OAH 65-9000-37175
Revisor R-4605

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the of the Proposed Rules of the Minnesota Department of Health Governing Assisted Living Facilities, Minnesota Rules Chapter 4659

REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subds. 3, 4 (2020) and Minn. R. 1400.2240, subp. 4 (2019). These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge's findings that a proposed agency rule is defective and should not be approved.

This rulemaking concerns the proposed rules of the Minnesota Department of Health (Department) governing assisted living facilities and came on for public hearing on January 19-20, 2021.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge **CONCURS** with all disapprovals contained in the Report of the Administrative Law Judge dated March 29, 2021.

The following proposed rules are **DISAPPROVED:**

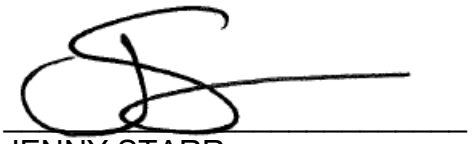
- Proposed Minn. R. 4659.0020, subp. 14;
- Proposed Minn. R. 4659.0040, subp. 1;
- Proposed Minn. R. 4659.0110, subp. 1;
- Proposed Minn. R. 4659.0120, subp. 1B;
- Proposed Minn. R. 4659.0140, subp. 1B;
- Proposed Minn. R. 4659.0140, subp. 4;
- Proposed Minn. R. 4659.0180, subp. 4
- Proposed Minn. R. 4659.0180, subp. 5;
- Proposed Minn. R. 4659.0180, subp. 6; and
- Proposed Minn. R. 4659.0210, subp. 3A;

The changes or actions necessary for approval of the disapproved rules are as identified in the Administrative Law Judge's Report.

If the Department elects not to correct the defects associated with the proposed rules, the Department must submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4 (2020).

If the Department chooses to make changes to correct the defects, it shall submit to the Chief Administrative Law Judge a copy of the rules as originally published in the State Register, the order adopting the rules, and the rule showing the Departments' changes. The Chief Administrative Law Judge will then make a determination as to whether the defect has been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated: April 8, 2021



JENNY STARR
Chief Administrative Law Judge

OAH 65-9000-37175
Revisor ID No. R-4605

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Minnesota Department of Health Governing Assisted Living Facilities, Minnesota Rules Chapter 4659

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Ann O'Reilly for a rulemaking hearing on January 19 and 20, 2021. The public hearing was held online via interactive video conference and telephone using WebEx and Intercall technology.

The Department of Health (Department) proposes to create Minnesota Rules, chapter 4659, which will regulate Minnesota's assisted living facilities.[1]

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act (APA).[2] The purpose of this process is to ensure that state agencies meet all requirements established by law for adopting rules.

The hearing process permits agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss, and critique the proposed rules.

The Department must establish that: (1) it complied with all procedural requirements for rulemaking; (2) the proposed rules are within the Department's statutory authority; (3) are rationally related to the agency's objectives; (4) are necessary and reasonable; (5) are constitutional and legal; (6) do not improperly delegate the agency's powers; (7) are "rules" as defined in law or do not have the force or effect of law; and (8) are not substantially different from the rules published in the *State Register* unless the Department has complied with the procedures set forth in Minn. R. 1400.2110 (2019).[3]

The Department panel at the public hearing included: Josh Skaar, Department legal counsel; Lindsey Krueger, Program Manager, Home Care and Assisted Living Program; Amy Chantry, Legal and Policy Advisor, Health and Regulation Division; Amy Hyers, Survey Supervisor, Assisted Living Licensure; Daphne Ponds, Investigator Supervisor, Office of Health Facility Complaints; Maria King, Assistant Program Manager, Licensing and Certification; Ben Hanson, Appeals Coordinator, Background Studies; Jeri Cumins, Survey Supervisor, Home Care and Assisted Living Program; Rick Michels,

[1] Exhibit (Ex.) D (Statement of Need and Reasonableness (SONAR)).
[2] *See* Minn. Stat. §§ 14.131-.20 (2020).
[3] Minn. Stat. §§ 14.05, .14, .24, .25, .50 (2020); Minn. R. 1400.2100 (2019).

Licensing and Enforcement Supervisor, Home Care and Assisted Living Program; Robert Dehler, Program Manager, Engineer; Mark Schulz, Legal Specialist, Health Regulation Division; and Jeremy Peichel, Principal/Owner, Civic Intelligence, LLC.[4]

The hearing was open to all members of the public who wished to attend. The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules. Twenty-one members of the public made statements or asked questions during the hearing.[5] Approximately 115 written comments were received.[6]

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days, until February 9, 2021, to permit interested persons and the Department to submit written comments. Following the initial comment period, the hearing record was open an additional five business days to permit interested parties and the Department an opportunity to reply to earlier-submitted comments.[7] The hearing record closed on February 17, 2021.

