STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of Proposed Adoption of Department of Human Services Rules Relating to Licensing; Background Studies, Minnesota Rules, Parts 9543.3000 to 9543.3090.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Howard L. Kaibel Jr. on October 3, 1990, at 9:00 a.m. in Room 300 South, State Office Building, 100 Constitution Avenue, St. Paul, Minnesota and on October 15, 1990 at 9:00 a.m. in Room 500 South, State Office Building.

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 (Department staff or Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable, and whether any of the modifications to the rules made after their initial publication constitute substantial changes in the proposed rules.

Gail Olson, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Department at both hearings. The Department's hearing panel included: Jerry Kerber, Chief Inspector; James Loving, Director of Licensing; Martha O'Toole, Staff Attorney; and Jim Schmidt, Rulemaker.

Forty-four persons attended the October 3 hearing. Thirty-two persons signed the hearing register. At that hearing, the Administrative Law Judge received the Department staff procedural exhibits, comments, and exhibits from interested members of the public. As a result of receiving requests from several individuals to conduct an additional hearing more readily available to persons with a scheduling conflict, the Administrative Law Judge recessed the hearing. The hearing was reconvened in St. Paul on October 15, 1990. Twenty persons attended the October 15 hearing. Nine persons signed that hearing register. Both hearings continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for sixteen calendar days following the October 15 hearing, to October 31, 1990. Pursuant to Minn. Stat. § 14.15, subd. 1 (1988), three business days were allowed for the filing of responsive comments. At the close of business on

November 5, 1990, the rulemaking record closed for all purposes. The Administrative Law Judge received 27 written comments from interested persons during the comment period relating to these proposed rules. The Department submitted written comments responding to matters discussed at the hearing and altering some parts of the proposed rules.

The Commissioner must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons on request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Department of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Department may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Department does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Department may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Department makes changes in the rule other than those suggested by the Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing record, to the Chief Administrative Law Judge for a review of the changes prior to adopting it and submitting it to the Revisor of Statutes.

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On August 9, 1990, the Minnesota Department of Human Services (Department staff or 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 Intent to Adopt With and Without a Hearing;
(d) The Notice of Hearing and Notice of Intent to Cancel proposed to be issued;
(e) The Statement of Need and Reasonableness (SONAR);
(f) A letter stating the expected length of the hearing, that additional notice would be given, and the anticipated attendance.
(g) a Fiscal Note.

2. On August 22, 1990, Department staff mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice and to those entities to whom the Department gave discretionary notice.

3. On August 27, 1990, a Notice of Hearing and a copy of the proposed rules were published at 15 State Register 486.

4. On August 28, 1990, Department staff filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed;
(b) a photocopy of the pages of the State Register containing the Notice of Hearing and the proposed rules;
(c) the Agency's certification that its mailing list was accurate and complete;
(d) the Affidavit of Mailing the Notice to all persons on Department staff's mailing list;
(e) the Affidavit of Mailing the Notice of Hearing to the Discretionary Mailing List;
(e) the names of Board personnel who would represent it at the hearing;
(f) a copy of the Statement of Need and Reasonableness transmittal letter to the Legislative Commission for the Review of Administrative Rules;
(g) a copy of the Notice of Solicitation of Outside Opinion together with all materials received in response to that notice.

5. On September 27, 1990, Department staff mailed notice of the hearing to all persons who requested a hearing as required by Minn. Stat. § 14.25. Department staff filed a copy of that notice with the Administrative Law Judge on September 27, 1990.

6. Through circumstances outside the control of the Department the room named in the Notice of Hearing as the location of the public hearing, Room 500 South, was unavailable for the October 3, 1990, hearing. The location of the hearing was moved to Room 300 South in the same building. Notices were posted throughout the building informing interested persons of the change. Under these circumstances, the change of location from that stated in the Notice of Hearing does not constitute a defect.

Nature of the Proposed Rules.

7. The Department licenses individuals, corporations, and other organizations to operate residential and nonresidential programs which provide

care for certain vulnerable adults and children. Minn. Stat. § 245A.03, subd. 1. As a prerequisite to issuance of such a license, the Commissioner is required to conduct a background study of four classes of caregivers who are likely to have direct contact with the persons served. Minn. Stat. § 245A.04, subd. 3. However, the implementation of the background study requirement is expressly delayed until the Commissioner adopts rules to carry out those studies. Id. Department staff intends that the rules proposed in this rulemaking fulfill the statutory obligation to adopt rules prior to implementing the background study requirement.

The proposed rules are composed of three different sections. The background study rules are contained in the second section. The first and third sections are deletions of all or part of existing rules. These deletions are made to conform to the new language contained in the second section, and eliminate any redundant language.

Statutory Authority.

8. In its Statement of Need and Reasonableness (SONAR), Department staff cites Minn. Stat. §§ 245A.09, subd. 1 (1988), 245A.04, subd. 3 and Minnesota Laws chapter 542, section 7 and chapter 568, article 2, sections 42 to 44 as authorizing the adoption of the proposed rules. Minn. Stat. § 245A.09, subd. 1 states the general grant of rulemaking authority over programs licensed under chapter 245A, provided that the rules be consistent with the state and federal regulatory provisions governing those programs. Rulemaking authority is impliedly granted by Minn. Stat. § 245A.04, sub. 3, since the legislature has conditioned implementation of a statutory program on the adoption of rules by the Commissioner. The references to session laws are only the amended language of Minn. Stat. § 245A.03, subd. 3 and do not grant additional rulemaking authority. The Commissioner has statutory authority to adopt these rules.

Small Business Considerations in Rulemaking.

9. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. The proposed rules in this proceeding are only implementing an express statutory program. The extent of the program is set by statute and may not be varied by the Department. Department staff has considered the potential effects of these rules on small businesses. No alternative methods or less stringent requirements can be implemented to reduce the adverse impact on small businesses imposed by operation of these rules and still remain within the Department's statutory mandate. The Department has met the small business consideration requirements of Minn. Stat. § 14.115.

Fiscal Notice.

10. Minnesota Statutes § 14.11 requires "special notice" in certain rulemaking proceedings, as follows:

> If the adoption of a rule by an agency will require the expenditures of public money by local public bodies, the

appropriate notice of the agency's intent to adopt a rule shall be accompanied by a written statement giving the agency's reasonable estimate of the total cost to all public bodies in the state to implement the rule for the two years immediately following adoption of the rule if the estimated total cost exceeds $100,000 in either of the two years.

The notices of hearing in this proceeding contain the following with regard to the special notice requirements of Minn. Stat. § 14.11:

> Adoption of these rules will not result in additional spending by local public bodies in excess of $100,000 per year for the first two years following adoption under the requirements of Minn. Stat. § 14.11.

Department staff did prepare a fiscal note pursuant to Minn. Stat. § 3.982 (which was repealed in 1990) and prepared and submitted one with its prehearing filings. The sole reference in that document to increased local government costs is the following:

> B. Local costs. The department does not anticipate any increased costs to county agencies or other local units of government upon implementation of this rule. Requirements imposed on local agencies are requirements imposed by statute.

The authorizing statute, Minn. Stat. § 245A.04, subd. 3, ¶ (g) provides that, "The commissioner shall not implement the procedures contained in this subdivision until appropriate rules have been adopted . . . ." Adoption of the rule will allow implementation of the procedures which will result in cost increases to Minnesota counties well in excess of $100,000 per year. There was no state appropriation to cover these costs.

The Department staff estimates that 50,000 to 60,000 background checks per year will be required once the rules as proposed are adopted. They called this an "informal guesstimate". No study or sampling was done to obtain any factual basis for this prediction, although data on the number of licensees and their employees, contractors and volunteers should be readily ascertainable. The actual number of annual required studies could be substantially more.

Each of the study forms under the proposed rules will have to be forwarded to the subject's county of residence, licensee's county, or both. The counties will have to check their records for the last seven years on abuse and neglect of children and vulnerable adults to determine whether the subject has any record of substantiated abuse or neglect and whether the alleged maltreatment occurred within a licensed program. The results of the search (including presumably the specifics in cases of substantiation) will then have to be put together and forwarded to the Department.

A Dakota County official estimated that the total time involved in completing the study, from opening the form to putting it back in the mail, will average one-half hour per subject. At a conservative salary and benefit FTE expense of $8 per hour, 60,000 background checks will thus increase county costs a minimum of $240,000 annually, if only one county per subject is consulted.

The actual cost impact on the counties will be substantially more, at least double and probably triple that figure, particularly in the initial couple of years. Dakota County has computerized its maltreatment report data on a system that allows it to access files based upon the identity of alleged perpetrators. No facts were presented on recordkeeping in other counties other than an indication that the systems vary considerably from county to county. Most counties apparently do not have this data computerized and the time-cost per study in those counties will be considerably more. Moreover, many, perhaps most, counties do not have their files indexed by the identity of alleged perpetrators. Some counties, perhaps most, title their files and maintain them by identity of alleged victims or clients. Others reportedly have the records filed simply chronologically. All of these counties will have substantial initial costs to create an index of all their child and vulnerable adult report files over the last nine years, keyed to the names of reported perpetrators.

Additionally, the county agencies will apparently incur very substantial costs compiling data whenever the Department decides that there is "reasonable cause" to go beyond BCA and county maltreatment records. In those cases, someone will have to spend very substantial time obtaining and compiling data from county attorneys, county sheriffs, courts, other county agency files, police chiefs, the National Record Repository and criminal records from other states. It is clear that the Department staff will not have the time to do any of this field work and will be delegating this further investigation to local county agencies.

There is no way of estimating what percentage of the background checks will involve reasonable cause for such investigations, based on the factual data that the Department has presented. If they are required in only five percent of 60,000 checks and can be completed in ten hours at $8 per hour, the county cost of compliance will be an additional $240,000 per year. Again, this assumes such further investigation in only one county per subject.

There is a substantial likelihood that the percentage of "reasonable cause" investigations will be much higher than five percent, because of the referral to counties for maltreatment record searches. There is nothing to prevent conscientious, responsible local social workers from volunteering any information they are aware of that leads them to believe the subject should be disqualified. For example, county officials are likely to report substantiated neglect and abuse that took place outside of licensed facilities and any charges or arrests they are aware of that did not become convictions on BCA records. (The county review was specifically limited to maltreatment reports from licensed facilities as a cost-cutting measure by the Legislature). The local social workers who testified objected vigorously to that limitation. To the extent that these county officials volunteer information on non-institutional maltreatment, those cost savings will not be realized. Substantiated maltreatment anywhere will automatically disqualify subjects and doubtless increase the number of reconsideration requests that the staff will have to deal with. The Department's final written comments indicate that this

is the approach they plan to take. It is likely that such non-statutory information will frequently cause the Department to decide there is reasonable cause for more exhaustive investigation.

