STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARING

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Department of Human Services Rules Governing Child Protective Services, Minnesota Rules, Part 9543.0100 and Parts 9560.0210 - 9560.0234

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:00 a.m. on February 23, 1993 in Rooms 1A and 1B at the Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota. The hearing was held pursuant to an Order for Hearing dated December 3, 1992.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1992) to hear public comments, determine whether the Minnesota Department of Human Services (Department) has fulfilled all relevant substantive and procedural requirements of statute and rule applicable to the adoption of rules, determine whether the proposed rules are authorized, 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.

Robert V. Sauer, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Department. The Department's hearing panel consisted of Erin Sullivan Sutton, Supervisor of Early Intervention/Child Protection, Family and Children's Services Division, Early Intervention/Child Protective Services Section; Susan Stoterau, Protective Services Program Advisor, Family and Children's Services Division, Early Intervention/Child Protective Services Section; Jerry Kerber, Licensing Manager, Division of Licensing, Applicant Background Study and Investigative Unit; and Stephanie Schwartz, Rulemaker, Rules Division. Approximately 20 persons attended the hearing; 14 persons signed the hearing register. The hearing continued until all interested persons, groups, and associations had an opportunity to be heard concerning the adoption of the Department's proposed rules.

The record remained open for the submission of written comments until March 15, 1993, 20 calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five business days were allowed for the filing of responsive comments. At the close of business on March 22, 1993 the rulemaking record closed for all purposes.

The Department of Human Services 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 Department of Human Services of actions which will correct the defects and the Department of Human Services may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Department of Human Services may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Department of Human Services 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 Department of Human Services elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Department of Human Services may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Department of Human Services 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 Department of Human Services 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 November 19, 1992, the Department filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes.
(b) The Order for Hearing.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
(e) The Statement of Need and Reasonableness (SONAR) and a Fiscal Note.
(f) A Statement of Additional Notice.

2. On Monday, January 4, 1993, a Notice of Hearing and a copy of the proposed rules were published at 17 State Register 1693-1704.

3. On December 30, 1992, 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. Ex. 5.

4. On January 28, 1993, the Department filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) An Affidavit of Additional Notice.
(e) The names of departmental personnel who would represent the Department at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
(f) A copy of the State Register containing the proposed rules.
(g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 15 State Register 2192-2193 on April 1, 1991 and a Notice of Intent to Solicit Outside Opinion published at 16 State Register 2412-2413 on Monday, May 4, 1992, and copies of those Notices.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing, and thereafter until this Report was issued.

5. The period for submission of written comment and statements remained open through March 15, 1993 the period having been extended by order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on March 22, 1993, the fifth business day following the close of the initial comment period.

6. Minn. Stat. § 14.115, subd. 2 provides that state agencies proposing rules affecting small business must consider methods of reducing adverse impact on those businesses. As the Department asserted, however, the rules proposed in this proceeding will not have any adverse impact on small businesses. SONAR at 34. Moreover, the rules are exempt from the small business considerations in the statute. Under Minn. Stat. § 14.115, subd. 7(2), "agency rules that do not affect small businesses directly, including, but not limited to, rules relating to county or municipal administration of state and federal programs" are exempt from statutory small business requirements. The rules proposed in this proceeding do not affect small businesses directly and relate to county administration of state programs. Hence, they are exempt from small business considerations.

7. Minn. Stat. § 14.11, subd. 1 requires the preparation of a fiscal note when local public bodies are required to spend $100,000 in either of the two years immediately following the adoption of rules. The Department prepared a fiscal note estimating that the proposed rules will require total expenditures of $36,676 by local public bodies. Because the costs to local public bodies are less that $100,000 in either of the two years following promulgation of these rules, no fiscal note was required under the statute, and the Department, by preparing one, fully met its requirements.

8. Under Minn. Stat. § 14.11, subd. 2 (1992), agencies which propose rules having a "direct and substantial adverse impact on agricultural land" must comply with the provisions of Minn. Stat. §§ 17.80 to 17.84. The rules proposed in this proceeding do not directly or indirectly impact agricultural lands. Therefore, the provisions of Minn. Stat. §§ 17.80 to 17.84 are inapplicable.

9. The Department supported its proposed rules with a Statement of Need and Reasonableness which was primarily relied upon as its affirmative presentation of fact in support of the need and reasonableness of the rules. Due to the nature of these rules, and the preponderantly favorable support they received from interested persons, the Administrative Law Judge will not comment on any rule part which didn't receive critical comment or otherwise requires no discussion. Any rule not discussed in this Report is found to be needed and reasonable on the basis of the Department's SONAR, its verbal presentation at the hearing, and its post-hearing comments. During the course of this proceeding, the Department proposed some changes in the language of the rules as originally published. Any changes in the rules that are not specifically discussed in this Report were shown to be necessary and reasonable and none of those changes constitute a substantial change in the rules for purposes of Minn. Stat. § 14.15, subd. 3 and Minn. Rules, pt. 1400.1100 (1991).

10. Some commentators addressed rules the Department didn't propose to change. Those comments are not discussed because the Department generally has the discretion to determine which rules require change. The Department generally is not required to establish the need and reasonableness of rules that have already been promulgated. Also, unless other changes in the rules substantially change the meaning or impact of existing rules, the Department is not required to establish the need and reasonable for not changing existing rules. Thus, where commentators suggested a rule change which the Department did not consider, and where the Department failed to offer a proposed rule change or amendment, the Department will generally be deemed to have exercised its discretion in rejecting the proposal. The Department will not be required to establish the need and reasonableness of rules that are not changed absent some showing that the meaning or effect of existing rule provisions has been substantially changed by other amendments.

