

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed  
Adoption of Amendments to Rules of  
Department of Health Relating to  
Family Planning Special Project Grants  
Minn. Rules 4700.1900 to 4700.2550

REPORT OF THE  
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on May 13, 1991, at 9:30 a.m. in the Chesley Room, Minnesota Department of Health Building, 717 Delaware Street SE, Minneapolis, Minnesota.

Pati Maier, Assistant Division Director and Erica Fishman, Family Planning Consultant, Division of Maternal and Child Health, represented the Commissioner of Health (Commissioner) at the hearing and testified in support of the proposed rules. Richard Wexler, Assistant Attorney General, appeared on behalf of the Department of Health (Department).

Approximately twelve persons attended the hearing, eight of whom signed the hearing register. The hearing continued until all interested persons had had an opportunity to be heard concerning the adoption of the proposed rules.

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

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On March 13, 1991, the Department filed preliminary documents with the Chief Administrative Law Judge requesting the initiation of a rulemaking

hearing. The request contained a statement of the number of persons expected to attend the hearing, an estimated length of the Department's presentation and a statement that additional notice would be given to all applicants for family planning special grants for the last grant cycle and to other interested persons. The following documents were filed:

- (a) A copy of the proposed rules approved for publication by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) The Statement of Need and Reasonableness.

2. On March 28, 1991, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. On March 29, 1991, the Department mailed the Notice of Hearing to community health board administrators, public health nursing directors, Department district representatives and Department public health nurse consultants. On March 25, 1991, the Department mailed the Notice of Hearing to current Family Planning Project Grant recipients, applicants from the last grant cycle who were not funded and to other interested parties. On March 27, 1991, the Department mailed the Notice of Hearing to all members of the Minnesota Legislature.

3. On March 14, 1991, the Department mailed a copy of the Statement of Need and Reasonableness and a copy of the proposed rules to the Legislative Commission to Review Administrative Rules.

4. On April 1, 1991, the Notice of Hearing and a copy of the proposed rules were published at 15 State Register 2183-2190.

5. The Notice of Hearing published in the State Register and mailed by the Department was a "dual notice." The Notice stated that the Department intended to adopt the rules without a public hearing under the provisions of Minn. Stat. §§ 14.22 to 14.28, but also provided that if 25 or more persons requested a hearing within thirty days, a public hearing would be held on May 13, 1991. The Notice also gave notice of a hearing to be held May 13, 1991, and stated that the hearing would be canceled if fewer than twenty-five persons requested a hearing in response to the first part of the Notice. The technique of using a "dual notice" provides a mechanism for agencies to adopt rules without unnecessarily delaying the process if twenty-five people request a hearing, while at the same time affording all required notice to interested persons.

6. On April 18, 1991, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing and proposed rules as mailed.
- (b) An Affidavit certifying that the Department's mailing list was accurate and complete and that the Notice of Hearing had been mailed to all persons on the Department's mailing list and to additional persons.
- (c) Copies of comments received by the Department in response to a Notice of Solicitation of Outside Information or Opinions published September 10, 1990, at 15 State Register 630.
- (d) An Affidavit of Mailing the Statement of Need and Reasonableness to the Legislative Commission to Review Administrative Rules.

7. On April 19, 1991, the Department filed a copy of the Notice of Solicitation of Outside Information or Opinions published at 15 State Register 630 that had inadvertently not been filed with the material filed on April 18, 1991.

8. More than 25 persons requested a hearing. On May 8, 1991, the Department mailed a notice of its intent to adopt the proposed rules with a public hearing to all persons who had requested that a public hearing be held and to all persons that had submitted comments in response to the original Notice of Hearing. On May 10, 1991, the Department filed an affidavit of mailing of such notice.

9. The period for submission of written comment and statements remained open through May 20, 1991. The record closed on May 23, 1991, the third business day following the close of the comment period. Six comments were received during the comment period including one from the Department. One comment was received during the response period and that was from the Department.

10. Many of the requests for hearing submitted to the Department requested that additional hearings be held outside of the Twin Cities area. Most of those were from northeastern Minnesota and requested that a hearing be held there. Of the seven non-Department people who signed the hearing register, three were from Duluth, one was from St. Cloud, and one was from Gaylord. In its post-hearing comments (Ex. 25) the Department stated that it had considered holding hearings in other areas of the state, but decided to hold one hearing in the Twin Cities because it was a central location and individuals were accustomed to attending meetings in the metro area. The Department also felt that by providing more than 30 days notice of the hearing, individuals could arrange to attend the hearing or submit written comments. The Department is correct, providing only one hearing date in this matter was more than sufficient to allow interested persons an opportunity to hear the Department's presentation and to make their views known. Because the metro area is centrally located transportation-wise and is the center of State government, holding the hearing in the Twin Cities provided for the maximum participation by all affected individuals.