The costs discussed thus far have been staff time only. They do not include county expenses of offices, supplies, phones and travel for these employees. They do not include the costs of reproducing and mailing the data. Minimum postage for 60,000 mailings without enclosures is $15,000. The total postage and copying costs will be substantially more, because files in cases of substantiated abuse are reportedly often sizable. Police departments, sheriff offices, court personnel and other agencies also may reportedly charge counties substantial fees to offset their costs of accessing investigative data.

All of these costs will have to be passed on by the county to local taxpayers in increased property tax levies. Minn. Stat. § 14.11 was enacted to identify situations where state mandates significantly increase local government costs and provide notice to them of the magnitude of the increases, so that they might participate fully in the rulemaking process and identify ways of minimizing them. There was no participation in this hearing by any of the counties, although many of their budgets will be affected quite significantly. Although it would certainly be unusual, it could be that the counties just don't care. It could also be and is certainly more likely the case, that counties were misled by the notice saying the rules would not increase local costs more than $100,000 per year.

It is also not accurate to say that the local costs are caused by the statute and not the rules. The Legislature specifically provided that the statute could not be implemented until "appropriate" rules are adopted. The Legislature further required the special notice and cost estimates in the rulemaking process. The latter mandate has simply not been complied with. Moreover, the statute specifically requires county agency "help" only in providing reports of abuse, neglect and maltreatment in licensed programs. It does not specifically require such help in the review of arrest and investigative information when there is reasonable cause to believe it might pertinent, which will be the most expensive part of the studies. Finally, the statute does not define the "reasonable cause" that will trigger these reviews. That was left to the rulemaking process. Reasonable cause could be defined as limited to convictions within say the last five years for the offenses listed in the rule and substantiated reports of maltreatment in licensed programs, where further investigation is needed to determine the gravity of the offense and the surrounding circumstances. If that were done, the number and costs of such reviews would doubtless be minimal. On the other hand, if reasonable cause is more broadly defined, the local costs of these reviews could be $500,000 or more a year. In short, the local costs are created and controlled by the rule, not the statute. A reasonable estimate of those costs is also essential to legally adequate findings on the need for and reasonableness of the rule's provisions.

The notice of hearing does not comply with the requirement in Minn. Stat. § 14.14, subd. 1a that it include all "other information as required by law or rule", specifically the special notice required in Minn. Stat. § 14.11, subd. 1. This is a finding "that the agency has not met the requirements of Minn. Stat. §§ 14.13 to 14.18", pursuant to Minn. Stat. § 14.15, subd. 3, which is herewith submitted to the Chief Administrative Law Judge for approval.

The defect can be corrected in at least three ways. The following statutorily required suggested corrections should not be interpreted as precluding other cures that Department staff might devise.

First, the Department could prepare the best estimate it can of local costs and reconvene the hearing after new notice which complies with Minn. Stat. § 14.11. This would give the public a full opportunity to react to this Report and the Department an opportunity to make major substantial changes. If this approach to curing the defect is taken, it is respectfully suggested that the Minnesota Association of Counties and the 87 county boards be added to the mailing list, as particularly affected parties.

Second, the Department could centralize the substantiated-report-perpetrators list and computerize it at the state level. The savings in mailing costs alone in the first couple of years should more than pay for the software and data entry involved. The software doubtless already exists on the BCA computer, which is one logical place to store the information. It would then be a simple matter for the BCA to search for the perpetrator information in all counties statewide at the same that it is searching for conviction information. This would also eliminate one of the most important concerns of the public in what is doubtless the vast majority of cases -- the uncertain turnaround time involved in mostly fruitless county record searches. Licensees were particularly vexed by this inestimable potential delay between form submission and Department response, because of the requirement of other rules of investing thirty hours of training in each new employee during the first month of employment. Department staff testified that the BCA computer check is a routine process that will be completed in all cases in eight hours. If the forms are mailed directly to the BCA to check for both convictions and substantiated maltreatment at the same time, licensees could be informed of "clean" employee records within a couple of days. There would also be a substantial cost savings for Department staff involved in eliminating the processing and forwarding of an estimated 240 forms per day, the vast majority of which will certainly have "clean" backgrounds. (The staff complement for the program of four clerical employees would have eight minutes per form to handle 240 per day, including making decisions on "reasonable cause", disqualifications and requests for reconsideration). Assuming there will be some subjects who should be disqualified from the beginning, eliminating the county delays will very substantially minimize the direct contact these subjects would otherwise have with vulnerable clients in licensed programs. Centralizing the list will also ensure that only substantiated reports of abuse and neglect which occurred in licensed programs will be examined, as the Legislature mandated to save costs. It will also eliminate the volunteering of other non-statutory data on subjects, which should significantly curtail the more expensive "reasonable cause" investigations. There may also be an unrelated benefit of improving law enforcement involved in having a central registry of substantiated perpetrators, particularly in cases of serious sexual and violent abuse of children and vulnerable adults. Coupled with a reasonably narrowed definition of "reasonable cause", such a revision should keep local costs below $100,000 and cure the defect.

Finally, the defect could also be cured by limiting the initial phase of the program to operators and applicants for licensure and/or a single county such as Dakota County, expanding it later when potential problems of implementation have been ironed out. The main advantage of this approach would

be the cost savings to the state in addition to the local government savings, at a time when Human Services dollars are exceedingly hard to come by. Jerry Mueller, the Executive Director of the Minnesota Developmental Achievement Center Association, found it somewhat ironic that the Legislature slashed DAC funding last session by $300,000 to meet a projected revenue shortfall, at the same time it appropriated $273,000 to create this background check program. He was concerned that the cuts had to be absorbed in staff salaries, in an industry that is already having difficulty attracting a competent stable workforce.

Because the program has not been implemented, most of the $273,000 has apparently not been spent, with six months remaining in the biennium. Although its of course a judgment that involves considerations which were not dealt with in this record, if further cuts are needed, scaling back the implementation of this new proposed program would seem to be wiser than laying off employees in other programs and making further cuts in essential client services.

Even if the proposed program were well thought out, it would seem imprudent at this point to proceed full bore with establishing offices, hiring a professional plus four clerical staff, et cetera, building an automatic $546,000 increase into the budget of the next biennium. However, there are few hearing participants outside of Department staff who would describe this program as being particularly well thought out. The most troublesome aspect of the record generally in this proceeding is the lack of facts. It consists almost entirely of unanswered questions, unassessed impacts and untried proposed procedures. In short, it suggests a need for further study, including a demonstration project to identify the inevitable kinks and snags that will be associated with this new enterprise. It would also provide hard data instead of guesstimates on the cost and number of studies required and experience with applying the "direct contact" and "reasonable cause" definitions. It would also allow the Legislature to do a cost-benefit analysis, once they have real data on the nature and number of subjects disqualified as a result of the program.

The Department staff indicated that background checks would be required in roughly 1,000 licensed programs statewide by adoption of these proposed rules. Limiting the initial impact of the program to the operators of these facilities and a demonstration county, should not consequently increase local costs by more than $100,000 a year, curing the defect.

Impact on Agricultural Land.

11. Minn. Stat. § 14.11, subd. 2, imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in this state". The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The proposed rules relate only to programs licensed under Minn. Stat. Chapter 245A. The proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2.

Amended Rule 9502.0335 - Licensing Process.

12. This rule part is amended by deleting reference to termination of parental rights and adding a reference to disqualification under the new rule language of part 9543.3070. This change includes the outcome of background

studies in the licensing process to promote the full cooperation of licensees or applicants in studies and carry out the intent behind requiring background studies. No adverse comments were received regarding these proposed rule changes. Department staff has shown that amended rule part 9502.0335 is needed and reasonable.

Amended Rule 9503.0030 - Qualifications of Applicant and Staff.
Amended Rule 9525.1520 - Licensing Process.
Amended Rule 9525.2020 - Licensure.
Amended Rule 9530.4270 - Staff Qualifications.

13. The changes to amended rules 9503.0030, 9525.1520, 9525.2020, and 9530.4270 consist of deleting disqualification factors that are now found in the proposed background study rules. Similarly, the reconsideration scheme in rule parts 9503.0030 and 9525.2020 is deleted, in favor of the reconsideration procedure in the proposed rules. These deletions are necessary to remove redundant language and bring up to date the disqualification factors and reconsideration procedures that will be found in the newly proposed rules. No adverse comments were received regarding these proposed rule parts. Department staff has shown that amended rule parts 9503.0030, 9525.1520, 9525.2020, and 9530.4270 are needed and reasonable.

Proposed Rule 9543.3000 - Purpose.

14. The Department has included this proposed rule part to explain the intent behind requiring background studies and reiterate that a disqualification of an employee is not intended to dictate personnel decisions (i.e. discharging a disqualified employee). Nevertheless, the proposed rules will dictate personnel decisions regarding disqualified employees insofar as such employees cannot have direct contact with the persons enrolled in licensed programs. This involvement in personnel decisions is dictated by Minn. Stat. § 245A.04, subd. 3(f). Mary Martin, representing the Minnesota Habilitation Coalition (MHC); Douglas C. Morse, Chief Executive Officer of Industries, Incorporated; and several of the Developmental Achievement Centers (DACs) indicated that the ultimate result of disqualification will be termination of an employee owing to a lack of alternative employment available in a facility. Despite this impact, the proposed rule part is needed and reasonable to clarify that employers need not terminate disqualified employees if functions not involving "direct contact" are available. The Department has replaced the word "ensure" with "protect" in response to a comment by Dianna Krogstad of Metro Work Center, Inc. Krogstad objected to word "ensure" on the basis that this language implied providers would guarantee the health, safety, and rights of persons served in licensed programs. The Department's change addresses that concern, more accurately states the purpose of the proposed rules, and does not constitute a substantial change.

Proposed Rule 9543.3010 - Applicability.

15. Proposed rule 9543.3010 specifies that the background study rules from parts 9543.3000 to 9543.3090 apply to all licensed programs under Minn. Stat. chapter 245A, except for child foster care, adult foster care, and family day care programs. Those three programs (child foster care, adult foster care, and family day care) are governed by parts 9543.3070 to 9543.3080. Regarding

the three named programs, this rule part has the effect of imposing the disqualification standards and reconsideration process on child foster care, adult foster care, and family day care programs, but denying to those programs the benefit of having the cost of the background study borne by the Department. Michael Peterson, Executive Director of the Professional Association of Treatment Homes (PATH), objected to this division of cost and obligation. PATH's objection is based on its assertion that the intent of the statutory scheme was to delay full implementation of background study requirements until Department staff was administratively prepared to handle the process, but cotemporaneously to not interfere with those programs for which background studies were already being conducted (namely, child foster care, adult foster care, and family day care). PATH maintains that this intent to not interfere with existing programs does not extend to excluding those programs from the background study system once it is initiated by Department staff. Excluding the three named programs has a financial impact on private programs, since the background studies, presently being paid for by the private program, will continue to be paid for by the private program. If those private programs were included in the Department-initiated background study system, Minn. Stat. § 245A.04, subd. 3(a) would prohibit charging any licensee for the cost of the study.

