

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of Proposed Adoption
of Department of Human Services Rules
Governing Licensure of Residential
Treatment Programs for Children with
Severe Emotional Disturbance, Minnesota
Rules, Parts 9545.0905 to 9545.1125.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on April 20, 1995, at 9:30 a.m. in the Minnesota Lottery Headquarters, 2645 Long Lake Road, Roseville, Minnesota.

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

Lucinda Jesson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department at the hearing. The Department's hearing panel consisted of Bob Klukas, Rulemaker of the Appeals and Regulations Division at DHS; Larry Burzinski, Supervisor of the Licensing Division; Halisi Edwards Staten, Co-Director of Mental Health Division; Mary Jo Verschay, Mental Health Program Consultant with the Mental Health Division; Julie Reger, Unit Manager of the Licensing Division; and John Kalachnik, Planner Principal of the Human Resources Division. Approximately thirty-five persons attended the hearing. Twenty-four persons signed the hearing register. The Administrative Law Judge ("ALJ" or "the Judge") received twenty agency exhibits and one public exhibit during the hearing. The hearing continued until all interested persons, groups, and associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until May 10, 1995, twenty calendar days following the date of the hearing. Pursuant

to Minn. Stat. § 14.15, subd. 1 (1992), five working days were allowed for the filing of responsive comments. At the close of business on May 17, 1995, the rulemaking record closed for all purposes.

The Department must wait at least five working days before it takes any final action on the rule; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subds. 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 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 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, it must submit the proposed rule 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 rule and submit it to the Revisor of Statutes for a review of the form. If the Department makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing 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 files the rules 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 January 28, 1991, the Department published a Notice of Solicitation of Outside Opinion at 15 State Register 1703 regarding its proposal to adopt rules governing facilities that serve emotionally disturbed children.

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2. On February 13, 1995, 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. the Statement of Need and Reasonableness ("SONAR");
- e. a fiscal note;
- f. a statement by the Department of the anticipated duration and attendance at the hearing; and
- g. a notice of discretionary additional public notice pursuant to Minn. Stat. §14.14, subd. 1a.

3. On March 14, 1995, the Department mailed the Notice of Hearing and a copy of the proposed rule to all persons and associations who had registered their names with the Department for the purpose of receiving such notice, all persons who requested a hearing on these rules, and all persons to whom additional discretionary notice was given by the Department.

4. On March 20, 1995, the Department published the Notice of Hearing and the proposed rules at 19 State Register 1924.

5. On March 22, 1995, the Department filed the following documents with the Administrative Law Judge:

- a. a photocopy of the pages of the State Register containing the Notice of Hearing and the proposed rules;
- b. the Notice of Hearing as mailed;
- c. the Department's certification that its mailing list was accurate and complete as of March 14, and the Affidavit of Mailing the Notice to all persons on the Department's mailing list;
- d. the Affidavit of Mailing the Notice to those persons to whom the Department gave discretionary notice;
- e. all materials received in response to the Notice of Solicitation of Outside Opinion published on January 28, 1991; and
- f. the names of Agency personnel or others solicited by it to appear.

Nature of the Proposed Rules and Statutory Authority

6. In 1971, rules were adopted by DHS to govern the provision of residential treatment for emotionally disturbed children. These rules (informally known as Rule 5 and codified at Minn. Rules 9545.0900-.1090) have not been significantly changed since their initial adoption, despite several attempts. The proposed rules define terms, require particular services be offered, set recordkeeping standards, require particular staffing levels, set admissions criteria, set standards for individual treatment plans, and establish criteria for children to stay or be discharged from licensed facilities. The use of restrictive techniques and procedures are regulated, and the use of discipline must be according to a written plan developed by the facility. Licensed facilities are required to meet conditions in the proposed rules for the use of psychotropic medications. Where treatment is being given to children in secure settings, the proposed rules set further requirements on the facility regarding admissions, limit who may be placed, require a higher staff-child ratio, require additional staff training, and place limitations on the use of rooms for isolation. Similar, less restrictive requirements are proposed for shelter services.

Minn. Stat. § 245.802, subd. 2a(6), provides that the Commissioner of Human Services shall:

review and make changes in rules relating to residential care and service programs for persons with mental illness as the commissioner may determine necessary.

Minn. Stat. § 245.696, subd. 2(14) authorizes the Commissioner to "... promulgate rules the commissioner deems necessary to carry out the purposes of this chapter." Providers of residential services to children must be licensed under rules adopted by the Commissioner. Minn. Stat. § 245.4882, subd. 2. Minn. Stat. § 245.484 requires the Commissioner to adopt rules "as necessary" to implement the statutory provisions of Chapter 245. Minn. Stat. § 245A.09, subd. 1, requires that the Commissioner adopt rules to govern "the operation, maintenance, and licensure" of programs under Chapter 245A. Residential treatment programs must be licensed under Minn. Stat. § 245A.03, subd. 1. Residential treatment programs for persons with mental illnesses must be licensed under Minn. Stat. § 245A.095, subd. 1.

