11-1800-7471-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Amendments to the Rules of the Department of Human Services Governing the Use of Aversive and Deprivation Procedures By Licensed Facilities Serving Persons with Mental Retardation or Related Conditions (Minnesota Rules, Parts 9525.2700 and 9525.2810)

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on April 12, 1993, at 9:00 a.m. in Rooms 1-A and 1-B of the Department of Human Services Building, 444 Lafayette Road, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1992) to hear public comment, determine whether the Minnesota Department of Human Services (hereinafter referred to as "DHS" or "the Department") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, assess whether the proposed rules are needed and reasonable, and determine whether or not modifications to the rules proposed by the Department after initial publication are substantially different from those originally proposed.

David Iverson, Special Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Department. The Department's hearing panel consisted of Gerald Nord, Assistant Director of the Department's Division for Persons with Developmental Disabilities; Laura Plummer Zrust, Rules Coordinator with the Department's Rules Division; and Laura Doyle, Management Consultant at the Department's Division for Persons with Development Disabilities.

Forty-eight persons attended the hearing. Forty persons signed the hearing register. Many of the attendees gave testimony about these rules. The Department submitted changes to the proposed rules at the hearing. The Administrative Law Judge received thirty-eight agency exhibits into evidence during the hearing. The hearing 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 until May 3, 1993, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five working days were allowed for the filing of responsive comments. At the close of business on May 10, 1993, the rulemaking record closed for all purposes.

The Administrative Law Judge received several written comments from interested persons during the comment period. The Department submitted written comments responding to matters discussed at the hearings and comments filed during the twenty-day period. In its written comments, the Department proposed further amendments to the rules.

The agency 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 upon 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 agency of actions which will correct the defects and the agency 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 agency may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the agency 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 agency 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 agency may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the agency makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the agency 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 February 3, 1993, the Department filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules certified by the Revisor of Statutes (Exhibit 2);

(b) an estimate of persons expected to attend the hearing and an estimate of the expected duration of the hearing;

(c) the Order for Hearing (Exhibit 7);

(d) the Notice of Hearing proposed to be issued;

(e) the Statement of Need and Reasonableness (hereinafter referred to as the "SONAR") (Exhibit 3);

(f) a statement that additional discretionary public notice would be given; and

(g) a Fiscal Note (Exhibit 5).

2. On February 24, 1993, 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. The Department also sent additional discretionary notice to the 87 Minnesota County Human Service Agencies, the Chief Executive Officers of the Minnesota Regional Treatment Centers, the members of the Rule 40 Advisory Committee, and persons who expressed an interest in the proposed rules.

3. On March 1, 1993, a copy of the proposed rules and the Notice of Hearing were published at 17 State Register 2085.

4. On March 1, 1993, DHS filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed (Exhibit 1);

(b) a copy of the State Register containing the Notice of Hearing and the proposed rules (Exhibit 4);

(c) a copy of the Notice of Solicitation of Outside Opinion published at 15 State Register 2193 (April 1, 1991), together with the materials received in response to that notice (Exhibits 14-20);

(d) the Affidavit of Mailing the Notice to all persons on the Department's mailing list and to those persons receiving discretionary notice and the Agency's certification that its mailing list was accurate and complete (Exhibits 8-10); and

(e) the names of agency personnel and witnesses who would testify on behalf of the Department at the hearing (Exhibit 11).

Statutory Authority

5. In the Statement of Need and Reasonableness, the Department relies on Minnesota Statutes § 245.825 (1992) as authority for the proposed rules. That statutory provision expressly authorizes the Commissioner to adopt rules governing the use of aversive and deprivation procedures with respect to persons with mental retardation or related conditions served by DHS-licensed facilities or services:

> Subdivision 1. Rules governing use of aversive and deprivation procedures. The commissioner of human services shall by

October, 1983, promulgate rules governing the use of aversive and deprivation procedures in all licensed facilities and licensed services serving persons with mental retardation or related conditions, as defined in section 252.27, subdivision 1a. No provision of these rules shall encourage or require the use of aversive and deprivation procedures. The rules shall prohibit: (a) the application of certain aversive and deprivation procedures in facilities except as authorized and monitored by the designated regional review committees; (b) the use of aversive or deprivation procedures that restrict the consumers' normal access to nutritious diet, drinking water, adequate ventilation, necessary medical care, ordinary hygiene facilities, normal sleeping conditions, and necessary clothing; and (c) the use of faradic shock without a court order. The rule shall further specify that consumers may not be denied ordinary access to legal counsel and next of kin. In addition, the rule may specify other prohibited practices and specific conditions under which permitted practices are to be carried out. For any persons receiving faradic shock, a plan to reduce and eliminate the use of faradic shock shall be in effect upon implementation of the procedure.

Minn. Stat. § 245.825, subd. 1 (1992).

The Commissioner originally promulgated rules governing the use of aversive and deprivation procedures in 1987. These rules are commonly referred to as "Rule 40." The Department now proposes to amend the existing rules in order to clarify the rule parts, conform the provisions to statutory changes, and make modifications based upon the Department's review of individual program plans, emergency procedure reports, and quarterly reports, as well as on-site reviews conducted by the Department. The Administrative Law Judge concludes that the Department has general statutory authority to adopt the proposed rules.

Nature of the Proposed Rules

6. Aversive and deprivation procedures are actions which are taken to deter harmful conduct by persons with mental retardation or related conditions, such as self-inflicted injury or aggression toward staff or other persons. Procedures used include the use of electric shock, mechanical restraints, "time outs," or delaying the receipt of a benefit. Since aversive and deprivation procedures are by their nature negative, they are used only as a last resort. Rule 40 establishes restrictions with respect to particular aversive and deprivation procedures and mandates that certain individuals and groups be involved in making decisions regarding the use of such procedures, including the person's legal representative, the interdisciplinary team, the internal review committee, and the regional review committee.

Small Business Considerations in Rulemaking

7. Minn. Stat. § 14.115, subd. 2 (1992), requires state agencies proposing rules that may affect small businesses to consider methods for reducing adverse impact on those businesses. In its Notice of Hearing and

SONAR, the Department indicated that it had considered the small business requirements in drafting the proposed rules. The Department asserted that these rules merely implement the statutory requirements of Minn. Stat. § 245.825 and that it would be contrary to the objectives of the legislation to adopt less stringent requirements for small businesses. Notice of Hearing at 3; SONAR at 40. In addition, the Department maintains that these rules are exempt from the small business requirements pursuant to Minn. Stat. § 14.115, subd. 7(2) (1992). Id. That provision exempts from the small business consideration requirements agency rules that do not affect small businesses directly, including but not limited to rules relating to county or municipal administration of state or federal requirements. The Department did not explain the basis for its position that this exemption applies to the proposed rules involved in this rulemaking proceeding. The Administrative Law Judge thus is unable to conclude that the exemption set forth in subdivision 7(2) applies. The Judge does, however, agree that the easing of restrictions on small businesses would violate the intent of the statute that persons with mental retardation or related conditions be fully protected when aversive or deprivation procedures are used. The Department thus has satisfied the small business requirements of Minn. Stat. § 14.115, subd. 2 (1992).

Fiscal Notice

8. Minn. Stat. § 14.11, subd. 1 (1992), requires agencies proposing rules that will require the expenditure of public funds in excess of $100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two-year period immediately following adoption of the rules. In its fiscal note, the Department stated that the proposed rule amendments are fiscally neutral and will not affect either state or local spending in the two fiscal years following their promulgation. DHS Exhibit 5 at 1. The Administrative Law Judge concludes that the Department has met the fiscal notice requirements of Minn. Stat. § 14.11, subd. 1 (1992).

Impact on Agricultural Land

9. Minn. Stat. § 14.11, subd. 2 (1992), requires that agencies proposing rules that have a "direct and substantial adverse impact on agricultural land in the state" comply with the requirements set forth in Minn. Stat. §§ 17.80 to 17.84 (1992). Because the proposed rules will not have an impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1992), these provisions do not apply to this rulemaking proceeding.