11. In considering the proposed amendments, the Department established a work group of the Maternal and Child Health Advisory Task Force to examine the grant program, solicited written input from approximately 150 individuals and organizations interested in the program and reviewed the 18 comments received and met with 12 individuals to discuss concerns about the existing rules and grant program. Natural Family Planning of Duluth, Inc., Ex. 22, and the Family Life Bureau of the diocese of St. Cloud, Ex. 24, expressed concern that the work group had no members that represented the concerns of natural family planning agencies in the state. They felt that the interests of natural family planning were shortchanged by the group and even treated with a bit of hostility. In its post-hearing response, Ex. 26, the Department acknowledged that there were no representatives of the natural family planning agencies on the work group but that, nonetheless, input was sought from all parties including natural family planning agencies and those groups were able to present their views to the work group and help shape its final report. Just as importantly, those groups have provided their comments to the Department and during this rulemaking process and they have been considered.

### Nature of the Proposed Rules

12. Minn. Stat. § 145.925 authorizes the Commissioner of Health to make special grants to cities, counties, groups of cities or counties or nonprofit corporations to provide prepregnancy family planning services. Permanent rules governing this Family Planning Special Project (FPSP) grant program have been effective since 1979 and were amended in 1988. The Department now proposes to make several amendments to those rules with the purpose of making the grant program more effective and efficient. Three of the most significant proposals by the Department are the establishment of mandatory funding for a statewide hotline, a change to a regional allocation of funds from a statewide allocation and increase the limit for any one provider to \$75,000.00 per region.

### Statutory Authority

13. Minn. Stat. § 145.925, subd. 5, contains a specific grant of authority to the Commissioner to "promulgate rules for approval of plans and budgets of prospective grant recipients, for the submission of annual financial and statistical reports, and the maintenance of statements of source and application of funds by grant recipients." This statute provides the statutory authority of the Commissioner to adopt the proposed amendments.

14. During the pendency of this rule hearing, legislation regarding FPSP grants was also pending. On June 4, 1991, the Governor signed House File 719 into effect. It became Minn. Laws 1991, Chapter 292, and contains the following provisions:

The commissioner shall fund a statewide family planning hotline grant and shall allocate remaining family planning special project grant funds to eight regions according to a needs-based distribution formula.

The funding for family planning special project grants shall be awarded through the criteria established in Minnesota Rules. Notwithstanding any rule to the contrary, an organization shall not be excluded or reduced in priority for funding because the organization does not make available, directly or through referral, all methods of contraceptives for reasons of conscience. The commissioner of health shall develop procedures for establishing a conscience clause in the grant application process.

Minn. Laws 1991, Ch. 292, Art. 1, § 9, subd. 3. At Minn. Laws 1991, Ch. 292, Art. 2, § 32, a new subdivision 9 is added to Minn. Stat. § 145.925 that states:

Notwithstanding any rules to the contrary, including rules proposed in the State Register on April 1, 1991, the commissioner, in allocating grant funds for family planning special projects, shall not limit the total

amount of funds that can be allocated to an organization that has submitted applications from more than one region, except that no more than \$75,000 may be allocated to any grantee within a single region. For two or more organizations who have submitted a joint application, that limit is \$75,000 for each organization. This subdivision does not affect any procedure established in rule for allocating special project money to the different regions. The commissioner shall revise the rules for family planning special project grants so that they conform to the requirements of this subdivision. In adopting these revisions, the commissioner is not subject to the rulemaking provisions of chapter 14, but is bound by section 14.38, subdivision 7.

The legislation also appropriated an additional \$950,000 per year to the FPSP grant program, making total funding available \$2,055,000 per year and \$4,110,000 for the biennium.

The effect of this legislation is that the Department is now required by law to do some of the things it was proposing in this proceeding. In particular, it is required to fund a statewide family planning hotline grant, allocate remaining funds to eight regions according to a needs-based formula and increase the limit that can be awarded to one organization to \$75,000 per region.

#### Small Business Considerations

15. Minn. Stat. § 14.115 requires agencies to consider the effect on small businesses when they adopt rules. In particular, Minn. Stat. § 14.115, subd. 2 states, in part:

When an agency proposes a new rule, or an amendment to an existing rule, which may affect small businesses . . . , the agency shall consider each of the following methods for reducing the impact of the rule on small businesses:

- (a) the establishment of less stringent compliance or reporting requirements for small businesses;
- (b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- (c) the consolidation or simplification of compliance or reporting requirements for small businesses;
- (d) the establishment of performance standards for small businesses to replace design or operational standards as required in the rule;
- (e) the exemption of small businesses from any or all requirements of the rule.

