v. Iowa Department of Social Services, 263 N.W.2d 739, 743 (Iowa 1978) (citing Hoffman, 257 N.W.2d at 25).

II. Preemption by Federal Act. Although not raised by either party, we sua sponte determine whether either federal legislation or federal agency regulations have preempted state legislation or agency rulemaking thereby depriving this court of jurisdiction. See In re Marriage of Schisel, 292 N.W.2d 421, 424-26 (Iowa 1980).

The federal medical assistance program for states under Title XIX is codified in 42 U.S.C. sections 1396 and 1396a-d (Supp. 1979). Iowa's Department of Social Services Commissioner is directed to implement this plan through chapter 249A. § 249A.4(1), The Code 1979. Federal preemption of the field is excepted, however, where medical assistance payments of state or local obligations are made under medicaid and similar federal, state, or local health-care programs. Exemptions from Federal Preemption of State and Local Medical Device Requirement, 21 C.F.R. 808.1(d)(5) (1979). See also 21 U.S.C. § 360K (1979). Consequently, we conclude district court properly asserted jurisdiction to review respondent's promulgation of amended rule 78.14 where the field of regulation has not been preempted by federal legislation.

III. Substantial Compliance with Procedural Requirements. A rule promulgated under the Iowa Administrative Code is not valid unless adopted in "substantial compliance" with the procedures of chapter 17A requiring respondent to "issue a concise statement of the principal reasons for and against the rule it adopted, incorporating

therein the reasons for overruling considerations urged against the rule." § 17A.4(1)(b), The Code 1977. Respondent urges its statement of reasons substantially met this requirement and contends section 17A.4(1)(b), The Code 1977, does not require the agency set forth all reasons for adoption of the rule, but merely some or most of its reasons. In support of its argument, respondent cites federal case law interpreting the procedural rule-making requirements of the Federal Administrative Procedures Act, 5 U.S.C. § 553(c), and decisions of other state appellate courts involving administrative procedures acts of the respective states for the proposition the concise statement is adequate if the agency gives some indication of its reasoning and of the basis upon which the rule was adopted. It contends formal findings in a judicial sense are not required.

Interpretation of a statute is a question of law that must be determined by the judiciary. West Des Moines Education Association v. Public Employment Relations Board, 266 N.W.2d 118, 124 (Iowa 1978). Considerations which motivated the legislature will be weighed in construing a statute. Schmitt, 263 N.W.2d at 746. Construction of a statute must be made sensibly and fairly with the goal of carrying out that intent. Iowa State Education Association - Iowa Higher Education Association v. Public Employment Relations Board, 269 N.W.2d 446, 447 (Iowa 1978). We also will consider the consequences of a particular construction. Churchill Truck Lines, Inc. v. Transportation Regulation Board of Iowa Department of Transportation, 274 N.W.2d 295, 298 (Iowa 1979). Section 17A.23 mandates the IAPA is to be broadly construed to effectuate its purposes, which include: increasing public accountability of administrative agencies; increasing public participation in the formulation of administrative rules; and simplifying the process of judicial review of agency action, as well as increasing its ease and availability. § 17A.1(2), The Code 1977. In sum, all aspects of a statute administered by an administrative agency will be considered without undue emphasis on any single portion. City of Des Moines v. Public Employment Relations Board, 275 N.W.2d 753, 759 (Iowa 1979).

Applying these standards to the record in the instant case, we find respondent's contentions without merit. Arguments against adoption of the proposed rule presented at the hearing included, but were not limited to the following: (1) necessity of having an audiologist care for the special needs of the elderly and the young with hearing impairments; (2) failure of the proposed rule to provide safeguards against the sale of a high-priced hearing aid when it is not appropriate; (3) inconsistency of the proposed rule

with the Iowa licensure laws; (4) whether the inclusion of the audiologist in the procedure for obtaining hearing aids results in any unreasonable delay; (5) whether the elimination of the audiologist from the hearing aid procedure will result in some persons being denied hearing aids even though hearing aids would be beneficial to them; (6) whether the proposed rule will involve expenditure of greater amounts of public funds while resulting in lower quality medical care; and (7) whether the elimination of the audiologist from the procedure may result in persons receiving hearing aids when the problem should be surgically or medically treated. Yet, respondent, in its adoption statement, articulated only two principal arguments against adoption of the rule: (1) people with less education and training will be recommending which people can benefit from a hearing aid and (2) implementation of proposed rule 78.14 may cause some overutilization of hearing aids and expenditures through the Title XIX program which are not necessary. No consideration was given to the other factors.