Under Minn. Stat. § 245A.03, subd. 1, child foster care, adult foster care, and family day care are included among the programs which must be licensed. These programs do not fall under the exemptions from licensure listed in the statute. Minn. Stat. § 245A.03, subd. 2. As a licensed program, background studies must be conducted of the applicant, persons over 13 years of age residing in the program facility, employees or contractors of the licensee in direct contact with persons served by the program, and unsupervised volunteers who have direct contact with persons served by the program. Minn. Stat. § 245A.04, subd. 3. Subdivision 3(g) of Minn. Stat. § 245A.04 states:

> The commissioner shall not implement the procedures contained in this subdivision until appropriate rules have been adopted, except for the applicants and license holders for child foster care, adult foster care, and family day care homes.

The express language of subdivision 3(g) supports PATH's position. The intent of the Legislature in creating two classes of programs was not to exempt child foster care, adult foster care, and family day care from the background study requirements to be imposed by subdivision 3, but rather to allow the existing background studies to continue without interruption. There is no basis for concluding, under the language quoted above, that the Legislature intended an ongoing exclusion for the named programs once "appropriate rules" were adopted by the Department.

However, the foregoing analysis does not provide a complete picture of the Legislature's intent in this instance. The Department asserts that the background study program, as proposed, will generate 50,000 to 60,000 applications for studies. Department staff received an allocation of $273,390 for fiscal year 1991 to operate the background study program. The Department will hire four clerical staff persons and one supervisor to administer the background study program. MHC expressed serious misgivings over whether the Department would be able to operate the program with the allocated budget and

staff limitations. The allocation was received from the Legislature with the expectation that the funds would be applied toward the anticipated 60,000 study applications. Including those licensed programs which already conduct background studies will dramatically increase the number of studies required to be performed by the same number of staff without any increase in the allocation for the task. The Legislature, being aware of the scope of the project, did not intend to substantially increase the scope of the required background studies at this time. While the language of subdivision 3(g) intends that all licensed programs be included under the proposed rules, the actions of the Legislature in setting funding and staffing levels conclusively demonstrate that child foster care, adult foster care, and family day care are not to be included in the Department-initiated background study requirements of the rule at this time.

Department staff has demonstrated that limiting applicability of the proposed rules to those licensed programs not already conducting background studies is needed and reasonable. Continuing to exclude programs now conducting background studies is statutorily authorized to the extent that the funding allocated by the Legislature was not expected to meet the needs of applicants in the named programs. Since an allocation was granted for only the estimated number of study applications anticipated for the licensed programs not currently requiring background studies, the only conclusion possible is that restricting the proposed rules to those programs is authorized by statute.

Proposed Rule 9543.3020 - Definitions.

16. This proposed rule part is composed of eleven subparts which define some of the terms used in the proposed rules. Only those definitions which received comment will be discussed in this report.

Commissioner.

17. After the hearing on this matter, Department staff agreed to a suggestion that Department might make the rules more consistent by referring to the definition of "commissioner" in proposed rule 9543.3020, subp. 3 by reference to the statutory definition. This would define "commissioner" in the same manner as "county agency" and "license." The proposed subpart, as amended, is needed and reasonable to describe the entity with authority to act under these proposed rules. The change was suggested during the hearing, is consistent with the Department's statutory authority, and does not constitute a substantial change.

Direct Contact.

18. Subpart 5 of proposed rule 9543.3020 defines "direct contact" as:

"Direct contact" means providing face-to-face care, training, supervision, counseling, consultation, or medical assistance to persons served by a program. Direct contact includes direct access to children in programs serving children and to persons receiving service in adult foster care programs.

Tom Beer, Assistant to the Director of Council 6, American Federation of State, County, and Municipal Employees; MHC; and Mary Brosnan, Public Health Nurse and

Child Care Consultant with the Maternal and Child Health Division of the Minnesota Department of Health (Brosnan or Department of Health) objected to this definition. The objections were focused on the Department's inclusion of "direct access" which broadened the scope of the background study requirements beyond what is reasonable and statutorily authorized. Barbara O'Sullivan, representing Resources for Child Caring, Dale Anderson of the Greater Minneapolis Day Care Association, and Lynn Galle, President of the Minnesota Association for the Education of Young Children supported the inclusion of "direct access" so long as the cost of background studies was borne by the Department. The supporters cited the potential for harm to vulnerable persons should "non-direct service staff" not be studied. The commentators believe that such staff members would be able to gain access to children and vulnerable adults if such staff members were so inclined. They believed that the additional paperwork for program administrators would not be an undue burden and would result in much more protection for children and vulnerable adults.

Minn. Stat. § 245A.04, subd. 3(a) includes a definition of "direct contact" which reads:

> For the purposes of this subdivision, "direct contact" means providing face-to-face care, training, supervision, counseling, consultation, or medical assistance to persons served by a program.

There is no mention of "direct access" in the subdivision. The statutory definition extends to persons having both a functional connection to the person being served in a program and physical proximity to that person. Including "direct access" in the definition of "direct contact" removes the functional connection requirement.

Commentators opposed to the proposed subpart objected on the basis that any "contractor" brought on the premises of a licensed program (while persons are being served there) would need a background study. This would be true even if the "contractor" was present only to perform building maintenance, staff training, or administrative functions and would have no planned contact with persons served in the program, so long as access could occur. For many of these contractors, the work would be completed and the contractors off the premises before the background study could be completed.

Brosnan suggested that Department staff's definition of "direct contact" would include epidemiologists, sanitarians, and immunization staff of the Department of Health through interpretation of the term "contractor." Although the term "contractor" is not defined in either the statute or the proposed rules, the term cannot be interpreted to extend to public officials engaged in public business on the premises of the licensed program. Those individuals have both the right and obligation to enter the licensed premises and carry out their duties. Even when such persons enter at the request of a licensee, the licensee does not have a right of control (which is characteristic of an employee or contractor) when the visitor is a public official.

While Brosnan's objection regarding the potential for restricting the function of public officials is not a serious concern, the potential for restricting persons who do not provide care, but could gain direct access to persons served in licensed programs is a problem. The proposed subpart expands

the background study requirement to persons not providing care. Department staff asserts that the "direct access" prohibition has been included in the rules governing family foster care, adult foster care, and child care centers since 1988. The Department maintains that allowing otherwise disqualified staff to have direct access to vulnerable persons is unreasonable. The staff has not addressed the question of whether the Department is statutorily authorized to include a "direct access" in the definition of "direct contact."

By adding "direct access" to the definition of "direct contact," Department staff has greatly expanded the scope of the proposed rules beyond that permitted by Chapter 245A. As discussed earlier in this Finding, the statutory definition of "direct contact" required a functional connection with vulnerable persons. The Department's proposed definition would require background studies of on-premise staff persons regardless of their function. The second sentence of proposed rule 9543.3020, subp. 5 must be deleted because the Department lacks the statutory authority to require background studies of those persons whose only connection to a licensed program is that they could gain access to persons served by that licensed program. Although good reasons exist to study the background of persons who could gain access to vulnerable persons, the Department is required to confine its actions within the scope established by its authorizing statute and conform its actions to the limits imposed by statute. The lack of statutory authority for including "direct access" in the definition of "direct contact" is a defect in the proposed rules.

Since the definition of "direct contact" which remains after the deletion of the second sentence of subpart 5 is identical to that in Minn. Stat. § 245A.04, subd. 3(a), Department staff may choose to replace the definition with a reference to that statute. On the other hand, the Department may choose to retain the first sentence of subpart 5 to provide this critical definition to persons reading the rule without requiring them to make reference to the statute. Retaining the statutory definition in this subpart is not a defect in the proposed rules. The required and suggested changes to subpart 5 do not constitute substantial changes.

Disqualification or disqualified.

19. Department staff has chosen to delete the definition proposed in subpart 6, "disqualification or disqualified." The Department intends to reduce confusion by eliminating any ambiguity between the status of being disqualified and the process of disqualification. The deletion of this subpart improves the clarity of the proposed rules, is needed and reasonable, and does not constitute a substantial change.

Perpetrator.

20. Proposed subpart 8, defining "perpetrator," received several comments regarding how to accurately draft the definition to include the full scope of actions which relate to the term. "Perpetrator" is a term over which there is no confusion as to whom it applies. However, any attempt to define that term is likely to create confusion. Department staff recognized this problem and chose to delete the definition. The deletion is needed and reasonable and does not constitute a substantial change.

Program.

21. "Program" is defined in subpart 9. The Department's original language specifically identified residential and nonresidential programs and cited each to specific statutory subdivisions. It was suggested that Department staff simplify this definition to read all activities under Chapter 245A. The Department changed its definition to "a residential or nonresidential program licensed under Minnesota Statutes, chapter 245A." This change clearly identifies the what Department staff means by "program." The subpart, as amended, is needed and reasonable. The change does not constitute a substantial change.

Serious Injury.

22. MHC objected to the proposed rules as being vague on what constitutes a "serious injury." Department staff responded to this objection by proposing an additional definition of "serious injury." The opening language of the definition reads "serious injury includes but is not limited to" and goes on to list various injuries ranging from bruises to fractures. In addition, the last condition listed is "all other injuries considered serious by a physician."

The definition of serious injury is faulty in two respects. First, the language "includes but is not limited to," does not give affected persons adequate notice of what harm is included in the definition. The failure renders this subpart unreasonable. Second, by including "all other injuries considered serious by a physician," Department staff would create a discretionary nonstandard, relying on the subjective opinion of a physician rather than setting forth a reviewable rule.

One way the Department can correct this defect is by actually defining serious injury, rather than using a noninclusive list of examples. A definition which would cure both defects reads as follows:

> Subpart 9. Serious injury. "Serious injury" is defined as any harm suffered by a person which reasonably requires the care of a physician. The following are deemed to be serious injuries:
>
> A. bruises, bites, skin lacerations, or tissue damage;
>
> . . .
>
> L. heat exhaustion or sunstroke.