Statutory Authority

11. In its Hearing Notice the Department cited Minn. Stat. §§ 256.01, subds. 2 and 12; 256E.05, subd. 1; 257.175; and 393.07 as its authority for the rules and rule amendments proposed in this proceeding. Minn. Stat. § 256E.05, subd. 1 (1992) states:

> The commissioner of human services shall supervise the community social services administered by the counties through standard-setting, technical assistance to the counties, approval of county plans, preparation of the state biennial plan, evaluation of community social services programs and distribution of public money for services. The commissioner shall establish minimum administrative and service standards for the provision of community social services by county boards of commissioners, by the promulgation of a permanent administrative rule under chapter 14.

For purposes of the statute, community social services include a vast array of services provided or arranged for by county boards. Minn. Stat. §§ 256E.03, subd. 2 and 256E.08, subd. 1. Under Minn. Stat. § 256E.08, the community social services county boards must provide "include protection aimed at alleviating urgent needs of each person by determining urgent need, shielding persons in hazardous conditions when they are unable to care for themselves, and providing urgently needed assistance. . . ." Minn. Stat. § 256E.08, subd. 1(3) (1992). Community social services must be provided to families with children under age 18 "who are experiencing child dependency, neglect or abuse", including pregnant adolescents and adolescent parents under age 18, as well as emotionally disturbed children and adolescents unable to provide for their own needs. Minn. Stat. § 256E.03, subd. 2(1) and (5). Minn. Stat. § 257.175 elaborates on the Commissioner's duties toward children. It states:

> It shall be the duty of the commissioner of human services to promote the enforcement of all laws for the protection of defective, dependent, neglected, and delinquent children, to cooperate to this end with juvenile courts and all reputable child-helping and child-placing agencies of a public or private character, and to take the initiative in all matters involving the interests of such children where adequate provision therefore has not already been made. . . .

12. Under Minn. Stat. § 256.01, subd. 2(3) the Commissioner is required to administer and supervise all child welfare activities in the State and to promote the enforcement of laws protecting handicapped, dependent, neglected, and delinquent children. Under Minn. Stat. § 256.01, subd. 12, the Commissioner is authorized to require county agencies to establish local child mortality review panels and establish procedures those review panels must follow in reviewing the deaths of children in the State. Under Minn. Stat. § 393.07 county welfare boards must administer a program of social services and financial assistance to implement the child protection, delinquency prevention and family assistance responsibilities of the State. This system, known as the Public Child Welfare Program, is supervised by the Commissioner pursuant to statutes and rules promulgated by the Commissioner. The purpose of the program is to assure protection for and financial assistance to children experiencing social, physical, or emotional problems requiring protection or assistance. Although not cited in the Department's hearing notice, the Commissioner also has authority to adopt rules relating to the county licensure of family day-care homes and foster care homes under Minn. Stat. § 245A.09.

13. Because the Administrative Law Judge is not authorized, in this proceeding, to determine whether or not the Department had statutory authority to promulgate rules that already have been adopted, review of the Department's statutory authority in this proceeding is exceedingly limited. The Department need only establish authority to adopt new requirements. Grammatical changes in the rules and clarifications of existing rules, which do not change the substance of the rule, are not considered. Given the substantial authority the Commissioner of Human Services has to regulate the provision of community social services as noted in the statutes referenced above, and in view of the rulemaking authority granted to the Commissioner in Minn. Stat. § 256E.05, subd. 1, it is concluded that the Department has established its statutory authority for the rules and rule amendments proposed in this proceeding.

Introduction

14. Child welfare and protection matters are the responsibility of the Commissioner. To carry out her statutory obligation to supervise and provide for such services, the Commissioner has delegated to county agencies much of the responsibility for dealing with child welfare matters. County welfare agencies are required by statute to provide these services in accordance with rules adopted by the Commissioner. The proposed rules are offered for the purpose of incorporating statutory changes occurring in the various child welfare acts between 1989 and 1991. As a result of legislative changes, county agencies have sought direction from the Department with respect to the interpretation of its present rules. SONAR at 2. The proposed rules seek to achieve consistency between departmental rules, statutes and departmental policy directives. They also attempt to address areas which previously were not considered or are vague. In sum, the proposed rules are an attempt to implement statutory changes and policy directives and to provide county agencies with more substantial and clearer guidelines for the provision or child protective services.

15. Apart from an insignificant change to Part 9543.0100, the amendments all involve Parts 9560.02214 through 9560.0232, which is commonly referred to as "Rule 207." The amendments relate to definitions, basic requirements imposed upon county agencies regarding the receipt of maltreatment reports, county responses to reports of infant medical neglect, responses to reports of maltreatment within the family unit or in a facility, coordination of activities with law enforcement agencies and state licensing agencies, child interviews, protective intervention on behalf of children, placement preferences for children at risk, information to reporters of maltreatment, protective services provided to children, and the establishment of child mortality review panels.

16. 9560.0214, subp. 5. This rule currently defines a "child protection worker" as a "social worker" who provides protective services or supervises social workers who do. The Department proposes to amend the definition to delete the reference to social workers. As amended, subpart 5 states:

> "Child protection worker" means an employee of a local agency who is responsible for providing child protective services.