Outside Information Solicited

10. In formulating these proposed rules, the Department published notices soliciting outside information on February 15, 1988, and April 1, 1991, and received responsive comments. Twelve regional public meetings attended by 672 persons were held between August and October 1991 to obtain input from the public. In addition, proposed amendments to the rules were discussed at meetings of the Regional Review Committees held during October 1990 through October 1991. The Department also sent a preliminary draft of the proposed amendments to a group which included providers, advocates, parents, and county agencies. SONAR AT 2.

Analysis of the Proposed Rules

11. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules has been established by the Department by an affirmative presentation of fact. The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the adoption of the proposed rules. At the hearing, the Department primarily relied upon its SONAR as its affirmative presentation of need and reasonableness. The SONAR was supplemented by the comments made by the Department at the public hearing and its written post-hearing comments.

The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn.App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).

This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of the provisions that are not discussed in this Report by an affirmative presentation of facts, that such provisions are specifically authorized by statute, and that there are no other problems that prevent their adoption.

Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed. Minn. Stat. § 14.15, subd. 4 (1992). Minn. Rules pt. 1400.1100 (1991) sets forth the standards which are applied in order to determine whether the new language is substantially different from the rules as originally proposed. Any change proposed by the Department from the rules as published in the State Register which is not discussed in this Report is found not to constitute a substantial change.

Proposed Rule 9525.2700 - Purpose and Applicablility

12. The Department proposes to modify part 9525.2700 of the existing rules by updating terminology used in the rule and clarifying the facilities and services to which the rules apply. Since the time the rules were originally promulgated, the Minnesota Legislature amended Minn. Stat. § 245.825, subd. 1 to specify that all "licensed services" as well as "licensed facilities" are to be governed by the Department's rules on aversive and deprivation procedures. The proposed rules accordingly replace the existing references to licensed "programs" and "facilities" with the term "license holder." Item C of subpart 1 is amended by changing the term "facility review

committee" to "internal review committee." This change is made throughout the rule to ensure that the term is applicable to all facilities and services to which Rule 40 now applies. The rule as amended also requires the development of an "individual program plan" ("IPP") rather than the existing reference to an "individual habilitation plan," in accordance with the current terminology used in Minn. Stat. § 256B.092, as amended in 1991. The changes to subpart 1 are needed and reasonable.

13. Subpart 2 of the rule, as amended, clarifies that Rule 40 applies to to day training and habilitation services licensed under Rule 38, intermediate care facilities for the mentally retarded ("ICFs/MR"), residential-based habilitation services, those licensed to provide services to children with mental retardation or related conditions, adult day care centers, foster care providers, and others licensed by the Commissioner as a residential or nonresidential program serving persons with mental retardation or a related condition. The proposed rules also cite the particular DHS rule provisions governing the licensure of each such facility or program. All of the listed entities are licensed facilities and licensed services serving persons with mental retardation or related conditions and thus are subject to Rule 40 by operation of Minn. Stat. § 245.825, as amended. Subpart 2 has been shown to be needed and reasonable to identify licensees who must comply with the rule.

Proposed Rule 9525.2710 - Definitions

14. Proposed rule part 9525.2710 amends and replaces a number of existing definitions. Only the definitions which received significant critical comment will be discussed.

Subpart 3 - Advocate

15. The proposed rules seek to amend the definition of "advocate" contained in the existing rules. Advocates take part in the development and approval of aversive and deprivation procedures as part of the interdisciplinary team. The role of the advocate is to speak on the behalf of the developmentally disabled person and represent the best interests of the person. As modified at the hearing, the rule would define "advocate" as follows:

> "Advocate" means an individual who has been authorized, in a written statement signed by the person with mental retardation or a related condition or by that person's legal representative, to speak on the person's behalf and help the person understand and make informed choices regarding identification of needs and choices of services and supports. An advocate for a person with mental retardation or a related condition and the advocate's employer must have no direct or indirect financial interest in providing services or supports they are advocating that the person receive.

The Department asserts that the rule is needed and reasonable "to assure that the person is represented by an objective person with no conflict of interest" and "to facilitate protection of the client's best interests." SONAR AT 6.

The proposed definition of "advocate," as modified at the hearing, was supported by Legal Advocacy for Persons with Developmental Disabilities

("LAPDD"), the Governor's Planning Council on Developmental Disabilities, Mount Olivet Rolling Acres, Gloria Steinberg of Advocating Change Together, Association of Retarded Citizens ("ARC ") Minnesota, ARC Suburban, New Dawn, Inc., Woodvale Management Group, Cheryl A. Peterson, Pattianne Casselton Gumatz, and Sandy Schlossen. These commentators expressed a belief that the amended rule provision would ensure that conflicts of interest are avoided and that developmentally disabled persons and their families or guardians are informed of all of their options. A number of persons opposed the definition on the grounds that it is unconstitutional, inconsistent with state and federal statutes and regulations, and not needed or reasonable. Those objecting to the proposed rule included the Association of Residential Resources in Minnesota ("ARRM"); Mary Rodenberg-Roberts, Consumer Advocate for REM-Minnesota, Inc.; Thomas Darling, Mary K. Martin, and Gregory Merz, Attorneys at Law, Gray, Plant, Mooty, Mooty & Bennett, P.A. ("Gray, Plant"); Elynn and Scott Niles; Barbara Jardano; and Sharon Todoroff.

16. Gray, Plant argued that the rule is unconstitutionally vague for failing to define the phrase "direct or indirect financial interest." In support of this contention, Gray, Plant emphasizes that Gerald Nord, a member of the agency panel, was unable to explain how the rule would apply in particular circumstances. Gray, Plant also cites the conflicting opinions of Gerald Nord and Special Assistant Attorney General Iverson regarding whether an attorney whose firm had represented care providers could act as an advocate as further evidence that the rule is impermissibly vague.

The Administrative Law Judge is not persuaded that the proposed rule is unduly vague. The language used in the rule is "sufficiently specific to provide fair warning" of the type of situation which is encompassed. See Thompson v. City of Minneapolis, 300 N.W.2d 763 (Minn. 1980), quoting Colten v. Kentucky, 407 U.S. 104, 110 (1972). As the United States Supreme Court recognized in Colten, the vagueness doctrine "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." Id. The phrase "direct or indirect financial interest" has a common meaning which is readily understood by the public. Its plain meaning encompasses situations is which an individual either directly receives payment from a particular source or indirectly receives such payment through a third party intermediary. Mr. Nord's reluctance to prejudge whether the rule would apply in a particular situation without knowing all of the facts does not mandate the conclusion that the rule is impermissibly vague. Moreover, the responses of Mssrs. Nord and Iverson regarding whether attorneys would be prohibited from serving as advocates in particular instances were not necessarily at odds. As Mr. Nord noted, it would be permissible under the proposed rule for an attorney whose law firm at times represents providers to act as an advocate in an unrelated case. As Mr. Iverson noted, however, it would not be permissible for an attorney to advocate that a developmentally disabled person receive services or supports provided by the particular provider who is paying the attorney's fee regarding that matter. The term "direct or indirect financial interest" is not impermissibly vague.

Gray, Plant argues that state-owned regional treatment centers (RTCs) have patient advocates who would be disqualified under the rules and that the employees of the Office of the Ombudsman for Mental Health and Mental

Retardation would also be disqualified from serving as advocates for RTC residents because they are state employees. The Department pointed out in response that the DHS no longer employs advocates who are employees of the RTCs. Advocacy services for the RTCs are now supplied by the Office of the Ombudsman, a separate, independent state agency, or LAPDD. Under the plain meaning of the phrase "direct or indirect financial interest," neither employees of the Office of the Ombudsman nor employees of LAPDD would properly be deemed to have any direct or indirect financial interest in the provision of services or supports by the state.

17. Barbara Jardano and Gray, Plant also allege that the restriction imposed by the proposed rule on who may serve as an advocate constitutes an unconstitutional prior restraint on speech. The definition of advocate does not affect any person's right to speak. As the Department emphasized at the hearing and in its post-hearing comments, the proposed rule would not preclude any license holder from actively promoting the interests of persons with developmental disabilities. The proposed rule instead affects the relationship between persons and the ability of one person to be recognized as a formal advocate and speak on another's behalf. Restricting those who may serve as formal advocates for developmentally disabled individuals is not an impermissible prior restraint.