We note Professor Arthur E. Bonfield, a principal drafter of the IAPA, has interpreted the language of section 17A.4(1)(b) in question as explicitly requiring the agency list "all of 'the principal reasons for and against the rule' it adopted and all of the reasons why it overruled arguments against it." Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 Iowa L. Rev. 731, 857 (1975) (emphasis supplied).[4] While we agree with respondent's contention section 17A.4(1)(b) does not require a statement of all reasons, we believe the statute requires a statement of all the principal reasons. We therefore agree with district court's conclusion respondent's statement was insufficient to meet the "substantial compliance" mandate of the IAPA.

IV. Abuse of Agency Discretion. Respondent asserts district court erred in ruling its action in adopting amended rule 78.14 constituted an unreasonable, arbitrary, or capricious abuse of agency discretion in violation of section 17A.19(8)(g), The Code 1977. For purposes of our review, agency action is defined as unreasonable, arbitrary or capricious when it is "willful and unreasonable action, without consideration and in disregard of the facts or circumstances of the case; action taken without some basis which would lead a reasonable and honest man to such action." Markwardt v. County Board of Review, Franklin Co., 174 N.W.2d 396, 400 (Iowa 1970) (quoting State Board of Tax Commissioners v. Chicago, M., St. P. & P. Ry., 121 Ind. App. 302, 309, 96 N.E.2d 279, 282 (1950)).

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[4] The Iowa Supreme Court, this court, and the department, have recognized the usefulness of this article in interpreting specific provisions of the IAPA. See, e.g., Schmitt v. Iowa Department of Social Services, 263 N.W.2d 739, 743-44 (Iowa 1978).

When these standards are applied to the record before district court, we find there is a sufficient number of audiologists in the State of Iowa to serve the needs of all medicaid patients with hearing impairments. No delay experienced by patients in obtaining hearing aids was caused by audiologists.[5] General practice physicians and hearing aid dealers[6] are not adequately trained to detect, diagnose, and treat hearing deficiencies. The new rule provides no safeguard against the sale of a high-priced hearing aid when one is not appropriate. The new rule will involve the expenditure of greater amounts of public funds, while resulting in lower quality health care.

In light of these facts, we conclude district court properly determined respondent's adoption of rule 78.14 was unreasonable, arbitrary, and capricious, constituting an unwarranted abuse of discretion in violation of section 17A.19(8)(g).

V. Violation of Substantial Rights of Petitioner. Respondent further argues district court erred in invalidating the amendments to rule 78.14 when no finding substantial rights of petitioner had been prejudiced was made. Section 17A.19(8), The Code 1977, provides review of administrative action is restricted to a determination whether petitioner's substantial rights have been violated because the agency action violates one of seven section 17A.19(8) criteria. Schmitt, 263 N.W.2d at 743. The substantial rights language of section 17A.19(8), however, has no bearing on a person or party's standing to obtain judicial review. City of Des Moines, 275 N.W.2d at 759. Rather, it is merely a direction to the court that an agency's action should not be altered unless the complaining party has in fact been harmed. Id.

Under the facts, we conclude no error was committed by district court in ruling substantial rights of petitioner were violated. The amended rule's elimination of the requirement a person seeking a hearing aid under Title XIX obtain an evaluation of need from a licensed clinical audiologist constituted a violation of the substantial rights of all audiologists by denying them employment opportunites. Nor do we find district court is required to explicitly state substantial rights of petitioner were violated where, as here, such a finding is implicit in its ruling.

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[5] See letter from Victor Preisser, Commissioner of the Iowa Department of Social Services to Elaine Syzmoniak of the Iowa Speech and Hearing Association, stating: "The information was inaccurate and obtained in a hasty manner in order to have some information available by the date of the public hearing. It is our fault the information regarding the 282 people was misinterpreted to mean that the services requested from audiologists were not provided in a timely fashion." Exh. App. at 166.