The purpose of the amendment, from the Department's perspective, is to make it clear that child protection workers need not be social workers. The Department argued that the amendment is reasonable because many currently employed child protection workers are not licensed social workers. SONAR, at 3. The Department has not required counties to employ licensed social workers as child protection workers and desires to eliminate the reference to social workers to avoid confusion.

17. During public testimony, several individuals spoke in opposition to the proposed change in the definition of a child protection worker. For example, Ms. Judith Woitas stated that allowing "non-social workers to take on child protection responsibilities is not in the best interest of the people and communities who count on and expect quality human service." Public

Ex. 5. Beth Koskie of the Greater Minneapolis Day Care Association also expressed concern that the proposed change in the definition will result in lower minimal qualifications for child protection workers. Public Ex. 9. C. David Hollister, president of the Minnesota Conference on Social Work Education, stated that the proposed change "would act to reduce the quality of child protection services". Public Ex. I. Similar sentiments were expressed by Allan W. Ingram, Executive Director of the National Association of Social Workers, Minnesota Chapter; Jean K. Quam, University of Minnesota; William Anderson, Chair of the Department of Social Work, Mankato State University; Thomas M. McSteen, Executive Director of the State Board of Social Work; Audrey Saxton and Jodee Kulp. The Department reiterated its position that the change in the definition will not change present hiring requirements for child protection workers. The Department recognized that minimum qualifications for child protection workers are desirable. However, these rules are not designed to establish qualifications for child protection workers and the proposed amendment is not intended to affect existing hiring requirements.

18. The Department demonstrated the need and reasonableness of the proposed change in the definition of child protection workers. The inference to be drawn from the present rule is that a child protection worker must be a "social worker". However, Minn. Stat. § 148B.27 provides that those purporting to be "social workers" must be licensed by the Board of Social Work. The proposed rule is reasonable because it seeks to make the definition of child protection worker consistent with the licensing statute. The language of the current rule is in conflict with Minn. Stat. § 148B.28, subd. 4, which makes the licensing of city, county, and state agency social workers voluntary. It is necessary and reasonable to remove this conflict. An administrative agency cannot change statutes in its rules. McGuire Viking Tool and Die, 258 Minn. 336 104 N.W.2d 519 (1960).

19. Some commentators suggested the idea of establishing regional child protection teams. In its post-hearing comments, the Department noted that counties are not prevented from establishing such teams and may wish to share expertise and knowledge in "regional" multi-disciplinary child protection teams established pursuant to statute or in "regional" local child mortality review panels established under Minn. Stat. § 256.01, subd. 12(b). The Department encourages the sharing of information between counties.

20. The rule defining child protection workers as social workers was initially proposed on April 4, 1988. 12 S.R. 2180. The rule was adopted in August, 1988 (13 S.R. 303), and codified as Minn. Rules, pt. 9560.0214, subp. 5 (1987 Supp.). Before the rules were amended to define child protection workers as "social workers", the legislature had created a Board of Social Work and required the licensure of social workers. See, 1987 Minn. Laws, c. 347 art. 2, §§ 1-11, codified Minn. Stat. §§ 148B.18 - 148B.28.

21. The new social worker licensing law was enacted before the 1988 rule change equating child protection workers and social workers. This suggests that when the rule was promulgated, the Department intended its use of the words "social worker" to mean a person licensed under Minn. Stat. § 148B.18. However, the Statement of Need and Reasonableness prepared in connection with the 1988 amendments to the rule is not available and it appears that the Department intended to use "social worker" generically and not as "words of art" restricted to those persons licensed as social workers. This is evinced by the language in Section 148B.28, subd. 4, which provides that the licensure

of city, county, and state agency social workers is voluntary and that city, county, and state agencies are not required to employ social workers and cannot require their social worker employees to be licensed. Also supporting this construction is the language in Minn. Stat. § 626.559, subd. 1, which was enacted in 1985. It provides, in part:

> The commissioner of human services, for employees subject to the Minnesota merit system, and directors of county personnel systems, for counties not subject to the Minnesota merit system, shall establish a job classification consisting exclusively of persons with the specialized knowledge, skills, and experience required to satisfactorily perform child protection duties pursuant to section 626.556, subd. 10, 10a and 10b.

Under this statute, the Commissioner's authority to establish the necessary qualifications of child protection workers is limited to employees subject to the Minnesota Merit System. Employees not subject to that system are governed by the qualifications adopted by the directors of county personnel systems. The adoption of minimum requirements for persons subject to the Minnesota Merit System is not made pursuant to a rulemaking proceeding but is made and published as part of the Human Services Merit System Manual, which is submitted to the Merit System Council for review and recommendations prior to adoption by the Commissioner. See Minn. Rules, pt. 9575.1550 (1991).

22. In its initial post-hearing response to public comments, the Department noted that under the Minnesota Merit System, a person must have a Bachelor's degree with a major in social work, psychology, sociology, or other closely-related field in order to qualify as a child protection worker. If the Commissioner desires to change those qualification, she must do so following the procedures in part 9575.0010 et seq., which governs the Minnesota Merit System, and not in this proceeding. Accordingly, it is concluded that while many of the commentators raised legitimate concerns about the desirability of having highly trained child protection workers, the issues raised by those commentators are outside the scope of this proceeding, and that the Department's proposed amendment is necessary and reasonable.