The Judge finds that the Department has general statutory authority to adopt these rules.

Impact on Agricultural Land

7. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in this state." The statutory requirements

referred to are found in Minn. Stat. §§ 17.80 to 17.84. The rules proposed by the Department will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

Fiscal Note

8. Minn. Stat. § 14.11, subd. 1, requires state 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 years immediately following adoption of the rules. DHS has prepared a fiscal note indicating its estimate of the anticipated cost in the first year coming from the rules is \$2,240,000. The costs from the rule in the second year are estimated at \$2,000,000.

The sources of the new costs are identified as the increased expenses for staffing, recordkeeping, and specialized treatment. Exhibit 16, at 3. DHS arrived at its figures by estimating the cost increases for five facilities. The range of cost increases ranged from 2.13 percent to 18 percent. The Department compared the high end result with two additional facilities of similar size. Those two facilities anticipated costs of 20 to 25 percent and 10 to 20 percent. Exhibit 16, Appendix II. DHS took the average of all these ranges, 8 percent, as the amount upon which to base the estimate of increase in expenditure of public funds. Exhibit 16, at 3. The difference between the first and second years comes from administrative costs not expected to be repeated in the second year the rule is in effect. Exhibit 16, Appendix II. DHS expects that some reductions in overall costs will occur through a reduction in placements, but not until the third year of operation under the rule. *Id.* Several commentators criticized the total arrived at in the fiscal note, but none offered more than anecdotal evidence as to the total amount the rules will cost.

Counties are not required to place children in the placements governed by this rule. If the costs of providers increase, counties may choose other placement options. The fiscal note is only required where local public bodies will be required to expend funds. Counties remain free to contract with providers to arrive at an acceptable per diem payment for children placed.

It is found that DHS has met the requirements for preparing a fiscal note.

Small Business Considerations in Rulemaking

9. 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 SONAR and Notice of Hearing, the Department indicated that these rules fall within the exemption for rules that cover "service businesses regulated by government bodies for standards and costs." Minn. Stat. § 14.115, subd. 7(3). As analyzed in the

discussion on statutory authority, above, the Department regulates standards for the programs falling under these rules. The same statute expressly exempts "residential care facilities" from the application of small business considerations.

Programs falling under these rules receive most of their funding from per diem county payments. Minnesota Council of Child Caring Agencies (MCCCA) 1994 Annual Report, at 5 (estimating over 90 percent of children in MCCCA agencies are paid for by per diems). The amount of the per diem is negotiated between each county and the provider. As discussed in the foregoing Finding, counties are not required to increase the amount of the per diem in line with cost increases experienced by a provider. There is no regulation of the cost charged by each provider.

John L. Doman, Executive Director of MCCCA, provided a list of Rule 5 providers who belong to the Council. Many of these providers fall within the statutory definition of small businesses. The nature of the payment system places financial stresses on these businesses that are not present on other businesses in the exempt category. Considering the potential adverse effects of these rules on some small businesses would ease that impact. While the purpose for the exemption does not appear to be present here, that does not affect the express exemption of rules governing residential care facilities. It is found that an analysis of small business considerations is not required under Minn. Stat. § 14.115, subd. 2, for these rules.

Analysis of the Proposed Rules

10. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules has been established by the Department by an affirmative presentation of fact. The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the adoption of each of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for each provision. The SONAR was supplemented by the comments made by the Department at the public hearing and in its written post-hearing comments. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn.App. 1985); Blocher Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn.App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). An agency is entitled to make choices between possible standards as long as the choice it makes is

rational. If commentators suggest approaches other than that selected by the agency, it is not the proper role of the Administrative Law Judge to determine which alternative presents the "best" approach.

11. This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Accordingly, the Report will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion has been carefully read and considered. Moreover, because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of the provisions of the rules that are not discussed in this Report by an affirmative presentation of facts, that such provisions are specifically authorized by statute, and that there are no other problems that prevent their adoption.

12. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed. Minn. Stat. § 14.15, subd. 3 (1992). The standards to determine if the new language is substantially different are found in Minn. Rules Part 1400.1100 (1991). Any language proposed by the Department which differs from the rules as published in the State Register and is not discussed in this Report is found not to constitute a substantial change.

Proposed Rule Part 9545.0915 - Applicability

13. Under proposed rule 9545.0915, subpart 1, the rules apply to persons operating residential treatment programs for children with severe emotional disturbance. The second paragraph of the subpart reads, in part:

Until the commissioner adopts separate rules to license shelter services, parts 9545.0905 to 9545.1125 apply according to part 9545.1045 to

Phyllis Seachrist and Lori Squire of St. Joseph's Home; Jim Fischer, Program Director of the Austin Ranch of the Sheriff's Youth Program (Sheriff's Youth Program); and Roberta C. Opheim, Ombudsman of the Minnesota Office of the Ombudsman for Mental Health and Mental Retardation (Ombudsman's Office), objected to this language and to the inclusion of shelter services within these rules. At the hearing, the Judge suggested the opening phrase of the quoted language be deleted. The Department declined to delete that language intending thereby to aid persons by informing them that other rules may be adopted.

