11-1800-4303-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Department of Human Services Rules Governing Community Alternatives for Disabled Individuals Under Age 65

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on February 9, 1990, at 9:00 a.m. in the State Office Building in the City of Saint Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. § 14.131 to 14.20 to hear public comment, to determine whether the Minnesota Department of Human Services ("the Department") has fulfilled all relevant substantive and procedural requirements of law or rule, to determine whether the proposed rules are needed and reasonable, and to determine whether or not the rules, if modified, are substantially different from those originally proposed.

Deborah Huskins, Special Assistant Attorney General, Office of the Attorney General, Human Services Division, appeared on behalf of the Department. The Department's hearing panel consisted of Lynda Adams, Coordinator, CADI Program, Home and Community Services, Long Term Management Division, and Eleanor Weber, Assistant Director, Rules and Bulletins Division.

Approximately five persons attended the hearing. Four individuals signed the hearing register. The Administrative Law Judge received 32 exhibits as evidence during the hearing. The Department offered Exhibits 1-30, and two public exhibits were offered. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of the rules.

The record remained open for the submission of written comments until February 20, 1990, eleven calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1, three business days were allowed for the filing of responsive comments. On February 23, 1990, the rulemaking record closed for all purposes. In addition to the oral comments made at the hearing and the two public exhibits that were offered at the hearing, the Administrative Law Judge received six letters from interested persons and two submissions from the Department regarding the proposed rules before the record closed.

This Report must be available for review by all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Commissioner makes changes in the rule other than those recommended in this report, she must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On or about December 12, 1989, the Department filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes;
(b) The Order for Hearing;
(c) The proposed "Notice of Hearing and Notice of Intent to Cancel Hearing if Fewer than Twenty-five Persons Request a Hearing in Response to Notice of Intent to Adopt Rules Without a Public Hearing" (hereinafter referred to as "Notice of Hearing");
(d) The Statement of Need and Reasonableness;
(e) A fiscal note;
(f) A statement of the estimated length of the Department's presentation at the hearing;
(g) A statement of the number of people expected to attend the hearing;
(h) A statement indicating that the Department intended to provide discretionary additional public notice of the proposed rules; and
(i) A "Notice of Intent to Adopt a Rule Without a Public Hearing and Notice of Intent to Adopt a Rule With a Public Hearing if Twenty-five or more Persons Request a Hearing" (hereinafter referred to as "Notice of Intent to Adopt Rule without a Hearing").

2. On December 27, 1989, the Department mailed the Notice of Hearing and the Notice of Intent to Adopt Rule Without a Hearing to all persons and associations who had requested that their names be placed on file with the Department for the purpose of receiving notice of hearing by the Department.

3. On December 27, 1989, the Department mailed the Notice of Hearing and the Notice of Intent to Adopt Rule Without a Hearing to 87 Minnesota County Human Services Agencies, Advisory Committee Members, and 87 County administrative contacts.

4. On January 2, 1990, the Notice of Hearing, Notice of Intent to Adopt Rule Without a Hearing, and a copy of the proposed rules were published at 14 State Register 1627-1646.

5. On January 10, 1990, the Department filed the following documents with the undersigned Administrative Law Judge:

(a) The Notice of Hearing and Notice of Intent to Adopt Rule Without a Hearing as mailed;
(b) The Department's Certification that its mailing list was accurate and complete;
(c) The Affidavit of Mailing the Notice of Hearing and Notice of Intent to Adopt Rule Without a Hearing to all persons on the Department's mailing list;
(d) The Affidavit of Mailing the Notice of Hearing and Notice of Intent to Adopt Rule Without a Hearing to 87 Minnesota County Human Services Agencies, Advisory Committee Members, and 87 County administrative contacts;
(e) A copy of the Notice of Solicitation of Outside Opinion published in 11 State Register 50 (July 14, 1986), along with the materials received by the Department in response to the solicitation;
(f) The names of agency personnel who would represent the Department at the hearing, together with the names of witnesses solicited by the agency to appear on its behalf; and
(g) A copy of the proposed rule as published in the State Register.

These documents were timely filed by the Department pursuant to Minn. Rule 1400.0600.

6. All documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to February 23, 1990, the date the rulemaking record closed.

7. The period for submission of written comments and statements remained open through February 20, 1990, the comment period having been set during the hearing at eleven calendar days. The record remained open for an additional three working days through February 23, 1990, for responses to filed comments.

8. At least one copy of the Department's notices and proposed rules published in 14 State Register 1627-1646 (Jan. 2, 1990) was printed with a blank page 1640. On January 16, 1990, the Department published a Correction in 14 State Register 1796 which noted this publication error and reprinted page 1640. The Administrative Law Judge finds that the publication error was harmless since a correction notice and the missing page were promptly published in the State Register, complete copies of the proposed rules were mailed to those who appeared on the Department's mailing list and were sent out in an additional mailing to Advisory Committee Members, County Human Services Agencies, and County administrative contacts, and the proposed rules were made available at the hearing and upon request. The Administrative Law Judge finds that this rulemaking proceeding is procedurally valid.

Nature of the Proposed Rules

9. The proposed rules set forth standards and procedures for the Community Alternatives for Disabled Individuals program ("CADI" or "the CADI Program"). The CADI Program permits Medicaid to pay for approved community-based services provided to eligible persons who require the level of care provided in a nursing home. The proposed rules, which will remain in effect only as long as a waiver obtained from the United States Department of Health and Human Services remains in effect in Minnesota, would govern the determination of the eligibility of disabled persons under the age of 65 for home and community-based services in lieu of nursing home care, as well as the nature and scope of such home and community-based services. The rules would establish procedures that counties would be required to follow when conducting the screening of applicants for the CADI Program, developing individual care plans under which CADI services will be provided, selecting providers and setting standards for home and community-based services, authorizing services for reimbursement, billing the Department for reimbursement of eligible services, and establishing limits on payment rates for services and screenings.

Background and Need for the Proposed Rules

10. Minn. Stat. § 256B.49, which was enacted in 1984, required the Department to conduct a study to assess the need for a home and community-based waiver from the federal government for disabled persons under the age of 65 who, without the waiver, were likely to reside in a nursing home. A similar waiver had previously been obtained with respect to individuals age 65 or older. If the study established the need for a waiver with respect to individuals under the age of 65, Minn. Stat. § 256B.49 required the Commissioner to apply for the federal waiver necessary to receive medical assistance reimbursement for the provision of home and community-based services to such persons. The study, entitled "The Needs of the Adult Physically Disabled in Minnesota," was completed in 1985. It recommended the Home and Community-Based Waiver as the most feasible option. The Department thus submitted a request to the Health Care Finance Administration (HCFA) of the federal Department of Health and Human Services for waivered services in January 1987. The HCFA approved the waiver for the period of October 1, 1987, to September 30, 1990. The Department will be able to request a renewal of the waiver.

11. The Department published a Notice to Solicit Outside Opinion in 11 State Register 50 (July 14, 1986), and received responsive comments. A public advisory committee also assisted in drafting the proposed rules. The committee consisted of persons representing county agencies, public health nursing services, consumers, community service agencies, and consumer advocate and nursing associations.

Statutory Authority

12. In the Statement of Need and Reasonableness, the Department states that the authority for the promulgation of the proposed rules is derived from Minn. Stat. §§ 256B.04, 256B.091, subd. 9, and 256B.49,

subd. 2. Subdivisions 1, 2, 4 and 12 of Minn. Stat. § 256B.04 authorize the Department, inter alia, to "[s]upervise the administration of medical assistance for eligible recipients by the county agencies hereunder," "[m]ake uniform rules, not inconsistent with law, for carrying out and enforcing the provisions hereof in an efficient, economical, and impartial manner, and to the end that the medical assistance system may be administered uniformly throughout the state, having regard for varying costs of medical care in different parts of the state and the conditions in each case, and in all things to carry out the spirit and purpose of this program . . .," "[c]ooperate with the federal department of health, education, and welfare in any reasonable manner as may be necessary to qualify for federal aid in connection with the medical assistance program . . .," and "[p]lace limits on the types of services covered by medical assistance, the frequency with which the same or similar services may be covered by medical assistance for an individual recipient, and the amount paid for each covered service."

Minn. Stat. § 256B.091, subd. 9, empowers the Commissioner of Human Services to promulgate emergency rules and permanent rules to implement the provisions of subdivisions 6 and 8 of § 256B.091 (relating to reimbursement for local screening teams and alternative care grants) and permanent rules to implement the provisions of subdivisions 2 and 4 of § 256B.091 (relating to the establishment of screening teams and the screening process). Minn. Stat. 256B.49, subd. 2, provides that the Commissioner of Human Services may adopt emergency and permanent rules as necessary to implement subdivision 1 of that statute, which (as discussed in paragraph 10 above) relates, inter alia, to a study to be done to assess the need for home and community-based waivers for chronically ill children and disabled individuals under the age of 65, and the application for federal waivers in the event that such a need is demonstrated. The cited statutes generally authorize the rules proposed in this proceeding and, unless specifically noted to the contrary in this Report, the rules proposed by the Department are authorized under these statutes.