18. A number of state and federal statutes and regulations were cited by Gray, Plant in support of its argument that the Department lacks statutory authority to place limitations on persons who may provide advocacy services. For the most part, these statutes and regulations protect various rights of persons with mental retardation or related conditions and reflect a public policy favoring personal autonomy and self-determination. The only statutory provision that directly involves access to advocacy services is Minn. Stat. § 144.651, subd. 30 (1992). That provision states:

> Patients and residents shall have the right of reasonable access at reasonable times to <u>any available</u> rights protection services and <u>advocacy services</u> so that the patient may receive assistance in understanding, exercising, and protecting the rights described in this section and in other law. This right shall include the opportuntity for private communication between the patient and a representative of the rights protection service or advocacy service.

(Emphasis added.)

In enacting this statute, the Legislature has expressed a clear intent to protect the rights of patients 1/ to choose any available advocate. The

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1/ The definition of "patient" in Minn. Stat. § 141.651, subd. 2 (1992), expressly references subd. 30 and includes persons receiving services under Rule 40.

statute does not limit in any way a patient's right to reasonable access to advocacy services. There is no intimation that advocacy services may be provided only by parties who are unrelated to the provider. Indeed, the statute mandates that patients be afforded reasonable access to "any available" advocacy services. Advocacy services offered by employees of providers certainly would be included within this description.

The Department's proposal to preclude employees of providers from serving as advocates when the employer-provider's services are being urged by the advocates clearly interferes with the patient's right to gain access to "any available . . . advocacy services" and thus is not consistent with Minn. Stat. 141.651, subd. 30 (1992). The Administrative Law Judge concludes that the last sentence of subpart 3 of the proposed rules is defective because it conflicts with Minn. Stat. § 144.651, subd. 30.

19. Sharon Todoroff, Elynn Niles, Barbara Jardano, ARRM, and Gray, Plant contended that it is neither needed nor reasonable to amend the definition of advocate to preclude certain individuals from being selected to serve as advocates. The Department indicated that it is aware of five cases in which a legal guardian requested information regarding the availability of advocates who were not affiliated with the provider in order to assist in conflict resolution. The Department maintains that the proposed rule is needed and reasonable to foreclose any possibility of a conflict of interest occurring and to prevent developmentally disabled persons and their families or legal representatives from being subjected to overreaching by providers. The Department did not provide any information suggesting that such overreaching has in fact occurred. DHS also argues that the proposed amendment is consistent with public policy favoring the making of informed choices by the developmentally disabled person "by facilitating a voluntary choice under circumstances void of the possibility of duress due to an existing conflict of interest." DHS' May 10, 1993, response at 8.

One advocate, Mary Rodenberg-Roberts, is employed by REM, Inc. (a provider subject to Rule 40). Ms. Rodenberg-Roberts testified that she has filed appeals against REM Minnesota or its affiliated companies on at least five separate occasions in order to prevent demission. Where a potential conflict of interest arose in the course of her advocacy with respect to Barbara Jardano's step-daughter, Ms. Rodenberg-Roberts advised Ms. Jardano of the conflict and gave her the choice of continuing the relationship or contacting other advocates.

As noted above, the Department has not cited any examples of improper actions taken by an advocate affiliated with a provider owing to a conflict of interest. The only demonstrated problem being addressed is a potential conflict of interest and the potential for undue influence that might ensue from such conflicts. Against these potentialities, the outcome of the Department's proposal is the actual preclusion of certain individuals from serving in the role of an advocate during the Rule 40 decision-making process. If there were some assurance that substitute advocates would be available, the proposed rule could perhaps be demonstrated to be reasonable. That is not the case, however. The evidence presented at the hearing demonstrated that "outside" advocates, i.e., advocates who are not affiliated with providers, are often not available and a backlog currently exists of persons seeking such advocacy services. For persons with an urgent need for

an advocate, the choice is often between an advocate affiliated with a provider or no advocate at all. It is not reasonable to preclude the designation of employee-advocates where there has been no showing of instances of undisclosed conflicts of interest or provider overreaching occur and where there is no readily obtainable substitute advocate for the patient. This defect is independent from the statutory conflict discussed at Finding 18, above.

20. To correct the defects in the proposed rule, the Department must delete the provision of the proposed rules which precludes persons affiliated with providers from serving in the role of advocate. The last sentence of the definition of "advocate" thus must be omitted. This deletion is required both by the conflict between the proposed rule and Minn. Stat. § 144.651, subd. 30 (1992), and the Department's failure to demonstrate that the proposed exclusion is needed and reasonable.

The Department has demonstrated that conflicts of interest may be harmful to patients. It is reasonable to ensure that developmentally disabled persons and their legal representatives are fully informed of potential conflicts of interest. Such a requirement does not interfere with the person's right to reasonable access to any available advocacy services recognized by Minn. Stat. § 144.651, subd. 30 (1992). Accordingly, the Administrative Law Judge suggests that Department replace the last sentence of subpart 3 with the language similar to the following in order to accomplish the goals of eliminating conflicts of interest and ensuring fully informed choices:

> Where an advocate or an advocate's employer has a direct or indirect financial interest in providing services or supports that the advocate is suggesting that the person with mental retardation or a related condition receive, the advocate must fully disclose the nature of the relationship and financial interest to the person and the person's legal representative.

The foregoing language addresses the Department's concerns over potential conflicts of interest and overreaching without infringing on the person's right to choose an advocate or denying the person the use of an available advocate. The suggested language is needed and reasonable. There is evidence in the record that this is the procedure presently followed by Ms. Rodenberg-Roberts. Since that procedure was discussed at the hearing and meets the demonstrated needs of the Department in a less restrictive fashion, the new language does not constitute a substantial change from the rules as originally proposed.

Subpart 12 - Deprivation Procedure

21. Subpart 12 of the existing rules defines "deprivation procedure" to mean "the planned delay or withdrawal of goods, services, or activities to which the person is otherwise entitled . . . ." The Department originally proposed to modify the existing definition by including language that allows the determination of deprivation to be based on individual criteria. Joan Oslund and Steve Anderson of Mount Olivet Rolling Acres objected to the subpart as replacing the industry definition of "deprivation procedure."

Elizabeth Carlson suggested that an objective definition be used rather than a subjective definition. Cheryl Peterson suggested that the current definition be retained. Dr. Richard Amado, Licensed Psychologist, opposed the definition and urged the Department to refer to industry standard language which defines deprivation procedures to encompass the withholding of a positive reinforcer prior to the occurrence of the behavior rather than after the occurrence of the behavior. Dr. Amado further suggested that deprivation be added to the list of controlled procedures and that punishment by loss be addressed in the rule.

At the hearing, the Department indicated that it proposed to modify the definition of "deprivation procedure" by deleting the proposed changes and retaining the current definition. In its post-hearing submission, the Department agreed with the commentators who urged that a more objective standard be utilized. While the Department and two experts contacted by the Department disagreed with Dr. Amado's opinion that industry-wide standards exist for the term "deprivation," the Department agreed that the language proposed by Dr. Amado would clarify the meaning of the term "deprivation." Thus, based upon its consideration of the testimony presented at the hearing and the comments filed following the hearing, the Department modified the definition to provide as follows:

> "Deprivation procedure" means the removal of a positive reinforcer following a response resulting in, or intended to result in, a decrease in the frequency, duration and/or intensity of that response. Often times the positive reinforcer available is goods, services, or activities to which the person is normally entitled. The removal is often in the form of a delay or postponement of the positive reinforcer.

The new language is needed and reasonable to clarify the meaning of "deprivation procedure." The modifications made by the Department were made in response to concerns of the commentators and do not constitute a substantial change from the rules as originally proposed.