Including shelter services under these rules has been shown to be needed and reasonable. See Finding 34, below. Application of specific rules to shelter services will be discussed as appropriate. The cited phrase, however, is a defect in the proposed rule. Language that indicates the application of a rule is conditional on other rulemaking, without citation, is vague and could cause confusion. This is unreasonable. The proper approach for the Department is to delete the shelter language when the shelter rule is adopted. To cure this defect, the first phrase, from "Until" to the first comma, must be deleted. The subpart, as modified, is needed and reasonable. Correction of the defect as noted is found not to be a substantial change.

Proposed Rule 9545.0935 - Conditions of Licensure

14. Proposed rule 9545.0935 is entitled "Conditions of Licensure" and prohibits unlicensed persons from providing residential treatment services to children with severe emotional disturbance. In response to the Judge's suggestion that variance provisions be easier to find, the Department added a subpart referencing Minn. Rule 9543.1020, subpart 5, which is the variance provision applicable to all human services licensure provisions. Two problems are posed by this rule part. The language proposed in the State Register does not impose "conditions of licensure," and the variance provision does not have any relation to the rest of the part. This rule has not been shown to be needed or reasonable as proposed or modified.

To cure the problem with subpart 1, it is suggested that the title of part 9545.0935 be changed to "Prohibition Against Unlicensed Services." With such a change of title, it is found that the rule as drafted reasonably relates to the purpose stated in the title. To cure the problem with subpart 2, the variance provision must be expanded to indicate what the subpart actually does (allows a licensee to provide services without strict compliance with all the applicable rules), and the subpart must be located in a part of the rules that does not obscure its meaning or intent.

It is suggested that the best location for the subpart is proposed rule 9545.0905. The new subpart should contain language indicating that services not to be provided in compliance with the rules must be under a variance granted by the Department. The Judge suggests the following language in a (new) subpart 3:

A licensee seeking to provide services not in compliance with parts 9545.0905 to 9545.1125 must first obtain a variance under the process set forth in part 9543.1020, subpart 5.

With the modifications suggested to the rule language and location, it is found that the rule is needed and reasonable. It is found that the proposed language changes do not constitute substantial changes. As finally submitted, the

Department listed two subparts. The changes suggested by the ALJ obviate the need for subparts, so the title "Subpart 1. General Provisions" is found to be unnecessary and should be deleted. This clerical change is found to be needed, reasonable, and not a substantial change.

Proposed Rule 9545.0945 - Program and Service Standards

15. Services specified by DHS are required to be offered to children in licensed programs. Subpart 1 of proposed rule 9545.0945 lists those services. The Sheriff's Youth Program and Gerard Treatment Programs (Gerard) asserted that rural Minnesota was not overly-supplied with mental health professionals and meeting the requirements of subpart 1 would be difficult. The Department responded that Minn. Stat. § 245.4882, subd. 2 requires clinical supervision of residential treatment programs by a mental health professional. DHS Comment, at 6-7. The Department also noted that the Advisory Committee recommended this standard. *Id.* at 7. Requiring supervision of programs for emotionally disturbed children by mental health professionals is not unreasonable. If such professionals are not available for full-time, on-site supervision, perhaps some less direct supervision can be established through the variance process. The requirement is needed and reasonable as proposed.

16. MCCA suggested that several of the activities in subpart 1 (instruction in independent living skills; engaging in recreation, leisure, and play activities; social skills; and vocational skills), do not require mental health professionals to carry out. DHS agreed. DHS Comment, at 7-9. The Department pointed out that some of these activities are more complex when children with severe emotional disturbances are involved. The rule does not require that a mental health professional perform the activities. The requirements of subpart 1 are found to be needed and reasonable to ensure the children in a residential program are afforded appropriate care.

17. Subpart 2 requires that children have opportunities to associate with adults and peers with similar cultural and racial backgrounds. The Sheriff's Youth Program pointed out that obtaining racially and culturally diverse staff is difficult in rural Minnesota. The Judge questioned whether this rule provision was "a form of affirmative action." *Tr.* at 342-343. The SONAR describes the rule as requiring programs to "utilize persons as employees, consultants, or volunteers with racial or cultural backgrounds similar to those of the children in treatment" SONAR, at 22. DHS responded that the Comprehensive Children's Mental Health Act requires sensitivity to cultural issues. DHS Comment, at 9. The rule does not place requirements on staffing, but does require programs to maintain a connection to the cultural community from which the child has come. Subpart 2 is found to be needed and reasonable as proposed.