Small Business Considerations

13. Minn. Stat. § 14.115, subd. 2, requires state agencies proposing rules affecting small businesses to consider methods for reducing adverse impact on those businesses. In its Notice of Hearing, the Department stated that the agency considered the requirements of this statute in preparing the proposed rules and believed that the statute did not apply to these rules, but invited public comment at the hearing concerning the applicability of the statute and concerns relating to any person who may be affected as a small business. No one who provided oral testimony at the hearing or written comments following the hearing indicated that the rules would have an adverse an impact on small businesses.

In the Statement of Need and Reasonableness, the Department indicated that it believed the proposed rules came within the exemption set forth in Minn. Stat. § 14.115, subd. 7(c), "because either the providers affected by this rule are providers of medical care or compliance with the waiver specified provider standards is required under Minnesota Statutes, section 256B.04, subdivision 4." Subdivision 7(c) exempts "service businesses regulated by government bodies, for standards and

costs, such as . . . providers of medical care . . . ." To the extent that the proposed rules relate to the provision of services by providers of medical care, the exemption in subdivision 7(c) is applicable and the proposed rules are not subject to the small business considerations set forth in Minn. Stat. § 14.115. Although entities affected by the proposed rules that are not providers of medical care, such as those who provide adaptations, adult day care, homemaker services, respite care services, and case management services, do not appear to fall within the exemption recognized in subdivision 7(c) even though they provide health-care-related services.

The Statement of Need and Reasonableness indicates that the Department in any event considered the methods listed in Minn. Stat. § 14.115, subd. 2, for reducing the impact of the proposed rules on small businesses. The Department considered less stringent compliance or reporting requirements, less stringent schedules or deadlines, the consolidation or simplification of compliance or reporting requirements, the replacement of design or operational standards with performance standards, and the exemption of small businesses from the proposed rules as possible methods to reduce the burden of the proposed rules on small businesses. The Department discussed various state and federal requirements relating to medical assistance program standards and reporting requirements, and determined that it would be unreasonable and contrary to federal and state laws and regulations to modify the proposed rules to establish less stringent compliance or reporting standards, deadlines, simplified requirements, or exemptions for small businesses in accordance with Minn. Stat. § 14.115, subd. (a), (b), (c) and (e).

For example, less stringent compliance and reporting standards or the exemption of small businesses from the proposed rules was deemed to be contrary to the requirement of Minn. Stat. § 256B.04, subd. 2, that the Department "make uniform rules . . . to the end that the medical assistance system may be uniformly administered throughout the state" and inconsistent with federal statutes mandating that the amount, duration, and scope of medical assistance be the same for all persons receiving services and that medical assistance provide services "in a manner consistent with simplicity of administration and the best interests of the recipients." See 42 U.S.C. § 1396(a)(10)(B) and (a)(19). The Department determined that it would not be feasible to set less stringent deadlines or to simplify compliance or reporting requirements for small businesses because 42 U.S.C. § 1396(a)(27) requires entities providing medical assistance services to "keep such records as are necessary to fully disclose the extent of the services provided" to recipients and to furnish the state or federal governments with any information required about payments for services, the federal statute does not vary the reporting requirements based upon the amount of medical assistance business done by the provider, and the reporting requirements are the minimum standards that the Department believes are reasonably necessary to administer the medical assistance program.

Finally, although the Department concluded that the proposed rules do not contain design or operational standards within the meaning of clause (d) of section 14.115, subd. 2, it determined that the establishment of performance standards for small businesses was not feasible. In reaching this conclusion, the Department stressed that 42 U.S.C. § 1396(a)(30)

requires the state to assure that medical assistance payments are consistent with quality of care, federal law does not permit the establishment of different levels of quality of care according to the size of the provider's business, and the licensure standards with which the providers must comply to obtain and retain their licenses set uniform standards applicable to all without regard to size of business. The Department thus has met the requirements of Minn. Stat. § 14.115, subd. 2, with respect to the impact of the rules on small businesses.

Fiscal Note

14. In its Notice of Hearing, the Department stated that the proposed rules implement projected decreases in costs reported in the approved waiver and that it had prepared a fiscal note estimating the fiscal impact of the rule pursuant to the requirements of Minn. Stat. § 3.98, subd. 2. The Department also gave notice in the Notice of Hearing that the fiscal note was available upon request from the individual designated in the notice, and introduced the fiscal note as a hearing exhibit. Thus, if a fiscal note was required of the Department, it has fulfilled the requirements of Minn. Stat. §§ 3.98, subd. 2, and 3.982 .

The fiscal note prepared by the Department pursuant to the requirements of Minn. Stat. § 3.98, subd. 2, indicates that, in order to obtain the HCFA's approval of the waiver and thereby ensure that there would be federal financial participation in the CADI Program, the Department had to assure the HCFA that the amount of medical assistance funds expended for a client's waivered services would not exceed the cost if the client received nursing home care. In preparing the waiver request, the Department estimated that the implementation of the CADI Program would actually decrease the expenditure of medical assistance funds of the federal, state, and county governments. The fiscal note analyzes various other provisions of the proposed rules and finds, with two exceptions, that they are fiscally neutral. The first exception involves Part 9505.3070 of the proposed rules regarding case management services, which the Department concluded would be "fiscally neutral to most counties." The second exception involves Part 9505.3120 of the proposed rules regarding lead agency selection of CADI providers, which the Department concluded would be fiscally neutral if the selection procedure for CADI providers is combined with the procedure for selecting ACG (Alternative Care Grants) providers. The ACG Program is another service program operated by the Department pursuant to a federal waiver.

Minn. Stat. § 14.11, subd. 1, requires agencies proposing rules that will require the expenditure of public funds in excess of $100,00 by local public bodies to publish an estimate of the total cost for the two years immediately following adoption of the rule. Based upon the statement in the Notice of Hearing that the proposed rules implement projected decreases in costs and the information contained in the fiscal note prepared by the Department pursuant to the requirements of Minn. Stat. § 3.98, the Administrative Law Judge finds that this statute does not apply to the proposed rules.

Impact on Agricultural Land

15. Minn. Stat. § 14.11, subd. 2, requires agencies proposing rules that may have a "direct and substantial adverse impact on agricultural land in this state" to comply with the requirements of Minn. Stat. §§ 17.80 through 17.84. Because the proposed rules have no impact on agricultural land, this provision is inapplicable.

Analysis of Substantive Provisions

16. The proposed rules consist of 38 pages of new material. This Report is generally limited to the discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined. Because many sections of the proposed rules were not opposed and were adequately supported by the Statement of Need and Reasonableness, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the need for and reasonableness of the provisions that are not discussed in this Report have been demonstrated by an affirmative presentation of facts, and that such provisions are specifically authorized by statute.

Proposed Rule 9505.3015 - Definitions

17. Proposed rule 9505.3015 contains 53 subparts defining the terms to be used in the proposed rules. Only two of these subparts were the subject of comments. First, Susan Stout, Staff Specialist, Governmental Affairs, Minnesota Nurses Association, urged that the definition of "public health nurse" contained in subpart 37 be revised to reflect recent changes in the Nurse Practice Act that place public health nurse certification under the Board of Nursing. In response to this comment, the Department modified subpart 37 to state as follows:

> Subp. 37. Public health nurse. "Public health nurse" means a registered nurse who is qualified as a public health nurse under the Minnesota nurse practice act and employed by a public health nursing service as defined in subpart 38.

This rule part is needed and reasonable to clarify the definition of "public health nurse" as used in the proposed rules and to render the definition consistent with the Minnesota Statutes and the certification procedures of the Department of Health. The modification does not constitute a substantial change.

Second, Todd Monson, CADI Program Manager with the Hennepin County Community Health Department, proposed that the definition of "slot" contained in subpart 47 be revised to refer to services to a "recipient" rather than to a "person." In accordance with this suggestion, the Department modified subpart 47 to state as follows:

> Subp. 47. Slot. "Slot" means an opening available for services to a recipient under the waiver.

This rule part is needed and reasonable to clarify the definition of the term "slot" as used in the proposed rules. "Recipient" is defined in subpart 40 of the proposed rules, and its use in subpart 47 aids in an understanding of the meaning of "slot." The modification does not constitute a substantial change.