This approach deletes item M, but incorporates the intent of the Department to include any harm requiring medical care in the initial definition, without delegating undue discretion to that professional's judgment. The new definition of serious injury is based on the Department's proposed language.

A further objection was raised by MHC which asserts that the injuries listed at item A are not commonly understood to be "serious injuries" and could lead to disqualifications for insignificant harm to persons served in licensed programs. Becky Smith of MHC suggested that the definition of serious injury used by the Minnesota Ombudsman's Office be used in the background study rules. With the addition of item A, the Ombudsman's definition of serious

injury is used by Department staff. The background study is intended to be as inclusive as reasonably possible. Including arguably insignificant harm is reasonable, since there does not appear to be any other efficient method to include recognizable harm from abuse or neglect which is serious (particularly if intentionally inflicted) but only leaves bruises or relatively minor cuts. The definition, as altered above, is needed and reasonable to advise subjects of background studies of what conduct will receive closer examination, and standards to measure that conduct are expressed, rather than implied. The change does not constitute a substantial change.

Subject.

23. MHC objected that the definition of "subject" in proposed subpart 10 suggested that the person being studied is responsible for the background study. The Department acknowledged that background studies are required on persons, not from them. Department staff changed the language of the proposed subpart to reflect this distinction. Proposed subpart 10 is needed and reasonable, as amended. The alteration was made in response to comments from interested persons and does not constitute a substantial change.

Proposed Rule 9543.3030 - Individuals Who Must Be Studied.

24. Chapter 245A specifies four categories of persons who must undergo background studies. The categories are:

(1) the applicant [for the program license];
(2) persons over age 13 living in the household where the licensed program will be provided;
(3) current employees or contractors of the applicant who will have direct contact with persons served by the program; and
(4) volunteers who have direct contact with persons served by the program to provide program services, if the contact is not directly supervised by the individuals listed in clause (1) or (3).

Minn. Stat. § 245A.04, subd. 3(a). The language of proposed rule part 9543.3030 parallels the statutory categories. With changes proposed by Department staff after the hearing, the rule reads as follows:

A. individuals who are providers of programs licensed by the commissioner;
B. persons over age 13 living in the household where a program is operated;
C. current employees or contractors of a provider who have direct contact with persons served by the program;
D. individuals who, even if employed or under contract with a contractor of the provider, under the control of the provider have direct contact with persons served by the provider's program; and
E. volunteers who provide program services to persons served if:
(1) the volunteer has direct contact with persons served; and
(2) the volunteer is not directly supervised.

"Directly supervised" means being within sight or hearing of an individual who has passed a background study and who is capable of intervening to protect persons being served by the program.

The rule, although parallel, is subtly different from the statute. The addition of item D extends the background study requirement to contractors of contractors working for the provider. The effect of this language is to prevent avoidance of background studies by subcontracting work to unrelated third parties. This extension is consistent with the statutory intent that all individuals with a financial connection to a provider and who provide services to vulnerable persons in licensed programs have a background study performed. Item D also mandates that the substance of a contractual relationship prevail over its form, so that a contractor cannot evade the background study requirement by hiring another to perform the required services. Department staff showed the need for such background studies by citing several cases where van drivers under contract to programs serving vulnerable adults abused those persons. Item D has been demonstrated to be needed and reasonable, as written.

Having found item D to be needed and reasonable, the Department may wish to remove item D from proposed rule 9543.3030, and establish a definition of "contractor" in proposed rule 9543.3020, instead. There are two advantages to making this change. First, the categories of persons of whom background checks are required will more closely track the language of the statute. Second, defining contractor will aid the application of item C in proposed rule 9543.3030. Lori Squire of St. Joseph's Home for Children and Bob Utke of MHC objected to items C and D on the ground that securing certain nonprogram services such as barbering, dentistry, or medical care require providers to contract with professionals over whom the provider has no control. Incorporating the "control" language added to item D by Department staff after the hearing into a definition of "contractor" would resolve the commentators' objection.

A definition of "contractor" consistent with the proposed rules and Chapter 245A could read as follows:

> "Contractor" means any person, regardless of employer, who is providing program services for hire under the control of the provider.

The additional clarity provided by the definition resolves the objections of the commentators. Since providers cannot control the actions of professional service providers (such as barbers, dentists, or other medical professionals outside the program), they do not fall within the definition of contractor. An individual who, for pay, drives a van providing transportation as part of a licensed program would fall within the definition of contractor, even if the individual was a self-employed independent contractor to a van company which contracted with a provider to offer the transportation. Individuals who provide such services, but not for hire, would fall under item E, as volunteers. If the Department chooses to make this change, item C should be changed to delete "of a provider" since that linkage is provided in the definition. The direct contact requirement [omitted in the definition of "contractor"] would remain in item C. Deleting item D, adding a definition of "contractor," and modifying item C does not constitute a substantial change. Items A, B, C and D [if retained] of proposed rule 9543.3030 are needed and reasonable.

Item E conforms to the statutory intent of Minn. Stat. § 245A.04, subd. 3(a)(4) to the extent that volunteers will need a background study performed

only if they are in direct contact with persons served in a program and not directly supervised. However, the proposed rule defines directly supervised to include supervision by children and other volunteers, so long as background studies have been performed on these persons. Additionally, the proposed rule requires any individual who would supervise volunteers to be able to intervene to protect the vulnerable persons served in the licensed program. Minn. Stat. § 245A.04, subd. 3(a)(4) defines "direct supervision" and allows only the licensee or employees and contractors of the licensee to supervise volunteers. The ability to intervene standard is also required in the statute. Department staff maintains that allowing children and volunteers with background studies to supervise other, unstudied volunteers is reasonable to permit flexibility for those programs that use volunteers. The use of volunteers to supervise other volunteers does appear reasonable to maximize the benefit to persons receiving services when employees or contractors are not available (although some consideration should be given to setting a minimum age level when children are doing the supervising). Nevertheless, the statute expressly limits those who can supervise volunteers. The statutory limitation is set forth as an exception to the blanket prohibition against using unstudied volunteers. Thus, the exemption must be read narrowly. The expansion by rule of who may supervise volunteers is a defect in the proposed rules, since the Department lacks statutory authority to alter the class of individuals who may directly supervise volunteers. This defect may be corrected either by deleting the rule definition of "directly supervised" and inserting a reference to the statute or adding the statutory limitation to the proposed definition. In either case, the changes are made to conform the rules to the limits imposed by statute and do not constitute substantial changes. Once altered, the proposed rule is needed and reasonable to carry out the requirements of Chapter 245A.

MHC suggested that the proposed rule exempt clergy who volunteer to provide program services from the background study requirement. In addition, Bob Utke proposed an exemption for volunteers who provide program services for only a minimal amount of time per quarter. Department staff decided against making the first change on the basis that clergy members have, on rare occasions, committed acts of abuse against vulnerable persons. The Department did not accept the second exemption on the ground that the time spent volunteering does not alter the risk of abuse to persons receiving services. Both of these grounds are valid reasons for not altering the proposed rule. More important, however, the Department cannot create exemptions to the background study requirement and remain consistent with Chapter 245A. Additional exemptions must be created by the Legislature, not the Department. Declining to exempt certain volunteers in certain occupations from the background study requirements is not a defect in the proposed rules.

Proposed Rule 9543.3040 - Responsibilities of Provider.

25. This proposed rule part sets forth the obligations of providers in aiding in the background study process. Subpart 1 requires all individuals identified as needing a background study to submit a completed form prescribed by the commissioner. MHC objected to the proposed rules not including the form which Department staff intends to use in collecting this information. The Department stated that the Revisor of Statutes advised against placing forms in the rules. Department staff must promulgate rules to regulate what information is to be collected. The precise document on which the information is to be provided, however, is a matter within the Department's discretion. Department

staff may discover, upon initiating the process of background studies, that the first form devised to convey this information does not do so in the most efficient manner. Additionally, the method of processing this information may change over time. The form used to obtain the raw data may need to be changed to accommodate improvements in the Department's system. To require the Department to engage in rulemaking for the purpose of changing its forms would be burdensome and would not provide any measurable benefit to the agency or the public. Proposed subpart 1 is needed and reasonable as proposed.

Subpart 2 requires providers to submit background study forms to the Commissioner. MHC suggested that the language was confusing, insofar as a provider might think that more than one form per individual was required. To eliminate any potential confusion, Department staff altered the language of the rule to require each form be submitted. The other requirements of subpart 2 are that the provider must submit its study form before initial licensure and with each renewal and that a subject of the study form must have submitted the form prior to having direct contact with any person receiving program services. Department staff has expressly stated that the subject need not wait for an approval letter from the Commissioner before having direct contact with persons receiving program services. The effect of this provision is to conditionally qualify employees, subject to the results of the background study. Since only persons who are found to be disqualified are prohibited from direct contact [Minn. Stat. § 245A.04, subd. 3(f)], this system is consistent with the statutory scheme. This proposed subpart is needed and reasonable, as amended. The alteration was suggested in public comment and does not constitute a substantial change.

Direct contact is prohibited between persons receiving program services and individuals disqualified by the Commissioner. Subpart 3 places the responsibility on the provider to ensure that any subject who is disqualified complies with this prohibition. This subpart is needed and reasonable to place the responsibility of enforcing disqualification on the party ultimately responsible for the proper operation of each licensed program, the provider. Many commentators suggested that some mechanism be added for permitting subjects to continue to have direct contact pending reconsideration of a disqualification. In response, Department staff added two exceptions, items A and B, to the prohibition of subpart 3. Item A permits continued direct contact if specified actions are taken by the subject to request reconsideration of the disqualification, the Commissioner approves of continued direct contact, and those actions are documented by the provider. Item B allows direct contact if the provider receives notice that the disqualification has been set aside. The revisions are consistent with the statutory scheme, since the Commissioner has the ultimate responsibility to conclude whether a subject is disqualified. Some circumstances may exist whereby a subject is disqualified despite that individual not posing any risk of harm to vulnerable persons. The Commissioner is entitled to reconsider such a result and correct it. The subpart, as amended, is needed and reasonable. The new language was added in response to specific comments at the hearing and does not constitute a substantial change.