18. As proposed, subpart 4 requires programs to have a system to contact a medical health professional within thirty minutes of any discovered emergency. Dan Bowman objected to this requirement as being unreasonably costly, particularly if the professional must be contacted whenever a "time-out" is used. DHS indicated that the emergency requiring contact with a medical professional is a clinical emergency, not behavioral problems. The Department added language to clarify that the contact could be in-person or by telephone. Subpart 4 is found to be needed and reasonable, as modified. The new language is not a substantial change.

19. Subpart 5 sets staffing ratios required of programs during waking and sleeping hours. During waking hours, the ratio runs from one staff to three children for children under 6 years old, to one staff to eight children for children 12 to 18 years old. During sleeping hours the ratio is 1 to 7 for children under 9 years old, and 1 to 12 for other children. Rodney Stivland of Harbor Shelters (three shelter facilities), objected to the staffing levels during sleeping hours as unnecessarily high. Stivland's shelters currently have one person on staff at each facility during sleeping hours. Stivland points out that the proposed rule would require two staff on duty. In its SONAR, the Department indicates that more staffing should be required for younger children since they require more care. SONAR, at 24. Beyond that, the SONAR does not indicate why any specific staff level was chosen.

In the rule record, one discussion of staffing levels, outside the rule itself, is in a monograph on caring for severely emotionally disturbed children. Exhibit 12. In this monograph, the staffing level of one staff to every eight to ten children is suggested for therapeutic foster care. Exhibit 12, at 49. The context suggests that the staff person is a mental health professional and not involved in providing day-to-day care. Particular ratios are discussed in the Child Welfare League of America (CWLA) Standards of Excellence for Residential Group Care Services. Exhibit 11. Ratios of one staff to two children under two years of age, one to four for children under ten, and one to six for children over ten are suggested for emergency shelters during daytime hours. While sleeping, a ratio of one to eight is suggested. Exhibit 11, at 104. The Department has shown that the ratios proposed in the rule are needed and reasonable.

Proposed Rule Part 9545.0955 - Admissions Criteria and Process

20. Proposed rule 9545.0955 is composed of two subparts. Subpart 1 sets the conditions governing admission of children to licensed programs. Subpart 2 details what information must be obtained initially by the licensee and retained in the child's file. Among the conditions for admitting a child are a preadmission screening and a determination that the proposed treatment is necessary and appropriate, the length of stay is as short as possible, and the care could not have been provided in the child's home. MCCA expressed

concern that a provider could not know if care could not be provided in the child's home. DHS responded that the professional doing the assessment would arrive at a conclusion on this issue in the assessment process. The standards are appropriate to ensure that children are placed in facilities based on their needs. Proposed rule 9545.0955 is found to be needed and reasonable as proposed.

Proposed Rule Part 9545.0975 - Developing and Reviewing Individual Treatment Plan

21. Each child must have an individual treatment plan, developed within ten working days of admission to a licensed program under proposed rule 9545.0975, subpart 1. The subpart lists outcomes that must be addressed in the plan. Subpart 2 requires review of the plan every 90 days. Progress notes must be recorded in the child's record at least weekly under subpart 3. It is found that the Department has adequately supported the need and reasonableness of part 9545.0975 in its SONAR.

Proposed Rule Part 9545.0985 - Criteria for Continued Stay, Discharge, and Discharge Planning

22. Whether a child should remain in a licensed program, and what pre-discharge planning must be done is addressed in proposed rule 9545.0985. At the hearing, the Judge suggested one discharge criterion, that the child be "at least 18 years old," be changed to delete "at least" as redundant. DHS agreed with this change. The Judge also suggested that use of a mental health consultant remain optional, as stated in the SONAR, where the child is from a racial or cultural minority group. The use of such a professional is required under subpart 3. The Department declined to make that change, stating:

The department prefers to retain the term "must" in this subpart. It is important to require that discharge plans for children from a racial or cultural minority group must be developed with the advice from a special mental health consultant because these children often have different needs not identified by the majority culture. The special mental health consultant may be an employee of the program. If the program does not have a staff person who is qualified to perform this task, the program must seek this advice from a special mental health consultant outside of the program.

Department Comment, at 13.

DHS has stated a valid reason for requiring the use of a special mental health consultant. Since the consultant can come from any racial or ethnic group, and because consultation is not "employment," the proposed rule does

not conflict with the Minnesota Human Rights Act. The rule as modified is found to be needed and reasonable. The new language does not constitute a substantial change.