Proposed Rule 9505.3025 - Duties of Preadmission Screening Team

Subpart 1 - General Procedure for Preadmission Screening

18. As originally proposed, Subpart 1 of this section required the preadmission screening team to conduct the preadmission screening of a CADI applicant; inform the applicant about eligibility requirements for CADI and the services available through CADI; give persons who are not medical assistance recipients a medical assistance application and help them complete the application; inform applicants who apply on or after October 1, 1989, and who were not nursing home residents on that date of the right of the applicant and the applicant's spouse to retain assets up to the amount specified in Minn. Stat. § 256B.059; and inform applicants who apply before October 1, 1989, of the right of the applicant and the applicant's spouse to retain assets that were exempt from consideration before October 1, 1989. Objections to this subpart were raised by Anita Boucher, Program Development Manager, Courage Center; Mark S. Moilanen, Associate Executive Director, Courage Center; Todd Monson, Hennepin County Community Health Department; and Virginia Rootkie, Pine County Public Health Nursing Service.

Ms. Boucher and Mr. Moilanen suggested that the proposed rule be modified to specify that the screening is to be performed by the county of service to avoid having the application delayed while the county of service and the county of financial responsibility determine which county would perform the screening. The Department representatives indicated at the hearing that the county of service is in current practice responsible for conducting the preadmission screening. Following the hearing, in accordance with the commenters' suggestions, the Department modified the proposed rule to state as follows:

> Subpart 1. General procedure for preadmission screening. The preadmission screening team of the county of service must conduct the preadmission screening of a CADI applicant . . . .

The modified rule part is needed and reasonable to clarify the procedures to be followed during the screening process and the responsibilities of the counties in that process, and to avoid unnecessary delays. It does not constitute a substantial change.

Mr. Monson suggested that item (B) be revised to refer to "applicant" rather than "person." The Department declined to utilize "applicant" rather than "person" because the disabled individual is not an "applicant" until he or she actually completes the application form. The use of "person" in this subpart is needed and reasonable to avoid confusion in the interpretation of the rule.

Mr. Monson also suggested that the portion of item (B) requiring that the screening team help the person complete the medical assistance application be deleted because such assistance exceeds the requirements contained in the state screening rules and the medical assistance rules. In support of the requirement contained in the proposed rules, Mr. Moilanen commented that the application process is complicated and that those at risk of nursing home placement who would be applying for CADI

are likely to find it particularly difficult without some assistance. The Department declined to delete the requirement that the screening team assist the person in completing the application form. The Department argued in response to Mr. Monson's comment on this point that assistance to the disabled individual is in fact consistent with Minn. Rules 9505.0085 and 9505.0090. The Department also stressed that the proposed rules do not require the screening team to actually take the application or to supply an application form at the time of the screening. Subpart 1(B) has been shown to be needed and reasonable to define the responsibilities of the screening team, reduce the burden on the applicant, and facilitate the implementation of the CADI Program for those who are eligible.

Mr. Monson further suggested that items (C) and (D) be consolidated and the references to applicants applying before October 1, 1989, be deleted. In accordance with this comment, the Department modified the proposed rules to delete item (D), and made corresponding minor changes in the wording and punctuation of items (B) and (C) (the addition of "and" after item (B) and substitution of a period for the semi-colon at the end of item (C)). The proposed rule as modified is reasonable and necessary to eliminate unnecessary language in the rule relating to applicants applying before October 1, 1989. The modification is not a substantial change, but merely clarifies the rule.

Finally, Ms. Rootkie questioned whether the rule would permit a person's eligibility for medical assistance to be determined before a county begins the process of preadmission screening of CADI applicants. She commented that time may be wasted if the county agency commences screening procedures before doing enough preliminaries to ensure that the person is in fact eligible. In its response filed during the comment period, the Department noted that the proposed rules do not prohibit counties from conducting at least a preliminary determination of a CADI applicant's eligibility for medical assistance before conducting a preadmission screening. The Department emphasized, however, that a determination of ineligibility based upon the income and assets of the person's spouse or parent that is made before the preadmission screening team completes its recommendation may need to be reviewed if the screening team concludes that the person is at risk of nursing home admission and recommends home and community-based services as an alternative. This review of the determination of ineligibility would be necessary because the waiver granted by the federal government permits the person's eligibility to be determined on the basis that would apply if the person were residing in a nursing home, and the determination thus would have to follow the institutional deeming rules such that parental and spousal income and resources would not be deemed beginning the first full month of entrance into the waiver program. The Department therefore concluded that a complete determination of a person's eligibility for medical assistance and CADI services cannot be made until the screening team has assessed the person's needs and has recommended home and community-based services as an alternative to admission to a nursing home, and did not suggest any modification to the proposed rule part in response to Ms. Rootkie's concern. The Department has demonstrated that the proposed rule is a necessary and reasonable specification of the procedures to be followed in the preadmission screening process.

Subpart 3 - Team Recommendations for CADI Applicants

19. Subpart 3 requires that, upon completion of the assessment form and interview, the preadmission screening team must recommend one of the approaches set forth in items (A) through (E) of subpart 3. Item (C) specifies that the team must recommend health and social services including CADI services and, if needed, medical assistance home care services when the following factors are present: the assessment indicates that the applicant needs the level of care provided by a nursing home; the services needed by the applicant to be at home are available or can be developed; and the anticipated cost of providing the services is within the limit specified in part 9505.3040. Item (D) provides that the team must recommend health and social services including CADI services and, if needed, medical assistance home care services when the following factors are present: the assessment indicates that the applicant who is a nursing home resident needs the level of care provided by a nursing home; the home and community-based services needed by the applicant are available or can be developed; and the anticipated cost of providing the necessary services is within the limit specified in part 9505.3040.

Mr. Monson commented that these items appear to make a distinction between applicants residing in their own homes and applicants residing in nursing homes, and were confusing to him. He suggested that the two subparts be combined and the two types of residence be described in the same subpart. The Department responded that Mr. Monson was correct and that a distinction was being made. The Department indicated that it desires to retain the distinction and declined to modify items (C) and (D). The proposed rule is sufficiently clear as written, is reasonable and necessary to provide guidance for the screening team in implementing the CADI Program, and is consistent with the waiver granted by the federal government.

Subpart 4 - Application for CADI Services; Request for Case Manager

20. As originally proposed, subpart 4 provided that a financial worker "shall" accompany the screening team to the screening to take an application for medical assistance. Several commenters objected to this requirement. Ms. Rootkie expressed concern regarding this requirement in conjunction with her comment that counties may wish to conduct analyses of the applicant's eligibility for medical assistance prior to the preadmission screening. Jay Anderson, Section Supervisor, Elderly and Support Services, St. Louis County Social Service Department, indicated that this requirement would delay the screening process because financial workers are not always available when the County desires them to participate in the screening. Mr. Monson indicated that the requirement would subject frail applicants to an even lengthier screening interview. Mr. Moilanen agreed that screenings are already long and tiring for applicants, and suggested that, although financial workers do not necessarily need to present at the screening, some assistance (perhaps by phone prior to the screening) should be given to the applicant with respect to the medical assistance application process.

In response to these comments, the Department has modified the third sentence of subpart 4 of the proposed rules to state that, "If the

person's eligibility for medical assistance has not been determined, a financial worker may accompany the team to the screening to take an application for medical assistance." (Emphasis added). As noted by the Department, it would be a duplication of effort to require the financial worker to accompany the screeming team if the applicant's eligibility had already been determined prior to the screening. In addition, as indicated in the comments by Mssrs. Monson and Moilanen, the requirement that a financial worker must be present at the screening might place an undue burden on the county or the applicant. It is reasonable to modify the rule in order to permit the county to decide when it is necessary to have a financial worker accompany the screening team. The proposed modification was discussed by the Department at the hearing and is not a substantial change but merely a clarification. The proposed subpart, as modified, is needed and reasonable to clarify the procedures which should be followed during the CADI application process.

Subpart 6 - Information to County of Financial Responsibility

21. Subpart 6 requires that, where the county of service differs from the county of financial responsibility, the screening team of the county of service must submit certain items of information about the applicant to the county of financial responsibility within ten working days after the preadmission screening is completed. Mr. Monson suggested that this subpart be deleted because the county of financial responsibility has virtually no substantive role in the provision of services to a CADI recipient when the recipient lives in another county. Mr. Monson indicated that the county of service assesses the client and requests the waiver slot from the Department; the county of service arranges the provision of CADI services and monitors the quality of such services; the county of service bills the Department directly for the services and is reimbursed by the Department; and the Department monitors and audits the county of service.

The Department declined to delete or modify this subpart in response to Mr. Monson's comments. The Department indicated that a pilot project developed by the Department to have the county of service bill the Department directly has been discontinued, and that the county of financial responsibility thus is the billing agent for CADI services and will be responsible for paying part of the cost of CADI services until January 1, 1991. Because the county of financial responsibility retains payment and billing agent responsibilities, it is logical to require that the county of financial responsibility be provided with accurate records concerning the screening team's work, the applicant's need for services, the estimated monthly cost of services, and the applicant's eligibility for Medical Assistance.CADI services. The proposed rule thus has been shown to be needed and reasonable.