23. 9543.0100, subp. 12a. This rule defines the words "Indian child." The proposed definition states that the words mean "an unmarried person under the age of 18 who is either a member of or eligible for membership in an American Indian tribe." The definition is necessary because different requirements apply to the placement of Indian children than children of a minority race or minority ethnic heritage. The proposed definition is consistent with federal and state laws. See SONAR at 4.

24. Mr. Thomas Cobb, Child Protection Supervisor for Becker County Human Services, stated that the proposed definition clearly conflicts with Minn. Stat. § 260.181, subd. 3. Under that statute, the declared policy of the state is to ensure that the best interests of children are met by giving due consideration to the child's race and ethnic heritage in foster care placements. The statute further describes the process that must be followed in placing a child consistent with that policy. As noted by the Department, however, Mr. Cobb did not explain how the proposed definition conflicts with the cited statute. Because no conflict is apparent on its face, it is concluded that the definition proposed is necessary and reasonable.

25. Part 9560.0216 contains the basic requirements for the provision of protective services to children. The Department proposes to amend this part in several ways. The rule currently addresses emergency assessments but contains no provisions for nonemergency situations. The Department has proposed amendments to distinguish between the services that must be provided when no imminent danger exists to a child and services that must be provided in cases of imminent danger.

26. 9560.0216, subp. 1a. This rule contains new language regarding the services counties must provide when no imminent danger to a child exists. In nonemergency situations, it provides that the cost of any child placement will be borne by the county where the child resides regardless of the child's location at the time the services are deemed necessary. It is reasonable to require the county where the child resides to pay the cost of nonemergency care because counties of residence generally are responsible for providing child welfare services to its residents. Putting the burden of providing services on the county of residence will not create any risk for the child. The first paragraph of subpart 1a, which reflects the Department's current practice, was shown to be necessary and reasonable.

27. Eunice Smith, commenting on behalf of Adults & Children's Alliance, stated that the first paragraph of subpart 1a could cause confusion in cases where a child receives day care services in a county other than the county in which the child resides. If an investigation involves a child care facility Ms. Smith stated that it is unclear which agency would be responsible for the individual children. Public Ex. J. However, as the Department noted, in a situation of no imminent danger the county where the child physically resides is required to provide services. The language of the rule is clear.

28. 9560.0216, subp. 1 A. and B. As originally proposed items A and B required one local agency to request another to provide protective services in a situation of no imminent danger if it received a report of maltreatment involving a family member employed by the local agency or a board member of the local agency. In other situations of no imminent danger, local agencies were authorized to request other local agencies to assist in assessments.

29. Several individuals objected to item A because it required referral to another county in "politically sensitive" cases. In their view, the local agency is in the best position to determine whether a referral is appropriate. See Public Exs. 2, 3, and 4. In its initial post-hearing comment, the Department decided to allow local agencies to decide for the themselves when, because of a "conflict of interest", another local agency should be requested to provide protective services. The Department's Social Services Manual, XVI - § 4200, currently makes referrals discretionary when there is a conflict of interest. Permitting counties to have discretion in referring cases to another county when conflicts of interest arise is necessary and reasonable, and the change in item A to grant such discretion to counties does not constitute a substantial change for purposes of Minn. Rules, pt. 1400.1100 (1991).

30. The Department also proposes not to adopt item B as originally published. Under item B, local agencies were authorized to request another local agency to assist in an assessment in situations of no imminent danger. In explaining this change, the Department stated that where there is no

conflict of interest it is appropriate that local agencies perform child protective services without referrals because the Social Services Manual only permits referrals "where there is a conflict of interest". See First Post-Hearing Comment, at 4. Deleting item B would not constitute a substantial change in the rules, but the Department should reconsider the proposed deletion.

31. In the SONAR, the Department proposed to adopt item B on the grounds that it was consistent with current practice as set forth in the Social Services Manual. It now takes the position that referrals for reasons other than a "conflict of interest" are inconsistent with the Social Services Manual. However, the Manual provision cited does not restrict referrals to cases where conflicts of interest exist. Furthermore, the need and reasonableness of the deletion does not depend on unpromulgated procedures or manuals. One can envision situations other than conflicts of interest which may necessitate a referral. Due to absences, vacations, or illnesses, for example, a county may not be in a position to provide necessary protective services in a reasonably expeditious fashion, or it may not have the necessary expertise or experience a particular case might require. In such cases, it is reasonable to allow the local agency to request assistance from another agency. The Department has noted, for example, that using regional child protection teams is permissible. The Department did not consider other circumstances, such as staff unavailability or the needs of a particular case, in deciding not to enact item B. Its failure to consider the need for local agencies to request assistance from another local agency in cases other than conflicts of interest, persuades the Administrative Law Judge that it should retain item B as proposed and it is recommended that it do so.

32. 9560.0216, subp. 3a. This subpart pertains to reports alleging the maltreatment of the child of a facility license holder. It states:

> A. If the report of maltreatment alleges maltreatment of a child related by blood, marriage, or adoption to the license holder in a facility during nonbusiness hours of the facility, the local agency shall follow the procedures under part 9560.0220. The local agency shall notify the responsible licensing agency listed in part 9560.0222, subp. 1, when the local agency receives the report of maltreatment and when the local agency completes an assessment.
>
> B. If the report of maltreatment alleges maltreatment of a child in a facility during business hours of the facility and if the child is related by blood, marriage, or adoption to the license holder, facility staff, or volunteer of the facility, the local agency shall follow the procedures under part 9560.0222.