Proposed Rule Part 9545.0995 - Standards Governing Use of Restrictive Techniques and Procedures

23. Children in licensed programs are subject to behavioral problems arising both from a disciplinary perspective and from aspects of each child's emotional disturbance. See MCCA 1994 Annual Report, at 29-30. Under proposed rule 9545.0995, each program must meet the standards set by DHS on restrictive techniques to address these behavioral problems. Subpart 1 sets out methods that are prohibited and requires programs to use methods which are positive, least restrictive approaches, and conform the use of time-out procedures to each child's individual treatment plan. Subpart 2 sets the standards for time-out, including prior notification, time limits on monitoring and assessment, and preferred location. Subparts 3 through 9 set standards on the use of emergency holding and isolation, including reviews of each use of either technique and periodic reviews of the program's pattern of use of either technique.

St. Joseph's Home supported the prior notification and prior authorization provisions of the rule, but questioned whether isolation and holding should be included in the same rule. Isolation is involuntary confinement away from the other persons in the program. Holding is the use of physical restraints to prevent some form of movement by the person. The St. Joseph's Home and Gerard suggested separating holding from isolation and not to treat holding as a restrictive technique. St. Joseph's Home cited the Joint Commission on Accreditation of Hospital Organizations (JCAHO) standards as support for not treating holding as a restrictive technique. DHS responded to the suggestions by noting that the JCAHO standards themselves do not purport to be regulatory standards and the proposed rule takes into account a variety of statutory requirements in setting the proper standard. Department Comment, at 13-14. The Judge agrees with DHS that holding is a restrictive technique under Minnesota law and should properly be included under the rule part on restrictive techniques.

The application of the prior notice and reauthorization requirements in subpart 2, governing the use of time-out, were questioned by St. Joseph's Homes. The Department indicated that prior notice does not apply to shelter services, since the family situation for a child in such a facility usually does not render such action meaningful. Department Comment, at 14-15. DHS also indicated that reauthorization is not required for use of time-out procedures. *Id.* at 14.

24. At the hearing, the Judge suggested that subpart 5 be modified to delete "or increase" from the rule requiring that prior authorization from a mental health professional to use an emergency hold be sought, unless the delay would "continue or increase the likelihood of harm." The Department agreed that the language was redundant and deleted "or increase." The change is found not to be a substantial change. Subpart 5, as modified, is found to be needed and reasonable.

25. When an emergency use of isolation or holding is used, subpart 7 requires that the use be documented. Subpart 8 requires that the facility conduct an administrative review of the isolation or holding. The Sheriff's Youth Program and St. Joseph's Home criticized the documentation requirements of subpart 7 as too costly. DHS indicated that Minn. Stat. § 144.651 requires documentation of the use of such procedures. The Department also asserted that a well-documented file is important to determine that appropriate procedures are being followed. SONAR, at 34. Subpart 7 is found to be needed and reasonable to ensure that restrictive techniques are properly used and the continued use of those procedures is consistent with the needs of the child.

26. The Sheriff's Youth Program and St. Joseph's Home suggested that the administrator be allowed to designate subordinates to complete the administrative review required by subpart 8 within one working day of the use of holding or isolation. The Department agreed with the suggestion as to times when an administrator is sick or on vacation. The change to the rule does not place any conditions on when a designee may be appointed. With or without such conditions, the subpart as modified is found to be needed and reasonable. It is found that neither change would constitute a substantial change.

27. St. Joseph's Home suggested allowing immediate supervisors to conduct the administrative review. Subpart 8 expressly prohibits that practice. The Department indicated that the proposed language avoids any conflict between the duty of a supervisor to be objectively critical and loyalty to an immediate subordinate. Department Comment, at 16. Prohibiting review by an immediate supervisor is found to be both needed and reasonable.

Proposed Rule Part 9545.1025 - Use of Psychotropic Medications

28. Proposed rule 9545.1025 establishes the standards for administration of psychotropic medications to children in licensed programs. Under subpart 1, the use of such medications must be called for in the child's individual treatment plan, documentation must be maintained, and certain prohibitions against use of those medications are set forth. The Judge questioned the use of the word "prompt" in item B(3). DHS indicated that the meaning intended was "cause" as in "to initiate." To clarify the item, DHS

changed the word to "cause." Subpart 1, as modified, is found to be needed and reasonable and not a substantial change.

29. Subpart 2 requires that the licensee monitor a child being given psychotropic medications. As originally proposed, either a "licensed nurse or physician" must direct the documentation. Susan D. Stout, R.N., Staff Specialist for Government Affairs for the Minnesota Nurses Association, suggested changing "licensed nurse" to "registered nurse" to remain consistent with the practice requirements of nursing. The Department accepted the suggestion and made the change. It is found that the new language does not constitute a substantial change. Subpart 2, as modified, is found to be needed and reasonable.

30. Subpart 4 requires training in administration of psychotropic medication for employees other than licensed medical practitioners. The subpart allows registered nurses to provide that training. The Minnesota Nurses Association questioned whether registered nurses have authority to do that training. The Department responded that such training is lawful under Minn. Stat. §148.171(3), the cost of such training is significantly reduced if performed by registered nurses, and employees are easier to retain if they lack formal certification from a postsecondary institution. Department Comment, at 17.

