

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption
of Department of Human Services Rules
Governing Family Community Support
Services for Children With Severe
Emotional Disturbance and Their
Families, Minnesota Rules, parts
9535.4000 to 9535.4070

REPORT OF THE
ADMINISTRATIVE
LAW JUDGE

The above-entitled matter came on for hearing before
Administrative Law Judge Marlene E. Senechal, on August 27,
1993, at 9:00 a.m. in Room 5D, Veterans Service Building, 20
West 12th Street, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held
pursuant to Minn. Stat. §§14.131 to 14.20 (1992) to
determine whether the Minnesota Department of Human Services
(hereinafter "the Department") has statutory authority to
adopt the proposed rules, whether the need for and
reasonableness of the proposed rules has been established by
the Department by an affirmative presentation of fact,
whether the Department has complied with all substantive and
procedural requirements of law or rule, and whether the
rules as finally proposed are substantially different from
those which were initially proposed at the public hearing.

Cheryl Heilman, Assistant Attorney General, 520
Lafayette Road, Suite 200, St. Paul, Minnesota 55155,
appeared on behalf of the Department. Sharon Silkwood,
Mental Health Program Consultant, Mental Health Division,
testified on behalf of the Department.

The Department submitted 11 exhibits at the hearing.
No public exhibits were offered.

Only one member of the public attended the hearing and
did not object to any portion of the rules. 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 September 16, 1993, twenty calendar days
following the date of the hearing. No written comments were
received. Pursuant to Minn. Stat. §14.15, subd. 1 (1992),
five working days were allowed for the filing of responsive

comments. The Department proposed no amendments to the rules. At the close of business on September 23, 1993, the rulemaking record closed for all purposes. The comment period in this rulemaking proceeding is the maximum period allowed under Minnesota law.

The Department 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 actions which will correct the defects and the Department may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Department may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Department does not elect to adopt the suggested actions, the Department must submit the proposed rules to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

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

When the Department files the rules with the Secretary of State, the Department 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 FACTProcedural Requirements

1. On June 30, 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 1);
- (b) the Order for Hearing (Exhibit 2);
- (c) the Notice of Hearing proposed to be issued;
- (d) a Statement of Need and Reasonableness (Exhibit 3);
- (e) a statement of the number of persons expected to attend the hearing and estimated length of the Department's presentation; and,
- (f) a fiscal note.

2. On July 21, 1993, the Department mailed the Notice of Hearing to all persons and associations who have requested that their names be placed on file with the Department for the purpose of receiving such notice.

3. On July 21, 1993, the Department also gave additional notice to the 87 Minnesota County Human Service Agencies, Advisory Committee members, and other interested persons.

4. On July 26, 1993, the proposed rules and the Notice of Hearing were published at 18 State Register 336.

5. On July 30, 1993, the Department filed the following documents with the Administrative Law Judge:

- (a) the Notice of Hearing as mailed (Exhibit 6);
- (b) the Department's certification that its mailing list was accurate and complete (Exhibit 5);
- (c) an Affidavit of Additional Mailing (Exhibit 7);
- (d) a copy of the State Register containing the Notice of Hearing and the proposed rules (Exhibit 4);
- (e) a copy of the Notice of Solicitation of Outside Information or Opinions published at 17 State Register 1410 (December 7, 1992) (Exhibit 8); and,

- (f) the names of agency personnel expected to testify on behalf of the Department at the hearing (Exhibit 9).

Small Business Considerations in Rulemaking

6. 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 the Department states that it believes that the rules are exempt from these requirements under Minn. Stat. §14.115, subd. 7 (2) which provides that small business considerations do not apply to 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. The proposed rules relate to a county administered, state mandated program. Therefore, the Administrative Law Judge finds that the rules are exempt under the statutory provision cited above.

Fiscal Note

7. 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 Notice of Hearing, the Department states that adoption of the rules will not result in additional spending by local public bodies in excess of \$100,000 per year for the first two years following adoption of the rules. The Department prepared a fiscal note which documented that the rules will not require increases in local spending beyond the amount already required by statute. No one disputed the Department's assessment. Therefore, the Administrative Law Judge finds that the Department is not required to publish a notice under Minn. Stat. §14.11, subd. 1 (1992).

Impact on Agricultural Land

8. 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

9. The Department published a notice of solicitation of outside information or opinions regarding the proposed adoption of these rules. Five comments were received in response thereto. (Exhibit 8). The Department also consulted with an Advisory Committee, which met on January 6, 1993, January 28, 1993, February 18, 1993, and March 9, 1993. Some Advisory Committee members also served on a Work Group to review alternatives and make recommendations in regard to the proposed rules. The Work Group met on January 6, 1993, January 21, 1993, February 18, 1993, and March 9, 1993. (Exhibit 3 at page 2).