[6] By law, hearing aid dealers are licensed only to fit, dispense and sell hearing aids. § 154A.1(4), The Code 1977. They are permitted to test hearing only for the purpose of selecting, adapting, and selling hearing aids. § 154A.1(5), The Code 1977.

VI. Invalidation of Rule. Our decision above is dispositive of respondent's assertion district court erred by invalidating its action where no finding has been made that substantial rights of petitioner were violated. The amicus curiae also argues district court erred in declaring the rule invalid since the rule could simply have been remanded to respondent for clarification of its statement of reasons or additional consideration of arguments presented. In response to the argument presented by the amicus curiae, we will examine district court's action only to assure discretion has not been abused because our review is at law.

Section 17A.19(8) states a district court "shall reverse, modify, or grant any other appropriate relief from the agency action, equitable or legal and including declaratory relief" if a party is prejudiced by agency action. Although this broad language provides district court a vast range of remedies, it does not require district court impose the most narrow remedy or the one least restrictive to respondent. While this court may have implemented a different remedy, we cannot say the action ordered by district court is unsupported by substantial evidence. See Northrup v. Foster, 204 N.W.2d 889, 891 (Iowa 1973). Thus we conclude no abuse of discretion exists. See Smiley v. Twin City Beef Co., 236 N.W.2d 356, 360 (Iowa 1975). District court properly reversed respondent's action. § 17A.19(8), The Code 1979.

VII. Substitution of Judgment. As a final assignment of error, the amicus curiae contends district court substituted its judgment for that of the agency by determining the new rule did not accomplish its goals. Examination of district court's order and the record in this case reveal amicus curiae's allegations are unfounded. District court has authority to "reverse, modify or grant other appropriate relief" where substantial rights of petitioner have been violated. We already have determined district court properly found respondent's action was unreasonable, arbitrary or capricious and an unwarranted abuse of discretion. § 17A.19(8)(f), The Code 1979. District court correctly invalidated the agency's action. Since prior rule 78.14 was not amended, stricken, or repealed, district court logically concluded that rule continues in effect. Under such circumstances, district court did not substitute its judgment for that of respondent.

Due to the foregoing considerations, judgment of district court is affirmed.

AFFIRMED.

All judges concur except Carter, J., and Oxberger, C.J., who dissent.

I dissent. The issue in the present case is not whether the record establishes audiologists to be more qualified to evaluate hearing impairment than are hearing aid dealers licensed under chapter 154A, The Code. The issue is whether the Iowa Department of Social Services was justified in determining that medicaid assistance payments may be approved for those persons who choose, after the need for a hearing aid is established by a physician, to deal with a licensed hearing aid dealer in the selection of the appropriate brand or model without also securing an audiologist's recommendation. This issue was viewed by the agency as being whether it should "approximate the practice of the general public in obtaining hearing aids" in dispensing aid under the Title XIX program. Upon my review of the record, I conclude that this was a decision well within the authority of the agency and that there exists a rational basis therefor.

The challenged action merely represents a legitimate effort by the agency to remove the effects of an unintentional monopoly resulting from the application of a 1971 regulation on hearing aid evaluation to events occurring after the effective date of 1974 legislation which substantially altered relevant circumstances with respect to the subject matter of the prior regulation. The 1971 regulation required that a two-step evaluation be completed before purchase of a hearing aid qualifies for medicaid funds: first, an examination by a physician to determine that no organic condition exists which would contraindicate the use of a hearing aid and, second, an evaluation of need by an audiologist. The challenged regulation would replace the 1971 regulation and would require that after the need for a hearing aid has been established by a physician, evaluation as to a specific brand or model may be made by a physician, a licensed audiologist or a licensed hearing aid dealer.

At the time of the 1971 regulation, hearing aid dealers were not licensed by law to measure human hearing for purposes of the selection, adaptation, or sale or hearing aids. This was peculiarly the work of audiologists. This was changed by the enactment of chapter 154A, The Code, effective January 1, 1975. Section 154A.1(5) provides:

> "Hearing aid fitting" [as may be performed by licensees under this chapter] means the measurement of human hearing by any means for the purpose of selections, adaptions, and sales of hearing aids, and the instruction and counseling pertaining thereto, and demonstration of techniques in the use of hearing aids, and the making of earmold impressions as part of the fitting of hearing aids.