In response to the comments, the Department modified the subpart to allow the facility to establish a formal training program taught and supervised by a registered nurse. The new language meets the concerns of persons about the scope of a registered nurse's practice. DHS acknowledges that some additional costs will be incurred by facilities but expects that the costs are minimal (especially in light of the costs of postsecondary training). Subpart 4 as modified is found to be needed and reasonable. The new language is not a substantial change.

31. At the hearing, the Department suggested a change to subpart 5 broadening the documentation in medication review to "the effect of psychotropic medication" on the goals in the child's individual treatment plan. The prior language required documentation of "whether these goals are adversely affected by the psychotropic medication." The new language is an improvement in that all aspects of the medication's effect on the child can be reviewed. Subpart 5 is found to be needed and reasonable, as modified. The new language is not a substantial change.

Proposed Rule Part 9545.1035 - Treatment in a Setting with Secure Capacity

32. Proposed rule 9545.1035 sets out the requirements for programs in a secure setting. A secure setting, according to subpart 1, is a location preventing a child from leaving. The subpart permits the setting to be secured by locks, but does not require that method. Subpart 2 sets the limits on which children can be

included in a secure setting. The essence of a child's inclusion is that the individual treatment plan calls for it to prevent harm to self or others.

As originally proposed, individual treatment plans would be reviewed once a week. David W. Cline, M.D., of the Children's Residential Treatment Center (CRTC) of Abbott-Northwestern Hospital, indicated that for many children, weekly review was not useful due to the child's condition and relative stability of condition. MCCA suggested that children who are placed by court order do not require weekly review, since the review would not change the placement. DHS agreed that the two situations identified should be exempted from the weekly review requirement and proposed new language to accomplish that goal. The Department notes that it is still necessary to meet the requirements of Minn. Stat. §§ 245.4871, subd. 21; 245.4876, subd. 3; and 245.4882, subd. 5. Subpart 2 is found to be needed and reasonable, as modified. The new language does not constitute a substantial change.

33. Subpart 4 requires a staff ratio of at least one treatment staff to three children during waking hours for secure facilities. A ratio of two staff to nine children must be maintained during sleeping hours and one of those staff members must be awake. CRTC asserts that facilities should maintain at least a one to six ratio during waking hours and one to eight during sleeping hours. CRTC indicates that with a one to four ratio it has a record of no citations for abuse or neglect. The reason for higher staffing levels at other facilities, according to CRTC, is that those facilities have a clientele requiring greater individual attention. CRTC frankly acknowledges that the staffing levels in subpart 4 are appropriate for the population in other facilities. For example, eighty percent of the population at one facility had been adjudicated delinquent. Tr. at 239. The population served by CRTC are typically not violent towards others and this reduces the need for a higher ratio of staff to clients. In addition, the higher the ratio of staff to children, the greater the cost to the program. CRTC expects an overall increase of eighteen percent in its costs, mostly from more staff.

Where the purpose of the rule is to prevent harm, a measure of prophylactic regulation is justified. The Department has demonstrated that the ratios of one to three (waking) and two to nine (sleeping) are needed and reasonable for secure facilities. This finding of reasonableness is influenced by the knowledge that a variance process is available to programs with a population less likely to cause harm. Where the characteristics of such a population can be identified and a program can demonstrate adequate assurances of client safety, a variance would be appropriate. Subpart 4 is found to be needed and reasonable, as proposed.

Proposed Rule Part 9545.1045 - Shelter Services

34. Where intervention is required on short notice, shelter services provide residential care for children with severe emotional disturbance. Subpart 1 of proposed rule 9545.1045 makes the remainder of the rule part applicable to shelter services "Until the commissioner adopts rules specifically developed to govern the licensure of shelter services" A number of commentators suggested delay of the applicability of rules to shelter services until a separate rule can be adopted. DHS declined to implement this suggestion. The Department noted that the advisory committee on these rules arrived at a consensus on applying these rules to shelter services and the proposed rules are an improvement over the existing regulation of shelter services. Department Comment, at 20.

There is no compelling reason to delay to the imposition of part 9545.1045 on shelter services. All commentators agree that the rule must be modernized and apply specifically to shelter services. The "Until ..." language quoted above however, creates confusion as to when or whether these rules are effective. The proper method of conforming a rule to later rulemaking is to delete the superseded rule provisions as part of that later rulemaking. Including language suggesting the rule is conditional renders the rule vague and that language is found to be neither needed nor reasonable. To cure the defect in the rule, the Department should delete the language of subpart 1 from the beginning to the first comma. The modification cures the defect in the proposed rule. As modified, subpart 1 is found to be needed and reasonable. The deletion does not constitute a substantial change.