Nature of the Proposed Rules

10. Proposed rule parts 9535.4000 to 9535.4070 govern family community support services for children with severe emotional disturbance and their families. Family community support services are one of the children's mental health services required under the Children's Mental Health Act, Minn. Stat. §§245.487 to 245.4888 and administered by the counties. Family community support services means services provided under the clinical supervision of a mental health professional and designed to help each child with severe emotional disturbance to function and remain with the child's family in the community. Minn. Stat. §245.4871, subd. 17. Family community support services include client outreach, medication monitoring, assistance in developing parenting skills necessary to address the needs of the child, assistance with leisure and recreational activities, crisis assistance, including crisis placement and respite care, professional home-based family treatment, foster care with therapeutic supports, day treatment, assistance in locating respite care and special needs day care, and assistance in obtaining potential financial resources. *Id.* The proposed rules establish standards and procedures that govern service design, eligibility to receive information and services, service outcomes, and service providers.

Analysis of the Proposed Rules

11. In analyzing the proposed rules, the Administrative Law Judge must determine:

- (a) whether the Department has statutory authority to adopt the proposed rules;
- (b) whether the need for and reasonableness of the proposed rules has been established by the Department by an affirmative presentation of fact;

- (c) whether the Department has complied with all substantive and procedural requirements of law or rule; and,
- (d) whether the rules as finally proposed are substantially different from those which were initially proposed at the public hearing.

Statutory Authority

12. The authority to adopt the proposed rules is set out in Minn. Stat. §245.484 which provides that the Commissioner shall adopt permanent rules specifying program requirements for family community support services.

13. Although the Department has statutory authority to adopt rules governing family community support services, further analysis is necessary to determine whether the rule provisions are consistent with the provisions of the Children's Mental Health Act. An agency is authorized to interpret the statute administered by it. Minnesota-Dakotas Retail Hardware Ass'n v. State, 279 N.W.2d 360 (Minn. 1979). However, a rule which is contrary to the language of the statute or to legislative intent is invalid. Can Manufacturers Institute, Inc. v. State, 289 N.W.2d 416 (Minn. 1979). A rule which exceeds the authority conferred by the legislature or which extends or narrows the scope of the statute is also invalid. Green v. Whirlpool Corporation, 389 N.W.2d 504 (Minn. 1986); United Hardware Distributing Company v. Commissioner of Revenue, 284 N.W.2d 820 (Minn. 1979); Wallace v. Commissioner, 184 N.W.2d 588 (Minn. 1971).

14. Proposed rule part 9535.4010 defines certain terms used in the rules. Most of the definitions in the rules incorporate the definitions of an underlying statute. However, in certain instances the proposed rules contain a definition different from the statutory definition of the same term.

15. Proposed rule part 9535.4010, subp. 15 defines "family" as follows:

"Family" has the meaning given in Minnesota Statutes, section 245.4871, subdivision 16, or, for an Indian child, means a relationship recognized by the Minnesota Indian Family Preservation Act in Minnesota Statutes, sections 257.35 to 257.3579.

The definition of "family" in the Children's Mental Health Act is as follows:

"Family" means a child and one or more of the following persons whose participation is necessary to accomplish the child's treatment goals: (1) a person related to the child by blood, marriage, or adoption; (2) a person who is the child's foster parent or significant other; (3) a person who is the child's legal representative.

Minn. Stat. §245.4871, subd. 16. The Legislature has provided a detailed definition of the term "family" for purposes of the Children's Mental Health Act and the provision of family community support services. The proposed rule "extends" the statute beyond the scope of Minn. Stat. §245.4871, subd. 16 to include relationships defined in Minn. Stat. §§257.35 to 257.3579. Therefore, part 9535.4010, subp. 15 exceeds the statutory authority of the Department. The Administrative Law Judge finds that part 9535.4010, subp. 15 must be amended to conform with the definition in Minn. Stat. §245.4871, subd. 16. Such an amendment would not result in a substantial change.

In making this finding, the Administrative Law Judge does not mean to suggest that it is unreasonable to recognize relationships under the Minnesota Indian Family Preservation Act. However, if the Department believes that such relationships are not presently recognized by the Children's Mental Health Act, then the appropriate method to address this omission is through legislative action. The Department is not authorized to supply a substantive provision of the law which the Department thinks the legislature should have included in the first place. Wallace at 594.