Subpart 33a - Substantial Change

22. An entirely new definition of "substantial change" is proposed in subpart 33a. The term refers to changes in an individual program plan ("IPP") that intensify the intrusiveness of controlled procedures. The new language was generally supported by Anita Schermer, LAPDD; ARC Minnesota; Dr. Norm Weiseler, Licensed Psychologist; and Dr. Amado. LAPDD and ARC Minnesota suggested including as a substantial change the discontinuation of an adaptive program aimed at replacing behavior. The Minnesota Habilitation Coalition suggested that the proposed rule clarify that the target behaviors to which the rule refers are those that are directly related to the use of a controlled procedure and not any target behavior in the person's IPP. Sue Macek of Community Involvement Programs (CIP) asserted that deleting a target behavior from the IPP because the behavior has been dramatically reduced or has ceased should not require a renewed informed consent. Dan Reitz of TSE, Inc. objected to the requirement of an interdisciplinary team meeting and an updated informed consent in instances in which a target behavior has ceased.

The Department responded that, where target behaviors are discontinued and adaptive behaviors are not instituted, unforeseen problems can arise.

DHS' May 3, 1993, Response at 13. The unexpected results may involve changes in the frequency, intensity, or types of challenging behavior. Id. The interdisciplinary team must meet to assess the situation presented by the diminished target behavior and fashion an appropriate response. The definition of substantial change has been shown to be needed and reasonable.

Subpart 34 - Target Behavior

23. LAPDD suggested that the word "increase" be deleted from the definition of "target behavior" in subpart 34 to ensure that a consistent meaning of the term is employed throughout the rule. The Department agreed and modified the definition to read as follows:

> "Target behavior" means a behavior identified in a person's individual program plan as the object of efforts intended to reduce, or eliminate the behavior.

The subpart as modified is needed and reasonable to clarify the meaning of "target behavior." The modification made by the Department following the hearing does not result in a rule that is substantially different from that originally proposed.

Subpart 35 - Time Out or Time Out From Positive Reinforcement

24. Subpart 25 of the proposed rules amends the definition of "time out or time out from positive reinforcement" contained in the current rules. At the time of the rule hearing, the Department revised the proposed rule to include the language, "Time out periods are usually brief, lasting only several minutes," before the last sentence in subpart 35 (at page 8, line 22 of the proposed rules) and deleted this language from item B of subpart 35 (page 8, lines 31-32). The modification was made because this standard applies to both items A and B.

Sue Macek of Community Involvement Programs suggested that the rule include criteria to be used in returning persons from time outs to normal activities. Dr. Jim Chicone, Licensed Psychologist for Merrick Companies, suggested that it would be preferable if the interdisciplinary team defined the terms of release. The Department objected to specifying criteria for release from time out in this definition and questioned whether policies regarding criteria for release would be sufficiently sensitive to individual differences in persons' reactions to time out. The Department thus declined to modify the proposed rule in the fashion suggested by the commentators.

The proposed rules include a provision which provides some guidance regarding release criteria. See rule part 9525.2750, subpart 1(G) (discussed at Finding 35 below). The expanded interdisciplinary team must apply these criteria in each individual case when developing an approach toward using time outs. The Administrative Law Judge finds that the subpart, as modified, has been demonstrated to be needed and reasonable to clarify the meaning of time outs. The change made by the Department merely moves language included in the rules as originally proposed from one location in subpart 35 to another and does not constitute a substantial change.

Proposed Rule 9525.2720 - Exempted Actions and Procedures

25. Part 9525.2720 of the existing rules identifies a number of instructional techniques and intervention procedures that are not subject to the restrictions on aversive and deprivation procedures. The proposed rules amend the existing rule in several respects. As orginally proposed, the amendments to this rule part contained two sentences which required that the use of the exempted procedures be addressed in the person's individual program plan. Prior to the hearing, a commentator suggested that the redundant language should be deleted. The Department agreed with that suggestion and modified the proposed rules at the time of the hearing to delete the sentence which provided that "[u]se of these techniques and interventions must be addressed in each person's individual program plan."

Mount Olivet Rolling Acres submitted comments questioning whether each of the techniques listed in items A through H must be addressed in each individual program plan. The Department responded that an item need only be addressed where the interdisciplinary team determines that the specific procedure is necessary to meet the individual needs of the person. The Department declined to modify the proposed rule.

26. Item A of proposed rule 9525.2720 exempts "[c]orrective feedback or prompts to assist a person in performing a task or exhibiting a response." Dr. Eric Larsson, a licensed psychologist, suggested that the rule refer instead to assisting a person in performing "an adaptive activity." The Department responded that item A focuses on the strategy for teaching and instruction by the use of corrective feedback or prompts, and that the result of such instruction whould be increasing adaptive activities, as described in item B. Item A has been shown to be is needed and reasonable, as proposed.

27. Under item B, physical contact is exempt where it is used to facilitate the person's completion of a task or response and is directed at increasing adaptive behavior when the person does not resist or the person's resistance is minimal in intensity and duration. The Office of the Ombudsman for Mental Health and Mental Retardation suggested that the term "minimal intensity" be further defined to avoid inconsistent application of the rule. No definition was suggested by the commentator. Item C of the proposed rule specifies that, to be exempt, the person's behavior must be effectively redirected with less than sixty seconds of physical contact by staff. This outer limit should serve as an adequate guide to staff in gauging whether the person's resistance should be deemed minimal. Item B has been shown to be needed and reasonable, as proposed.

28. Item C identifies four instances where physical contact or a physical prompt to redirect behavior is exempt from the controlled procedure requirements: (1) where the behavior does not pose a serious threat to the person or others; (2) where the physical contact is needed to escort or carry a person to safety when the person is in danger; (3) where the behavior is effectively redirected with less than sixty seconds of physical contact by staff; or (4) where the physical contact is used to conduct necessary medical examinations or treatment. Merrick Companies and Community Involvement Programs asserted that the first and third subitems should be combined in one part in order to require that both circumstances are present before the contact is exempt. In its post-hearing response, the Department explained

that it had chosen to separate subitems (1) and (3) in distinct portions of the rule in order to aid in the understanding of the rule. Subitems 1 and 3 deal with distinct situations and have different intended outcomes. The Department has shown that it is needed and reasonable to retain subitems (1) and (3) as separate entries.

The Minnesota Habilitation Coalition commented that neither subitem (1) nor subitem (3) specified the type or purpose of the physical contact. The language contained at the beginning of item C indicates that the purpose of the physical contact must be to "redirect a person's behavior." The explanatory language at the end of item C further describes the purpose of the exemption. In essence, if an intermittent and infrequently occurring behavior can be redirected with minimal physical intervention, the physical contact is exempted from the controlled procedures requirements. The Office of the Ombudsman suggested that the term "danger" be clarified and recommended that the rules require that positive procedures be tried first with respect to medical appointments before resorting to physical contact. The Department did not specifically respond to these concerns in its post-hearing comments. While the Department should consider these remarks and may choose to clarify "danger" or provide for the prior use of positive procedures in the context of medical examinations, the rule is not rendered unduly vague or defective by failing to define "danger" or incorporate the medical examination suggestions. Item C has been shown to be needed and reasonable, as proposed.

29. The first sentence of item F of the existing rules states that exempted actions and procedures include the "[t]emporary withdrawal or withholding of goods, services, or activites to which a person would otherwise have access as a natural consequence of the person's inappropriate use of the good, service, or activity." As originally proposed, the Department modified the first sentence of item F to exempt the "[t]emporary withdrawal or withholding of goods, services, or activities to which a person would otherwise have access, that the person or the person's legal representative does not consider intrusive." TSE, Inc., Kim Keprios, Arc Hennepin, Sonja Kerr, and Elizabeth Carlson expressed concern about the proposed change and criticized the subjective approach as lacking adequate standards. Mount Olivet Rolling Acres and LAPDD suggested that the current rule language be retained and the amendment deleted. At the hearing, the Department modified the rules by withdrawing the proposed new language and relying upon the language in the existing rule. The existing language was shown to be needed and reasonable during a prior rulemaking proceeding. The modification is not a substantial change from the rules as proposed in the State Register.