35. When a child is admitted to shelter services, subpart 4 requires the child have a health screening to determine if a physical examination is needed. The screening must occur within twenty-four hours of admission. The persons qualified to perform the health screening are listed in the subpart. Several commentators suggested delaying the screening to the next working day or leaving the screening to the discretion of shelter staff. The Department cited a correction order issued to a facility where a child's serious dental problems were not discovered by staff. The burden of a health screening is not onerous and has obvious benefits to both the child and the facility.

St. Joseph's Home objected to the time limit in subpart 4 that requires the facility to refer the child to a doctor or dentist for any health problems discovered. The objection arises from the facility's inability to compel the child to undergo medical care. It is found that the facility must obtain authorization from either a parent or the child's case manager. At the hearing, DHS responded that the facility's obligation is merely to schedule the appointment with the doctor or dentist. Tr. at 106-107. The Department indicated it would respond more fully in its comments. It has not done so, except to note it is to the child's advantage for shelters to make such appointments because of parental indifference or incompetence.

DHS has not demonstrated that a shelter facility has the authority to send a child to a doctor or dentist. The Department has not demonstrated that the facility has the authority to make a doctor's appointment. Compelling a shelter facility to do something by rule that is beyond its legal authority is found to be unreasonable. The Department can cure this defect and protect the health of the children admitted to shelters by requiring the shelter to notify the child's case manager of the need for medical or dental services. In the alternative, the "appointment" language can simply be deleted, but this option would not protect children's health. The subpart, as proposed for modification herein, is found to be needed and reasonable. The new language is found not to be a substantial change.

36. Subpart 6 requires shelters to refer children to the county for diagnostic assessment if the children show evidence of severe emotional disturbance. Subpart 7 requires shelters to follow up with the county if no response has been received by the shelter within three working days. St. Joseph's Home objected to being held responsible for a county failing to respond. The subparts only require the shelters to make contact with the county, not perform any function properly within the county's authority. The rule is not unreasonable for requiring a shelter to follow up where a county has failed to respond. The alternative would be to allow children to go without diagnostic assessment where that assessment was indicated. That is an unacceptable outcome. Subparts 6 and 7 are found to be needed and reasonable as proposed.

37. An individual stabilization plan for each child is required of shelters by subpart 8. As proposed, the plan would be required within five working days of the child's admission. St. Joseph's Home suggested allowing ten days for this plan. The Department responded that such a plan should be in place for any child in a shelter setting for more than one week. Department Comment, at 22. The Department's expectation is reasonable, particularly in light of the overall restrictions on the total length of stay in a shelter setting. Five working days is not an unreasonably short length of time. The Department did delete a reference to a discharge plan, since that plan is in the next subpart and a different time period will apply. Subpart 8 is found to be needed and reasonable, as modified. The new language is not a substantial change.

38. The Sheriff's Youth Program suggested that the discharge plan required by subpart 9 should be required within fifteen days, not five. The Department agreed that more time was appropriate for discharge and settled on ten days as the standard to be proposed. Department Comment, at 22. Ten days is found to be a reasonable period of time for preparation of a discharge order. As modified, subpart 9 is found to be needed and reasonable. It is found that the new language is not a substantial change.

39. Subpart 10 requires the facility to apply for a variance if a child is to remain in a shelter setting for more than ninety days. A review of the need for and consideration of alternative placement plans must be performed if the child remains in the shelter setting for more than thirty days. Several commentators suggested that stays beyond ninety days are appropriate in some cases and should not be so severely restricted that a variance application would be required. DHS pointed out that this rulemaking places less stringent standards on shelters and a limitation on the length of stay provides assurance that children are having all their needs met by the setting in which they are placed. The Department made two minor changes to clarify the subpart. Subpart 10 is found to be needed and reasonable as modified. The change is found not to be a substantial change.

Proposed Rule Part 9545.1065 - Personnel Policies and Procedures

40. Proposed rule 9545.1065 requires facilities to maintain written policies regarding personnel, maintain personnel files, and have a written plan for recruiting staff. At the hearing, the Judge suggested that the subpart be modified to use the term of art "terms and conditions of employment" in place of the list of provisions in subpart 1(B). The Department made the change and clarified that both laws and regulations of federal, state, and local government must be complied with regarding personnel policies. Subpart 1 is found to be needed and reasonable, as modified. The new language is not a substantial change.

41. Subpart 2 requires a license holder to have a written plan for "recruiting and employing staff members who are representative of the racial, cultural, and ethnic groups, and sex of the population served by the program." At the hearing, the Judge inquired if this was another example of affirmative action. DHS responded that the rule language merely implements the cultural sensitivity required by the Minnesota Comprehensive Children's Mental Health Act. DHS cites Minn. Stat. § 245.4871, subd. 33a, defining a "special mental health consultant," as supporting the rule on recruitment.