Subpart 7 - County of Financial Responsibility Action

22. Subpart 7 requires, inter alia, that the county of financial responsibility review the information submitted by the preadmission screening team under subpart 6, keep a file on the CADI applicant, sign off on the care plan, and approve the application if the applicant meets eligibility requirements and has been assigned a slot by the department. As originally proposed, the subpart did not provide a time frame within

which the county of financial responsibility must sign off on the care plan. In oral comments at the hearing, Ms. Boucher suggested that the Department include a time frame. In written comments submitted after the hearing, Mr. Moilanen suggested that the county be required to take action on the care plan within five working days. The Department agreed that it was necessary to specify a time limit, and modified the second sentence of the proposed rule to state as follows: "The county of financial responsibility must sign off on the care plan and approve the application no later than 5 working days after receiving the information if the applicant meets the eligibility requirements in part 9505.3035 and has been assigned a slot by the department." The proposed rule, as modified, is needed and reasonable to ensure that necessary approvals are completed in a manner that will permit the applicant to receive the needed home and community-based services as quickly as possible while also affording the county of financial responsibility adequate time to review and act upon the information submitted. The modification is not substantial but merely clarifies the rule.

Proposed Rule 9505.3030 - Individual Care Plan

Subpart 2 - Care Plan Contents

23. This subpart sets forth the necessary components of the care plan of a CADI recipient. Mr. Monson commented that the description of the care plan is too detailed for the purposes of rulemaking, and suggested that, in order to permit the contents of the care plans to be changed without amending the rule, the subpart be simplified to state that the care plan must include the items required by the Commissioner. Ms. Rootkie commented that the requirement that the care plan include a schedule for review and evaluation of the plan contained in item (F) is unnecessary because the review requirement is set forth in the reassessment provisions of the proposed rules. The Department declined to modify the rule as suggested.

The proposed subpart will provide affected persons with notice of what information is required to be included in the care plan, and thus is a proper subject of rulemaking. The proposed rules also will enable the Department to administer the program in a uniform manner, as required by Minn. Stat. § 256B.04, subd. 2. The items set forth in the proposed rule for inclusion in the care plan will identify the care objectives, provide evidence that the services needed by the applicant have been identified and can be implemented, facilitate a timely review of the recipient's service needs and the monitoring of the provider's services to the individual through the audit process, and provide the case manager with payment sources and an estimate of the total monthly medical assistance cost for CADI and medical assistance services. The requirement that a schedule for review and evaluation of the care plan be included in the plan permits the review schedule to be tailored to the needs of the recipient, constitutes a reminder to all affected persons of that schedule, and implements the requirement of the waiver that care plans be reassessed at least every six months, or sooner if necessary, to determine if changes are required. The proposed rule has been shown to be needed and reasonable to facilitate the smooth and efficient operation of the CADI Program and achieve compliance with the federal waiver and with Minn. Stat. §§ 256B.04, subd. 2, and 256B.091, subd. 3.

Subpart 4 - Signatures on Care Plan

24. Subpart 4 of the proposed rules requires that the case manager request the applicant to sign the care plan as an indication of the applicant's acceptance of the care plan and authorization to send a copy of the care plan to the service providers that the plan specifies. The subpart also requires that the case manager request the recipient's physician to sign the plan, if authorized by the applicant or recipient or his or her representative.

Mr. Monson commented that the applicant's signature on the care plan is not sufficient to permit the case manager to send copies of the care plan to anyone and does not meet the requirements of the Minnesota Data Privacy Act. He stated that the release of information currently signed by applicants is separate from the care plan. Ms. Rootkie stated that the proposed rule implies that the client must consent to the distribution of the care plan to providers, and expressed her belief that such consent was unnecessary and possibly inconsistent with later statements in the proposed rules that physicians "must" receive the plan of care. She also commented that physcians should not have to sign for non-medical care services contained in the care plan.

The Department reviewed subpart 4 in light of the above comments and decided to delete the reference in the proposed rule to the individual's signature constituting "authorization to send a copy of the care plan to the service providers that the plan specifies." The Department concluded after its review that, although it is reasonable to require the client's consent in order to protect his or her privacy, the client's authorization to release information is properly obtained under subpart 14 of existing rule 9505.2425, as part of the preadmission screening process. Proposed rule 9505.3025, subpart 1, requires the preadmission screening team to adhere to 9505.2425, subpart 14. The authorization provision contained in the rules as originally proposed thus is unnecessary, and the deletion of the authorization language is not a substantial change.The Department declined to modify the rule to eliminate the requirement that the applicant sign the care plan.

It is reasonable to require the applicant to consent to the care plan before implementing the plan and providing CADI services in order to ensure that the client in fact agrees with the plan and the services to be provided thereunder. In addition, it is needed and reasonable to require the applicant's physician to sign the care plan. The waiver requires the care plan to be developed in conjunction with the individual's physician, and the physician's signature on the plan provides evidence that the physician has in fact had an opportunity to review the plan and provide input.

The Administrative Law Judge thus finds that the rule, as modified, is needed and reasonable to protect the privacy and free choice of the applicant and to ensure the appropriate participation of the applicant's physician in the development of the care plan.

Subpart 5 - Distribution of Care Plan

25. The proposed rule provides that the case manager must give a copy of the care plan to the county of service, the county of financial

responsibility, the applicant/recipient, and (with the consent of the applicant/recipient or his or her representative) the applicant/recipient's physician and the providers of the services specified in the plan.

Ms. Rootkie questioned the need to give a copy of the entire care plan to the physician. The Department declined to eliminate this requirement from the proposed rules, stressing that the physician must be afforded an opportunity to assess all aspects of the patient's care and ensure that all needed services have been included. The Department has shown that the requirement that the physician receive a copy of the care plan is needed and reasonable to facilitate the physician's assessment of the care to be given the patient.

Mr. Monson stated that the requirement that the care plan be sent to all providers could include the providers of home delivered meals and equipment vendors and thus is overly broad, and urged that the case manager and client be given the discretion to decide to whom the care plan will be sent. The Department pointed out that providers of home delivered meals are not CADI service providers, and that equipment vendors would not usually be considered CADI service providers. The Department agreed that clarification of the rule was necessary to avoid confusion about who is to receive the care plan, and modified the rule to state that the providers of the CADI services will receive the care plan if the client consents. The proposed rule, as modified, is needed and reasonable to ensure that the appropriate parties are informed about what is to be provided to serve the recipient's needs. The modification serves to clarify the rule, and is not a substantial change.

Proposed Rule 9505.3035 - Eligibility for CADI Services

Subpart 1 - Eligibility Criteria

26. Item (G) of subpart 1 states that a person is eligible for CADI services if "the health and safety of the person is assured by providing home and community-based services." Ms. Rootkie stated that this was too broad a statement, and suggested that the rule be modified by adding the language, "to the best of the agency's ability." The Department declined to modify the rule as suggested, based upon its conclusion that the rule was consistent with the assurances required by the federal government. The Department has shown that the proposed rule is needed and reasonable to comply with the waiver's requirement that case managers check the "quality of care provided to ensure that the individual's health and safety are being maintained" and the requirements of 42 CFR 441.301 and 441.302 that the Department make assurances regarding safeguards necessary to protect the health and welfare of recipients.

Subpart 2 - Determination of CADI Applicant's Medical Assistance Eligibility

27. Item (B) of subpart 2 specifies that "[t]he applicant is responsible for paying bills used to meet the spend-down." Mr. Monson commented that the reference to "applicant" should be changed to "recipient." The Administrative Law Judge finds that the proposed rule

is needed and reasonable as written. The Department may wish to consider modify the proposed rule by changing the reference to "applicant" to "applicant/recipient." Such a modification would not constitute a substantial change and might serve to clarify the intent of the provision.

Proposed Rule 9505.3040 - Limit on Costs of Recipient's CADI Services

Subpart 2 - Service Costs to be Excluded

28. Subpart 2 indicates, inter alia, that the costs of physical therapy must be excluded from the costs to be applied toward the cost limit of a recipient's CADI services to the extent that they are reimbursed by medical assistance. In response to a question raised by Ms. Boucher at the hearing, the Department reiterated that therapy services are excluded from eligibility for payment under CADI only to the extent that they are eligible for payment as medical assistance services. The proposed rules are sufficiently clear concerning this interpretation, and are needed and reasonable to clarify which costs are to be deemed to fall outside the cost limit of a recipient's CADI services.

Subpart 3 - Monthly Limit on Costs of Recipient's CADI

29. This subpart of the proposed rules sets forth certain limitations on the monthly cost of CADI services to a recipient. The limit is based upon the statewide monthly average nursing home rate for a person assigned the same resident class as the CADI recipient under existing Department Rules parts 9549.0050 to 9549.0059. Anne L. Henry, Attorney at Law, Legal Advocacy for Persons with Developmental Disabilities, Minnesota Disability Law Center, questioned whether the proposed rules would provide an adequate cost comparison for CADI recipients who are children. Ms. Henry indicated that requiring children to meet the statewide average, rather than the average of children now in nursing homes in Minnesota, will work against children being able to remain in their families' homes because the average spent on adults is less than the average spent on children who need nursing care.