30. The proposed rules include a new item H which would exempt "[m]anual or mechanical restraint to treat a person's medical needs, to protect a person known to be at risk of injury resulting from lack of coordination or frequent loss of consciousness, or to position a person with physical disabilities in a manner specified in the person's individual program plan." Cheryl Peterson and Elaine Morrison commented that the use of the term "medical needs" is inadequate because it is vague and subject to varying interpretations. Numerous other commentators, including Connie Gacks, Jackie Meir, Pat Thomas, Curt Bossert, Kathy Thurston, and Terry Morrison, suggested that the rule include a definition of "medical restraint" and set standards for the use of physical restraints due to medical conditions such as Alzheimer's Disease.

In its post-hearing comments, the Department responded that it intended by the use of the term "medical needs" to encompass general medical, health, and safety needs. In its post-hearing comments, the Department indicated that it would not be appropriate or possible to include an exhaustive list of all possible medical needs. The Department also declined to list the types of mechanical restraints which may be used because it feared that there would be a tendency to use the restraints identified in the rule in place of less restrictive techniques. The Department pointed out that there have been few requests for clarification of this standard in the past and that it has not received any calls or training questions regarding this standard.

Item H as proposed has been shown to be needed and reasonable to clarify the types of physical contacts that are exempt from the controlled procedures restrictions. The terms "medical needs" and "mechanical restraints" have common meanings which are generally understood by those regulated by the rule. The rule is not unduly vague as a result of the failure to further define or explain these terms.

Proposed Rule 9525.2730 - Procedures and Actions Restricted or Prohibited

31. Subpart 2 of part 9525.2730 of the proposed rules prohibits various actions and procedures including, in item H, the use of room time out in emergency situations. This prohibition was supported by Dr. Norm Weiseler, LAPDD, and ARC Minnesota. Terri Bauernfeind, Vicki Gerrits, Dan Reitz, Dr. Jim Chicone, and Midway Training Services objected to the prohibition. They asserted that room time out may be the least restrictive means to isolate the person from the agitating stimulus, regain control of the person's actions, and return the person to participation in the program. They further indicated that the prohibition against room time out may increase the use of manual or mechanical restraint.

In its SONAR, the Department stated that it was necessary and reasonable to add item H in order to assure compliance with federal regulations. SONAR at 13. The Department indicated that 42 C.F.R. § 483.450(c) prohibits ICFs/MR from placing a client in a time out room in an emergency situation. The Department noted that the use of time out has frequently been the source of confusion and concern and that it became aware during the public informational meetings that some people were unaware of the federal prohibition. Id. While the federal rule applies only to ICFs/MR, the Department in its post-hearing comments stressed that there is a need for consistency across service settings, including day training and habilitation services, in order to facilitiate consistency in programming for developmentally disabled persons. The Department further indicated that there was no data suggesting that the use of room time out would be effective in day training and habilitation services. While the federal prohibition does not apply to non-ICF/MR settings, the Department has shown that it is needed and reasonable to apply a consistent standard across service areas.

Proposed Rule 9525.2740 - Procedures Permitted and Controlled

32. Part 9525.2740 of the proposed rules identifies the procedures which are permitted under the rules when they are implemented in accordance with the controlled procedures requirements of the rules. As originally proposed, item A referred to "time out procedures." Dr. Eric Larsson of REM Consulting and

Services suggested that item A refer specifically to room time out and exclusionary time out in order to clarify that nonexclusionary procedures (such as chair time out or time out ribbon) are not controlled. At the public hearing, the Department proposed to modify item A in accordance with Dr. Larsson's suggestion. As modified at the hearing, item A of the proposed rules refers to "exclusionary and room time out procedures." The modification is necessary and reasonable to clarify that exclusionary and room time out procedures are deemed controlled procedures under the rule and to avoid confusion regarding the coverage of nonexclusionary procedures. The modification does not constitute a substantial change.

Proposed Rule 9525.2750 - Standards for Controlled Procedures

33. Part 9525.2750 of the proposed rules sets forth the standards and conditions applicable to use of a controlled procedure. The Governor's Planning Council on Developmental Disabilities objected to the Department's proposal to replace the word "shall" with "may" in subpart 1. The language proposed in the first sentence of that subpart reads as follows:

> Except in an emergency governed by part 9525.2770, use of a controlled procedure may occur only when the controlled procedure is based upon need identified in the individual service plan and is proposed, approved, and implemented as part of an individual program plan.

The Department responded that the use of "may" does not mean that the specified standards are permissive. The Department pointed out that the provision "clearly states that the use of controlled procedures may occur only if there is compliance with the standards set forth in items A through I. The intent of this provision is to mandate compliance with the standards, not to direct the use of a controlled procedure." The Department thus declined to modify the proposed rule.

The term "may" is sensitive in rule provisions because it may create unguided discretion on the part of the obligated party and result in inconsistent treatment of persons who are in similar situations. The use of the term "may" is permissible only where standards are established to limit discretion. Rule 40 specifies such standards by requiring that need be identified in the individual service plan and mandating that the controlled procedure be proposed, approved, and implemented as part of the individual program plan. Pursuant to the governing statute, the Department must not encourage or require the use of aversive or deprivation procedures. The use of the term "may" in subpart 1 avoids any implication that the use of controlled procedures is in any fashion required by the rules. The Department has demonstrated that subpart 1 is needed and reasonable as proposed since the provider's discretion to use controlled procedures is adequately limited by the rule.

34. Item F of subpart 1 of the proposed rules includes the following requirement:

> The license holder is responsible for providing ongoing training to all staff members responsible for implmenting, supervising, and monitoring controlled procedures, to

ensure that all staff responsible for implementing the program are competent to implement the procedures. The license holder must provide members of the expanded interdisciplinary team with documentation that staff are competent to implement the procedures.

A number of commentators, including TSE, Inc., Mount Olivet Rolling Acres, Brainerd Regional Human Services Center, Midway Training Services, and Cheryl Peterson, questioned the nature and extent of the documentation that would be required under the rule. In its post-hearing comments, the Department indicated that its primary concern is that the license holder maintain records demonstrating that training has been provided in compliance with the rule. The Department indicated that the manner in which license holders document training and maintain their records is up to them, and it is unnecessary for the Department to prescribe record-keeping practices. In addition, the Department pointed out that training needs will vary from license holder to license holder based on the individual needs of the persons served. Item F has been shown to be needed and reasonable.

35. Item G of subpart 1 sets forth time out procedures. The proposed rule specifies that, "when possible," the time out should be in the person's own room or common living area, rather than in a room used solely for time out. The person must, when possible, be returned from the time out to the activity from which he or she was removed once the time out is completed. Release from time out is contingent on the person stopping the behavior which intitiated the time out. If the behavior has not stopped, staff must attempt to return the person to an on-going activity at least every half-hour. If the person is in time out over thirty minutes, he or she must be offered access to drinking water and a bathroom. Placement in room time out must not exceed sixty consecutive minutes. Item G of the proposed rules also sets standards for time out rooms.

Mount Olivet Rolling Acres objected to requiring use of bedrooms for time out. The Department responded that expanded interdisciplinary teams have expressed a preference for the use of bedrooms or other common living spaces for exclusionary time out purposes and stressed that data regarding time out confirms that bedrooms and living areas provide a more normalized environment and have a greater calming effect than rooms used solely for time outs. The Department also pointed out that the proposed rules in essence retain language from the existing rules. The need for and reasonableness for this standard was previously demonstrated by the Department. The Department has shown that this provision is needed and reasonable.

The existing rule requires that persons in time out must be continuously monitored by staff. Dr. Larsson of REM Consulting & Services questioned what was meant by "continuous monitoring." The Department responded that both visual and auditory monitoring is required under that standard. Department Response at 27. This high standard is intended to ensure the protection of persons in time out. No one has shown that this level of protection is unnecessary or unreasonable.

Dr. Larsson also suggested several changes to the methods for release from time out to reduce the need for repeated travel to and from the location for time out. The Department declined to modify the rule since release

requirements are intended to be individualized and such tailoring will address Dr. Larsson's concerns. The DHS also indicated that data regarding the use of room time out has demonstrated that only three persons required time outs exceeding 60 minutes and none of those persons was in time out over 65 minutes. Department May 3, 1993, Response at 28. The Department concluded that other methods must be examined to control outbursts if the time out exceeds 60 minutes. Id. The limitations and standards on time out have been shown to be needed and reasonable.