16. In its Statement of Need and Reasonableness (SONAR), the Department acknowledged that the proposed amendments would affect small businesses and stated:

The Department reviewed its compliance and reporting requirements. These rules are designed to help small businesses by providing financial support to agencies while keeping reporting requirements at the minimum level necessary to assure the justifiable use of public dollars. Deadlines for reporting requirements were established with consideration that data collection by small businesses may take longer. Therefore, three months is allowed after the end of the reporting period for completion of the report. The minimum standard requirements stated in rule are those generally accepted by the public health community and thus must be applied to all applicant agencies equally. Because the Department elicits information from applicants that will be used to make appropriate funding judgments as well as to determine program effectiveness, the same information is required of all applicants regardless of the type of agency. Without receiving the same information from all agencies, small businesses would be at a disadvantage in that the Department would not have the information necessary to make an informed judgment. Thus, if the rules were different for small businesses, the Department would not be able to make a fair and equitable decision as to which agencies should receive these funds.

After review, it was concluded that the proposed rules will have no negative impact on small businesses. Many of the changes proposed will simplify the information that needs to be provided by the applicant. Other are to clarify the intent of the rules.

17. The Department has considered the applicable specific methods for reducing the impact of its rules on small businesses as required by Minn. Stat. § 14.115, subd. 2.

#### Fees Imposed by the Rules.

18. No fees are imposed by the proposed amendments, so compliance with Minn. Stat. § 16A.128, subd. 2a is not required.

#### Public Expenditures

19. Adoption of these rules will not require local public bodies to make any expenditures. Therefore, the requirement of Minn. Stat. § 14.11, subd. 1, for an estimate of total cost to public bodies if it is expected to exceed \$100,000.00 per year does not apply in this proceeding.

#### Agricultural Land Impact

20. Minn. Stat. § 14.11, subd. 2, is inapplicable because the proposed rules will not have any direct or substantial adverse impact on agricultural land in the state.

Minn. Rule 4700.1900 Purpose, Scope, and Applicability

21. This rule is proposed to be amended by deleting references to other rule parts that are being repealed in this proceeding or are no longer being followed and will be repealed in a future proceeding. These changes are necessary and reasonable so that the rule contain correct citations.

Minn. Rule 4700.2000 Definitions

22. Several new definitions are proposed of terms that are used in the operative parts of these rules. They are necessary and reasonable to provide persons affected by the rules a clear understanding of the terms used.

23. Subpart 9 defines "high risk person". The definition currently specifically includes persons whose income is at or below 200 percent of the official income poverty line. The Department is proposing to amend the rule to incorporate the annual revisions to the poverty figures issued by the federal government. As amended, the relevant portion of the rule would read:

. . . and persons whose individual or family income is determined to be at or below 200 percent of the official income poverty line as defined according to United States Code, title 42, section 9902, as amended by the Federal Office of Management and Budget and revised annually in the Federal Register. A copy of the most current guideline is available from the Office of Planning and Evaluation, Department of Health and Human Services, Washington, D. C. 20201 (202) 245-6141.

The language seems to indicate that the federal statute, 42 USC § 9902, is amended annually. Actually, it is the poverty figures that are published annually. While the rule is not unreasonable, it is suggested that the provision would be more clear and precise if it were amended to read as follows:

. . . and persons whose individual or family income is determined to be at or below 200 percent of the official income poverty line as defined by according to United States Code, title 42, section 9902, as amended and as published by the Federal Office of Management and Budget and revised annually in the Federal Register. A copy of the most current guideline is available from the Office of Planning and Evaluation, Department of Health and Human Services, Washington, D. C. 20201 (202) 245-6141.

24. Subpart 14 sets forth the definition of "region". As noted, the law now requires the Department to allocate FPSP grant funds to eight regions. Regions are established to coincide with each group of counties represented by each of the eight persons on the executive committee of the State Community Health Advisory Committee. The rule also sets forth the counties in the eight regions. In its SONAR, the Department provided the following justification for its determination of the eight regions.

Part 4700.2000 Subp. 14. adds and defines the term "region" to facilitate a better understanding of the use of this term within the rules. Because the proposed rule amendments establish a new regional funding formula, a clear understanding of the use of the term "region" is essential to their interpretation. The proposed regional boundaries are those used to designate membership on the State Community Health Advisory Committee (SCHSAC) executive committee. (See Minnesota Statutes, section 145A.10, subd. 10). These were chosen because they divide the state in a manner that assures that the community health board is self-contained within a single region. This is important because as defined in the Local Public Health Act, Minn. Chapter 145A, the community health board is responsible for the coordination of public health services in Minnesota and thus it would not be practical to administer a program that would place a multi-county community health board in two different regions. Also, these regions are known and generally accepted by any of the local agencies which participate in the Department's special projects grant program. Application of the allocation formula to smaller geographic areas was considered, but rejected because the funding level thus available to many less populous areas of the state would be too small to support an adequate program.