In its written response, the Department emphasized that the waiver does not allow a special rate or cost comparison based upon the age of the recipient. In implementing the CADI Program, however, the Department indicated that it has in fact used a cost comparison for children that takes into account how much it costs to care for a child with developmental disabilities and medical conditions requiring a nursing home level of care. The Department provided examples of the cost limitation calculations that have been utilized with respect to children who currently receive CADI services. The examples illustrate that, when the level of care needed by the child is weighted for that resident class and 115 percent of the average payment rate is allowed (based upon the assumption that a private room will generally be deemed to be a medical necessity for children in nursing homes), the actual cost of CADI services has been far less than the nursing home comparison. The Department has demonstrated that the proposed rules are consistent with the provisions of the federal waiver and are needed and reasonable to provide a standard under which the CADI cost limitation will be determined.

Subpart 4 - Exception to Monthly Limit on Costs of Recipient's CADI Services

30. One commenter, Mr. Monson, questioned the meaning of this subpart. In response, the Department explained that, if the monthly cost limit calculated under subpart 3 is exceeded due to the purchase of medical supplies and equipment or adaptations, this subpart will permit the cost of such purchases to be prorated over a longer time. The proration is to the benefit of the CADI recipient. Although the proposed rule is needed and reasonable and its intent is sufficiently clear as written, the Department may wish to consider adding language which clarifies that the reference to "other" CADI services encompasses the purchase of medical supplies and equipment or adaptations in order to avoid any possible confusion concerning the meaning of that phrase. Such a clarification would not constitute a substantial change.

Subpart 5 - Monthly Limits on Costs of CADI Services of Applicant who is a Nursing Home Resident

31. This subpart provides that the monthly cost of CADI services for a person who is a nursing home resident shall not exceed the monthly payment for the resident class assigned under parts 9549.0050 to 9549.0059 for that resident in the nursing home where the resident currently resides. Mr. Anderson suggested that this language be changed so that the monthly payments are tied to the state nursing home average rate rather than the maximum rate of the specific nursing home where the client resides. The Department declined to modify the rule in accordance with Mr. Anderson's suggestion. The comparison required in the proposed rules is an accurate measure of the actual cost of converting a nursing home resident to CADI services rather than continuing nursing home care. The Department has shown that the approach set forth in the proposed rules is a needed and reasonable method by which the Department may achieve compliance with the waiver's requirement that the cost of CADI not exceed the cost of maintaining the individual in a nursing home.

Proposed Rule 9505.3050 - Written Request for CADI Slot Assignment

32. This subpart identifies certain information that must be submitted by the lead agency to the Commissioner within 15 days after receiving a provisional CADI slot assignment. Mr. Monson suggested that this subpart be written to state more generally that the lead agency must submit information to the Department as specified by the Commissioner, in order to avoid the necessity of an amendment to the rule if the Department decides in the future that it no longer requires a particular piece of information. The Department indicated in response that the specification of the items of information required allows affected persons to know what information is necessary, aids administrative efficiency, reduces the possibility of delay needed to obtain more information, affords the Department an opportunity to review the care plan and thereby fulfill its obligations under the waiver, and promotes uniform administration of the program. The Administrative Law Judge finds that the Department has established the need for and reasonableness of the proposed rule.

Proposed Rule 9505.3055 - Commissioner's Determination

Subpart 3 - Disapproval of Request for CADI Services

33. This subpart requires the Commissioner to disapprove a request for CADI services if the information and documents submitted by the lead agency are incomplete. Ms. Henry suggested that the subpart be modified to require that the Department notify the client if it intends to deny a request for CADI services due to incomplete information, in order that the client receive notice and have an opportunity to take an appeal. The Department declined to modify the proposed rule, but pointed out in its response to Ms. Henry's comment that a client whose CADI application is denied for any reason receives a notice of the denial which includes information about how to appeal the denial, in accordance with the requirements of parts 9505.0125, subp. 1, and 9505.3140. The Department has established that other provisions of the Department's rules address Ms. Henry's concerns, and that there is no need to modify the proposed rule. The Administrative Law Judge finds that the proposed rule has been shown to be needed and reasonable.

Proposed Rule 9505.3060 - Reassessment of CADI Recipient

Subpart 1 - Reassessment Required

34. This subpart requires that the case manager conduct a reassessment of the health care needs of CADI recipients at least once every six months. Items (A) and (B) also require reassessments when a recipient is released following a stay in a nursing home or hospital, or when the case manager determines that changes in the recipient's needs or changes in informal support arrangements necessary to remain at home require revisions in the recipient's care plan.

This subpart engendered numerous comments. Ms. Rootkie commented that reassessments are unnecessary after each hospital stay. Mr. Monson stated that the mandated requirements for reassessments in items (A) and (B) are too broad and allow case managers little discretion, and requested that the rule allow for the professional judgment of the case manager to be exercised in determining whether, under the circumstances, a full, face-to-face assessment must be conducted. Mr. Anderson commented that a full reassessment under the circumstances involved in items (A) and (B) would be time consuming and unnecessary, and indicated that he assumes that the reassessment requirement set forth in those items does not include the reconvening of the assessment team, but only a reassessment by the social worker. Ms. Stout requested that the rule be revised to specify that the reassessment must be conducted by a registered nurse.

With respect to the comment concerning the need for a reassessment following each hospital stay, the Department indicated that the recipient's condition at the time of discharge from a hospital may differ from the recipient's condition before the admission, and the care plan which was based on the pre-admission condition thus may require changes. The waiver requires the Department to provide assurances that necessary safeguards have been taken to protect recipients' health and welfare and that the recipient's need for the level of care is periodically

reevaluated. The mandated reassessment will permit the Department to carry out its responsibilities under the waiver, and has been shown to be needed and reasonable.

With respect to the remainder of the comments concerning the scope of the required reassessments and who should conduct them, the Department indicated that it has been informed by the HCFA that the reassessment procedure must be the same procedure as that utilized in preadmission screening. As set forth in the waiver, the local agency may choose either a social worker or a registered nurse to be the case manager. If a nurse is chosen to be the case manager, he or she may conduct the reassessement alone. If a social worker is chosen to be the case manager, a registered nurse must either accompany the case manager during the reassessment or review the reassessment, certify the level of care status, and provide consultation to the case manager as necessary. The proposed rule does not specify the length of time required to conduct the reassessment, but relies on the professional judgment of those involved in the reassessment process to make that determination. The Administrative Law Judge finds that the proposed rule is needed and reasonable to protect the health and welfare of the recipient, ensure that a medical professional makes the appropriate judgment concerning the level of care required by an individual, and permit local agencies some flexibility in designating an appropriate case manager and reassessment team.

Subpart 3 - Record of Reassessment

35. This subpart requires, inter alia, that the revised care plan formulated after a reassessment or the statement explaining why revisions in the care plan were not needed must be signed by the recipient's physician and included in the recipient's records at the lead agency. Ms. Rootkie questioned the reasonableness of requiring the physician's signature, particularly where no revisions in the care plan are recommended. Mr. Anderson indicated that it is often time-consuming and difficult to obtain a physician's signature. Ms. Henry commented that she was concerned that physicians would be reluctant to sign plans of care involving non-medical services, and suggested that the rule be revised to limit physician oversight to direct medical care matters and clarify that the physician is not expected to supervise the providers who will provide services that are not medical in nature.

As discussed with respect to proposed rule 9505.3030, subpart 4, above, the Judge has found that it is reasonable and necessary (and consistent with the requirements of the waiver) to require that physicians sign care plans. The requirement that physicians sign revised care plans and statements that no revisions are necessary is based upon the same rationale, and is also found to be needed and reasonable. With respect to the concern regarding the non-medical services which may be encompassed within the care plan, the Department emphasizes that existing Department rules (Parts 9505.0170 through 9505.0475) contain supervisory requirements for medical assistance services which would continue to apply when those services are furnished to a CADI recipient unless the waiver specifies otherwise, and that the recipient's physician thus is not expected to supervise all of the services provided to a CADI recipient through medical assistance funding. The existing rules thus

address Ms. Henry's concerns. The requirement that physicians review and sign care plans that may include non-medical services will permit physicians to become apprised of all of the services to be provided to the recipient and will provide additional protection of the health and safety of the recipient. The Department thus has shown that it is needed and reasonable to require the signature of the recipient's physician under this subpart.