16. Proposed rule part 9535.4010, subp. 21 defines "legal representative" as follows:

"Legal representative" means a guardian appointed by the court to decide on services for a child as specified in Minnesota Statutes, section 525.619, a custodian or guardian as defined in Minnesota Statutes, section 260.015, subdivision 14, or 260.242, or an Indian custodian as defined in Minnesota Statutes, section 257.351, subdivision 8.

The term "legal representative" is also defined in the Children's Mental Health Act as follows:

"Legal representative" mean a guardian, conservator, or guardian ad litem of a child with an emotional disturbance authorized by the court to make decisions about mental health services for the child.

Minn. Stat. §245.4871, subd. 22. The Legislature has provided a detailed definition of "legal representative"

for purposes of the Children's Mental Health Act and for the provision of family community support services. The proposed rule is inconsistent with the statutory definition. Therefore, part 9535.4010, subp. 21 exceeds the statutory authority of the Department. The Administrative Law Judge finds that part 9535.4010, subp. 21 must be amended to conform with the definition of Minn. Stat. §245.4871, subd. 22. Such an amendment would not result in a substantial change. If the Department believes that the statutory definition is inappropriate or incomplete, the appropriate remedy is through legislative amendment.

17. Proposed rule part 9535.4023 specifies those persons who are eligible to receive information and plan services. Part 9535.4023, subp. 3 provides:

When one of the circumstances in item A or B applies, a child is the only person with the right to receive required notices, make decisions about family community support and other mental health services, and be included in planning family community support services.

A. The child is at least 16 years of age and the child's parent or legal representative is hindering or impeding the child's access to mental health services.

B. The child:

(1) has been married or has borne a child as specified in Minnesota Statutes, section 144.342;

(2) is living separate and apart from the child's parents or legal representative and is managing the child's own financial affairs as specified in Minnesota Statutes, section 144.341;

(3) is at least 16, but under 18, years of age and has consented to treatment as specified in Minnesota Statutes, section 253B.03, subdivision 6, paragraph (d); or

(4) is at least 16, but under 18, years of age and has been authorized by a county board for independent living pursuant to a court order as specified in Minnesota Statutes, section 260.191, subdivision 1, paragraph (a), clause (4).

Minn. Stat. §245.4876 subd. 5 governs consent for services or for release of information and provides as follows:

(a) Although sections 245.487 to 245.4888 require each county board, within the limits of available resources, to make the mental health services listed

in those sections available to each child residing in the county who needs them, the county board shall not provide any services, either directly or by contract, unless consent to the services is obtained under this subdivision....

(b) The consent or authorization must be obtained from the child's parent unless (1) the parental rights are terminated; or (2) consent is otherwise provided under sections 144.341 to 144.347; 253B.04, subdivision 1; 260.133; 260.135; and 260.191, subdivision 1, the terms of appointment of a court-appointed guardian or conservator, or federal regulations governing chemical dependency services.

The Legislature has determined the circumstances under which the consent of a child's parent is not required for purposes of the Children's Mental Health Act and for the provision of family community support services. Proposed rule part 9535.4023, subp. 3 is inconsistent with the governing statute. Therefore, part 9535.4023, subp. 3 is in excess of the Department's statutory authority. The Administrative Law Judge finds that part 9535.4023, subd. 3 must be amended to conform to the provisions of Minn. Stat. §245.4876, subd. 5. Such an amendment would not constitute a substantial change. If the Department believes that the statutory provision is inappropriate or incomplete, the proper remedy is thorough legislative amendment.

Need and Reasonableness

18. The Department prepared a Statement of Need and Reasonableness in support of the adoption of the proposed rules. At the hearing, the Department primarily relied upon the Statement of Need and Reasonableness as its affirmative presentation of fact. The proposed rules received no adverse comment or criticism. Therefore, a detailed discussion of the proposed rules is unnecessary. The Administrative Law Judge finds that the Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of fact.

Other Rulemaking Requirements

19. The Administrative Law Judge finds that the Department has met all other substantive and procedural requirements of law and rule. There is no issue of substantial change because the Department did not propose any amendments to the rules subsequent to the public hearing.

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

CONCLUSIONS

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

2. The Department has fulfilled the procedural requirements of Minn. Stat. §14.14 (1992), and all other procedural requirements of law or rule.

3. The Department has documented its statutory authority to adopt the proposed rules, and 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 Findings 15, 16, and 17.

4. The Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts within the meaning of Minn. Stat. §§14.14, subd. 2 and 14.50 (iii) (1992).

5. The Administrative Law Judge has suggested actions to correct the defects cited in Conclusion 3 as noted at Findings 15, 16, and 17.

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

7. 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 consistent with the Findings and Conclusions made above.

Dated: October 18, 1993


Marlene E. Senechal
Administrative Law Judge