Essentially, the rule requires that reports of maltreatment of a license holder's child during nonbusiness hours be dealt with like reports of maltreatment within a family unit and that reports of maltreatment of a license holder's or employee's child during business hours be treated like reports of maltreatment in a facility. The rule is need to clarify the procedures that must be followed by local agencies. Moreover, it is reasonable to treat allegations of abuse occurring during nonbusiness hours

like family-unit investigations because only the family will be involved. It is also reasonable to treat allegations of abuse occurring during working hours like investigations of maltreatment in a facility, because persons other than family members are involved.

33. The Minnesota Coalition on Provider Vulnerability supported the amendment, as did the Adults & Children's Alliance. See Public Ex. 6 and J. In discussing Subpart 3a the Department's SONAR states, in part:

> The Department's Licensing Division has consistently informed local agencies that providers cannot use corporal punishment on their own children or use their own culturally approved, but abusive, form of discipline during a facility's business hours. The reason is that these children are receiving a licensed service during business hours and are entitled to all the benefits and protections offered by licensure.

SONAR at 8. Julie Brunner, Division Manager of Anoka County Human Services Division, expressed concern about the reference to child care providers using corporal punishment during business hours. She stated that she didn't think such a prohibition was enforceable and should not be a child protection issue. Public Ex. 2. Tom Behr, Chair of the Metro Child Protection Association, stated that licensees have not been informed that they cannot use corporal punishment on their own children during business hours and that such a prohibition didn't seem reasonable, especially in foster care. Public Ex. 3. Because the rule does not prohibit a licensee's use of corporal punishment with the licensee's own children, it is unnecessary to consider whether the licensing division's instructions, as noted in the SONAR, are appropriate, necessary or reasonable. The rule itself does not address the use of corporal punishment in such cases. Instead, it refers to reports alleging maltreatment. Maltreatment is not defined to include corporal punishment. Rather, maltreatment is defined as physical or sexual abuse or neglect. Consequently, the issue raised by Ms. Brunner and Mr. Behr need not be discussed further.

34. 9560.0216, subp. 6, item C. Generally speaking, local agencies must give persons interviewed a written and oral notice ("Tennessen Warning") of the person's rights under the Minnesota Government Data Practices Act. Item C makes the notice optional for interviews with children under ten years of age. It states that the local agency "may waive the required notice in items A and B when interviewing a child under ten years of age who is reported to be maltreated." The rule is consistent with the provisions of Minn. Stat. § 626.556, subd. 11. The Coalition on Provider Vulnerability, and the Adults & Children's Alliance objected to item A. See Public Exs. 6 and J. Generally, the commentators believe that a waiver may be detrimental to any child subjected to the interview, and it was argued that if a child is too young to comprehend the Tennessen Warning, notice should be given to the child's parent or guardian. These criticisms are not persuasive. Item C is authorized, necessary and reasonable. The Tennessen Warning is legalistic and technical. It is likely that some children would not understand it. Furthermore, notice to a parent or guardian may not be appropriate if the parent or guardian is the subject of the investigation. It is concluded, therefore, that there is no danger in allowing local agency investigators the discretion to decide when providing a Tennessen Warning to a child under ten years of age should be waived.

35. 9560.0220. This rule governs the procedures local agencies must follow in responding to reports of maltreatment within a family unit. Following its investigation, the local agency must determine whether maltreatment occurred. Prior to the amendments proposed in this proceeding part 9560.0220, subp. 6 A. required the local agency to make a determination of maltreatment "if there is credible evidence that a child has suffered physical, mental, or emotional harm" or "the harm was caused by the act or failure to act of a person within the child's family unit who is responsible for the child's care." The Department initially proposed to amend item A to require a determination of maltreatment if:

> (1) The information obtained through the assessment leads the child protection worker to conclude that it is more likely than not that a child is a victim of maltreatment as defined in part 9560.0214, subpart 18; and
>
> (2) The maltreatment was caused by the act or failure to act of a person within the family unit who is responsible for the child's care.

The Department was changing the standard for finding maltreatment from "credible evidence" to a "preponderance" of the evidence based on the recommendations of the its Advisory Committee, which felt that something more that "credible evidence" should be required to make a finding of maltreatment. Initially, the Department phrased the preponderance standard in terms of whether maltreatment was "more likely than not". This was done at the recommendation of the Advisory Committee, which thought that using the words "preponderance of the evidence" was too legalistic.

36. Several persons supported the proposed language changes. However, Hennepin County and the Metro Child Protection Association argued that the proposed standard for making maltreatment determinations was still unclear and should be clarified. In response to written comments and testimony, the Department proposes to amend subpart 6 A.(1) to read as follows:

> (1) There is a preponderance of the evidence that a child is a victim of maltreatment as defined in part 9560.0214, subp. 18.

The change proposed by the Department does not change the substance of the rule and does not constitute a substantial change for purposes of Minn. Rules, pt. 1400.1100 (1991). However, the Department should amend the rule further by deleting from Subpart 6.A.(1) the words "as defined in part 9560.0214, subp. 18." Those words are unnecessary because the word "maltreatment" is defined in the rules.