Proposed Rule 9505.3068 - Costs Not Eligible for Reimbursement under CADI

36. Item (D) of this subpart provides that the costs of respite care services that exceed the 720-hour limit set forth in Proposed Rule 9505.3110 will not be reimbursed under the CADI program. Ms. Henry stated that the limitation of respite care to 720 hours per person per year is arbitrary and does not permit the consideration of individual circumstances. She suggested that the Department be required to use a prior authorization process for approval of additional respite hours which may be necessary for family relief. In response, the Department noted that section IV(D) of the waiver limits the CADI payment to a maximum of 720 hours per individual, and that compliance with the waiver is necessary in order to obtain federal financial participation as required under Minn. Stat. § 256B.04, subd. 4. The proposed rule is in accordance with the waiver provisions and has been shown to be needed and reasonable.

Proposed Rule 9505.3070 - Case Management Services

Subpart 1 - Case Management Services Required

37. As originally proposed, this subpart stated in pertinent part that "[t]he lead agency must provide case management services to each recipient." At the hearing, Ms. Rootkie suggested that the rule be modified to state that the lead agency must see that case management is provided. The Department agreed that the rule should be modified because the lead agency itself does not have to provide case management services. After the hearing, the Department modified the second sentence of the rule to state as follows: "The lead agency must assure that a case manager is designated to provide case management services to each recipient." The proposed rules, as modified, are needed and reasonable to establish the case management requirement and achieve compliance with the waiver. The modification clarifies the intent and purpose of the rule, and does not constitute a substantial change from the rule as originally proposed.

Subpart 2 - Case Manager Qualifications

38. This subpart requires in relevant part that a person who provides case management services must be employed by or under contract with the lead agency. Ms. Rootkie suggested that the contract requirement is unnecessary and confusing where the lead agency and the case manager are merely separate departments within the same local agency. The Department declined to modify the rule to eliminate the requirement of a contract between divisions within the same local agency based upon its opinion that, even in this setting, a contract could avoid possible confusion and misunderstanding. Because contracts may clarify

the tasks to be performed by each party and thus facilitate the efficient implementation of the CADI Program, the Judge finds that the proposed rules are needed and reasonable.

Subpart 3 - Responsibilities of Case Manager

39. This subpart sets forth the various responsibilities of the case manager, including the requirement that the case manager obtain the attending physician's signature (item C); monitor service providers and the provision of services to ensure that only the authorized care is being provided and that the recipient's health and safety at least is being maintained (item E); complete a notice of action form if the recommendations following a reassessment are to reduce, suspend, or terminate the recipient's CADI services (item I); and monitor the recipient's health and safety (item J).

With respect to item C, Ms. Rootkie suggested that the attending physician sign only for medical services. As discussed above, the requirement that the physician sign with respect to all services has been shown to be needed and reasonable.

With respect to items E and J, Ms. Stout commented that registered nurses are the only individuals included in the case manager definition who have the skills and training in health assessment which are necessary to identify health care needs for disabled individuals. She suggested that the definition of case manager be changed to encompass mean only registered nurses or that a provision be added to the rules which states that all health assessment and reassessment components must be conducted by a registered nurse. As discussed above with respect to Proposed Rule 9505.3060, subp. 1, the waiver provides that a case manager may be either a social worker or a registered nurse, and social workers are required to consult with registered nurses concerning health assessment issues. The proposed rules have been shown to be needed and reasonable in this regard.

With respect to item I, Mr. Monson suggested that the rule be modified to state that notice of action forms must be sent only in situations where clients have not already agreed to the change and have not signed a revised care plan. He also suggested that the Department define what is meant by "suspension of services." In its response, the Department stated that, in accordance with the procedures of the medical assistance program, the notice of action form is sent to a medical assistance recipient whenever the client's services are going to be suspended, reduced, or terminated. The form serves to notify the recipient of the action and of his or her appeal rights. It is reasonable for the Department to require the use of an existing standard form in order to provide uniformity in the implementation of the medical assistance program. The Department further noted that the HCFA encouraged it to use such a notice of action form when it implemented its first waivered service program, the ACG Program. It is sufficiently clear from the context of the proposed rule that the phrase "suspension of services" refers to an interruption of services which may not be permanent in nature. The Department has shown that the proposed rule is needed and reasonable.

Subpart 5 - Case Manager Decision

40. As originally proposed, this subpart specifies in item (C) that the case manager must determine whether to suspend the CADI services based upon the findings made as a result of a protection agency's investigation of allegations of abuse or neglect. It further provides that the suspension will take effect upon the date of the notice of the suspension to the recipient. In response to Mr. Monson's suggestion that the rule clarify the case manager's ability to terminate CADI services and the time lines for doing so, the Department modified the proposed rule to refer to suspension or termination. Thus, item (C) as modified reads as follows:

> C. to suspend or terminate the CADI services. Notwithstanding any rule to the contrary, if the case manager decides to suspend or terminate the recipient's CADI services, the suspension or termination shall take effect upon the date of the notice of the suspension or termination to the recipient.

The modification was made for the purposes of clarification and does not constitute a substantial change. The Department has demonstrated that the proposed rule, as modified, is needed and reasonable to protect the health and safety of the recipient.

Ms. Henry expressed a concern regarding the applicability of the appeals section of the rule to suspensions under this subpart, and urged that the appeal section be amended to allow for an expedited appeal in cases involving mistreatment of a vulnerable adult or a minor. She also questioned whether CADI recipients could lose their CADI "slot" as a result of a suspension, and have no alternative but nursing home placement. She suggested that, rather than suspending CADI services when there are questions of health and safety or abuse or neglect, case managers should be required to provide protective services until the matter has been resolved. She also urged that the right to CADI services and a CADI "slot" be retained pending appeal, even if the person must be removed from the situation.

The Department indicated in its response that subpart 5 already addresses several of Ms. Henry's concerns by recognizing that the case manager may decide to arrange for the services of another CADI provider or work out alternative housing and services for the recipient. The Department also stated that the slot assigned to a CADI recipient is held for the recipient until the outcome of the investigation is known. If the case manager suspends or terminates CADI services at that time, the recipient is notified and may take advantage of the appeal process. The Department has shown that the proposed rule is reasonable and necessary to protect the health and welfare of the recipient. Suspension of CADI services is needed and reasonable if the health and safety of the recipient cannot otherwise be safeguarded. Although the Department might wish to consider providing an expedited appeal process in these cases, the proposed rule as written is reasonable and necessary. If the Department chooses to modify the appeals section to provide such a process, it would not constitute a substantial change.

Proposed Rule 9505.3090 - Extended Personal Care Services

Subpart 1 - Availability under CADI

41. This subpart provides that extended personal care services are available under CADI if they meet the requirements in existing Department

Rules part 9505.0335 and the requirements set forth in the proposed rule. The proposed rule specifies that the directions for the recipient's care may be provided by a primary caregiver or family member if the recipient is not able to direct his or her own care. Mr. Monson asked for clarification of the latter requirement, indicating that he had previously understood that the primary caregiver or family member had to be living with the recipient in order to be able to direct personal care. The Department indicated in response that Minn. Rules 9505.0335, subp. 2(C) provides the applicable standard. That provision indicates that the recipient must either be capable of directing hir or her own care, or a responsible party must live in the residence of the qualified recipient. The definition of "responsible party" contained in Minn. Rules 9505.0335, subp. 1(I), makes it clear that a responsible party need not be the primary caregiver or a family member. Because the existing rules of the Department thus address Mr. Monson's concern, there has been no showing of a need to modify the proposed rules. The proposed rules are needed and reasonable to inform affected persons of the standard that will govern coverage of extended personal care services under CADI.

Subpart 2 - Qualification as Personal Care Assistant

42. This subpart states that a person who does not qualify as a personal care assistant under part 9505.0335 of the existing Department rules can be a personal care assistant for a CADI recipient if the person is employed by or under contract with the lead agency and meets the training requirements of existing rule 9505.0335, subpart 3. Mr. Monson requested deletion of the proposed rule. In response, the Department clarified that the CADI waiver permits extended personal care services provided by the recipient's primary caregiver or a family member to be eligible for medical assistance payments through CADI funds. Such family members would not otherwise be eligible for medical assistance payments under part 9505.0335 of the existing rules. This subpart of the proposed rules thus is intended to permit certain family members to receive medical assistance payment through CADI funds for personal care services provided to a family member who is a recipient, as long as the relative meets the same training requirements as other persons providing personal care services under the medical assistance program. The Department has shown that the proposed rule is needed and reasonable to comply with the waiver provisions, safeguard the health and safety of the recipient, and further the intent of the CADI program to maintain the individual at home by permitting family members to receive payment for providing needed services customarily performed by a personal care assistant.

Proposed Rule 9505.3095 - Family Support Services

Subpart 2 - Standards to be a CADI Provider of Training Services

43. This subpart sets forth various standards which must be met by physicians, registered nurses, physical therapists, occupational therapists, respiratory therapists, medical equipment suppliers, speech-language pathologists, and nutritionists to provide training services under the CADI Program. Four individuals addressed this subpart in their comments. Ms. Stout stated that the one year of experience required of registered nurses should either be deleted or that the same experience requirement should be added to the other professions listed.