Beverly Sharron of Opportunity Workshop, Inc.; MHC; Polk County DAC; Jackson County DAC; and Wadena County DAC, Inc. commented at length on the inadequacy of the proposed rules to insulate employers from liability in civil

actions arising from the discharge of disqualified employees. Of primary concern to those interested parties was the impact of the language of subpart 4 on unemployment compensation proceedings subsequent to subjects being discharged as a result of disqualification by the Department. Those commentators want an explicit application of these rules to that situation. The Department has declined to amend the subpart to explicitly include unemployment compensation proceedings, but Department staff has opined that actions which result in disqualification should equate to the flagrant disregard of an employer's interest which constitutes willful misconduct. If an employee engages in willful misconduct, that employee is not entitled to unemployment compensation benefits. In fact, nothing that Department staff places in its rules will affect whether or not disqualification constitutes willful misconduct. The Minnesota Department of Jobs and Training is entrusted with responsibility to make that decision and it will due so in accordance with its statutes, rules, and case law. Subpart 4 only restates the immunity from liability set forth in Minn. Stat. § 245A.04, subd. 3(h). The Department has no authority to expand the scope of that provision. The subpart is needed and reasonable as proposed.

Proposed rule 9543.3040, subpart 5 requires the provider to maintain a current notice in each subject's personnel file. The subpart also defines current notice as something which "demonstrates a background study has been completed within at least 12 months." This subpart places an obligation on the provider which is not solely within the provider's ability to meet. There have been strong suggestions made that Department staff will not be able to meet the volume of applications for background studies in a timely fashion. Such a situation is more likely when providers must file applications for studies from subjects sooner than the one year anniversary of the last application to ensure that the express requirement of subpart 5 will be met. This is the result of requiring a completed study from providers, rather than requiring the filing of the application annually. Should Department staff not complete the study within a year, the provider is in violation of the express rule provision requiring documentation of a completed study. This is unreasonable, unnecessary and a defect in the proposed rules.

Department staff may cure this defect by altering the language of the subpart to read as follows:

> Subp. 5. Record retention. The subject's personnel file must contain the most recent notice issued by the commissioner under part 9543.3060, subp. 5. If the current notice is more than twelve months old, the subject's personnel file must also include documentation that the provider has made a timely application for a background study as required by Minn. Stat. § 245A.04.

The suggested alteration shifts responsibility for completing studies to the entity which is required to complete them, namely the Department. The new language eliminates a potential conflict between the rules as written and the program as actually implemented. The proposed rule, as altered, is needed and reasonable. The change does not constitute a substantial change.

Proposed Rule 9543.3050 - Responsibilities of Subject.

26. This proposed rule part sets out the information which the subject of a background study is required to give to the provider for transmission to

Department staff. Along with the familiar name (including former names), address, and date of birth, Department staff required information on counties of residence for the last five years, "sex" (meaning gender), driver's license number, and whether the subject has prior convictions for specified crimes or substantiated reports of abuse or neglect. Only the conviction/abuse or neglect requirement received critical comments. Beer, Krogstad, and MHC made the point that a subject may not have been notified that an abuse or neglect report had been substantiated and, therefore, might be unable to comply with the rule as written. In response to that criticism, Department staff deleted the conviction/abuse or neglect reporting requirement. Department staff based this change on the two grounds. First, the purpose of background studies is to discover the same information requested under the deleted item. Second, the Department recognized that self-disclosure by a prospective employee on a form submitted to the would-be employer might affect the ultimate employment decision, even where the prospective employee would not be disqualified. Since Department staff will not lose the critical aspect of its inquiry and deleterious effects may be avoided by deleting this item, the change is needed, reasonable, and insubstantial

Richard Neumeister objected to the entire provision on the ground that a Tennessen warning (regarding the use of private or confidential data) should be given to all subjects. The Department has agreed to add such a warning to the forms developed for background studies. Department staff has not included the warning requirement in its rules on the basis that such an inclusion would not keep the rules brief. The Department is required to comply with the standards governing the collection of data by Minn. Stat. Chapter 13. Restating the statutory requirement in the proposed rule is not needed. Proposed rule part 9543.3050 is needed and reasonable, as amended.

Proposed Rule 9543.3060 - Responsibilities of Commissioner.

27. Proposed rule 9543.3060 is divided into six subparts setting forth the Commissioner's responsibilities regarding background studies. Subpart 1, in effect, defines reasonable cause to take adverse action against a provider's license for a provider failing or refusing to cooperate in conducting the required background studies, or permitting a disqualified subject to have direct contact with persons served by the provider's program. Originally, subpart 1 listed "immediately suspend, suspend, or revoke a license" as the actions available in the event of a failure or refusal to cooperate on the part of the provider. Department staff added the language "[i]n addition to other sanctions available to the commissioner under Chapter 245A" to the beginning of the subpart to clarify that any sanction that the Commissioner is statutory authorized to take is available, not merely those listed in the subpart. There is no indication that the Commissioner's authority to take adverse action against a license is limited to those actions listed in the subpart. The new language is needed and reasonable to inform licensees that other actions than immediate suspension, suspension, or revocation of a license may be taken by the Commissioner. The change does not constitute a substantial change.

The director of Jackson County Developmental Achievement Center (Jackson DAC) objected to the use of "fails" as a trigger for adverse licensing action. The ground for objection is that failure is a subjective term that could be interpreted in such a way as to deny the licensee prior notice as to what

conduct will result in adverse action. Department staff does not have the discretion to remove the failure criterion, however. Failure to cooperate in background studies is expressly made reasonable cause for adverse license action by Minn. Stat. § 245A.04, subd. 3(d).

MHC suggested that adverse licensing action occur only if direct contact with a disqualified person takes place with the knowledge of the licensee. Department staff declined to make that change, asserting that, once a person is disqualified, the provider is responsible for preventing direct contact. As discussed at Finding 18, above, "direct contact" cannot include "direct access." If that revision is adopted, a provider would not need to ensure that a disqualified person avoid access to persons served by the program. Rather, the provider must not assign a disqualified person to face-to-face care functions for persons served by the program. With the limited scope of "direct contact," adding "knowingly" is not necessary.

Krogstad and MHC suggested that the responsibility of the provider be specified as "submitting forms" rather than "conducting background studies." Department staff objected to this change as significantly narrowing the statutory responsibility of providers to "help with the background study." Minn. Stat. § 245A.04, subd. 3(a). The Department is correct in its interpretation of the statutory obligation of the provider. Should Department staff need information clarified or data confirmed, the statute contemplates that the provider will render any reasonable assistance to aid the Department in concluding the study. The wording of proposed subpart 1 is not a defect.

Subpart 2 sets forth what records must be examined by the Commissioner in conducting a background study. Due to the issues raised by commentators about this subpart, each type of record will be discussed separately.

<u>Conviction Records</u>.

28. Under subpart 2(A), the Commissioner must examine "conviction records of the Minnesota Bureau of Criminal Apprehension." Numerous commentators asserted that to include convictions of applicants which had taken place a substantial period of time in the past is unreasonable. Mary Bock of Head Start pointed out that the policy of the State, as set forth in Minn. Stat. Chapter 364, is to promote rehabilitation and not perpetuate the effect of a conviction. Department staff responded to these criticisms by adding language which limits the review of conviction records to those convictions for which the last date of discharge from the criminal justice system was less than 15 years ago. Although reasonable people could differ, it is specifically not found to be a defect. This is a matter of policy which is properly left to the sound discretion of the Commissioner. Whatever period she ultimately settles on would not be a substantial change.

<u>Records of Substantiated Abuse or Neglect</u>.

29. The timeliness question arose again with respect to records of substantiated abuse or neglect. Department staff responded to those comments by requiring that a 7 year period (running back from the date of the application) be used for cases of substantiated abuse or neglect which must be

considered. Of course, this is only the period which must be examined by the Commissioner. The proposed rule does not exclude any information from consideration by the Commissioner, only that information which must be examined to minimally complete a study. This open-ended approach is consistent with the statutory mandate placed on the Department. Department staff arrived at the 7 year figure after determining that the record retention policies of many counties would create a *de facto* limit of 7 years on the records which could be reviewed. The records provision for substantiated abuse and neglect is needed and reasonable.

Juvenile Court Records.

30. The staff has not documented the Department's statutory authority for the adoption of pt. .3060, subpart 2C, as written. The proposed language would require review of juvenile court records on every individual over the age of 13 residing in households where programs are operated, because it is set out as a separate item that would be required in all studies. However, these are court records, which the authorizing legislation clearly states can only be reviewed when there is reasonable cause to believe that the information is pertinent.

Juvenile court records are ordinarily confidential. Minn. Stat. § 242.31 provides that discharge from the custody of the corrections commissioner sets aside, purges and nullifies juvenile court convictions, "which shall not thereafter be used against the defendant, except in a criminal prosecution for a subsequent offense if otherwise admissible therein." Adjudications in juvenile court are inherently unreliable because the process is intended to be nonpunitive, informal and nonadversarial. See, Welch, Delinquency Proceedings - Fundamental Fairness for the Accused in a Quasi-Criminal Forum, 50 Minnesota Law Review 653. The Legislature certainly did not intend the reasonable cause limitation on review of court records to apply only to non-juvenile court records.

The defect can be corrected by deleting item C. and placing the language at the end of proposed item D. When this is done, the language should be clarified. The proposed wording, "within the five years preceding application or preceding the subject's 18th birthday, whichever period is longer" is statutory, but at best confusing. Some clarification is respectfully suggested on final adoption.

Any Other Information.

31. The language of this item is taken verbatim from Minn. Stat. § 245A.04, subd. 3(c), with two exceptions. First, the words "any other information, including" are placed at the beginning of the item. This expands the scope of the Commissioner's investigation, should reasonable cause exist to justify including different information. Second, the language making investigation into arrest data discretionary was deleted. In place of that discretion, Department staff defined reasonable cause. The definition of reasonable cause will be discussed below.

Industries, Inc.; Head Start; and Minnesota Association of Professional Employees (MAPE) objected to the expansion of the inquiry into "any other data." However, this portion of the proposed rules deals with subjects who have already triggered some reasonable suspicion that disqualifying factors are

present. The statutory intent appears to allow the Commissioner to search widely for information to determine whether the subject is qualified to provide face-to-face care to vulnerable persons. None of the commentators demonstrated that any particular type of information is inappropriate for the Commissioner to consider in making a disqualification decision, particularly if the Commissioner had reasonable cause to believe that the person may be disqualified.

At the suggestion of Richard Neumeister, Department staff added a definition of "reasonable cause." The Department proposed to define it as follows:

> "Reasonable cause to believe" means that the information or circumstances exist which provide the commissioner with facts, a strong belief, or reasonable suspicion that further pertinent information may exist concerning a subject.