On March 19, 2021, Chief Administrative Law Judge Jenny Starr issued an Order Granting an Extension of the Administrative Law Judge's Report. The Order gave the Administrative Law Judge until March 29, 2021, to complete her Report.

Numerous individuals submitted comments about the inadequate care their loved ones received at assisted living facilities.[8] These stories were shared to underscore the need for adequate staffing, training, and oversight of facilities. Other commenters shared stories of excellent services their loved ones received in small care facilities that could be impacted by the additional costs the Assisted Living Act and the rules will impose on these facilities.[9] The Administrative Law Judge has endeavored to address all relevant comments in this Report.

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[4] Hearing Transcript (Hrg. Tr.) at 2.

[5] *See* Hrg. Tr. Vol. I and II.

[6] *See* eComments PDF Report.

[7] *See* Minn. Stat. § 14.15, subd. 1.

[8] Comment of Jean Peters (Jan. 11, 2021); Comments of Nancy Haugen (Comments 5, 82); Testimony (Test.) of Nancy Haugen (Hrg. Tr. Vol. II at 249-255); Comment of JacLynn Herron (Comment 6); Comment of Jean Peters (Jan. 11, 2021); Comment of Anna Sterner; Comment of Sandy Klocker; Comment of Natalie and Benjamin Sallee (Comment 74); Comment of Patty Sagert (Comment 84); Comments of Charyl Korpal (Comment 63); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15) (presenting comments of various individual AARP members); Comments of Eilon Capsi (Comment 61); Test. of Eilon Capsi (Hrg. Tr. at 177-190).

[9] Comment of Dawn Kuzma (Comment 7); Test. of Dawn Kuzma (Hrg. Tr. Vol. I. at 104-111); Comment of Jenny Morgan (Comment 9); Comment of Muriel Carpenter (Comment 11); Comment of Chris Kunz (Jan. 12, 2021); Comment of Scott Carpenter (Comment 14); Comment of Jill Patterson (Comment 18); Comment of Scott Carlson (Comment 19); Comment of Luann Phillpich (Comment 21); Comment of Robert Phillipich (Comment 68); Comment of Ranae Noble (Comment 26); Comment of David Pederson (Comment 31); Comment of Jullene Kallas; Comment of Dave Zollar (Comment 88); Comment of Joanne Pahl (Comment 32); Comment of Christine Samuelson (Comment 33); Comment of Charles Pederson (Comment 34); Comment of Brad Pederson (Comment 35); Comment of Carrie Zebedee (Comment 36); Comment of Pam Christiansen (Comment 37); Comment of John Zollar (Comment 38); Comment of Lynn Flickinger (Comment 40); Comment of Sheila Berube (Comment 41); Comment of Carol Shapiro (Comment 42); Comment of Susan Boehm (Comment 43); Comments of Anneliese Peterson (Comment 48);

SUMMARY OF CONCLUSIONS

The Department has complied with all procedural requirements of rule and law. The Department also has the legal authority to adopt the proposed rules. With the exception of the disapproved rules detailed below, the Department has established that the rules are needed, reasonable, and not substantially different from those noticed in the *State Register*. The Administrative Law Judge **APPROVES** the proposed rules, as written or modified by the Department in response to comments, with the exception of the following rules, which are **DISAPPROVED**:

4659.0020, subp. 14
4659.0040, subp. 1
4659.0110, subp. 1
4659.0120, subp. 1B
4659.0140, subp. 1B
4659.0140, subp. 4
4659.0180, subp. 4
4659.0180, subp. 5
4659.0180, subp. 6
4659.0210, subp. 3A

The Administrative Law Judge **APPROVES** the following proposed rules subject to changes recommended by the Judge:

4659.0080, subp. 1
4659.0080, subp. 8
4659.0120, subp. 1D
4659.0120, subp. 7A
4659.0120, subp. 10, as modified by the Department
4659.0130, subp. 6A
4659.0150, subp. 1
4659.0160, subp. 5
4659.0200, subp. 1

Comments of Darla Lundell (Comment 56); Comment of Mandy Brecher (Comment 57); Comment of Greta Marston (Comment 64); Comment of Thomas Shackle (Comment 59); Comment of Nadine Scheop (Comment 51); Comment of Mary Jo Cosio (Comment 50); Test. of Scott Carpenter (Hrg. Tr. Vol. II at 218-233).