She questioned the rationale for the experience requirement for registered nurses, noting that respiratory therapists have a lower standard of required formal education than registered nurses and do not have to meet licensure or registration requirements. Ms. Boucher and Mr. Moilanen suggested that therapeutic recreation specialists be added to the list of providers who are qualified to provide family training. Scott L. Mayer, Executive Director of the Minnesota Chiropractic Association, suggested that chiropractic physicians be included as CADI providers of family training services.

In response to these comments, the Department explained that the qualifications of persons who may provide CADI training services as a category of family support are specified in Attachment K of the present CADI waiver, which will expire on September 30, 1990. The Department plans to submit a request for renewal of the waiver by July 1, 1990. The HCFA must approve or deny the renewal request by October 1, 1990. It is possible to request the HCFA's approval to amend the waiver. Each amendment requested must be submitted separately, and the HCFA has 90 days to approve or deny the request.

The Department further indicated that, if it were to submit a request for amendment of the waiver along with its renewal request, the renewal request would be processed as a new application for a waiver which the HCFA could choose to approve or deny. The Department believes that the continuity of service to CADI recipients would be jeopardized if it submitted an amendment request prior to the renewal of the waiver. The Department indicated that it would consider submitting amendments affecting CADI provider qualifications in the fall of 1990, after it receives the HCFA's approval of the waiver renewal. The Department stated specifically that it would consider submitting amendments to include chiropractic physicians as qualified CADI providers of training services and to remove the requirement that a registered nurse have one year of experience. The Department did not indicate in its response whether it would also consider submitting an amendment to add therapeutic recreation specialists as qualified CADI providers of training services.

The Administrative Law Judge finds that it is reasonable and necessary that the proposed rules adhere to the qualification standards specified in the current waiver and that the Department submit any requests to amend the waiver next fall, after the renewal request has been approved. This approach is also consistent with the intent expressed in Minn. Stat. § 256B.04 that the Department "[c]ooperate with the federal department of health, education, and welfare in any reasonable manner as may be necessary to qualify for federal aid in connection with the medical assistance program." It is also reasonable and necessary to impose an experience requirement on registered nurses given the more specialized training afforded to the other providers listed in the proposed rules.

The only issue remaining for discussion concerns a slight discrepancy between the language of the proposed rules and that contained in the current waiver. The proposed rules mandate one year of experience for professional nurses, while the waiver states that registered nurses must "preferably" have one year of experience. This deviation from the waiver may result in a somewhat more restrictive qualification requirement,

since the one-year experience factor has been elevated from a preference to an absolute requirement. It is, however, reasonable and necessary for the Department to set forth a specific requirement in the proposed rules rather than adopt the vague and subjective standard contained in the waiver. It is also reasonable and consistent with statutory authority for the Department to ensure compliance by local agencies with the "preference" expressed in the waiver by making it an absolute standard, and thereby avoid endangering federal financial participation in the CADI Program. The Administrative Law Judge thus finds that the proposed rules are needed and reasonable. Given the Department's indication that it will consider seeking an amendment to delete the experience requirement, however, the Department may wish to consider modifying the proposed rules to track the language of the waiver. Such a modification would not constitute a substantial change.

Subpart 3 - Standards for Providers of Family Support Counseling Services

44. This subpart specifies qualifications for providers of family support counseling. Ms. Stout commented that Clinical Nurse Specialists in Psychiatry and Mental Health will be deemed enrolled providers as of September 1990, and suggested that they should therefore be listed as providers. Mr. Monson suggested that the word "or" be added after item (E)(5)(1).

With respect to Ms. Stout's comment, the Department noted that the submission and approval of the waiver preceded the enactment of the Minn. Stat. § 245.462, subd. 18, which defines a Clinical Nurse Specialist as a mental health professional qualified to provide clinical services in the treatment of mental illness. Although the Department agrees that it is advisable to identify a clinical nurse specialist as a provider of family support counseling services, it is of the opinion that the request to amend the waiver should be made after the waiver has been renewed. For the reasons discussed in paragraph above, the Administrative Law Judge finds that the proposed rule, as well as the Department's intention to proceed with a request to amend the waiver after the renewal has been granted, is needed and reasonable.

The Department declined to modify item (E)(5)(1) in accordance with Mr. Monson's comments. The Judge finds that it is sufficiently clear from the reading of this provision that the factors listed under (E)(5) constitute alternative ways in which one may provide the proof required by (E)(5).

Proposed Rule 9505.3105 - Independent Living Skills Services

Subpart 2 - Standards for Providers of Independent Living Skills Services

45. Several individuals expressed concerns about the reasonableness of the qualifications established in this subpart for providers of independent living skills. Mr. Moilanen suggested that the education and experience requirements set forth in item (C)(5)(a) be modified to require a bachelor's degree with a major in health or human services or a combination of coursework, plus equivalent experience, rather than a

bachelor's degree with a major in nursing, physical therapy, occupational therapy, or speech-language pathology, psychology, or sociology. Ms. Rootkie commented that the alternative approaches specified in subpart 2 for qualifying as a provider of independent living skills services emcompass too broad a range of people and recommended that the rule be narrowed. In particular, Ms. Rootkie suggested that the 25 hours of training mentioned in item (C)(5)(e) is insufficient. Ms. Boucher agreed that the range of training for independent living skills specialists contemplated by the proposed rules is very broad, but mentioned that there is a need for a broad range in certain counties due to a lack of availability. Mr. Moilanen suggested that item (C)(5)(e) be deleted because the qualifications are too loose.

The Department declined to modify the proposed rules in response to these comments. The Department stressed that the qualification standards are prescribed in the waiver, and again stated that it does not wish to request an amendment to the waiver until after the waiver is renewed in the fall of 1990. In addition, the Department expressed its view that the broad range of levels of skills permitted by the rule is to the benefit of counties, particularly rural counties which may have only a limited number of persons available who would meet the most stringent requirements. The proposed rules give the local agency the discretion to choose the provider with the highest qualifications or the provider whose qualifications best meet the needs of the recipient. The Department has shown that the proposed rules are needed and reasonable to provide standards for providers of independent living services which are in conformity with the provisions of the waiver, while at the same time preserving the flexibility of the local agencies to choose the most qualified provider from a broad range of qualified providers.

Ms. Boucher and Mr. Moilanen raised concerns regarding who would supervise the providers of independent living skills services, and stressed that it is unnecessary to require that a nurse supervise the independent living skills program. The Department stated that the rule intentionally does not prescribe who is to supervise independent living skills service providers because of the diversity of skills, abilities and services involved. The agencies that are included as providers of these services (home health agencies, rehabilitation agencies, and independent living centers) must carry out the supervisory requirements established in other rules of the Department or set out in the contract between the lead agency and the provider. Although the Department has established that the proposed rules are reasonable and necessary as written, it should be noted that items (C)(5)(d) and (C)(5)(e)(iii) contain references to the "supervising nurse." These provisions are in accordance with the terms of the waiver, and the Judge finds that they are needed and reasonable. In light of the Department's statement that the rule is not intended to prescribe who will supervise independent living skills providers, however, the Department may wish to consider modifying these provisions to delete the references to the "supervising nurse." Such a modification would not constitute a substantial change from the rule as originally proposed.

Mr. Monson found the definition of "independent living center" in item (C)(5)(e)(iii) confusing, and asked whether it belonged in another location in the proposed rules. The Department agreed with Mr. Monson

that the context in which the term "independent living center" appears should be clarified. The Department modified the proposed rules by deleting the definition from the last sentence of item (C)(5)(e)(iii), and moving it to item (C). Thus, item (C) of subpart 2 has been modified to read as follows:

> C. a person who is employed by an independent living center and who is determined by the lead agency to meet the requirements in subitems (1) to (5). For purposes of this item, "independent living center" means a center that meets the requirements of parts 3300.3100 to 3300.3270; . . . .

The Judge finds that the rule as modified has been shown to be reasonable and necessary to clarify the definition of "independent living center." The exact definition was included in a different location in the original draft of the proposed rules, and did not engender any critical comment. The modification was made only for the purposes of clarification, and does not constitute a substantial change.

Finally, Mr. Moilanen suggested that the word "or" be added after items (C)(5)(a), (b), and (c) of subpart 2. The Department declined to make this modification. The Judge finds that it is evident from the context of the proposed rules that paragraphs (a), (b) and (c) of subitem (5) provide alternative forms of proof that the person may offer to establish that he or she meets the applicable requirements, and no modification is necessary.

Proposed Rule 9505.3110 - Respite Care Services

Subpart 2 - Provider Standards

46. This subpart specifies standards applicable to out-of-home and in-home respite care providers. Mr. Monson suggested that the definition of out-of-home respite care should be broadened to include other facilities, such as Camp Courage and Vinland. Ms. Rootkie indicated that she believed training in first aid and CPR is unnecessary for respite care workers. She stated that most well-trained home health aides do not have such training, and questioned why such training is only required for respite care workers under the proposed rules.