37. It is reasonable to have a standard for determining whether a child has been maltreated. It is also reasonable to use a preponderance standard, which is almost universally followed in civil cases. In addition, the Department noted that as reports of child maltreatment increase, "local agencies have found it reasonable to require a stronger standard of evidence in order to best serve children . . ." SONAR at 12. The Department's meaning is somewhat unclear because, in determining the need for protective intervention under the rule, local agencies may determine that child

protective services are needed even if there is no determination of maltreatment. However, it is appropriate to devote greater time and attention to reports that are likely true than to reports which are likely untrue. Hence, for prioritizing county efforts, the rule change proposed is necessary and reasonable.

38. Under Minn. Stat. § 245A.08, subd. 3, at a hearing on the proposed revocation of a family day care or foster care license, the Department need only establish that "reasonable cause" existed for the proposed license revocation. Once reasonable cause is established, the burden of proof in hearings involving the suspension or revocation of a family day care or foster care license shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with the laws or rules allegedly violated. Although adverse licensing action may be proposed by a local agency when there is "reasonable cause" to believe a licensee has violated relevant rules, the Department's use of a higher standard in determining whether maltreatment occurred for child protection purposes is not inconsistent with the licensing statutes standards. The Department may adopt a different standard for determining whether maltreatment occurred for purposes of providing child protective services than the standard applicable to negative licensing action involving the same facts.

39. 9560.0222. This rule pertains to the investigation of reports of maltreatment in a facility. The Department proposes to amend subpart 1 A, governing reports to licensing agencies, to read as follows:

> Subp. 1a. Report to licensing agency. A report that does not meet the criteria in subpart 1, items A to C, must be reported as a possible licensing violation to the responsible licensing agency listed in items A - E within 48 hours, excluding weekends and holidays.
>
> A. The local agency shall receive reports concerning family day care.
>
> B. If the local agency licenses the child foster care provider, the local agency shall receive reports concerning child foster care. Otherwise, the private licensing agency shall receive the report.
>
> C. The Department shall receive reports concerning facilities it directly licenses.
>
> D. Department of Corrections shall receive reports concerning facilities it licenses.
>
> E. The Department of Health shall receive reports concerning facilities it licenses.

40. Two commentators supported the language in Subpart 1a as proposed. See Public Exhibits 9 and J. However, Tom Behr of the Metro Child Protection Association, strongly objected to the requirement that local agencies relay reports of maltreatment to the appropriate licensing authority. In his view, the individual making the maltreatment report should be given the correct phone number to call, and that burden should not be placed on the local

agency. In spite of Mr. Behr's objections, it is concluded that the new language proposed is necessary and reasonable. Requiring local agency personnel to relay reports of maltreatment provides a greater assurance that possible licensing violations are reported to the licensing authority. This promotes the protection of children. Requiring the individual who reports child maltreatment to make that report may likely be less effective. Furthermore, situations may arise when the allegations in the report do not constitute maltreatment, but may constitute a licensing violation. In such cases, which may, for example, involve the use of corporal punishment, the licensing authority should be notified.

41. Part 9560.0222, subp. 2. This rule relates to a local agency's duty to coordinate its investigations with law enforcement personnel. The Department proposes to change item A. 2. to require the local agency to ask a law enforcement agency representative to accompany the child protection worker to interview a child when the maltreatment report alleges, in addition to sexual or physical abuse, "malicious punishment of a child, or neglect or endangerment of a child under Minnesota Statutes, chapter 609."

42. Under Minn. Stat. § 626.556, subd. 10(a) when local agencies receive reports alleging a violation of a criminal statute involving sexual abuse or physical abuse, the local law enforcement agencies and the local welfare agency must coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews. The Department acknowledged that the statute does not mention neglect. However, it argued that neglect is considered to be maltreatment under Minn. Stat. § 626.556, subd. 10e. It concluded, therefore, that the local agency's obligation to work with law enforcement personnel should be broadened when neglect, endangerment of a child, or malicious punishment of a child is alleged to have occurred. SONAR at 10. The amendment proposed by the Department insofar as neglect and endangerment are concerned, exceeds the scope of the Department's delegated rulemaking authority because it clearly broadens the plain language of Minn. Stat. § 626.556, subd. 10(a). The statute is limited to physical and sexual abuse as defined in section 626.556, subd. 2(a) and (d). Neglect, which is also defined, is not mentioned. The Department cannot add that which the legislature inadvertently overlooked or intentionally omitted. Wallace v. Commissioner of Taxation, 184 N.W.2d 588,594 (Minn. 1971). The fact that neglect is included within the meaning of the word "maltreatment" under Minn. Stat. § 626.556, subd. 10e is irrelevant because that inclusion applies solely to subdivision 10e and not to subdivision 10(a). Therefore, this defect constitutes a substantive violation of Minn. Stat. § 14.05, subd. 1; 14.50; 14.15, subd. 3; and 14.16 (1992). To correct this defect, reference to the neglect or endangerment of a child must be deleted from the proposed amendment. Also, similar language in part 9560.0220, subp. 2 A(2) is defective on the same grounds and must be corrected in the same manner. These changes do not prohibit local agencies from requesting law enforcement personnel to accompany them in cases of neglect or endangerment, it simply makes that optional.