The Administrative Law Judge **APPROVES** the following proposed rules with optional recommended changes for clarity or consistency:[10]

4659.0030
4659.0120, subp. 1C
4659.0120, subp. 4
4659.0150, subp. 2 (as modified by the Department)
4659.0190, subp. 6

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. Under the current laws governing assisted living, a resident's housing and services are separately regulated. Facilities providing resident housing are called "housing with services establishments."[11] Although these establishments must be registered with the state, they are subject to minimal oversight and regulation by the Department.[12] The housing they provide is generally governed by landlord-tenant law.[13] Whereas, the assisted living services provided to the residents of these facilities are considered "arranged home care providers" and regulated under Minnesota's home care licensure laws.[14]

2. Currently, there are 41,000 people living in 1,345 assisted living settings in Minnesota. As of 2014, 58 percent of these residents were over age 85, and 39 percent had dementia. Minnesota law does not restrict the level or complexity of the case these

[10] The Administrative Law Judge also recommends that the Department revise the proposed rules to make consistent use of the defined term "representatives." The word "representative" should be changed to "representatives" in the following proposed Rules:
4659.0120, subp. 2B (line 17.14)
4659.0120, subp. 5C (line 18.25)
4659.0120, subp. 7A (line 19.19)
4659.0130, subp. 2G(6) (line 24.13)
4659.0130, subp. 6A (line 26.8)
4659.0130, subp. 7 (line 26.21)
4659.0160, subp. 3 (line 35.22)
46459.0200, subp. 2B(4) (line 43.12)

[11] Minn. Stat. § 144D.01, subd. 4 (2020).

[12] *See* Minn. Stat. §§ 144D.02 (2020) (requiring registration of housing with services establishments); 144D.04 (setting minimum standards for housing with services establishment contracts); 144D.05 (2020) (providing that the commissioner has standing to seek injunctive relief to "compel the housing with services establishment to meet the requirements of this chapter or other requirements of the state or of any county or local governmental unit to which the establishment is otherwise subject"); 144D.065–.066 (2020) (establishing dementia care training requirements for certain establishments and providing that the commissioner may levy fines for failure to comply with these training requirements).

[13] Minn. Stat. §§ 144D.01–.11 (2020); 504B.001–.471 (2020).

[14] *See* Minn. Stat. §§ 144A.43–.484 (2020) (governing the regulation of home care providers).

providers offer. As a result, residents with more severe or increasing care needs are choosing to live in assisted living settings and receive complex health and specialty services similar to those provided at nursing homes.[15]

3. The current regulatory framework separating assisted living housing from services was meant to provide more flexibility and choice for residents by allowing them to tailor their housing and services to their unique needs. Over time, however, it has created consumer confusion over what care is being provided and has left critical gaps in regulatory oversight.[16]

4. Due to a marked increase in the number of maltreatment cases arising in assisted living settings, the Department undertook an effort to better regulate these facilities.[17]

5. In 2017, in response to a number of significant elder abuse cases, then Governor Mark Dayton called for a workgroup led by consumer stakeholder groups to recommend changes to the then-current regulations of long-term care facilities. In 2018, Governor Dayton and the legislature announced a bipartisan plan to protect the health and safety of seniors and vulnerable adults living in Minnesota. This plan included an overhaul of the laws regulating assisted living and dementia care facilities.[18]

6. In the fall of 2018, the Commissioner convened six informal workgroups to develop recommendations around assisted living and related consumer rights. The workgroups recommended: (1) changing the law and enacting a single licensing structure combining housing and assisted living services; (2) creating a graduated license based upon the complexity of services offered and additional certification for memory care units; (3) establishing minimum criteria for physical plant requirements; (4) requiring trained and licensed assisted living administrators; and (5) establishing lease and service termination protections.[19]

7. During the 2019 legislative session, a group of stakeholders representing consumer and provider interests, the Department, and the Department of Human Services (DHS) worked together to develop legislation around assisted living licensure and consumer protections for seniors and vulnerable adults. These stakeholders included the following groups: Alzheimer's Association; American Association of Retired Persons (AARP); Minnesota Elder Justice Center (Elder Justice); ElderVoice Family Advocates (ElderVoice); Mid-Minnesota Legal Aid; LeadingAge Minnesota (LeadingAge); and Care Providers of Minnesota (Care Providers). DHS's Aging and Adult Services Division and the Office of Ombudsman for Long-Term Care (OOLTC) were also involved.[20]

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[15] Ex. D at 5 (SONAR).
[16] *Id.*
[17] *Id.* at 5-7.
[18] *Id.* at 7.
[19] *Id.*
[20] *Id.*

8. In May 2019, the Minnesota Legislature passed the Elder Care and Vulnerable Adult Protection Act of 2019, a comprehensive package of reforms aimed at strengthening consumer protections for vulnerable adults and mandating state licensure of assisted living facilities. The new Assisted Living Act, Minn. Stat. ch. 144G (referred to herein as the "Assisted Living Act" or "Act") is part of that package and will go into effect on August 1, 2021.[21]

9. The Assisted Living Act resolves the regulator gap between housing and services by streamlining housing and services under a single, integrated license, where the licensee is directly responsible to the residents for all housing and service-related matters. The Act includes two categories of licenses: assisted living facility licenses and assisted living facility with dementia care licenses. The Act enhances consumer protections for residents during relocations between facilities, transfers within facilities, and when services are reduced and terminated. It also includes an Assisted Living Bill of Rights.[22]

10. In the Assisted Living Act, the legislature directed the Commission to adopt rules to work in conjunction with the statutory requirements. The proposed rules, which will constitute Minnesota Rules ch. 4659 (a chapter that does not yet exist), are the Department's response to that legislative mandate.[23]