TSE, Inc. suggested that two subitems, 4 and 6, conflict with each other. Subitem 4 indicates the time out must cease when the behavior ceases and that, if the precipitating behavior does not abate, staff members must attempt to return the person to an on-going activity at least every thirty minutes. Subitem 6 requires that the placement of a person in room time out must not exceed sixty consecutive minutes from the initiation of the procedure. The two provisions are not inconsistent since they address different aspects of time out procedures. The attempt to return the person to an ongoing activity at least once every 30 minutes has no relation to the maximum time limit placed on the length of time out. Item H is needed and reasonable as proposed.

36. Items H and I of the proposed rules sets forth standards for controlled procedures using manual and mechanical restraints. Such restraints are generally used to prevent persons from injuring themselves or others. Item H provides that, with respect to manual restraints, the persons's primary care physician must be consulted, the person must be given an opportunity for release from the restraint and for motion and exercise of the restricted body parts for at least ten minutes out of every sixty minutes, efforts to lessen or discontinue the restraint must be made at least every 15 minutes unless contraindicated, and the procedures must meet the other standards set forth in Rule 40.

Item I applies to mechanical restraints. The term does not include mechanical restraints used to treat a person's medical needs, protect a person known to be at risk of injury resulting from lack of coordination or frequent loss of consciousness, or positioning a person with physical disabilities in the manner specified in the individual program plan. See part 9525.2710, subpart 23. Where mechanical restraints are used, item I of the proposed rules also requires consultation with the person's primary care physician and compliance with the other standards set forth in Rule 40. It further provides that, where a mechanical restraint is used that restricts two or fewer limbs or does not restrict the person's movement, staff must check on the person every thirty minutes, the person must be given an opportunity for release from the restraint and for motion and exercise for at least ten minutes out of every sixty minutes that the restraint is used, and efforts to lessen or discontinue the restraint must be made at least every fifteen minutes. Where a mechanical restraint is used that results in restriction of movement or of three or more of a person's limbs, the above requirements apply as well as the additional requirement that a staff member remain with the person during the time the person is in mechanical restraint.

The need for standards was strongly supported at the hearing by persons who have been subject to the use of restraints. Manual and mechanical restraints are by their nature a significant invasion of a person's autonomy

and can only be justified by the need to prevent self-harm. The standards proposed by items H and I ameliorate the negative effects of the use of restraints by providing for frequent attempts to discontinue the restraint and opportunities for release and exercise during every hour the restraints are used. The rule also mandates staff checks or, in the event of severe mobility restriction, constant supervision by staff.

TSE, Inc. suggested that the opportunity for exercise requirement was unnecessary in light of the requirement that attempts be made to lessen or discontinue the restraint every fifteen minutes. The Department disagreed with this characterization. The rule's requirement that attempts be made to lessen the restraints do not require motion or exercise. In contrast, the exercise requirement restores full movement over a longer range of time. Requiring both standards is needed and reasonable to protect the health of persons in manual and mechanical restraints.

The Ombudsman's Office objected to the imposition of different standards for manual and mechanical restraints and urged that the continuous presence of staff be required in both instances. In its post-hearing comments, the Department emphasized that license holders and case managers had urged during the informational meetings held in 1991 that standards set forth in the rules should depend upon the restrictiveness of the restraint procedure. The Department responded that it was unnecessary to require the presence of staff where the person's mobility was not restricted since the person can seek out assistance if any is required. The Department has shown that differing staff supervision standards are needed and reasonable for manual and mechanical restraints. The differences between the standards are reasonably related to the differences in the levels of restraint.

Subpart 1a - Review and Approval by Expanded Interdisciplinary Team

37. Under subpart 1a of the rules as originally proposed, the expanded interdisciplinary team must review and approve the individual program plan when it proposes using a controlled procedure or when a substantial change is "made." LAPDD objected to the use of the word "made" and suggested using "proposed" instead. The Department responded that it had intended the interdisciplinary team review to be performed prior to the change and modified the subpart as suggested by LAPDD.

Terry Morrison, M.S. objected to this requirement for licensed foster care homes and asserted that the oversight presently existing at those sites is adequate to protect persons. The Department noted that few foster care sites use Rule 40 procedures, but all persons subject to controlled procedures needed the additional protection of review and approval by the expanded interdisciplinary team.

The subpart is needed and reasonable to protect persons subject to Rule 40 procedures. The change in language from "made" to "proposed" clarifies the application of the rule and does not constitute a substantial change.

Subpart 2a - Quarterly Reporting

38. Subpart 2a of the proposed rules requires license holders to submit data on a quarterly basis regarding the use and effectiveness of individual

program plans that incorporate the use of controlled procedures. The rule requires the license holder to submit a form provided by the Commissioner to the expanded interdisciplinary team, the internal review committee, and the regional review committee. Terri Bauernfeind of Partnership Resources opposed reporting to the regional review committee, but agreed that the interdisciplinary team and internal review committee should receive such reports. Barbara Rudlang echoed that sentiment and questioned whether the regional review committees could handle the review. Dr. Larsson, LAPDD, Dr. Weiseler, and the Woodvale Management Group expressed support for the reporting requirements, including the use of a standardized form. Mount Olivet Rolling Acres questioned whether it would be preferable for the rule to list what was expected to be encompassed in the report rather than to prescribe the use of forms.

The Department declined to modify the rule in response to these comments. The Department indicated that the duties of the regional review committee as specified in state statute include the review and monitoring of the use of aversive and deprivation procedures. Unless the committee is provided data regarding the effectiveness of these procedures, it will be unable to monitor the procedures or provide effective technical assistance. The use of forms is not, in itself, a defect. Well-drafted forms are an efficient method of transmitting information for compilation and analysis of data. Without a form, there is a likelihood that follow-ups will be required to obtain additional information and clarify ambiguities. Because the Department has outlined in the rule what information the forms will seek (the use and effectiveness of controlled procedures) and will draft the form, there is no problem with vagueness. The Administrative Law Judge concludes that proposed subpart 2a is needed and reasonable to ensure that data on the use and effectiveness of controlled procedures is submitted for monitoring by the appropriate groups.

Proposed Rule 9525.2760 - Requirements for Individual Program Plans Proposing Use of a Controlled Procedure

Subpart 2 - Assessment Information

39. As originally proposed, item C of subpart 2 required that the case manager obtain assessment information relating to "a baseline measure of the target behavior for increase and decrease or elimination that provides a clear description of the behavior and the degree to which it is being expressed, with enough detail to provide a basis for comparing the target behavior before and after use of the proposed controlled procedure . . . ." The Office of the Ombudsman for Mental Health and Mental Retardation suggested that the language in this rule part was confusing and should be clarified. The Department indicated that modifications made to the definition of "target behavior" should avoid some confusion in this area. The Department agreed, however, that the subpart was somewhat confusing and proposed in its post-hearing comments to modify item C as follows:

> C. a baseline measure of the behavior to be increased and the target behavior for decrease or elimination that provides a clear description of the behavior and the degree to which it is being expressed with enough detail

to provide a basis for comparing the behaviors to be increased and decreased before and after use of a proposed controlled procedure.

Subpart 2, item C is found to be needed and reasonable to clarify the nature of the assessment required during the development of an individual program plan that includes the use of a controlled procedure. The change made to item C was made in response to comments received during the rulemaking process, serves to clarify the rule provision, and does not constitute a substantial change.

Subpart 4 - Review and Content Standards

40. Subpart 4 of part 9525.2760 requires individual program plans that propose the use of controlled procedures to include particular elements. A number of commentators made suggestions regarding the language of the specific elements to be included. In particular, ARRM, Dr. Weiseler, and Midway Training Services objected to the specification in item F that the plan ensure that "direct on-site supervision of the procedure's implementation is provided by the professional staff responsible for developing the procedure" based upon a concern that the proposed rule might mandate the hiring of additional staff. The Department declined to modify item F. In its post-hearing comments, the Department explained that the proposed amendments do not require increased staffing but merely are aimed at requiring the person who developed the plan to make on-site visits in order to observe implementation of the plan. The frequency of the on-site visits would be determined by the QMRP, other members of the expanded interdisciplinary team, or the Internal Review Committee.