25. The Department has demonstrated that the proposed changes to Minn. Rule 4700.2000 are necessary and reasonable.

Minn. Rule 4700.2100 Content of Application.

26. A change is proposed here to correct a typographical error in numbering. There is a reference to standards described in part 4700.2200. That part had been repealed in prior proceedings and the reference should be to 4700.2210. The change is necessary and reasonable.

Minn. Rule 4700.2210 Minimum Standards for Family Planning Service Components.

27. No changes are proposed in this rule.

Minn. Rule 4700.2300 Criteria for Award of Family Planning Special Project Grants.

28. Subpart 1 of this rule, Application Criteria, is changed from stating that applications that meet the requirements "shall be awarded" to "shall be deemed approvable applications and eligible for award". This change is necessary because not all applications that meet the requirements are awarded funds if the amount of funding requested exceeds the amount available.

29. Subpart 2, Priority, is proposed for deletion. The existing rule states that applications proposing to provide all six of the family planning



components specified in Minn. Rule 4700.2210 in counties with no other publicly subsidized family planning services shall be given priority in funding. In its SONAR, the Department provided the following justification for deleting this provision:

When the rule was originally promulgated, other public funding sources for family planning services were not readily available. Since then, other sources have become available and are being allocated in much of the state to support outreach, counseling, public education and other family planning service components. Also, because it is desirable to promote development of all funding sources in every community, and because the Family Planning Special Project grant funds have been limited, it is unwise to continue to assure absolute funding priority to counties using only this single funding source for their program.

30. Two changes are proposed to Subpart 3, Quality and Content. First, references to the community health service rules have been deleted because those rules are no longer used and will be repealed and because the criteria referred to are continued in the other changes proposed in this proceeding.

31. The second change in Subpart 3 is the addition of a new criterion for the evaluation of applications, which states:

F. The extent the application proposed to provide family planning methods according to part 4700.2210, item D.

Minn. Rule 4700.2210 D. is the "method" component of family planning services. "Method" must include the provision to a service recipient of the recipient's family planning method of choice. The Department justified this provision as follows in the SONAR:

This change recognizes that although the provision of service components other than the method component are very important, the provision of the method services as defined in part 4700.2210, item D, is the essential core of a family planning program. This change will give those applications in a region proposing to provide method services in counties with no publicly subsidized family planning method services a competitive advantage for Family Planning Special Project funds. It also gives those applicants in a region proposing method services in a county where other public dollars are used to provide method services an advantage over those applicants proposing the other family planning service components. Currently there are thirty-one counties in Minnesota with no publicly subsidized family planning method services. This change is made to encourage those counties already providing method services to continue to do so, while also encouraging those counties without method services to provide such services if deemed needed and feasible.

The increased support for the provision of method services with Family Planning Special Project funds is also a result of recognizing that since the rules were first promulgated, additional public dollars have become available and are being allocated in much of the state for service components other than the method component. Because Family Planning Special Project funds are limited, it is desirable to promote the use of these categorical family planning funds for method services while encouraging the use of other funding sources for the other service components.

32. Several persons expressed concern about the greater emphasis that will be placed on the method component, to the possible detriment of outreach and counseling components. For example, Mary Ho, Community Health Services Administrator and Nursing Director for Rice County, thought that ranking service components was inappropriate and that applications that correctly identify an unmet need for other service components would be less likely to receive funding than those proposing to provide method services. She noted that one of the high risk groups for unintended pregnancy is persons under the age of 18 and that because teens typically become sexually active before seeking contraceptive method services, information and outreach are very important in reaching sexually active teenagers and referring them for contraceptive methods or in reaching those who are not yet sexually active. She also stated that in rural Minnesota the provision of public information and outreach services may be a first step for rural counties to become involved in offering family planning services. Ex. 20. The Department responded to Ms. Ho's comments and similar comments in its post-hearing comments (Ex. 25), as follows:

The concern raised by the comment is understandable. Each applicant must identify the unmet needs in its community during a needs assessment process. The Department does recognize that in some areas, the unmet need may currently focus on the outreach and counseling components. As discussed on pages 5-6 above, the Department continues to recognize the importance of providing these components but feels that because funds for these grants are limited, if all other factors are equal a preference should be exercised in favor of applicants which will provide method services. If funds remain in a region after applicants which will provide the method component are awarded funds, remaining applicants with approvable applications proposing to provide other components will be funded according to Part 4700.2420 subp. 2. This approach will encourage applicants, if feasible, to provide family planning components in addition to the method component or to submit joint applications with agencies proposing to provide different family planning service components.