II. Rulemaking Authority

11. The Assisted Living Act, Minn. Stat. § 144G.09, subd. 3, expressly directs and authorizes the Commissioner to adopt rules for all assisted living facilities that: (1) promote person-centered planning and service delivery and optimal quality of life; and (2) ensure resident rights are protected, resident choice is allowed, and public health and safety is assured. Subdivision 3(c) of the statute specifically directs and authorizes the Commissioner to promulgate rules addressing the following 13 topics:[24]

- staffing appropriate for each licensure category to best protect the health and safety of residents no matter their vulnerability;
- training prerequisites and ongoing training, including dementia care training and standards for demonstrating competency;
- procedures for discharge planning and ensuring resident appeal rights;
- initial assessments, continuing assessments, and a uniform assessment tool;

[21] *Id.*
[22] *Id.* at 8.
[23] *Id.* at 3.
[24] Minn. Stat. § 144G.09, subd. 3(c).

- emergency disaster and preparedness plans;
- uniform checklist disclosure of services;
- a definition of serious injury that results from maltreatment;
- conditions and fine amounts for planned closures;
- procedures and timelines for the commissioner regarding termination appeals between facilities and the Office of Administrative Hearings;
- establishing base fees and per-resident fees for each category of licensure;
- considering the establishment of a maximum amount for any one fee;
- procedures for relinquishing an assisted living facility with dementia care license and fine amounts for noncompliance; and
- procedures to efficiently transfer existing housing with services registrants and home care licensees to the new assisted living facility licensure structure.

12. The Act further directed that the Commissioner publish its proposed rules by December 31, 2019, and its final rules by December 31, 2020.[25]

13. The Commissioner has met this requirement, as set forth in Section III(A), below.

14. The Administrative Law Judge finds that the Department has the legal authority to adopt the proposed rules.

III. Procedural Requirements of Minn. Stat. Ch. 14 and Minn. R. Ch. 1400

A. Request for Comments

15. Minnesota Statutes section 14.101 (2020) requires that an agency, at least 60 days prior to the publication of a notice of intent to adopt rules or a notice of hearing, solicit comments from the public on the subject matter of a proposed rulemaking. Such notice must be published in the *State Register*.[26]

[25] Minn. Stat. § 144G.09, subd. 3(d).
[26] Minn. Stat. § 14.101.

16. On August 12, 2019, the Department published in the *State Register* a Request for Comments seeking comments on the proposed chapter 4659 rulemaking.[27]

17. The Request for Comments was published at least 60 prior to the publication of the Notice of Intent to Adopt Rules, as discussed below.

18. The Administrative Law Judge finds that the Department complied with the requirements set forth in Minn. Stat. § 14.101.

B. Publication of Notice of Hearing

19. Minnesota Statutes section 14.14, subdivision 1a, (2020) and Minn. R 1400.2080, subp. 6 (2019), require that an agency publish in the *State Register* a notice of hearing at least 30 days prior to the date of hearing and at least 30 days prior to the end of the comment period.

20. An agency may request approval of its notice of hearing by an administrative law judge prior to service.[28]

21. The Department requested approval of its Notice of Hearing on November 10, 2020.[29] The Department also made a request to the Chief Administrative Law Judge for permission to omit the text of the proposed rules from publication in the *State Register* pursuant to Minn. Stat. § 14.14, subd. 1a(b).[30]

22. On November 17, 2020, the Chief Administrative Law Judge granted the Department's request to omit the text[31] of the proposed rules from publication.[32]

23. Also on November 17, 2020, the Administrative Law Judge approved the Department's Notice of Hearing for form and substance.[33] The Administrative Law Judge made one minor modification to the Notice, which allowed members of the public to submit comments outside of the eComments system, while clarifying that using the eComments system was preferred.[34]

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[27] Ex. A (Request for Comments).
[28] Minn. R. 1400.2080 (2019); Minn. Stat. § 14.22 (2020).
[29] Letter requesting scheduling of rules hearing and approval of additional notice plan (Nov. 10, 2020).
[30] *Id.*
[31] Ex. J (Chief Judge Order).
[32] Commenter Ian Lewenstein disputes the Chief Judge's determination on this issue, arguing that the proposed rules do not involve just a "small class of persons." *See* Comments of Ian Lewenstein (Comment 54). Compared to the State of Minnesota's population as a whole (approximately 5.64 million people), the rules apply to a relatively small and discrete group of individuals and entities (approximately 41,000 people in assisted living homes and 908 assisted living facilities). Given the extensive and targeted additional notice given to stakeholders and interest groups, who were able to easily access the proposed rules on the internet or by requesting a free paper copy, the Chief Judge's determination is obviously correct.
[33] Order on Request for Review and Approval of Additional Notice Plan and Notice of Hearing (Nov. 17, 2020).
[34] *Id.*