Although the Department declined to modify the rules in response to many of the comments, it did propose modifications to items A, D, and J. As modified, item A will require that "objectives designed to develop or enhance the adaptive behavior of the person for whom the plan is made, including the change expected in the adaptive behavior and the anticipated time frame for achieving the change" be included in the individual program plan. Item A as originally proposed referred to the change expected in the "target" behavior. The modification was made in compliance with the recommendation made by Dr. Eric Larsson. In addition, the first portion of item D was modified to refer to "strategies to decrease aspects of the person's target behavior," rather than simply referring to "behavior," in accordance with Dr. Larsson's comments. Finally, the Department modified item J to include additional language. As modified, item J will read as follows:

J. a description of how implementation of the plan will be coordinated with services provided by other agencies or documentation of why the plan will not be implemented by a particular service provider or in a particular setting.

This modification was also made in response to a suggestion by Dr. Larsson that item J be strengthened to require the use of the procedure in all settings or explain why the procedure is only required in certain settings.

The modifications to items A, D, and J were proposed at the time of the hearing. They were made in response to comments received prior to the hearing

and serve to clarify these provisions of the proposed rules. They do not constitute a substantial change from the rules as originally proposed. In its post-hearing comments, the Department adequately considered and explained the basis for its decision not to modify items A-K further in response to the numerous other comments which were submitted. The Department's failure to make these suggested modifications do not render items A-K unreasonable.

41. Item L of the proposed rules deletes the requirement in the current rules that informed consent must be obtained every 90 days and that use of the controlled procedure must terminate no more than 90 days after the date on which its use was authorized. The proposed rules instead provide that the projected date when use of the controlled procedure will terminate "must be no more than 365 days after the date on which use of the procedure was approved. Reapproval for using the procedure must be obtained at the intervals identified in the individual program plan, if evaluation data on the target behavior and effectiveness of the procedure support continuation."

A large number of commentators, including Elizabeth Carlson, Cheryl Peterson, Gloria Steinberg, Catherine Ranck, Eugenia Hedlund, the Governor's Planning Council on Disabilities, Dr. Amado, LAPDD, ARC Minnesota, ARC Suburban, and Sonja Kerr, expressed concern about the the Department's proposal to increase the required period for obtaining renewal of informed consent to use controlled procedures from 90 days to 365 days. These commentators maintain that a year is too lengthy a period of time to authorize the use of controlled procedures. Several other commentators, including Pattianne Casselton Gumatz, Hiawatha Homes, Jerry Mauer of Moose Lake Regional Treatment Center, Dr. Weiseler, and the Woodvale Management Group, supported the change to 365 days for obtaining renewed informed consent. These commentators stressed that the use of controlled procedures needs to be individually tailored and the focus should be on the person, not on paper deadlines. The Office of the Ombudsman suggested a compromise of a six-month period.

In its SONAR, the Department indicated that it discovered during the process of obtaining input from the regional review committees that,

> while 90 days is philosophically more desirable in terms of ensuring support for program continuance by the person or the person's legal representative, there was a general recognition that greater flexibility is needed when considering termination and reauthorization dates. . . . [T]he current 90-day authorization period may, in some cases, be too short and is unworkable, and in others too long. . . . As alternative [sic] for more feasible reauthorization periods, the consensus among members was a recommendation that the periods be individualized, but should never exceed 365 days."

SONAR at 27. The SONAR further emphasizes that "parents or guardians can still withdraw consent at will and can request reauthorization in intervals they feel warranted." Id. at 28. The Department introduced several charts at the hearing showing the infrequency of Rule 40 program changes or discontinuation and the lack of correlation between program change and the current requirement of obtaining informed consent every 90 days. The Department also stated that "those who testified in opposition to the change

from 90 days to the proposed language overlooked or failed to understand the phrase '**informed consent must be obtained as frequently as requested by the legal representative.**' The testimony presented at the hearing focused only on the one year requirement and predisposed that all IPPs will require only yearly informed consent." Department's May 3, 1993, Response at 50 (emphasis in original). The Department concluded from the information it gathered prior to the formulation of the proposed rules that a longer authorization period was reasonable, but that legal representatives should have the power to impose a shorter period to renew informed consent on a case-by-case basis. It declined to modify the proposed rules in response to the comments objecting to this amendment.

The Administrative Law Judge is not persuaded that the Department has established that the change from 90 days to 365 days is needed or reasonable. The record demonstrates that developmentally disabled persons and their parents and legal representatives are at a disadvantage in dealing with the professionals in Rule 40 matters. There is a tendency in regulated matters to use a standard expressed in a rule as the appropriate standard, regardless of the intent underlying the rule. 2/ The 90-day standard is needed and reasonable to ensure that the legal representative is aware of the nature of the controlled procedures that are authorized to be used and is giving informed consent to the continued use of those procedures. Given the serious nature of the procedures used under Rule 40, a less stringent requirement raises the potential for unnecessary or inappropriate use of controlled procedures. Only by requiring frequent renewal of the informed consent by the legal representative can there be assurance that the individual knows that such consent can be denied. As Dr. Amado noted,

> [G]iven the protective nature of this rule, I believe it is appropriate to meet every 90 days. If these procedures are working, the program will need to be changed to reflect the evolution of the individual being served; if the procedures are not working, they should not be

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2/ The Department itself recognized in the SONAR that no current programs vary the 90-day time period suggested in the existing rules, even though the current rules specify that the date on which the controlled procedure terminates must be "no more than 90 days" from the date on which it was approved:

> [N]ot one program has been submitted to the Regional Review Committee which utilized controlled procedures terminated before 90 days. This may illustrate that legally authorized representatives and other interdisciplinary team members do not take into consideration more frequent termination and reauthorization time periods.

SONAR at 28.

continued. There is no such thing as maintenance with aversive procedures. I believe this proposed change in the rule is a reflection of systemic resignation regarding the potential for reducing our dependence on aversive control.

ARC Minnesota similarly stressed that implementation of Rule 40 programs "should be for the shortest possible periods, not the longest. If an aversive program is not showing results, it should be terminated. The goal is positive programming."

The Administrative Law Judge concludes that the proposed 365-day informed consent period has not been shown to be either needed or reasonable. A quarterly report is already being required which is to be submitted to the person's legal representative, as a member of the expanded interdisciplinary team. There would be no significant additional burden if the informed consent document were appended to the quarterly report. Indeed, because the quarterly report will provide current information on the use and effectiveness of controlled procedures, it would be a logical time to require consideration of whether informed consent should be renewed.

Suggestions for curing this defect in the proposed rules are discussed in Finding 46 below.

Proposed Rule 9525.2770 - Emergency Use of Controlled Procedures

42. Existing rule part 9525.2770, subpart 3 provides that the emergency use of a controlled procedure shall not continue for more than 15 days and requires that, within 15 days of the emergency use, the interdisciplinary team evaluate whether the individual habilitation plan requires modification. The proposed rules repeal subdivision 3. Dr. Amado, LAPDD, Gloria Steinberg of Advocating Change Together, the Ombudsman's Office, ARC Minnesota, and Kim Keprios of Hennepin County expressed concern that the deletion of the time limit would result in the improper emergency use of controlled procedures. The Department indicated that the deletion of the time limit was unintentional and proposed adding a new item F to subpart 5 reinstating the fifteen-day limit on emergency use of controlled procedures that is contained in the existing rule. As proposed, item F would provide that "[u]se of a controlled procedure initiated on an emergency basis according to subpart 2 must not continue for more than 15 days." Item F of subpart 3 is needed and reasonable and does not constitute a substantial change.

43. Prior to the hearing, Merrick Companies pointed out that subpart 5, item E appeared to conflict with proposed rule 9525.2750, subpart 1. The Department agreed with the comment and proposed at the hearing to modify item E to conform to the proposed language in part 9525.2750, subpart 1. As modified, item E specifies that "the standards in part 9525.2750, subpart 1, items F, G(1)-(5), H and I must be met when controlled procedures are used on an emergency basis." The new langauge has been shown to be needed and reasonable and does not constitute a substantial change.