The statute cited states that a special mental health consultant is "a mental health practitioner or professional with special expertise in treating children from a particular cultural or racial minority group." There is no mention in the definition of the race, national origin, cultural background, or gender of the person providing the consulting services. Minn. Stat. § 363.03, subd. 1(2)(c) prohibits discrimination in hiring on the basis of, *inter alia*, race, color, national origin, or sex. Subpart 2 attempts to require facilities to do what is expressly forbidden by the Minnesota Human Rights Act. Where a proposed rule is in conflict with a statute, the agency lacks the statutory authority to adopt the rule. It is found that proposed rule 9545.1065, subpart 2, suffers from that defect.

To cure the defect, the Department can delete the entire subpart, or change the subpart to be consistent with both the Human Rights Act and the Comprehensive Children's Mental Health Act. This goal can be accomplished by eliminating any reference in the plan to whom the staff person to be employed is, and rely upon what knowledge and experience the staff person has. If DHS were to replace "who are representative of" with "who are knowledgeable regarding the issues of," or delete the words "and employing" from the published subpart, there would be no conflict between the rule and the Human Rights Act. The Human Rights Act prohibits employing persons on the basis of race, color, national origin, or gender. That Act does not prohibit encouraging applications from groups underrepresented in facility staffs. So long as the hiring decision is based upon the skills of the individual applicant (which can include knowledge of cultures found in a particular facility's population) the hiring is consistent with the Human Rights Act. The suggested modifications are found to be needed and reasonable. They are further found not to constitute substantial changes.

Proposed Rule Part 9545.1085 - Staff Qualifications

42. The qualifications for program staff, administrators, and program directors are set forth in proposed rule 9545.1085. At the hearing, the Judge suggested expanding on the term "related field" in subpart 2 (describing the qualifications of administrators). The Department added the phrase "such as special education or education administration" after "related field." The new language improves the understanding of the rule's meaning. In response to a suggestion from the ALJ, the Department also changed the "grandfather clause" by extending the exemption of currently employed administrators and program directors who do not meet the educational, experience, or training requirements of part 9545.1085 from July 1, 1999, to July 1, 2001. DHS agreed with the Judge's suggestion that more time was needed to conform the "transition period" to that mentioned in the SONAR. The proposed rule is found to be needed and reasonable as modified. The new language is not a substantial change.

Proposed Rule Part 9545.1105 - Individual Staff Development

43. Among the training requirements of staff in a licensed facility, subpart 2 of proposed rule 9545.1105 published in the State Register requires forty hours of training per year for staff working an average of more than half-time and twenty hours of training per year for staff averaging less than half-time. St. Joseph's Home and the Sheriff's Youth Program suggested reducing the hours of training to reduce costs to the facility. The suggested training levels were between eighteen and twenty-four hours. DHS changed the levels to twenty-four hours for staff working more than half-time and sixteen for staff working less than half-time. The Department cited the staff training levels in CWLA's Standards of Excellence for Residential Group Services as support for the new rule standards. Department Comment, at 26. The rule, as modified, is found to be needed and

reasonable to ensure adequate minimum training levels for staff. The new hourly levels do not constitute substantial changes.

44. It is noted that an ambiguity exists regarding persons working an average of exactly half-time. These persons work neither more nor less than half-time and the rule does not identify what standard of training applies to them. To clarify the rule, it is suggested that either subpart 2A or 2B be changed to read "half-time or more" or "half-time or less," as appropriate, to clarify the status of those who work precisely half-time. Such a change is found to be necessary and reasonable and not a substantial change.

Proposed Rule Part 9545.1115 - Physical Plant

45. The physical plant of licensed facilities must meet the requirements of proposed rule 9545.1115. Subpart 1 suffers from the "Until" defect identified in Findings 13 and 34, above. To correct this defect, the Department must delete the rule language from "Until" to "governing" and add language ensuring grammatical correctness. The Judge suggests starting the subpart with either "for" or "regarding", to ensure clarity. The subpart, modified as suggested, is found to be needed and reasonable. The new language is found not to be a substantial change.

46. The Department agreed with suggestions made at the hearing to delete subpart 2 entirely, since subpart 2 suggests other rules will someday apply to Rule 5 facilities but those rules are not being revised at this time. Department Comment, at 28. Deleting subpart 2 is found not to be a substantial change.

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

CONCLUSIONS

1. The Minnesota Department of Human Services ("the Department") gave proper notice of this rulemaking hearing.

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

3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii) (1992), except as noted at Finding 41.

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii) (1992), except as noted at Findings 13, 14, 34, 35 and 45.

5. The additions or amendments to the proposed rules suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3 (1992), and Minn. Rules pts. 1400.1000, subp. 1 and 1400.1100 (1991).

6. The Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4, as noted at Findings 13, 14, 34, 35, 41 and 45.

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

8. Any Findings which might properly be termed Conclusions are hereby adopted as such.

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

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where otherwise noted above.

Dated this 16th day of June, 1995.



RICHARD C. LUIS
Administrative Law Judge

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