24. The Notice was published in the December 14, 2020 *State Register.*[35] The Notice informed the public that the hearing would take place via WebEx on January 19 -20, 2021, that the initial comment period closed five working days after the hearing date (but could be extended up to 20 calendar days by the Administrative Law Judge), and that a five-working-day rebuttal period followed the close of the comment period.[36]

25. The Notice identified the date and locations of the hearing in this matter.[37] Because of the pandemic, the hearing took place solely on WebEx, and the Notice informed the public how to access the WebEx hearing.[38]

26. The Notice contained all information required in Minn. R. 1400.2080.

C. Notice Requirements

1. Notice to Official Rulemaking List

27. Minnesota Statutes section 14.14, subdivision 1a requires that each agency maintain a list of all persons who have registered with the agency for the purpose of receiving notice of rule proceedings.

28. On December 14 and 15, 2020, the Department mailed or emailed a copy of the Notice to all persons and entities on its official rulemaking list.[39]

29. The Notice advised that the comment period would expire no sooner than five working days after the close of the hearing on January 20, 2021, which was January 27, 2021.[40] There are 43 days between December 15, 2020, and January 27, 2021.

30. Minnesota Statutes section 14.14, subdivision 1a, requires that agencies give notice of intent to adopt rules by U.S. mail or electronic mail to all persons on its official rulemaking list at least 30 days before the date of hearing.

31. Minnesota Rule 1400.2080, subpart 6 provides that a notice of hearing or notice of intent to adopt rules must be mailed at least 33 days before the end of the comment period or the date of the hearing.

32. The Administrative Law Judge concludes that the Department fulfilled the notice requirements set forth in Minn. Stat. § 14.14 and Minn. R. 1400.2080, subp. 6.

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[35] Ex. O (Notice as published in *State Register*).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Ex. G (Certificate of Accuracy of Mailing List); Ex. F (Certificate of Mailing of Notice).
[40] Ex. F (Notice as sent to mailing list).

2. Additional Notice

33. Minnesota Statutes section 14.14, subdivision 1a(a) requires that an agency make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intent to adopt rules. Such notice may be made in newsletters, newspapers, or other publications, or through other means of communication.[41] This notice is referred to as "additional notice" and is detailed by an agency in its additional notice plan.

34. Minnesota Statutes sections 14.131 and 14.23 (2020) require that an agency include in its Statement of Need and Reasonableness (SONAR) a description of its efforts to provide additional notice. Alternatively, the agency must detail why additional notification efforts were not made.[42]

35. An agency may request approval of its additional notice plan by an administrative law judge prior to service.[43]

36. The Department requested approval of its Additional Notice Plan on November 10, 2020.[44]

37. On November 17, 2020, the Administrative Law Judge approved the Department's Additional Notice Plan.[45]

38. The Department provided notice according to the approved Additional Notice Plan, as follows:[46]

(a) mailed the proposed rule and Notice of Hearing to everyone who has registered to be on the Department's rulemaking mailing list under Minnesota Statutes, section 14.14, subdivision 1a;

(b) provided notice via electronic mail to its GovDelivery list, which includes representatives of those entities identified in the Additional Notice Plan, including Care Providers MN, Leading Age MN, Minnesota Alzheimer's Association, Minnesota Elder Justice Center, Minnesota Legal Aid, American Association of Retired Persons, and Elder Voices Family Advocates;

(c) issued a press release announcing the Notice of Hearing and inviting people to review and comment on the proposed rule;

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[41] Minn. Stat. § 14.14, subd. 1a(a).
[42] Minn. Stat. §§ 14.131, .23.
[43] Minn. R. 1400.2060, subp. 3 (2019).
[44] Letter requesting scheduling of rules hearing and approval of additional notice plan (Nov. 10, 2020).
[45] Order on Request for Review and Approval of Additional Notice Plan and Notice of Hearing (Nov. 17, 2020).
[46] Ex. H.

(d) posted the Notice of Hearing, proposed rule, and SONAR on the Department's dedicated Assisted Living Licensure website at https://www.health.state.mn.us/facilities/regulation/assistedliving/index.html;

(e) gave notice to the Legislature per Minnesota Statutes, section 14.116 (2020); and

(f) presented on and discussed this matter at various meetings with stakeholders and legislators.

39. The Administrative Law Judge finds that the Department complied with its Additional Notice Plan and fulfilled the additional notice requirements set forth in Minn. Stat. §§ 14.14, subd. 1a(a), .131, .23.

3. Notice to Legislators

40. Minnesota Statutes section 14.116 requires the agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators at the time it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.[47]

41. On December 14, 2020, the Department mailed or emailed a copy of the Notice, SONAR, and proposed rules to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the proposed rules, and to the Legislative Coordinating Commission, in compliance with Minn. Stat. § 14.116.[48]

42. The Administrative Law Judge concludes that the Department fulfilled its responsibilities under Minn. Stat. § 14.116.