Subpart 6 - Reporting and Reviewing Emergency Use

44. The proposed changes to subpart 6 require that, after emergency use of controlled procedures, the staff member must report the use in writing to

the qualified mental retardation professional ("QMRP") designated to review, document, and report emergency use of controlled procedures. Item A of the existing rules allows a three-day period for such reporting. The Ombudsman's Office and LAPDD urged that the reporting be required at the end of the staff member's shift or, at the latest, twenty-four hours after the emergency use occurred. The Department indicated that the regional review committees have reviewed information going back to 1987 which indicates that staff have difficulties in immediately documenting emergency actions due to other pressing responsiblities. The data underpinning this conclusion was not entered into the rulemaking record, but the three-day reporting period is already contained in the existing rule. The proposed rules are not rendered defective by retaining the three-day reporting period.

45. The proposed rules modify item B of subpart 6 to require the QMRP to review the staff member's report on the emergency use of a controlled procedure and transmit the report to the person's case manager and the interdisciplinary team. If the controlled procedure meets certain standards, the report must also be sent to the internal review committee. These transmittals must occur within seven calendar days of the emergency use. LAPDD suggested requiring that these reports be filed within 48 hours and adding the regional review committee to the list of those who will receive the report. The Department disagreed with the shorter time limit as being too restrictive to allow for other demands on staff time. The Department also suggested that the shorter timeline would prove counterproductive by rushing the review and not allowing for adequate analysis. The Department did, however, modify item E to require that the regional review committee receive the staff member's report.

As originally proposed, item C of subpart 6 requires the case manager to confer with members of the expanded interdisciplinary team within seven calendar days after the date of the emergency use of a controlled procedure. Several commentators expressed concern about the time period specified in the proposed rule. In response to these concerns, the Department modified item C at the hearing to clarify that the case manager must confer with the team members within seven calendar days after the "date of receipt of the emergency report." The subpart, as modified, is needed and reasonable to ensure that the emergency incident is discussed in a prompt manner. The modification does not constitute a substantial change from the rule as originally proposed.

As originally proposed, subpart D of the proposed rules required that an expanded interdisciplinary team meeting be conduct within 30 calendary days after an emergency use if it is determined that the behavior should be identified in the individual program plan for reduction or elimination. Merrick Companies and TSE suggested modifications to this item. LAPDD recommended that the language of the existing rule be retained. At the hearing, the Department proposed modifications to subpart D to clarify that a meeting of the team is required only if it is determined that a controlled procedure is necessary as part of the individual program plan. As modified, item D indicates that the meeting must be conducted within 30 days "if it is determined that a controlled procedure is necessary and that the target behavior should be identified in the individual program plan for reduction or elimination." The modification is responsive to comments received during the rulemaking proceeding, clarifies the itent of the rule provision, and does not constitute a substantial change from the rules as originally proposed.

Merrick Companies and Dr. Larsson suggested that the timelines contained in items B and C created a potential conflict. Item B requires the QMRP to review the report of the staff person who implemented the emergency procedure within seven calendar days after the date of the emergency use and ensure that the report is sent to the case manager and expanded interdisciplinary team for review. Item C as originally proposed requires the case manager to confer with members of the expanded interdisciplinary team within seven calendar days "after the date of the emergency reported in item A . . . ." The Department agreed with the commentators and modified item C to change the starting time from "seven days after the date of the emergency" to "seven days after the date of receipt of the emergency report." The rule, as modified, is needed and reasonable. The modification corrects a potential problem with the time limits set forth in the rules and does not constitute a substantial change.

Proposed Rule 9525.2780 - Requirements for Obtaining Informed Consent

46. Subpart 2 requires that "[i]nformed consent must be obtained as frequently as requested by the legal representative, but must never exceed one year." Subpart 4, item K similarly provides that consent automatically expires "as specified in the individual program plan and as determined by the person or the person's legal representative, but must never exceed one year." These amendments are derived from the proposed change for informed consent that was concluded to be defective in Finding 41 of this Report, and are found to be defective for the same reasons.

In order to correct the defects found in parts 9525.2760, subpart 4, item L, and part 9525.2780, subparts 2 and 4.K., as set forth in this Finding and in Finding 41 above, the Department must take one of two approaches. First, the Department may retain the 90-day informed consent standard and withdraw the proposed new language by making the following modifications to each rule provision:

1. The second and third sentences of part 9525.2760, item L should be revised to provide as follows:

> The projected termination date must be no more than 90 days after the date on which use of the procedure was approved. Reapproval for using the procedure must be obtained at 90-day intervals, if evaluation data on the target behavior and effectiveness of the procedure support continuation.

2. Part 9525.2780, subpart 2 should be revised following item A as follows:

> B. a controlled procedure for which informed consent has expired. Informed consent must be obtained every 90 days in order to continue use of the controlled procedure;
>
> C. a substantial change in the individual program plan.
>
> If the case manager is unable to obtain written informed consent, the procedure must not be implemented.

3. Part 9525.2780, subpart 4, item K(1) and (2) should be revised as follows:

K. an explanation that:

(1) consent is time limited and automatically expires 90 days after the date on which consent was given;

(2) informed consent must again be obtained in order for use of a procedure to continue after the initial 90-day period ends. . . .

(3) the legal representative may request additional information related to parts 9525.2700 to 9525.2810 and must be provided a copy of the signed informed consent form by the case manager after it is received.

In the alternative, because the Department did support by affirmative presentation of fact the need for and reasonableness of affording the option of establishing a time frame shorter than 90 days, the Department may choose to retain the 90-day standard but also incorporate portions of its new language which permit the setting of a time period of less than 90 days. In order to take this approach, the Department would need to make the following modications:

1. The second and third sentences of part 9525.2760, item L should be modified as follows:

The projected termination date must be no more than 90 days after the date on which use of the procedure was approved. Reapproval for using the procedure can be given at 90-day intervals or at more frequent intervals identified in the individual program plan, if evaluation data on the target behavior and effectiveness of the procedure support continuation. Informed consent must be obtained at least every 90 days under part 9525.2780.

2. Part 9525.2780, subpart 2 should be revised after item A as follows:

B. a controlled procedure for which informed consent has expired. Informed consent must be obtained every 90 days in order to continue use of the controlled procedure; or

C. a substantial change in the individual program plan.

Informed consent must be obtained as frequently as requested by the legal representative, but must never exceed 90 days. The frequency for obtaining informed consent must be identified in the individual program plan in order to continue use of the controlled procedure. If the case manager is unable to obtain written informed consent, the procedure must not be implemented.

3. Part 9525.2780, subpart 4, item K should be revised as follows:

K. an explanation that:

(1) consent is time limited and automatically expires as specified in the individual program plan and as determined by the person or the person's legal representative, but must never exceed 90 days;

(2) informed consent must again be obtained in order for use of a procedure to continue after the initial consent period ends; and

(3) the legal representative may request additional information related to parts 9525.2700 to 9525.2810 and must be provided a copy of the signed informed consent form by the case manager at least quarterly or more frequently as specified int he individual program plan.

Either option has been shown to be needed and reasonable. The modifications would cure the defects in the proposed rules and would not constitute a substantial change.

47. Luther Granquist of the Minnesota Disability Law Center pointed out a citation error in subpart 7 of proposed rule 9525.2780. The Department determined that there had been a typographical error in the subpart and modified the provision to refer to the proper citation (Minnesota Statutes, section 256.045, subdivision 4a). The modification corrects an error in the rule and is not a substantial change.

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

CONCLUSIONS

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

2. The Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a, and 2 (1992), and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

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) (1992), except as noted in Finding 18 above.

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) (1992), except as noted at Findings 19, 41 and 46 above.

5. The additions and amendments to the proposed rules which were suggested by DHS 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 (1992), and Minn. Rule 1400.1000, subp. 1 and 1400.1100 (1991).

6. The Administrative Law Judge has suggested action to correct the defects cited at Conclusions 3 and 4 as noted at Findings 20 and 46.

7. Due to Conclusions 3, 4 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3 (1992).

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 11th day of June, 1993.

Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Transcript prepared by Angela D. Sauro
Court Reporter
Kirby A. Kennedy & Associates
(one volume)