33. The Department proposed to insert a new subpart 4.a. (Priority) in this rule that provides that current recipients of family planning special

project funds will not be accorded any priority over new applicants. The Department justified this provision in the SONAR as follows:

"Current recipients" are not accorded priority because these limited funds will be directed to funding those programs in a region which best meet the criteria for award in rule. It is only reasonable that meeting the award criteria and not simply having received funds in the past should be the appropriate and required basis for receiving new funding. Although this may be of concern to agencies who are "current recipients" of funds, almost all agencies who received Family Planning Special Project funds in the Calendar year (CY) 1988-1989 grant cycle but did not receive funding in the CY 1990-1991 grant cycle have been able to maintain their programs by using funds from other sources. Also, because these funds are available to promote statewide services for family planning, and currently there are thirty-one counties in Minnesota with no subsidized method services, new applicants must be able to compete competitively for funds. A new applicant for funding which would provide services in one of these thirty one counties, should not go without funding simply because other agencies are being funded again solely because they had received it in the past. For each funding cycle, all applicants should be judged equally based upon the current needs of the area they serve.

According to the Department's post-hearing comments (Ex. 25), this amendment did not change existing practice because current grant recipients never did receive priority or preferential treatment in subsequent grant application cycles. However, the Department felt that it would be best to specifically state that fact in the rule.

34. Subpart 5 of this rule currently provides for review and comment by the local boards of health. Consistent with statutory changes and other changes within these rules, that is changed to review and comment by the community health boards. Other changes are made to clarify that applicants shall submit their proposals to the community health board responsible for the geographic area in which the application proposes to provide services for review and comment and that the community health board's comments shall address the application based on criteria in subpart 3. The changes here are not substantive but merely correct the name of the community health board to the current statutory name. The requirement that the community health board comments address the criteria set forth in subpart 3 was not specifically stated before but was an obvious requirement and an existing practice. Some commentors expressed concern for the apparent conflict of interested created by the fact that the community health boards themselves may submit applications. As the Department pointed out in its SONAR and its post hearing comments, the Local Public Health Act, Minn. Stat. Ch. 145A, assigns community health boards the primary responsibility for planning developing and maintaining integrated systems of community public health services in Minnesota. Thus, it is important for them to be aware of and be able to comment on proposals to provide family planning services in their areas. Any conflict that exists is mitigated by the fact that the comments must address

the criteria specified and that such comments are not binding on the commissioner who makes the final grant decisions based on review on the review criteria and can give the comments the appropriate weight in view of any possible conflict.

35. The proposed changes to Minn. Rule 4700.2300 are necessary and reasonable for the reasons given by the Department.

#### Minn. Rules 4700.2410 Allocation Scheme

36. The current allocations scheme is set forth in Minn. Rules 4700.2400, Contingency Funding, and 4700.2550, Allocation Scheme. The Department proposes to repeal those sections and replace them with this entirely new rule.

37. Subpart 1 of this rule provides for a family planning hotline grant. It provides that the lesser of 5% of the total annual funds available or \$100,000.00 per year shall be allocated for a state-wide family planning hotline. The Department justified the proposal in its SONAR as follows:

Part 4700.2410, Subp. 1, earmarks part of the Family Planning Special Project funds specifically for a statewide family planning hotline. This service needs to remain statewide, serving all geographic areas, and providing referrals to all publicly-subsidized family planning programs in the State. It cannot be efficiently funded through the regional allocation scheme established in Subp. 2 of this rule for distribution of all of the other available program funding.

It is important to assure the availability of funding for the hotline for a number of reasons. First, it provides anonymous, confidential family planning information for those individuals throughout the state who, for whatever reason, do not directly access family planning services to address their concerns. Secondly, the hotline provides information on the nearest location of subsidized services. This is important because many agencies do not have the resources to promote their services and in areas with no or limited services, it is difficult for individual to locate the closest service location.

The Department is proposing to set aside 5% of the total funds available or \$100,000, whichever is less, specifically for the family planning hotline. This figure is derived from a Department estimate that takes into account the cost of operating and promoting the hotline statewide. Currently \$1,100,000 annually is available for award to all family planning applicants. Five percent of this amount would make approximately \$50,000 available for the hotline. The \$30,000 currently awarded for operation of the hotline does not allow for an adequate level of services nor for promotion to expand its use. Because the hotline is an "800" number, as use

increases so does the operating cost. Therefore, with increased promotion the operating costs would increase. A funding limit of \$100,000 was established because the Department estimates this is the maximum amount that would be needed for the operation (staffing, etc.) and promotion of the hotline even with a substantial increase in its use.