4. Notice to the Legislative Reference Library

43. Minnesota Statutes sections 14.23 and 14.131 and Minn. R. 1400.2070, subp. 3 (2019), require the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

44. On December 14, 2020, the Department emailed a copy of the Notice, SONAR, and proposed rules to the Legislative Reference Library.[49]

45. The Administrative Law Judge concludes that the Department fulfilled its responsibilities under Minn. Stat. §§ 14.23 and .131.

[47] Minn. Stat. § 14.116.
[48] Ex. K (Certificate of Sending Dual Notice and SONAR to Legislators).
[49] Ex. E.

5. Notice of Impact on Farming Operations

46. Minnesota Statutes section 14.111 (2020) imposes additional notice requirements when the proposed rules affect farming operations.

47. The Department concluded that the proposed rule does not impact farming operations.[50]

48. The Administrative Law Judge agrees with the Department and concludes that the Department fulfilled its responsibilities under Minn. Stat. § 14.111.

D. Rule Hearing

49. Due to the COVID-19 Pandemic and state regulations limiting in-person hearings, a remote hearing was held on January 19 and 20, 2021. The hearing was conducted by videoconferencing and telephone using WebEx and InterCall technology. Members of the public who did not have access to the internet were able to call into the hearing and participate equally with those appearing by videoconference.

50. At the hearing, the Department submitted copies of the following documents, as required by Minn. R. 1400.2220 (2019):

Ex. A: the Department's Request for Comments as published in the *State Register* on August 12, 2019;

Ex. B: Petition for Rulemaking (omitted)

Ex. C: the proposed rules dated November 9, 2020, including the Revisor's approval;

Ex. D: the Department's SONAR, dated December 2, 2020, including appendices A (consultation with Minnesota Management and Budget) and B (Uniform Disclosure of Assisted Living Services);

Ex. E: a copy of the transmittal email of the SONAR to the Legislative Reference Library on December 14, 2020;

Ex. F: the Notice of Hearing as mailed or emailed and published in the *State Register* on December 14, 2020;

Ex. G: the Certificate of Mailing the Notice to the rulemaking mailing list on December 14 and 15, 2020; and the Certificate of Accuracy of the Mailing List

Ex. H: the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on December 15, 2020, or earlier;

[50] Ex. D at 21 (SONAR).

Ex. I: written comments received prior to the hearing and the Department's responses to those comments;

Ex. J: the Chief Administrative Law Judge's Order, dated November 17, 2020, permitting the Department to omit the text of the proposed rules from the Notice as published in the *State Register*;

Ex. K: the Certificate of Sending the Notice and SONAR to Legislators and Legislative Coordinating Commission on December 14, 2020;

Ex. L: Modifications to Proposed Rules and additional responses to public comments;

Ex. M: additional public comments and responses;

Ex. N: a report titled Cost Baseline and Impact Analysis; and

Ex. O: the Notice of Hearing as published in the *State Register* on December 14, 2020.[51]

51. Jan Malcolm, the Commissioner of Human Services, gave introductory and background information.[52] Josh Skaar, the Department's legal counsel, offered the Department's exhibits.[53]

52. The hearing was open to the public. The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules.

53. Twenty-one members of the public made statements or asked questions during the hearing.[54] Approximately 115 written comments (including rebuttals) were received during the comment period.[55]

54. The Department responded to the comments as they were received, with specific responses or rebuttals filed in eComments on February 2, 3, 5, 8, 9, 12, 16, 2021.[56]

55. The Department filed Additional Modifications to the Proposed Rules with the Office of Administrative Hearings on February 16, 2021.[57]

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[51] Exhibit O was added to the Department's exhibits on March 5, 2021.
[52] Hrg. Tr. Vol. I at 20-24.
[53] *Id.* at 24-32.
[54] *See* Hrg. Tr. Vol. I and II.
[55] *See* eComments PDF Report.
[56] *Id.*
[57] Additional Modifications to Proposed Rules (Feb. 16, 2021) (on file and of record with the Minn. Office Admin. Hearings).

56. Also on February 16, 2021, the Department filed a memorandum from the Minnesota Management and Budget (MMB) providing its cost analysis of the proposed rules.[58]

IV. Statutory Requirements for the SONAR

A. Regulatory Factors

57. The Administrative Procedure Act requires an agency adopting rules to address eight factors in its SONAR.[59] Those factors are:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
>
> (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
>
> (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
>
> (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
>
> (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
>
> (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;
>
> (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and

[58] MMB Memorandum of Cost Review (Feb. 16, 2021) (on file and of record with the Minn. Office of Admin. Hearings).
[59] Minn. Stat. § 14.131.