There is absolutely no indication in the record that the purpose of the 1971 regulation was to create a perpetual monopoly for audiologists in the measurement of hearing for the purpose of selection, adaptation or sale of hearing aids to medicaid recipients. Recognizing this, and further recognizing the changed circumstances resulting from the enactment of chapter 154A, the council on social services reconsidered the existing rule in one form or another at its meetings of November 18, 1977, January 6, 1978, February 24, 1978, March 30, 1978, May 25, 1978, June 30, 1978, and September 1, 1978. The new rule was filed September 12, 1978, and published in the Iowa Administrative Bulletin on October 4, 1978, to be effective November 8, 1978.

Included in the agency's statement of the principal reasons for and against the rule, promulgated pursuant to section 17A.4(1)(b), the Code, was the following:

> The previous rule had been criticized for imposing too much restriction on hearing aid dealers. The Iowa Legislature has established minimum requirements and procedures for licensing hearing aid dealers. (Chapter 154A of the Code) The Department of Social Services does not believe it should administratively determine that members of a licensed trade group meeting the requirements established by law are, in fact, not qualified to practice that trade. The appropriate remedy would be for the Legislature to raise the minimum requirements for hearing aid dealers.

I submit that this reason alone provides a rational basis for sustaining the new rule against the challenges which have been lodged against it by the appellee.

The action taken by the district court and approved by a majority of this court forces upon the department of social services an obligation to impose restrictions far beyond that which is required of the agency under its statutory mandate for overseeing disbursements of medicaid funds. I know of no legal reason, and the appellee suggests none, why the agency may not decline the invitation to arbitrate the issues raised by appellees' objections. These issues are based upon the relative qualifications of audiologists on the one hand, and licensed hearing aid dealers on the other. It was not the purpose of the original rule to resolve these issues. Therefore, such relative qualifications need not be made the concern of the agency as to the proposed rule except with respect to the objection lodged that the proposed rule may involve expenditure of greater amounts of public funds. The agency stated, in its statement of reasons, its desire to treat medicaid patients as private care patients are treated. The Food and Drug Administration, whose rules apply to private care patients, has made a finding that requiring an examination from an audiologist would increase, rather than decrease, the cost of obtaining a hearing aid without assuring any additional benefits.

42 Fed. Reg. 9285, 9289 (Feb. 15, 1977). The council was free to consider such determination by the federal agency in its action on the challenged rule. At its March 30, 1978 meeting, the agency council specifically discussed the cost factor and voted to evaluate the service under the newly enacted rule and review the cost figures after it had been in effect for one year. Thus, as to the cost effectiveness argument, the record viewed as a whole supports an administrative determination that the charge lodged is unsubstantiated at this time and will be the subject of further study. For all of the foregoing reasons, I would hold that the finding of the district court that the rule is an abuse of agency discretion should be reversed.

I also disagree with the majority's conclusion that the agency's listing of the principal reasons for and against the rule fails to comply with section 17A.4(1)(b), The Code. As the majority concedes only "substantial compliance" with this statute is necessary. Within the context of the present dispute, the principal reasons listed for adoption of the rule also serve as reasons for overruling the appellee's objections to the rule. A separate statement of reasons for overruling the objections thus become superfluous. The purpose of statutes such as section 17A.4(1)(b) is merely to give some indication of the reasoning of the agency in order that the courts be able to properly perform their reviewing functions. Formal findings are not required. See, Automotive Parks & Accessories Association v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968); Anderson v. Washington State Liquor Control Board, 89 Wash.2d 688, 693, 575 P.2d 221, 224-225 (1978); New Mexico Municipal League v. New Mexico Environmental Improvement Board, 88 N.M. 201, 539 P.2d 221 (1975). This purpose is clearly satisified by the agency's statement of reasons in the present case. In addition, it has been held that where, as in the present case, the stated reason for administrative action is the implementation of specific legislation, less specificity is required in the statement of reasons. Anderson, 89 Wash.2d at 693, 575 P.2d at 224-25. I would reverse the trial court and uphold the validity of the rule.

Oxberger, C.J., joins in this dissent.