This definition of "reasonable cause" suffers from too much subjectivity. Something which gives rise to a strong belief does not provide an adequate check on the discretion of an agency. The Legislature doubtless intended the ordinary meaning of the term when it adopted the limitation. The standard used to justify a minimal police stop is ordinarily considered the appropriate standard to protect citizens from unreasonable searches and fulfill the government's need to readily search for information. That standard, set forth in Terry v. Ohio, 392 U.S. 1, (1968) is where facts or circumstances give rise to an articulable suspicion on the part of the investigator, a limited stop and search (incident to the stop) may be conducted. The Department's proposed standard is statutorily defective. To cure that defect, it is suggested that the Department incorporate the Terry standard into the proposed rules. Department staff can accomplish this by changing the definition to read as follows:

> "Reasonable cause to believe" means that information or circumstances exist which provide the commissioner with an articulable suspicion that further pertinent information may exist concerning a subject.

This definition provides two advantages. First, the Commissioner is not given the discretion to inquire into arrest records on the basis of a strong belief. Such a basis is not a reviewable check on investigatory discretion. Second, insofar as the suspicion which triggers the further inquiry need only be articulable, further inquiry is not dependent on any one fact or circumstance, but will arise from a totality of the circumstances, based on the Department's experience in administering the background study system. The Terry standard meets the needs of the Department by providing a low threshold standard to trigger inquiry which has been readily accepted in similar investigatory situations for over 20 years. The suggested definition cures the defect in the proposed rules while incorporating the most important concepts from the Department's prior definition. The change to subpart 2(D) does not constitute a substantial change.

32. Subpart 3 restates the statutory responsibility of the Commissioner to both evaluate the study and determine whether a subject is disqualified. No comments were made regarding this subpart. The subpart is needed and reasonable as proposed.

33. Several commentators objected to the lack of a time limit on notification to subjects of the results of background studies. MHC suggested a modification to the rules which would require a result within a certain time or the subject could not be disqualified. Proposed subpart 4 requires the Commissioner to notify the subject in writing. Department staff amended this subpart to add a 15 day limit for notifications, but also added a provision that the subject may be informed that more time is necessary to complete the background study. The Department does not have the statutory authority to "exempt" persons from the results of a background study if it is not completed promptly. The proposed subpart, as amended, meets the objections of the commentators and achieves an appropriate compromise. The change is not a substantial change.

Subpart 4 also contains the requirements for what information must be in a written disqualification notice. MAPE objected to the process on the ground that the records relied upon by the Commissioner are often not in the possession of the applicant and the applicant cannot readily find or obtain those records to appeal the disqualification. Department staff added "and how to obtain the records relied upon by the Commissioner" to subpart 4(A). This addition is needed and reasonable to lead a disqualified person to the "paper trail" of the underlying basis for the result. MAPE suggested that attaching a copy of the documentation would be easier for all concerned. The Department declined to make that change, citing administrative inefficiency and the increased burden of making and attaching copies to each disqualification. However, Department staff may find attaching copies of the records to be more administratively efficient than providing instructions to obtain access to those records. This may be particularly true if Department staff intends to be the source of those documents, or the records came from many sources. Therefore, the Department should consider maximizing its flexibility by amending subpart 4(A) to read as follows:

> . . . the notice shall state:
> A. the reason for the disqualification and either:
> (i) have attached a copy of the records relied upon by the commissioner, or
> (ii) state how to obtain the records relied upon by the commissioner.

This proposed language would give Department staff the option of either sending instructions or copies and may eliminate the need for a further amendment of the rule. Neither change constitutes a substantial change. Proposed subpart 4 (either as finally proposed or suggested above) is needed and reasonable to inform disqualified applicants of the basis for the decision and their appeal rights.

34. In addition to notifying the subject of the study, the Commissioner must notify the provider, in writing, of the results of the study under proposed subpart 5. Department staff altered the proposed rule part in response to comments from interested persons. The new language follows the changes in proposed subpart 4 regarding a 15 day limit on the first notification, adding the option of informing the provider of a need for more time to complete the study. The notice to the provider will also include a statement of the subject's appeal rights and the conditions, if any, under which the subject may continue to have direct contact with vulnerable persons

during the appeal period. This change comes in response to the objections raised during the hearing that, although a subject is not required to disclose the reason for disqualification to the provider, the provider was given the responsibility for requesting a variance to permit direct contact during appeal.

Luther Granquist of Legal Advocacy for Persons with Developmental Disabilities objected to allowing disqualified persons to have direct contact with vulnerable persons pending reconsideration. He asserts that it is illogical to allow persons, who are already aware that they are disqualified, to submit forms, be disqualified, and request reconsideration. Instead, Granquist suggests that persons recognize they are disqualified and immediately request reconsideration. This approach would eliminate two steps in the study process and eliminate any direct contact pending reconsideration. However, this approach relies upon both a great deal of self-reporting and detailed knowledge of the rules by each subject. Neither of those circumstances can be relied upon by Department staff.

There is no perfect answer to the question of whether a disqualified subject, pending appeal, should be in direct contact with vulnerable persons. Absent disclosure of the reason for the disqualification, the provider is left in the difficult position of either removing the person from direct contact pending appeal or trusting a person who has been deemed untrustworthy by the criteria of these rules. The new language in the proposed subpart is a compromise which does not require disclosure of the reason for disqualification, but still leaves the provider with the ultimate decision of whether to make the accommodations which would be required by Department staff to retain the disqualified subject pending resolution of any appeal. The new language reserves to the Commissioner the right to prohibit direct contact by a disqualified subject pending appeal if the subject is deemed to pose a risk of imminent danger to persons receiving services. Proposed subpart 5 is needed and reasonable to provide protection for vulnerable persons, security for providers, and opportunities for disqualified subjects who appeal disqualifications. Although the new language of this subpart is more detailed than the provision it replaces, the amendment is based on comments received at the hearing and does not constitute a substantial change.

35. Subpart 6 sets forth the responsibilities of the Commissioner regarding record retention and destruction of confidential data. The proposed subpart restates the statutory responsibility of the Department and did not receive critical comment. Proposed subpart 6 is needed and reasonable as proposed.

Proposed Rule 9543.3070 - Disqualification Standards.

36. Upon completion of the background study, the Commissioner must determine whether the subject is disqualified. This proposed rule part establishes the standards by which the Commissioner must make that determination. Subpart 1 was deleted by Department staff, since it is redundant. Proposed subpart 2 identifies any "subject convicted of a crime against persons or a crime reasonably related to the provision of services or an anticipatory crime as defined in Minnesota Statutes, sections 609.15 and 609.175, including but not limited to:" followed by a list of statute numbers, loosely identified by the overall type of offense (e.g. "crimes against the family"). Department staff asserts that the "including but not limited to" language is necessary to include other offenses which cannot be enumerated in

the proposed rule. The use of "including but not limited to" is a defect in the proposed rules. The manner in which the rule is stated is too vague to give adequate notice to the regulated public of what offenses are grounds for disqualification. This vagueness and unfettered discretion renders the subpart unreasonable.

This defect may be corrected, however, by clearly expressing Department staff's intent in proposing subpart 2. The Department wishes to include all convictions of "a crime against persons" and any "crime reasonably related to the provision of services." Further, Department staff wishes to include any anticipatory crime (attempt or conspiracy) relating to either category. The Department wants to include any offense in those categories, regardless of where it was committed. In addition, Department staff wants to list the crimes most likely to be encountered in background studies which will result in disqualification. To achieve these goals, the initial language of subpart 2 should read as follows:

> A. The subject has been convicted of: 1) a crime or anticipatory crime against persons; or, 2) a crime or anticipatory crime reasonably related to the provision of services. The following offenses have been deemed to be crimes against persons and/or reasonably related to the provision of services:

The proposed language will reduce the vagueness inherent in a noninclusive list and expressly relate the offenses listed with the intent behind disqualification. The Department will still be able to assert that other offenses, not on the list, are reasonably related to the provision of services or are crimes against persons as the need arises. The change restates the Department's proposed language and does not constitute a substantial change.

37. MHC objected to the lack of an affirmative presentation of facts by the Department made to support this subpart, asserting that none of the listed offenses were shown to be needed and reasonable disqualifying factors. Since the population to be protected by these proposed rules consists of vulnerable adults and children, Department staff need not present specific facts to demonstrate that each offense is needed and reasonable to disqualify a subject. For example, subpart 2(A)(1) lists homicide, aiding suicide, or arson as offenses which disqualify a subject. Since the population at risk is not as capable of self preservation as mainstream persons, disqualifying subjects convicted of these offenses is needed and reasonable to reduce the risk of injury or death to vulnerable persons from those whose conduct has (or was likely to) put others at risk in the past. Only those offenses altered by Department staff or requiring specific comments will consequently be discussed in this report.

38. Subpart 2(A)(2) lists crimes against persons of a somewhat less serious nature as disqualifying factors. Crimes such as assault (all degrees), kidnapping, mistreatment of patients, and robbery are some of the factors identified in this item. All these offenses are based on the inappropriate use of force against another person. Since the vulnerable populations in direct contact with subjects are particularly susceptible to the use of force the Department is justified in using the offenses listed in this item to disqualify applicants, subject to review. The only offense listed in this item which does not involve some use of force is Minn. Stat. § 609.26, depriving another of

custodial or parental rights. Several commentators at the hearing asserted that this offense was inappropriate for disqualifying subjects. This offense is likely to arise in the context of some domestic discord. The offender is asserting a belief that he or she has a superior right to custody of the victim. The underlying act is typically not accomplished through violence. Department staff has not shown that this offense is by nature related to the provision of care of vulnerable persons to the degree that making it a disqualification factor is needed or reasonable. The defect can be corrected by deleting this offense.

39. Most of the offenses listed in subpart 2(A)(3) are degrees of criminal sexual conduct. These crimes involve force and uninvited sexual contact. Such offenses are clearly appropriate grounds to disqualify a subject, when that subject would have direct contact with vulnerable adults and children. Of course, persons who have demonstrated rehabilitation to the satisfaction of the Commissioner, can be qualified to care for these vulnerable populations. The offenses in this item which relate to sexual contact with children are also clearly appropriate to render a subject disqualified. Another disqualifying factor is any conviction of Minn. Stat. § 609.324 (other prohibited acts). The acts prohibited consist of various forms of prostitution. Subdivisions 1 and 1a involve prostitution with minors of various ages and are appropriate disqualifying factors in light of the vulnerability of the populations with which the subject will have direct contact.