(8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.[60]

1. Classes of Persons Affected, Benefitted, or Bearing Costs of the Proposed Rule

58. In the SONAR, the Department describes the classes of persons who will likely be affected by the proposed rules, including the classes of persons that will bear the costs of the proposed rules and the classes that will benefit from the proposed rules.[61]

59. The Department explains that the proposed rules will require certain entities that provide sleeping accommodations and assisted living services, such as housing with services establishments, to obtain licenses and become assisted living facilities upon the chapter's effective date.[62] The Department states that these facilities and their owners (including certain cities that own and operate such facilities), licensees, managers, directors, administrators, contractors, and employees will be affected by the proposed rules; additionally, entities that provide services at these facilities, such as arranged home care providers, will be affected.[63]

60. In addition, the Department notes that the proposed rules will likely affect: (1) current residents of housing with services establishments who receive services from home care providers; (2) future assisted living residents and their families or representatives; (3) current and future volunteers who work at assisted living facilities; (4) state agencies that license health professionals; (5) the Department of Human Services, which develops and operates social-service programs such as home and community based service programs that assist residents on Medicaid who are on Elderly Waivers; (6) state agencies that process maltreatment reports and complaints about services and facilities, including the Minnesota Adult Abuse Reporting Center (under DHS), the Office of Ombudsman for Long-Term Care, and the Office of Ombudsman for Mental Health and Developmental Disabilities; (7) the Senior LinkAge Line under the Minnesota Board on Aging and Disability Hub MN (previously, the Disability Linkage Line); (8) Minnesota lead agencies such as county social-service agencies, managed-care organizations, and tribal nations; (9) facility staff, registered nurses, and licensed health professionals that facilities hire to comply with or whose responsibilities will be altered by these rules; (10) local law-enforcement agencies, local units of government, and emergency-preparedness-and-response departments; (11) trade associations, including LeadingAge and Care Providers and (12) consumer-advocacy organizations, including AARP Minnesota, the Alzheimer's Association, Mid-Minnesota Legal Aid, Elder Voice Family Advocates, the Minnesota Elder Justice Center, and other related organizations.[64]

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[60] *Id.*
[61] Ex. D at 9-10 (SONAR).
[62] *Id.* at 9.
[63] *Id.*
[64] *Id.* at 9-10.

61. The Department states that assisted living facilities, residents, and ombudsman offices that carry out assigned duties under the rules will bear costs under the proposed rules.[65]

62. The Department asserts that assisted living residents and their families, caregivers, assisted living facilities, and Minnesotans who will eventually reside in assisted living facilities will benefit from the proposed rule.[66]

2. Probable Costs to the Department and Other Agencies for Implementation and Enforcement and Effect on State Revenues

63. The SONAR next analyzes the probable costs to the Department and to other agencies in implementing and enforcing the proposed rule changes, as well as what effect the proposed rules may have on state revenues.[67]

64. The Department believes that the costs of implementing the proposed rules will be minimal.[68] The estimated costs will be borne by the Department using money appropriated to it by the legislature.[69] The Department will implement the proposed rule with money collected through fees as provided by Minnesota law.[70]

65. The Department determined that no other state agencies, offices, or boards will incur costs as a result of the proposed rule.[71]

66. The Office of Ombudsman of Mental Health and Developmental Disabilities (OOMHDD) commented that it will likely incur costs as a result of the proposed rules that are not identified in the SONAR.[72] This is because there are several provisions in the proposed rules were the OOMHDD is referenced:[73]

- Under proposed Rule 4659.0120, subp. 1D(5), contact information for the OOMHDD must be provided in the pretermination meeting notice.

- Under Proposed Rule 4659.0120, subp. 2B, a representative from the OOMHDD is allowed to participate at the pretermination meeting, if requested by the resident or resident's representatives.

- Under proposed Rule 4659.0130, subp. 1A, the OOMHDD must be provided notice of a planned closure of a facility.

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[65] *Id.* at 10.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.* (citing 2019 Minn. Laws ch. 60, art. 5, § 2).
[70] *Id.*
[71] *Id.*
[72] Comments of Aisha Elmquist, OOMHDD (Comment 47).
[73] *Id.*

- Under proposed Rule 4659.0130, subp. 4, the notice of closure must give contact information for the OOMHDD.

- Under proposed Rule 4659.0200, subp. 3A, the OOMHDD must be provided written notice where there is a curtailment, reduction, or capital improvement within a facility necessitating transfers, as required under Minn. Stat. § 144G.56, subd. 5(a)(4).

67. While the OOMHDD is included in the proposed rules to receive notice or be allowed to attend a meeting, there is nothing in the rules that requires the OOMHDD to act on behalf of any resident or take any action. Merely receiving notice of an action or being permitted to be present at a meeting does not obligate the OOMHDD in any way. Therefore, the Administrative Law Judge agrees with the Department that that proposed rules do not necessarily impose additional costs on the OOMHDD.