With respect to Mr. Monson's concern, the Department indicated that item (A) of subpart 2 provides that out-of-home respite care must be provided in a facility approved by the county, and merely goes on to list examples of such facilities. Thus, if the county approves a facility such as Camp Courage, it could be eligible to receive medical assistance funds for services provided to CADI clients. It is sufficiently clear that the proposed rule does not intend to encompass an all-inclusive list of facilities that will qualify for respite care providers, and the Department has shown that the rule is needed and reasonable to provide guidance concerning the standards that must be met under this subpart.

With respect to Ms. Rootkie's comment, the Department stated that it believes that first-aid and CPR training are necessary for in-home respite care workers because the recipients are disabled individuals under the age of 65 who may suddenly develop medical problems of an

emergency nature. In addition, the Department noted that the waiver requires such training for in-home respite care providers. The Department has established that the proposed rule is needed and reasonable to safeguard the health and safety of recipients and to conform to the requirements of the waiver.

Proposed Rule 9505.3120 - Lead Agency Selection of CADI Providers

Subpart 2 - Selection Factors

47. This subpart requires, inter alia, that the lead agency must contract with all providers that meet the standards to provide CADI services under parts 9505.3010 through 9505.3140. Mr. Monson suggested that the lead agency be permitted to select a specific number of providers who qualify rather than having to contract with all providers who meet the applicable standards. The Department declined to modify the rule based on its belief that the requirement is necessary to ensure that all qualified service providers are treated fairly and that recipients are able to exercise free choice. Although it may be somewhat burdensome for lead agencies in counties with large populations to contract with all qualified providers, the Administrative Law Judge finds that the benefit to the CADI recipients and to the providers outweighs this burden, and that the proposed rule has been shown to be reasonable and necessary.

Proposed Rule 9505.3125 - Contracts for CADI Services

Subpart 3 - Information Required in Contract

48. The proposed rule provides in relevant part that the contract between the lead agency and the provider must contain the estimated number of CADI recipients to be served by the provider. Mr. Monson suggested that this provision be modified to focus on the maximum amount of money that an individual CADI provider can receive rather than the estimated number of CADI recipients to be served. The Department declined to modify the proposed rule, stating that the suggested modification would be contrary to the intent of contracting with all qualified providers and supporting the recipient's freedom to choose. The Department has shown that these objectives are reasonable and necessary to the appropriate implementation of the CADI Program, and that the proposed rule is needed and reasonable to accomplish these goals.

As originally drafted, item (H) of subpart 3 of the proposed rules required that the contract contain documentation of an individual abuse prevention plan that complies with parts 9555.8000 to 9555.8500. Mr. Monson requested that this provision either be deleted or that the proposed rules be modified to require only compliance with the state laws regarding child and adult abuse. The Department stated in its response to Mr. Monson's comments that it continues to believe that a standard is necessary because service providers and equipment vendors may enter the homes of recipients who may be vulnerable to abuse. The Department clarified that it was not its intent to require a standard that differs from state law, and modified the proposed rule to refer to "abuse prevention plan" rather than "individual abuse prevention plan" and to

include a citation to the provisions of the rules relating to child abuse. Thus, the Department modified item (H) to state as follows:

> H. documentation of an abuse prevention plan that complies with parts 9555.8000 to 9555.8500 in the case of adults or with parts 9560.0210 to 9560.0234 in the case of children.

The modification is responsive to Mr. Monson's concern, is consistent with existing rule provisions, and has been shown to be needed and reasonable to safeguard the health and safety of the recipients. The modification merely clarifies the rule, and does not constitute a substantial change.

Proposed Rule 9505.3130 - Agency Reports and Records

49. Mr. Monson suggested that the rule provisions describing the information to be contained in the annual county plan submitted by the lead agency for CADI services be less detailed and that the rule merely provide that the lead agency should submit an annual plan in the format requested by the Commissioner, in order to facilitate the Department's ability to make changes in the format without the necessity of amendments to the rules. The Department declined to modify the rule based upon its belief that the proposed rule will prevent confusion and misunderstanding and will inform affected individuals of the information that is required. The Department has shown that the proposed rule is needed and reasonable to notify lead agencies of the information that will be required to be included in the county plan, and that it will promote the efficient operation of the CADI program.

Ms. Rootkie expressed concern about the requirement in item (E) of the proposed rules that the county plan include "proof that all services covered by the waiver will be available in the community." She indicated that her agency did not receive any responses to a recent request for proposals for extended hour home health aide services, and indicated that the requirement contained in the proposed rules would be problematic for many rural counties. In response, the Department stated that it is aware that some counties cannot guarantee that all of the covered services will be available within the county, but that the Department believes it is reasonable to expect counties to undertake to develop such services or enter into alternative arrangements, such as cooperative agreements with a county where the needed service is available. The Administrative Law Judge finds that the proposed rule has been shown to be needed and reasonable to the implementation of the CADI Program throughout the state.

Subpart 4 - CADI Provider Records

50. Ms. Rootkie questioned the intent of the requirement contained in this subpart of the proposed rules that CADI records "must be identified and maintained separately from other provider records." She indicated that her agency does not currently isolate CADI records from other records, although it could identify payment sources. Because the clear meaning of the proposed rule requires separate maintenance of the CADI records, clarification of the rule is unnecessary. The proposed rule is needed and reasonable because separate maintenance of CADI records will facilitate the auditing of the lead agencies and providers under the CADI Program as well as ensure accurate recordkeeping.

Proposed Rule 9505.3135 - Rates for CADI Services

Subpart 3 - County CADI Service Rate

51. This subpart provides, inter alia, that administrative costs are part of the case management rate and are to be included in that rate and not added to the county rate for other services. Ms. Rootkie asked that this provision be clarified to clearly indicate whether it encompasses administrative costs charged by providers, or only those charged by the county. Mr. Moilanen indicated his support for the proposed rule and stated that he believes it is clear that the reference made is to the county's administrative costs, not to those of the provider.

The Department's response indicates that the rule is intended to encompass the county's administrative costs. The Department stated that, when the CADI Program was begun, the rate for case management services was calculated to include not only payment for case management services but also payment for the administrative overhead of the entire CADI Program. The Department indicated that placement of administrative costs in the area of case management services ensures that the burden of administrative costs will be proportioned among all recipients. If administrative overhead were built into the costs of specific services, the costs of the services would be increased, the amount of CADI services available to some recipients would be decreased, and some CADI recipients could be determined to be ineligible for CADI and placed in nursing homes. The Department has shown that the proposed rule is a needed and reasonable method to spread administrative costs among all recipients and implement the CADI Program in an equitable manner.

Proposed Rule 9505.3140 - Appeals

Subpart 1 - Notice of Right to Appeal

52. Ms. Henry commented that this subpart does not include a statement of the time during which it is necessary to file an appeal in order to have services continued pending appeal. She recommended that the Department require that the case manager provide appeals information which includes a notification that, if a person files an appeal within thirty days of notice, their services will not be reduced, suspended or terminated pending appeal. The Department declined to modify subpart 1 of the proposed rule, indicating that the time for submitting an appeal is specified in subpart 4 of the proposed rule and that subpart 1 of the proposed rule already requires the notification suggested by Ms. Henry.

Although the proposed rule has been shown to be needed and reasonable as written, the Department may wish to consider modifying subpart 1 to require that the notice specifically set forth the applicable time limits for submission of an appeal and thereby remove any possible interpretation that the date mentioned in the notice need not conform to the time periods established in subpart 4. Thus, the last sentence of subpart 1 might be modified to state as follows: "The information must state the grounds for an appealable action and must state that CADI services will not be reduced, suspended, or terminated if the appeal is filed within 30 days after receiving written notice of the appealable action, or within 90 days of the written notice if a good cause for delay

can be shown, unless the person requests in writing not to receive CADI services while the appeal is pending." Such a modification would merely serve to clarify the rule, and would not constitute a substantial change.

Subpart 3 - Actions That Are Not Appealable

53. Mr. Monson requested that the proposed rule be modified to state that the termination of CADI services as a result of a failure to pay the spend-down constitutes an action that is not appealable. The Department did not make any modification to the proposed rule in response to this comment. The Administrative Law Judge finds that the rule as written is a needed and reasonable definition of the circumstances under which a denial, reduction, suspension of termination of CADI services will be deemed not to be an appealable action. Because these conditions are specified in the waiver, it is reasonable to identify them as matters which are not appealable, and a modification to include the spend-down issue is not required.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.

2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.

3. That the Department has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. That the Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That the additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

6. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the rules based upon an examination of the public comments, provided that no substantial

change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted consistent with the Findings and Conclusions made above.

Dated: March 26, 1990

Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge