

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption
of Amendments of Department of Human
Services Rules Related to Mental Health
Services Under Medical Assistance,
Minnesota Rules, Part 9505.0323, Subpart
4, Item 1, Subitem (5)

REPORT OF THE
ADMINISTRATIVE
LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:00 a.m. on Wednesday, March 31, 1993, at the Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota. This Report is part of a rule hearing proceeding held pursuant to Minn. Stat. §§ 14.131 - 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable, and whether or not the proposed rules, if modified, are substantially different from those originally proposed.

A version of this proposed rule was initially heard by the undersigned on August 13, 1992. Subsequent to adoption of that version by the Department of Human Services, petitions were filed with the legislative commission to review administrative rules (LCRAR) objecting to the content of the rule. After considering these petitions and taking oral testimony, the LCRAR issued a remand Order to the Department of Human Services directing it to amend the adopted rule in order to "accommodate the alternative language offered by the Minnesota Psychological Association and the Minnesota Mental Health Association." The LCRAR further encouraged the Department to initiate meetings between the parties so that compromise language could be agreed to which the Department could support. This Remand was dated January 11, 1993 and signed by the chairperson of the LCRAR, Representative Peter Rodosovich. Subsequent to receipt of the January 11 Remand, the Department of Human Services published a Notice of Solicitation in the State Register on January 19, 1993. Meetings with the affected groups were held on January 25 and January 28, 1993 which resulted in proposed "compromised" language for the rule. On January 29, 1993, Assistant Commissioner of Human Services, Helen Yates, wrote to Representative Rodosovich informing him that the "advisory committee has met twice and, on January 28, reached a tentative agreement that appears to be acceptable to both the psychologists and the Department." Consequently, the agreed-to language was proposed for adoption and published in the State Register on March 1, 1993.

Patricia Sonnenberg, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Minnesota Department of Human Services (DHS or Department). Appearing and testifying in support of the proposed rule amendments on behalf of the DHS were: Eleanor Weber, Rules Division; Nancy McMorran, Supervisor of Health Service Policy-

Medicine; and Marcia Tippery, Ph.D., Mental Health Policy Consultant. The hearing continued until all interested groups or persons had had an opportunity to testify concerning the adoption of the proposed rules herein.

The Commissioner 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 Commissioner of Human Services of actions which will correct the defects and the Commissioner 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 Commissioner of Human Services may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner of Human Services does not elect to adopt the suggested actions, she must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner 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 Commissioner 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 Commissioner of Human Services makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then she 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 Commissioner of Human Services files the rule with the Secretary of State, she 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 11, 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.
- (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.
- (f) A Fiscal Note.

2. On March 1, 1993, a Notice of Hearing and a copy of the proposed rules were published at 17 State Register pp. 2101-2103.

3. On February 24, 1993, the Department mailed a Notice of Hearing to all persons and associations who had registered their names with the Department of Human Services for the purpose of receiving such notice.

4. On March 4, 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 Department personnel who will represent the Agency 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 717 State Register p. 1799 (January 19, 1993) and a copy of the Notice.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comment and statements remained open through April 7, 1993. The record closed on April 14, 1993, the fifth business day following the close of the comment period.

Statutory Authority

6. Statutory authority to adopt the proposed rules is contained in Minn. Stat. §§ 245.484; 256B.04, subd. 2; 256B.0625, subd. 20; and 256B.0625, subd. 24. Minn. Stat. § 245.484 (1991 Supp.) specifically authorized the Commissioner to adopt emergency rules to govern implementation of case management services for eligible children and professional home-based family treatment services for medical assistance eligible children by January 1, 1992 and to adopt permanent rules by January 1, 1993. Permanent rules have recently been adopted as a result of the earlier rule hearing conducted on August 13, 1992. The proposed rules herein are a revised version of a very small portion of the adopted rules being heard as a result of the remand Order from the LCRAR.

Fiscal Note

7. The Department revised its analysis of fiscal impact based on the revision of the rules which now limit mandatory referrals. The Department estimates that if 100 percent of the estimated number of eligible recipients is referred to a psychiatrist, the state share of the costs of referral in each of the first two fiscal years after implementation would be approximately \$101,765. However, if only 50 percent of the estimated number of eligible recipients is referred, the state costs for implementation in each of the first two fiscal years would be approximately \$51,000. At this time, however, the Department is unsure as to the number of recipients who will be referred as a result of the proposed rule. Consequently, the estimates set forth above provide a framework to gauge the total amount of state expenditure.

Nature of the Proposed Rules

8. As was set forth above, this hearing results from an Order from the LCRAR that the Department "bring the parties together to agree on some compromise language to address their concerns, which now have become the concerns of the LCRAR." (January 11, 1993 letter from the Chair of the LCRAR to Assistant Commissioner Yates) The LCRAR action was taken in response to petitions received from William Conley, representing the Mental Health Association (MHA) and Dr. Seymour Gross, representing the Minnesota Psychological Association (MPA). Additionally, Denise Wilder, Chair of the Minnesota Women Psychologists (MWP) participated in the LCRAR hearings which considered the "appropriateness" of the adopted rule provision requiring mandatory referral. In order to comply with the directive issued by the LCRAR, the Department invited "industry" representatives to be part of an advisory committee to consider alternate language for the rule. The advisory committee which met on January 25 and 28, 1993 consisted of representatives from the affected professional associations including Dr. Gross, William Conley, and Denise Wilder. Dr. Maurice Dysken, President of the Minnesota Psychiatric Society, was invited to attend the meeting but did not do so. However, subsequent to the publication of the proposed rule (compromised language) in the State Register, Dr. Dysken submitted comments dated March 15, 1993 which suggested certain changes to the proposed language. The compromise language which had been agreed to by the advisory committee was designed to limit the mandatory referral of eligible recipients for psychiatric or medical consultation, except in instances when conditions were present which required referral. However, in response to Dr. Dysken's suggestions, the Department proposed modifications to the rules as proposed subsequent to the hearing which slightly expand the conditions which would require a referral for psychiatric and/or medical evaluation.

The modifications to the proposed rule were submitted into the record by the Department on April 7, 1993, the last day of the initial comment period. These modifications were reviewed by Dr. Gross of the Minnesota Psychological Association and he submitted a responsive comment on April 12 on behalf of the Minnesota Psychological Association which objected to the modifications proposed by the Department. Dr. Gross stated that there was a "near unanimous consensus for the wording in the draft" which was proposed for adoption initially by the Department. The Judge points out that one member of the January 28, 1993 advisory committee was Dr. Philip Edwardson, representing the Minnesota Society for Child and Adolescent Psychiatry. Dr. Gross commented further that the modifications made by the Department are "not tuned in to the needs of the recipients and may encourage an inappropriate referral. . ."

Dr. Gross contends that in order to modify the language which was agreed to at the advisory committee meetings, a new advisory committee meeting should be scheduled so that input from all affected professionals could be solicited. Absent that procedure, Dr. Gross argues that the modifications proposed should be rejected.

9. The Judge specifically finds that the need for and reasonableness of the rules as initially proposed and published by the Department on March 1, 1993 has been demonstrated. The proposed modifications, however, add new criteria for the requirement of referral to a psychiatrist and/or for a medical evaluation to the rules. There is no evidence in the record to show that the modifications were discussed or considered during the advisory committee meetings at which a consensus on the rule language was reached. The Department did not offer these modifications before or during the hearing. Rather, they were submitted on the last day of the initial comment period. Only Dr. Gross took the time to see what the Department had submitted for the purpose of filing a response. Dr. Gross, on behalf of the Minnesota Psychological Association, makes it very clear that there is no longer a consensus on the proposed rule if the modifications are adopted. Due to the nature of the directive to reach consensus by the LCRAR, and the fact that the Department published and supported the language which was agreed to at the advisory committee meeting, the Judge finds that the modifications constitute a substantial change in the rules. These modifications obviously deserve consideration and comment by the affected professional groups who were in attendance at the advisory committee meetings and who must have assumed that the "consensus" language which had been published would be adopted by the Department without change. Consequently, in order to correct this defect, the Department must adopt the rule as initially proposed on March 1, 1993 which was supported by all affected groups, including the Department. It surely would not make any sense at this time to adopt a rule which the "parties" did not agree upon and have the whole matter back in the lap of the LCRAR.

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

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.
2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.
3. That 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)(ii).
4. That the Department has documented the need for and reasonableness of its proposed rules which were published on March 1, 1993 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 after publication of the proposed rules in the State Register do result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, Minn. Rules, pt. 1400.1000, subp. 1 and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion 5 as noted at Finding 9.

7. That due to Conclusion 5, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

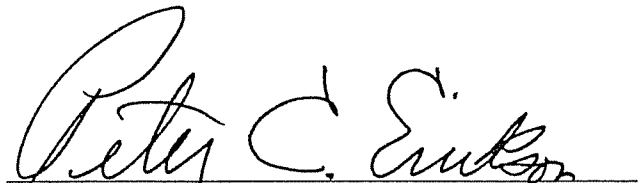
8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

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 7 day of May, 1993.


PETER C. ERICKSON
Administrative Law Judge

Reported: Taped