The only crimes listed in this item which do not involve force or abuse of children are also set forth in Minn. Stat. § 609.324, subds. 2 and 3. Subdivision 2 consists of gross misdemeanor prostitution (soliciting to engage for hire in sexual contact in a public place) and misdemeanor prostitution (hiring or engaging in prostitution with a person 18 years of age or above). Although engaging in prostitution is unsavory to many, either as a supplier or consumer, the Department has not demonstrated a link between commission of that offense and a risk to vulnerable persons. The Department recognized during the hearing that the legislation was not intended to disqualify persons for departures from majoritarian morals. Department staff deleted consensual sodomy and bestiality as disqualifying factors, acceding to objections of the public. When questions were raised about the reasons behind the prostitution provision, staff did not articulate any reasons for retaining it. Because staff did not make any showing that the particular offenses relate to direct care of vulnerable persons, it has not shown by affirmative facts that including Minn. Stat. § 609.324, subds. 2 and 3 as disqualification factors is needed and reasonable. The Department can correct this defect by retaining the cite to the statute and adding ", subds. 1 and 1a" after the citation. Such changes were discussed at the hearing, would not constitute substantial changes, and the item, as amended, would be needed and reasonable. It could also correct the defect by reconvening the hearing and introducing the requisite facts to show a linkage between the offenses and a risk to vulnerable persons, if any exists. Alternatively, of course, it can ignore the defect and seek the counsel of the LCRAR.

40. Crimes against the family are listed as disqualification factors in subpart 2(A)(4). The offenses listed are incest, malicious punishment of a child, and neglect of a child. These offenses are clearly against persons and related to the provision of services. They are appropriate disqualification

factors under the Department's scheme. Department staff deleted bigamy and adultery due to comments received during the hearing. The deletion of those two crimes is appropriate to retain a demonstrable relationship between the disqualification factors and the provision of services.

41. The public misconduct offenses identified as disqualification factors in subpart 2(A)(5) all relate to a lack of sensitivity to the emotional impact of one person's actions on another. Crimes of making terroristic threats, interfering with privacy, making obscene or harrassing telephone calls, or opening someone's mail without permission should arguably disqualify one from dealing with vulnerable populations. For that reason, including these crimes as initial disqualification factors with an opportunity for reconsideration is not unreasonable. However, the Commissioner should keep in mind that providers are likely to fire subjects outright, without knowing why they were banned and is urged to take particular care in reconsidering disqualifications based on any of these offenses. The circumstances under which the conviction was obtained for these offenses are likely to show that the acts committed do not present any dangers to providing care for vulnerable persons. Minn. Stat. § 609.713 (terroristic threats) was added at the suggestion of Ramsey County Social Services. While the final decision is up to the Chief Administrative Law Judge, the change does not appear to constitute a substantial change.

42. No commentator objected to the inclusion of offenses arising from obscenity involving children as listed in subpart 2(A)(6). The item is needed and reasonable.

43. Originally, Department staff intended to disqualify (subject to reconsideration) any person convicted of any type of drug offense under Minn. Stat. Chapter 152. Numerous commentators objected to this action as being over-inclusive and not indicative of the subject's fitness to maintain safe direct contact with vulnerable persons. In response to these comments, Department staff altered subpart 2(A)(7) to include only felony drug convictions under Minn. Stat. Chapter 152. This change will greatly reduce the number of persons disqualified under the proposed rules and limit those disqualified to the most serious drug offenses. The item, as amended, is needed and reasonable and the change does not constitute a substantial change.

44. Wadena County DAC, Inc. objected to the rule merely listing the statute numbers of the disqualifying offenses, rather than naming the offenses. The commentator suggested that the names of the offenses be added to provide adequate notice to readers without access to statutes of what crimes result in disqualification. The list of offenses in numerical order and the title of each offense is contained in the Appendix attached to this Report. It is respectfully suggested that the Commissioner add the title of each offense which leads to disqualification to the proposed rule part. In this way, persons who have been convicted of offenses but are unaware of the numerical reference will have adequate notice of what constitutes disqualification, subject to reconsideration. As Department staff conceded at the hearing, not including the titles of offenses can lead to absurd results. The change would certainly not appear to be a substantial change.

45. Subpart 2(B) received adverse comment from Polk County DAC and other interested persons who believe that U.S. citizens are "innocent until proven guilty" and that disqualification should await conviction. It should not occur

if the subject is merely awaiting trial, and especially if a defendant is acquitted. As the proposed item presently reads, if the subject "has admitted to, or has been arrested and is awaiting trial for, or a preponderance of the evidence indicates" that a disqualifying crime was committed by the subject, the subject would be immediately disqualified. The proposed standard of proof is considerably lower in this item than for criminal trials. Even if a subject were acquitted (on the basis that the state did not prove its case "beyond a reasonable doubt"), a preponderance of the evidence may arguably nevertheless be enough to convice licensors that a subject did the act complained of and must be disqualified. Department staff asserted that the lower standard of proof is the norm in administrative proceedings and should therefore, be used in these rules. The "beyond a reasonable doubt" standard is needed and reasonable to protect innocent citizens from unjust criminal sanctions. The preponderance of the evidence standard is needed and reasonable to protect vulnerable adults and children from demonstrably dangerous caregivers. Using that legally reviewable standard does not violate any rights of subjects regarding background studies. The language "or has been arrested and is awaiting trial for" is patently defective as being unreasonable when the preponderance of the evidence standard cannot be met. Deleting the arrested standard and keeping preponderance will ensure that licensors at least contact the subject and evaluate the defendant's side of the story. That language must be excised or taken to the LCRAR.

46. Subpart 2(C) and (D) incorporate substantiated reports of abuse or neglect of adults or minors into the disqualification factors. Most of the adverse comments referred to subpart 2(D)(substantiated reports of abuse or neglect of vulnerable adults) but these comments apply to subpart 2(C) with equal force. The proposed subpart was criticized by Wadena County DAC for relying upon "substantiated reports," since there are no statewide standards for determining whether a report is "substantiated." MHC suggested instead that Department staff conduct its own investigation into whether the incident which gave rise to the report constitutes abuse or neglect, by the Department's standards.

That suggestion has several points in its favor. First, differences between counties as to what constitutes "substantiated abuse or neglect" would be eliminated for the purposes of the background study. Second, disqualifications would occur after looking at evidence, not relying on the conclusion of another agency. Third, each county would maintain close contact with Department staff concerning reports of abuse and neglect, since Department staff would examine each incident as part of the annual renewal of each subject's background study.

Requiring the Department to investigate each report of abuse or neglect as part of the background study rules has drawbacks, however. Many of the incidents which Department staff will be considering are not recent. Witnesses and physical evidence are not likely to be available. For the Department to reach a conclusion on such a report may be unduly speculative or misleading. Further, such a requirement may act as a de facto "pardon" since the older incidents are not likely to have enough evidence available for Department staff to reach a conclusion on the incident. Some of those persons whom Minn. Stat. 245A sought to exclude from direct contact with vulnerable persons would not be disqualified, despite a record of abuse or neglect.

The most compelling argument against the requirement is that the Department is authorized to conduct background studies. The legislature intended that the Department make its initial decision on the evidence available through a routine search of state conviction and explicitly limited county records. As discussed earlier in this report, the funding made available to Department staff to carry out these background studies may not be adequate for that task, without considering additional investigations to be conducted by Department staff in cases of substantiated reports of abuse and neglect or other "reasonable cause" intensive investigations.

The Department's SONAR concedes that reliance upon county records of abuse and neglect would be per se unreasonable. It is respectfully suggested that the Commissioner consider a short "early warning" notice to "disqualified" subjects (before they are fired because of notice to the licensee) if these rules are noticed for further hearing.

47. The other important factor in subpart 2(C) and (D) is that the maltreatment be "serious or recurring." "Recurring" is a word whose meaning is clear and it need not be defined in the proposed rules. "Serious," on the other hand, is a word whose meaning varies greatly by context and individual preconception. Many commentators were concerned that, without a definition of "serious," Department staff would interpret the standard inconsistently. Responding to those concerns, the Department added to subpart 2(D) a definition which reads:

> Serious maltreatment, abuse or neglect includes but is not limited to sexual abuse, serious injury, or neglect that results in serious injury or illness considered serious by a physician or death.

The Department maintains that the proposed language sets criteria for determining whether maltreatment, abuse, or neglect is "serious" for the purposes of subpart 2. In the Department's final responsive comments, it also cross-referenced the new definition of "serious injury," which is discussed at Finding 22, above.

The phrase "includes but is not limited to" is a nonrule that is too vague to provide the regulated public notice of what conduct is included as a disqualification factor. The shortcoming is a defect. Such language, without a reviewable standard, has been consistently rejected in legal proceedings.

One way to correct the defect would be to revise the proposed language as follows:

> "Serious maltreatment, abuse, and neglect" is defined as:
>
> (1) serious injury (as set forth in Minn. Rule 9543.3020, subp. 9), whether intended or suffered as the result of neglect,
> (2) sexual abuse,
> (3) neglect or abuse which results in illness which reasonably requires the attention of a physician, or
> (4) death.

The foregoing language eliminates the vagueness in the Department's proposed language and eliminates the delegation of discretion to a physician to

determine that an illness is "serious." This definition cures the defect in the proposed rule regarding the spelling out of what is "serious." The new language is based on the Department's proposed addition and does not vary from its intent. The change would not be a substantial change.

48. Subpart 3 of proposed rule 9543.3070 disqualifies any person who has had his or her parental rights terminated under Minn. Stat. § 260.221, paragraph (b) from any program serving children. Department staff was asked why it did not follow the past practice of placing a limitation on the disqualifying factor (e.g. after one year from the termination, the fact would no longer disqualify a subject). Department staff responded that, since the termination would only occur under egregious circumstances of neglect or abuse, the burden should be on the subject to show fitness to care for children through the reconsideration process. The public did not disagree. Subpart 3 is consequently found to be needed and reasonable as proposed.

49. Subpart 4 disqualifies persons from Category 1 detoxification programs if they have a disqualification under subpart 2, items A through D, or subpart 5(G). Subjects providing other chemical dependency and abuse services to adults would be exempted from the uniform standards as long as they have not been convicted or incarcerated for any kind of felony within the last three years. Department staff maintains that such an exemption is needed and reasonable since chemical dependency programs do not serve a population that is as vulnerable as other licensed programs, without providing any factual data to support the contention. The Vulnerable Adult Maltreatment Report indicates a substantial portion of maltreatment occurs in chemical dependency programs. These subjects are clearly serving the same populations and it has not been shown to be reasonable to have a different standard, particularly one where felonies are not reasonably related to the provision of services. The defect can be corrected by deleting subpart 4 and the exception in subpart 2, adding category 1 detoxification to subpart 5. Such a change does not appear to be substantial, but it is obviously a close call.

50. Persons involved in residential programs are subject to other disqualification factors under proposed subpart 5. The additional factors are stated as follows:

> . . . a conviction for, have admitted to, or have been arrested and be awaiting trial for theft and related crimes, including but not limited to crimes defined in Minnesota Statutes, sections 609.52 to 609.523, 609.582, and 609.625 to 609.635.