38. There were some public comments that funds should not be set aside for a family planning hotline but that it should be evaluated and funded based on its effectiveness and use by the target population. As pointed out above, the Department is now required by law to fund a statewide family planning hotline. Therefore it is necessary and reasonable for the Department to do so. Furthermore, for the reasons stated in this SONAR, the amount of the grant funds to be set aside for the hotline is reasonable.

39. Natural Family Planning of Duluth, Inc. suggested that consideration should be given to treating natural family planning (NFP) proposals in the same manner as the hotline, that is, a certain amount should be set aside for natural family planning agencies. In its posthearing response, Exhibit 26, the Department replied to the suggestion as follows:

The Department did consider treating NFP in the same manner as the hotline by setting aside funds for the provision of MFP services. The Family Planning Statute (Mn. Stat. 145.925 Subd. 1a) and Rule (Mn. Rules part 4700.2000 subp. 2) gives equal treatment to all family planning methods. Therefore, it was concluded that special funding consideration should not be given to any specific family planning method.

The Department's decision is not unreasonable. Furthermore, a change to the rules at this point to establish separate funding for natural family planning would be a substantial change from the rules as proposed and could not be adopted.

40. Subpart 2 of the rule, Family Planning Services Grants, states that the portion of the funds remaining after distribution of funds to the hotline will be allocated on a regional basis according to a needs-based distribution formula set forth in the rule. In its SONAR, the Department provided an explanation of the options it had considered and its reasons for selecting a regional allocation scheme. Several concerns were raised about the regional allocation scheme, particularly from persons in Northeast Minnesota who felt that it would jeopardize the level of funding they had received in the past. Again, however, the law now specifically requires the Department to allocate the FPSP grant funds to eight regions according to a needs-based distribution formula. Therefore, the use of the regional allocation scheme is necessary and reasonable.

41. The needs-based distribution formula established by the rule involves totaling the number of resident women in each region who are twelve to eighteen years of age, the number of resident women who are nineteen to thirty-four years of age who are on medical assistance and the number of resident women who are thirty-five to forty-four years of age. The FPSP grant funds are then allocated to each region based upon its proportion of the

number of such women to the total number of such women in the State. The Department justified its proposed needs-based distribution formula as follows in the SONAR:

Once the regional allocation option was selected, the Department needed to determine how to implement it. In order to determine the need for family planning services within each region, the Department is proposing a formula based upon the age related and socio-economic related factors in part 4700.2000, subp. 4. (recodified as Subp. 9) used to define "high risk person." In this section it states that, "high risk persons include, but are not limited to women under 18 or over 35 . . . . . and persons whose individual or family income is determined to be at or below 200 percent of the official income povertyline. . . ." With this in mind, the following three factors were chosen:

(1) The number of women 12-18 years of age in a region. Age twelve was picked because this is generally considered the age at which women become at risk for unintended pregnancy. Age 18 was included because it is generally felt that women age 18 are also at high risk for experiencing an unplanned pregnancy or problems during pregnancy. This data is provided by the Minnesota Department of Health, Center for Health Statistics which provides updated population estimates between federal census years.

(2) The number of women 19-34 years in a region receiving Medical Assistance. The use of data relative to poverty status was examined. Concern was expressed as to the accuracy of using census data for a needs based formula when, for some grant cycles, the data would be ten years old. The number of women who are Medical Assistance enrollees represents a group of women who have service access problems related to low income. Thus, it was concluded that the Medical Assistance data provided the most current indicator of poverty status in a region. This data is provided to the Department of Health by the Minnesota Department of Human Services and is only available by the ages indicated above. Thus, we are using data for ages 19-34 rather than 18-35 which would coincide with the definition of "high risk" discussed above.

(3) The number of women 35-44 years of age in a region. The number of women 35-44 years of age represents a group of women who have particular risk of adverse pregnancy outcome. Forty four was picked because the majority of births occur to women under age 45. The data will also be obtained from the Department's Center for Health Statistics.

The factors that were chosen for the formula are generally considered reliable indicators of family planning service needs. Also, as used in the formula, they result in numbers for the counties which are large enough as to not cause significant variance from year to year. Factors were picked in categories that are exclusive of each other because it was determined that it was not desirable to give additional weighting to criteria through the allocation scheme. These factors are based on women in a region and not individuals in general because women are the target population for family planning services provided with these limited dollars.