43. 9560.0222, subp. 6. This rule pertains to interviewing children during the course of investigating reports of maltreatment in a facility. The Department proposes to amend this subpart to read as follows:

> When necessary to make the determination in subpart 10, the local agency in the course of the investigation shall interview any child alleged to be maltreated who is in the care of the facility and may interview any other child who is or has been in the care of the facility, or any child related by blood, marriage, or adoption to the alleged offender, or any child who resides or has resided with the alleged offender. Interviews shall conducted and recorded according to part 9560.0220, subp. 3.

The Department proposes to amend Subpart 6 to comply with Minn. Stat. § 626.556, subd. 10b(a)(2). It argued that the rule changes are reasonable because state law provides that local agencies may interview children who are or were in the care of a facility during an investigation. The Department noted further that under Minn. Stat. § 626.556, subd. 10(c) local agencies have statutory authority to interview minors who live with or who resided with the alleged offender without parental consent.

44. Minn. Stat. § 626.556, subd. 10b(a)(2), which relates to reports of neglect or abuse in a facility, states that the Commissioner has all the powers and duties of local welfare agencies under section 626.556 and that both the Commissioner or the local welfare agency may interview any children "who are or have been in the care of a facility under investigation and their parents, guardians, or legal custodians". Under Section 626.556, local welfare agencies are required to investigate many complaints of abuse and neglect. During the course of their investigations, their authority "includes, but is not limited to, authority to interview, without parental consent, the alleged victim and any other minors who currently reside with or who have resided with the alleged perpetrator". The specific authorization contained in section 626.556, subd. 10(c) is not a limitation on the local agency's authority to interview other individuals. Unless otherwise specifically prohibited, the local agency may interview anyone. Under Minn. Stat. § 626.556, subd. 2(i) local agencies are authorized to interview "any other person with knowledge of the abuse or neglect for the purpose of gathering facts. . . ." Hence, it is concluded that the language of subpart 6, as initially proposed by the Department, is authorized, necessary and reasonable.

45. Marion Turner, of the Coalition on Provider Vulnerability, and Pamela Fogliano, suggested that subpart 6 be included to reference the family unit in the list of those individuals who may be interviewed. The Department agreed that it is necessary to gather the most information possible on alleged offenders and concluded that it is good public policy to authorize additional interviews. To accomplish this, the Department proposes a new subpart 8a, which will read as follows:

> Other Interviews. When necessary to make the determinations in subpart 10, the local agencies shall interview other persons whom the agency believes may have knowledge of the alleged maltreatment.

The new requirements in Subpart 8a were shown to be necessary and reasonable to effectuate thorough investigations. Furthermore, the additional obligations contained in that subpart do not constitute a substantial change for purposes of Minn. Rules, pt. 1400.1100 (1991). The Department can require local agencies to make specified interviews.

46. 9560.0223. The current version of the Department's rules does not contain any reference to placement preferences under state and federal law. Part 9560.0223 is a new rule which addresses those placement preferences. The placement preferences become operable when a child is temporarily removed from the home or from a facility.

47. 9560.0223, item A. Item A requires that a child temporarily removed from the home or a facility must be placed in the least restrictive setting consistent with the child's health and welfare and in closest proximity to the child's family as possible. Minn. Stat. § 260.173, subd. 2 requires such a least restrictive placement in closest proximity to the family as possible for children taken into custody pursuant to Section 260.165, subd. 1(a) and (c)(2). The latter statute authorizes children to be taken into immediate custody when there are reasonable grounds to believe the child is in surroundings or conditions which endanger the child's health, safety, or welfare. It is concluded, therefore, that item A is authorized, necessary and reasonable.

48. 9560.0223, item B. Item B states that if a child is in "imminent" danger, placement may be with the child's relative or in a shelter care facility according to Minnesota Statutes, Section 260.173, Subdivision 2. Item B was not criticized by interested persons, but it raises two issues. First, the Department should reconsider the statutory citation contained in item B. It adds nothing to the rule except a reference to underlying statutory provisions. Agencies should avoid statutory citations whenever possible to reduce the length of their rules. Second, is the requirement that a child must be in "imminent" danger before the child can be placed with a relative or in a shelter care facility. The Department's SONAR indicates that the subdivision is limited to imminent dangers to comply with Minn. Stat. § 260.173, subd. 2. However, the cited statute does not contain the word "imminent" and neither do the statutes referred to in the cited statute. Furthermore, restricting the placement of a child with a relative or in a shelter care facility only when there is an "imminent" danger is confusing. If there is an imminent danger any placement may be preferable to leaving a child at home. Therefore, the Department should reconsider using the word "imminent". The placements mentioned might be appropriate in other situations, such as in a voluntary placement.

49. 9560.0223, item C. This rule establishes the procedure for placement of Indian children. It sets forth the placement preferences in the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 and the Minnesota Indian Family Preservation Act, Minn. Stat. § 257.35 - 257.356. These statutes set forth the requirements for placing Indian children and must be followed in the absence of good cause to the contrary. 25 U.S.C. § 1915(b). Thomas Cobb, Becker County Child Protection Supervisor, stated that the Indian Child Placement requirements in the statutes do not apply to emergency placements. However, both state and federal statutes state that placement preferences must be followed whenever an Indian child is taken into custody. 25 U.S.C. § 1915; Minn. Stat. § 260.165, subd. 1 and 260.173, subd. 2. There are no provisions within the statutes for distinguishing between emergency placements and nonemergency placements as Mr. Cobb asserted.