As with other portions of the proposed rules, "including but not limited to" and "or have been arrested and awaiting trial for" are defects, for the same reasons. Department staff asserts that theft-type property offenses are proper to include in background studies related to residential programs since the property of vulnerable persons is at risk, and those persons cannot act to protect themselves from victimization. Disqualification of subjects related to residential programs for theft offenses is needed and reasonable. To correct the defects in the proposed rules and state the Department's intent, the subpart could be amended to use new language such as:

> . . . a conviction for, have admitted to, or a preponderance of the evidence indicates the individual has committed an act of theft or related crimes. Minnesota Statutes, sections 609.52, 609.521, 609.582, 609.625, 609.63, and 609.635 are deemed to be theft or related crimes:

Minn. Stat. § 609.523 has been removed from the list of offenses because that provision governs the return of stolen property to its lawful owner and is not a crime. The new language is needed and reasonable and would not constitute a substantial change.

Proposed Rule 9543.3080 - Reconsideration of Disqualification.

51. Given the broad scope of the disqualification factors, the mechanism for reconsideration is of extreme importance. The testimony of the commentators suggested that many subjects who are appropriate persons to have direct contact with vulnerable persons and who are presently providing services will be disqualified under the proposed rules. That being the case, the Commissioner should approach the reconsideration process with a keen appreciation of the equities present with each subject and delve deeply into the facts behind each disqualification factor. This proposed rule part is divided into seven subparts. The overall scheme of reconsideration is required by Minn. Stat. § 245A.04, subd. 3b.

Subpart 1 requires that applications for reconsideration contain information showing that the subject does not pose a risk of harm to persons served by the program or that the information resulting in disqualification is incorrect. MAPE suggested that a subject be allowed to submit information showing that the information relied upon by the Commissioner for disqualification is incomplete or nondispositive, as well as incorrect as provided for by subpart 1. Department staff declined to make that change on the ground that incomplete or equivocal data should be challenged under the Data Practices Act (Minn. Stat. Chapter 13), not through background studies. Minn. Stat. § 245A.04, subd. 3b (a)(1) and (2) limit the grounds of reconsideration to those set out in subpart 1. However, the statutory directive to consider incorrect information includes information that the disqualification was based on incomplete or nondispositive conclusions. In any case where a claim of abuse is found to be substantiated without an adequate investigation or clear facts demonstrating who perpetrated the abuse, the report is incorrect. Subpart 1 is needed and reasonable as proposed.

Subpart 3(b) lists seven factors to be considered by the commissioner in each reconsideration. No commentators objected to any of the factors. Department staff changed subpart 3(b)(5) to conform the language of one factor, time elapsed without some same or similar occurrence, to the language of Minn. Stat. 245A.04, subd. 3b(b). The change is not a substantial change and the rule part is needed and reasonable.

Of the remaining subparts, the only portion of this rule part which received adverse comment was subpart 6. That subpart gives public employees a right to an administrative appeal under Minn. Stat. Chapter 14 of a disqualification. Several commentators, including Head Start, expressed a desire for all subjects to receive a "third-party review" of disqualifications. Minn. Stat. § 245A.04, subds. 3b(d) and 3c clearly indicate that public employees must receive the opportunity for a contested case review,

and that in all other cases, the Commissioner's decision is the final administrative action. While the Commissioner has the discretion to use the review provisions of Chapter 14 in any decision-making process, not doing so does not constitute a defect in the proposed rules. Subpart 6 is statutorily authorized, needed, and reasonable as proposed.

Proposed Rule 9543.3090 - Applicability and Implementation of Rules.

52. Proposed rule 9543.3090 consists of three items. Items A and B govern the timing of background studies for new licensees, renewing licensees, and newly affiliated subjects. No specific comments were received on these particular items. Item C permits subjects who are presently affiliated with existing programs to continue in direct contact with persons being served by the licensed program until the Commissioner renders a decision on reconsideration. Granquist objected to allowing disqualified subjects to have direct contact with vulnerable persons. While he made that objection to the provision for another rule part, the comment applies to this item as well. Since the effect of a disqualification to an subject already affiliated with a program is to disturb a settled routine (which presumably has not already resulted in abuse or neglect to vulnerable persons) and the Department has some history in a licensed program by which to gauge the disqualified subject, permitting that subject to remain in direct contact until the reconsideration is concluded is needed and reasonable. Proposed rule 9543.3090 is needed and reasonable.

Amended Rule 9545.0090 - Personal Qualities of Foster Family Home Applicants.
Amended Rule 9555.6125 - Licensing Study.
Amended Rule 9555.9620 - Licensing Process.

53. The changes to amended rules 9545.0090, 9555.6125, and 9555.9620 consist of deleting disqualification factors that are now found in the proposed background study rules and cross-referencing the newly proposed rules. Additionally, one minor change in wording (to delete an inappropriate gender-specific reference) was made to amended rule 9545.0090, item B(7). No comments were received about these changes. The changes are necessary to conform existing rules to the new disqualification factors in the proposed rules. Department staff has shown that amended rule parts 9545.0090, 9555.6125, and 9555.9620 are needed and reasonable.

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

CONCLUSIONS

1. The Minnesota Department of Human Services (the Department) gave proper notice of this rulemaking hearing.

2. The Department has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules, except as noted at Finding 10, supra.

3. The Department has demonstrated 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), except as noted at Findings 18, 24, and 30, supra.

4. 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), except as noted at Findings 22, 25, 31, 36, 38, 39, 45, 47, 49 and 50, supra.

5. 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, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. The Administrative Law Judge has suggested action to correct the defects cited at Conclusions 2, 3 and 4, as noted at Findings 10, 18, 22, 24, 25, 30, 31, 36, 38, 39, 45, 47, 49 and 50, supra.

7. Due to Conclusions 2, 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

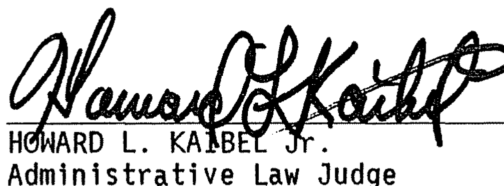
9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from 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 except where specifically otherwise noted above.

Dated this 6TH day of December, 1990.



HOWARD L. KAIBEL Jr.
Administrative Law Judge

Reported: Tape Recorded; No Transcript Prepared.

APPENDIX A

(1)

Minn. Stat. § 609.17	(Attempts)
Minn. Stat. § 609.175	(Conspiracy)
Minn. Stat. § 609.185	(Murder - 1st degree)
Minn. Stat. § 609.19	(Murder - 2nd degree)
Minn. Stat. § 609.195	(Murder - 3rd degree)
Minn. Stat. § 609.20	(Manslaughter - 1st degree)
Minn. Stat. § 609.205	(Manslaughter - 2nd degree)
Minn. Stat. § 609.21	(Criminal vehicular operation)
Minn. Stat. § 609.215	(Suicide)

(2)

Minn. Stat. § 609.221	(Assault - 1st degree)
Minn. Stat. § 609.222	(Assault - 2nd degree)
Minn. Stat. § 609.223	(Assault - 3rd degree)
Minn. Stat. § 609.2231	(Assault - 4th degree)
Minn. Stat. § 609.224	(Assault - 5th degree)
Minn. Stat. § 609.23	(Mistreatment of persons confined)
Minn. Stat. § 609.231	(Mistreatment of Residents or patients)
Minn. Stat. § 609.235	(Use of drugs to injure or facilitate crime)
Minn. Stat. § 609.24	(Simple robbery)
Minn. Stat. § 609.245	(Aggravated robbery)
Minn. Stat. § 609.25	(Kidnapping)
Minn. Stat. § 609.255	(False imprisonment)
Minn. Stat. § 609.26	(Depriving another of custodial or parental rights)
Minn. Stat. § 609.265	(Abduction)
Minn. Stat. § 609.2661	(Murder of an unborn child - 1st degree)
Minn. Stat. § 609.2662	(Murder of an unborn child - 2nd degree)
Minn. Stat. § 609.2663	(Murder of an unborn child - 3nd degree)
Minn. Stat. § 609.2664	(Manslaughter of an unborn child - 1st degree)
Minn. Stat. § 609.2665	(Manslaughter of an unborn child - 2nd degree)
Minn. Stat. § 609.267	(Assault of an unborn child - 1st degree)
Minn. Stat. § 609.2671	(Assault of an unborn child - 2nd degree)
Minn. Stat. § 609.2672	(Assault of an unborn child - 3rd degree)
Minn. Stat. § 609.268	(Injury or death of an unborn child in commission of a crime)

(3)

Minn. Stat. § 609.322	(Solicitation, inducement and promotion of prostitution)
Minn. Stat. § 609.3232	(Protective order authorized; procedures; penalties)

Minn. Stat. § 609.324	(Other prohibited acts)
Minn. Stat. § 609.33	(Disorderly house)
Minn. Stat. § 609.342	(Criminal sexual conduct - 1st degree)
Minn. Stat. § 609.343	(Criminal sexual conduct - 2nd degree)
Minn. Stat. § 609.344	(Criminal sexual conduct - 3rd degree)
Minn. Stat. § 609.345	(Criminal sexual conduct - 4th degree)
Minn. Stat. § 609.3451	(Criminal sexual conduct - 5th degree)
Minn. Stat. § 609.352	(Solicitation of children to engage in sexual conduct)

(4)

Minn. Stat. § 609.352	(Incest)
Minn. Stat. § 609.377	(Malicious punishment of a child)
Minn. Stat. § 609.378	(Neglect of a child)

(5)

Minn. Stat. § 609.713	(Terroristic threats)
Minn. Stat. § 609.746	(Interference with privacy)
Minn. Stat. § 609.79	(Obscene or harassing telephone calls)
Minn. Stat. § 609.795	(Opening sealed letter, telegram or package)

(6)

Minn. Stat. § 617.23	(Indecent exposure)
Minn. Stat. § 617.241	(Obscene materials)
Minn. Stat. § 617.243	(Indecent literature)
Minn. Stat. § 617.246	(Use of minors in sexual performance)
Minn. Stat. § 617.247	(Possession of pictorial representations of minors)
Minn. Stat. § 617.293	(Dissemination of harmful materials to minors)

Subpart 4

Minn. Stat. § 609.52	(Theft)
Minn. Stat. § 609.521	(Possession of shoplifting gear)
Minn. Stat. § 609.523	(Return of stolen property to owners)
Minn. Stat. § 609.582	(Burglary)
Minn. Stat. § 609.625	(Aggravated forgery)
Minn. Stat. § 609.63	(Forgery)
Minn. Stat. § 609.635	(Obtaining signature by false pretense)