42. Public comments on the distribution formula questioned the reliability of using medical assistance recipients and the number of women age 35-44 as determinants of the need for subsidized family planning services. They also question the failure to count men in determining needs. For reasons set forth in the SONAR, the Department has justified the factors that it has chosen. The age categories of women correspond to those defined as "at risk" by the rules and can be determined from statistics that are available. The Department examined other sources of information for poverty status data and concluded that medical assistance data provided the most current indicator of poverty status in the regions. The Department noted in its posthearing comments that women thirty five to forty four years of age have a particular risk of adverse pregnancy outcome and, therefore, should be included in determining need for family planning services. In its posthearing response, Exhibit 26, the Department stated that it had decided not to include the number of males in the formula because adding males would essentially only double the account and not change the final result.

#### Minn. Rule 4700.2420 Family Planning Services Grant Funding

43. Subpart 1, Funding Limit, as originally proposed by the Department set an annual limit on funding for each recipient of \$40,000.00 for the amount of its current award, whichever was greater. In response to numerous oral comments encouraging it to increase the funding limit to allow for the expansion of existing programs and the creation of new programs, the Department, at the hearing, proposed to change to limit to \$75,000.00 and proposed the following language for subpart 1:

Funding Limit. An applicant, other than an applicant for a family planning hotline grant, shall be limited to an annual application request of \$75,000 per region. Two or more agencies may submit a joint application; each agency that is a party to it shall be limited to an annual application request of \$75,000 for each region covered by the joint application.

In its Addendum to the Statement of Need and Reasonableness presented at the hearing, Exhibit 17, the Department stated that it believed the \$75,000.00 limit to be reasonable because it took into account the cost associated with operating a more comprehensive family planning program at a lower limit the agencies may not be able to meet the increased cost of providing services to

the same number of clients and would not be able to expand services and the increased limit would allow agencies to serve more than one county within a region to establish services in additional counties improving access by clients to needed services.

44. As noted above, the Department is now required by Minn. Stat. § 145.925, subd. 9 (1991) to establish the limit at \$75,000.00. Therefore, the modified rule proposed by the Department is necessary and reasonable. Moreover, since the requirement is imposed by statute and made exempt from the rulemaking provisions of the Administrative Procedure Act, except publication, the change cannot be considered a substantial change.

45. The funding limit set in subpart 1 replaces the existing funding limit established in Minn. Rule 4700.2500 of \$30,000. Therefore, 4700.2550 is proposed for repeal. That repeal is necessary and reasonable.

46. Subpart 2, Grant Allocations, provides that applications, other than those for a family planning hotline grant, must be ranked in order within each region based on the criteria in Minn. Rule 4700.2300 and that the applications must be funded in rank order until all available funds for the region are allocated. Rank order funding is the allocation method existing under the current rule, Minn. Rule 4700.2400, subp. 1B. As originally proposed by the Department, subpart 2 also contained a provision allowing applicants to submit applications for more than one region but limited the total funding for any applicant for all regions to the limit in subpart 1. Because the matter of multi-region applications is now covered by subpart 1, that provision is no longer necessary in subpart 2 and has been deleted by the Department.

47. The Department justified its proposal in the SONAR as follows:

While part 4700.2400 Subpart 1, is being repealed, the process of rank ordering applications for funding determinations will be maintained in proposed part 4700.2420, subp. 2. The only changes between the existing rule and the proposed amendment are that the procedure of rank ordering applications will now be used routinely, rather than just when requests will exceed available funds, to determine the awarding of grant funds and will be applied on a regional basis instead of on a statewide basis. It is necessary to maintain a competitive grant program because Family Planning Special Project funds are usually limited and may not meet the funding needs of all applicants. The establishment of a process to competitively review the applications within the regions ensures that limited grant funds will be allocated fairly by objectively determining which projects within each region best meet the criteria for award in part 4700.2300.

There was concern expressed in the public comments that regional competition would be counterproductive because it would create adversary relationships between providers and between community health boards and between the community health boards and other providers. In its posthearing comments, the Department argued that regional allocation of funds should stimulate cooperation by local agencies in determining how best to meet the family



planning needs in their area. The Department stated that it will continue to make technical assistance to individual agencies available, but will not focus more time on coordinating regional meetings to facilitate interagency cooperation. Moreover, with the increased funding provided by the 1991 Legislature and the increase in the funding limit to \$75,000.00, community health boards, imparticularly multi-county community health boards should be better able to meet the needs for subsidized family planning service in their communities through coordinated efforts by themselves and the nonprofit corporations that apply to provide services in their communities.