50. Mr. Cobb also stated that child safety may be compromised under the statutory placement guidelines because some tribal placement families may not be licensed by the State or may not be competent to provide care. As the Department pointed out in response, however, placement preferences must be consistent with the child's welfare. For example, if placing a child close to its home is inconsistent with the child's welfare, good cause for placement in a more remote location may exist. Furthermore, Mr. Cobb's concern that some placement facilities may not be licensed is immaterial because Minn. Stat. § 245A.03, subd. 2 exempts residential and nonresidential programs provided by relatives from licensure requirements. The Department established that the placement preferences in item C are consistent with statutory requirements, necessary, and reasonable.

51. 9560.0228, subp. 2. This rule requires that child protection workers work with the "family unit" as well as others in developing a protective services plan for children at risk. The proposed rule also requires that the family unit be given a copy of the plan and be signed by the family unit. However, the definition of "family unit" as set forth in Part 9560.0214, subd. 11, includes all persons related to the child by blood, marriage, or adoption, as well as persons residing with the child. The Department asserted that the strict reading of the proposed language, in concert with the definition of the family unit, would require the child protection worker to consult all persons related to or living with the child in developing the protection plan. The Department concluded that such a procedure would be cumbersome, confusing and unnecessary. Therefore, the Department proposes to amend the proposed rule to substitute the term "appropriate members of the family unit" for the term "family unit." Thus, child protection workers would be given discretion in limiting the scope of those family unit members to be consulted in developing, implementing, and signing the protective service plan. This is a necessary and reasonable because requiring child protection workers to consult all members of the family unit, as the term is defined, could be overly burdensome and unnecessary in a given situation.

52. Subpart 2 also requires that the protective service plan be prepared within 60 days of completion of the assessment. The Minnesota Coalition on Provider Vulnerability argued that 60 days is too long. However, when the Department initially suggested a 30-day period, members of its Advisory Committee argued that the time period should be 60 days, as is the current practice. The Department concluded that 60-day period would allow for a better quality assessment of the services needed, which is necessary to develop a sound protective services plan, and that the Advisory Committee's recommendation should be adopted because its members are familiar with the realities of requiring written protective services plan and the time reasonably needed to complete them. The proposed rule was shown to necessary and reasonable.

53. 9560.0232, subp. 5. This rule requires each county to establish a local child mortality review panel. It also sets forth the duties and procedures required of the panel. Roger G. Goudge, Director of the Lake of the Woods County Social Services Department, objected to the proposed rule on the grounds that a review panel is unnecessary and that he does not have the time and resources necessary to administer one. He also stated that the proposed rule is vague as to the responsibilities of the panel. Under Minn. Stat. § 256.01, subd. 12(b) the Commissioner may require counties to establish

child mortality review panels. The Commissioner has determined that review of child mortality information at the county level is an important function. SONAR at 31. In the Department's view, information about the circumstances surrounding a child's death may lead to better assessment of children at risk.

54. The establishment of county review panels is reasonable because the legislature has seen fit to allow the Commissioner to establish them. Moreover, gathering data for the purposes of preventing deaths is a reasonable basis for the establishment of such panels. The proposed rule is necessary because the Commissioner has decided that such information may lead to better assessment of children at risk and prevent child mortality. The language of the subpart is reasonable and necessary and it sets forth the parameters, procedures, and duties of local child mortality panels with sufficient clarity.

55. Several individuals raised issues only tangentially related to the rules proposed in this proceeding. Some individuals argued, for example, that local agencies sometimes unfairly and hastily accuse parents of sexual abuse. In particular, the nursing practices of mothers was mentioned. It is outside the scope of this proceeding to determine when nursing a child may be a form of sexual abuse. Consequently, issues of that nature have not been discussed. It is not that those issues are not important, it is simply that they are not directly related to the rules proposed in this proceeding. Of course, the impact a child protection worker has on a family is significant and in order to avoid improper charges of abuse, it is necessary for child protection workers to be familiar with normal behavior patterns and cultural differences. Furthermore, in the placement of children, it is important for local agencies to recognize the child's religious and cultural heritage. Rabbi Yonassan Gershom mentioned the problems that can arise when local agencies' employees unfamiliar with Jewish culture make placement decisions. He argued that local agency workers need to have an understanding of the cultural and religious heritage of Jewish children and the cultural and religious heritage of other minority groups. Most of the issues he raised are covered by statutory provisions requiring that child placement be consistent with the child's cultural and religious heritage and that placement decisions be periodically reviewed. The rules proposed in this proceeding do not directly address those factors and further comment on them is outside the scope of this proceeding.

56. Judge Walter H. Mann, a District Judge in Minneapolis, addressed the need for having highly qualified child protection workers due to the complexity of problems that arise in cases of physical or sexual abuse. Public Ex. A. Although the Department has not addressed the qualifications of such workers in this proceeding, the Department should consider carefully the comments that have been received and decide if statutory changes should be made which increase the qualifications of such employees. Of course, nothing prevents other interested groups from seeking those statutory changes on their own.

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

CONCLUSIONS

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

2. That the Department of Human Services has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. That the Department of Human Services 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)(ii), except as noted at Finding 42.

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

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

6. That the Administrative Law Judge has suggested action to correct the defect cited in Conclusion 3 as noted at Finding 42.

7. That due to Conclusion 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

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

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department of Human Services 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 19th day of April, 1993.

JON L. LUNDE
Administrative Law Judge