48. Subpart 3, Funding Awards, requires the Commissioner to deny funding or award less than the amount requested if the proposed services do not meet the requirements of the rules or if the amount requested is more than is reasonably required to provide for the proposed services. It also provides that when the Commissioner decides to award less than requested, the applicant must submit revised program information. As justified by the Department in the SONAR, this provision is necessary and reasonable to ensure that the available funds are allocated to programs that provide quality services in a cost effective and efficient manner and because the rule requires the application of the criteria for service delivery established in Minn. Rule 4700.2210 and the criteria for award established in Minn. Rule 4700.2300.

49. Subpart 4, Contingency Funding, describes what happens if the need for redistribution of funds arises. Subpart 4A states that if funds remain available in a region after all approvable applications are funded, the remaining funds shall be redistributed to the other regions in proportion to their share of funding need using the method for the original allocations to the regions under Minn. Rule 4700.2410, subp. 2. This provision is necessary and reasonable because it ensures that all available funds are allocated all while at the same time ensuring that each region is funded to the extent of its need.

50. Subpart 4B address the possibility that funds will remain after all approvable applications throughout the state have been funded. In that case, the remaining funds will be proportionally distributed to all applicants with approvable applications, if they submit revised program information. Again, this provision is necessary and reasonable because it ensures that all of the funds are allocated, allows an equal opportunity to all providers to receive a fair share of the remaining funds and ensures appropriate use of those funds by requiring revised program information from the providers.

51. Subpart 4C establishes a procedure for allocating funds if the FPSP funds are increased after awards have been made. Such funds are first allocated to the family planning hotline to the limits specified in Minn. Rule 4700.2410, subp. 1. Remaining funds are allocated to the regions according to the needs-based distribution formula under Minn. Rule 4700.2410, subp. 2. This will allow agencies within a region who had approvable applications but did not receive funding due to insufficient funds to be funded first. Again, this rule is necessary and reasonable to describe what happens if additional funding is received and because it is consistent with the basic allocation and distribution formulas of the rules.

52. Subpart 4D replaces Minn. Rule 4700.2400, subp. 2, concerning procedures for reduction of grant awards if the grant funding is reduced after grant awards have been made. All grants will be reduced in proportion to the

overall reduction in these funds. The old rule that is being repealed had given funding priority to applicants proposing to establish all service components in counties with no other publicly subsidized family planning services. As discussed above, that concept was dropped with regard to awarding grants and is therefore appropriate to drop with regard to award reductions.

53. The Department has demonstrated that proposed Minn. Rule 4700.2420 as modified by the Department at the hearing is necessary and reasonable.

Minn. Rule 4700.2500, Use of State Funds Available for Family Planning Special Project Grants

54. Language changes are proposed to this rule to clarify its meaning. It currently states that FPSP grant funds may not be used to "supplant" any existing state or local funds for family planning information or services. The Department proposes to amend the rule to state that FPSP grant recipients may not replace funds from other sources, such as existing federal, state or local funds which the recipient uses for family planning information or services and over which the recipient exercises discretion, with FPSP grant funds. The Department justified these changes in the SONAR as follows:

Part 4700.2500 is changed to clarify the meaning of the word "supplant" and to facilitate a better understanding of this section. The word supplant is deleted but the substance of what was intended is placed into the rule itself, thus further explaining what it means. Although the rule already prohibits supplantation, the lack of clarity has made compliance and enforcement difficult. This content is maintained because it will also eliminate the possibility that agencies will substitute Family Planning Special Project Grant funds for other funds which they have committed for family planning services. The net result, which is the underlying purpose of this program, is to increase family planning services offered by the agency.

55. For the reasons stated by the Department, the changes to Minn. Rule 4700.2500 are necessary and reasonable.

Repealer

56. The Department proposes to repeal Minn. Rule 4700.2300, subp. 2, 4700.2400 and 4700.2550. As discussed above, all those rules are replaced by new rules proposed by the Department in this proceeding and which have been found to be necessary and reasonable. Therefore, the repeal of the cited rules is also necessary and reasonable.

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

CONCLUSIONS

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

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

3. The Department has documented the Commissioner's statutory authority to adopt the proposed amendments and has fulfilled all other substantive requirements of law and rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

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

5. Any findings that might properly be termed conclusions and any conclusions which might properly be termed findings are hereby adopted as such.

6. A finding or conclusion of need and reasonableness in regard to any particular rule does not preclude and should not discourage the Commissioner from further modification of the rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rulehearing record.

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

#### RECOMMENDATION

It is hereby recommended that the Commissioner adopt the amendments as modified by the Department and with the modification suggested in Finding No. 23.

Dated this 17<sup>th</sup> day of June, 1991.



STEVE M. MIHALCHICK  
Administrative Law Judge