3. Less Costly or Less Intrusive Methods for Achieving the Purpose of the Proposed Rule

68. The SONAR evaluated whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule changes.[74] The purpose of the proposed rules was set forth in statute by the legislature, which required the Department to promulgate assisted living facility rules that "promote person-centered planning and service delivery and optimal quality of life, and . . . ensure resident rights are protected, resident choice is allowed, and public health and safety is ensured."[75]

69. The Department notes that its statutory mandate requires it to adopt assisted living rules that cover a nonexhaustive list of specific topics.[76]

70. The Department reviewed assisted living regulations of other jurisdictions when developing the proposed rules. It states that the proposed rules are similar to the regulations in place throughout the country for assisted living facilities and nursing homes that provide similar levels of care as assisted living facilities.[77]

71. After a full analysis, the Department concludes that there are no less costly or less intrusive alternatives for achieving the purposes mandated by the legislature other than the proposed rules.[78] The Department notes that the proposed rules allow facilities to apply for variances to limit costs and intrusiveness.[79]

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[74] Ex. D at 10 (SONAR).
[75] Minn. Stat. § 144G.09, subd. 3(a).
[76] Ex. D at 10-11 (SONAR).
[77] *Id.* at 11.
[78] *Id.*
[79] *Id.*

4. Description of Alternative Methods for Achieving the Purpose of the Proposed Rule Considered by the Department and Why Alternatives Were Rejected

72. The SONAR describes the alternative methods for achieving the purpose of the proposed rule changes that were seriously considered by the Department and explains the reasons why these alternatives were rejected in favor of the proposed rule changes.[80]

73. The Department describes how it convened an advisory committee to assist with developing the proposed rules.[81] The committee convened on three occasions, and the Department kept in regular contact with committee members regarding developments in the drafting process.[82] The Department says that no committee members, stakeholders, or members of the public presented an alternate proposal for meeting the legislature's mandate to enact assisted living facility rules.[83]

74. The Department analyzed and researched assisted living facility rules in 49 states, including proposed legislation.[84] The Department also analyzed best practices in assisted living facilities through research involving academic articles and journals and contact with officials in other states.[85] The Department asserts that its proposed rules reflect this research into practices that have proven effective in other jurisdictions.[86]

75. The Department identified no viable alternatives for enacting rules that comply with the legislature's mandate.[87]

5. Probable Costs of Complying with Proposed Rules, Including the Portion of the Total Costs Borne by Identifiable Categories of Affected Parties

76. The SONAR includes an extensive analysis of the probable costs of complying with the proposed rule changes, identifying the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.[88] The costs are separated out by specific portions of the proposed rules.[89]

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 12-18.
[89] *Id.*

77. The Department noted that, in most cases, the Assisted Living Act resulted in the increased cost to stakeholders, not the proposed rules.[90] To the extent that the costs could be attributed solely to the rules, the Department assessed those costs.

78. The Department also undertook a Cost Baseline and Impact Analysis (Department's Cost Analysis) to evaluate the additional costs to stakeholders related to both the Assisted Living Act and the rules.[91] The Department's Cost Analysis was based upon a survey sent to the 2,391 registered housing with services facilities in the state.[92] Of those providers, 1,060 responded with only 696 completing the survey.[93] Two-thirds of the responders were in the Twin Cities Metro Area and one-third offered dementia care.[94]

79. The Department's Cost Analysis concluded that the total costs of the Assisted Living Act and rules for average assisted living facilities would be $9,453 for facilities that do not provide dementia care and $20,260 for facilities that do provide dementia care.[95] Of these costs, the Department's Analysis determined that only $4,000 of these costs would be attributable to the proposed rules.[96]

80. In the SONAR, however, the Department concludes that the total estimated costs of the proposed rules would be $5,000 per facility, with $4,383 to comply with the emergency preparedness plans and the remainder resulting from the quarterly review of missing resident plans, additional training, and the pretermination meetings.[97] MMB accepted these cost figures in its analysis as well.[98]

81. In its SONAR analysis, the Department found that no additional costs would be attributable to the following rules: 4659.0020 (definitions); 4659.0060 (responsibility to meet standards); 4659.0040 (licensing in general); 4659.0050 (fines for noncompliance); 4659.0060 (assisted living licensure and conversion, now in statute); 4659.0070 (initial licensure and renewal, now in statute); 4659.0070 (variances, likely to reduce costs); 4659.0170 (disease prevention and infection control, now in statute). The Administrative Law Judge agrees with the Department's assessments for these proposed rule parts.

82. The Department contends that there are only minor administrative costs related to proposed Rule 4659.0090 (uniform checklist of disclosure of services). The Judge concurs with this assessment because the statute, Minn. Stat. § 144G.40, subd. 2 requires the use of the checklist and the Department has prepared a form for providers to use.

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[90] *Id.*
[91] Ex. N (Cost Baseline and Impact Analysis).
[92] *Id.* at 3.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 30.
[96] *Id.*
[97] Ex. D at 18 (SONAR).
[98] MMB Memorandum of Cost Review (Feb. 16, 2021) (on file and of record at the Minn. Office of Admin. Hearings).

83. As most of the commenters noted, the bulk of the additional costs for providers (and ultimately residents when the costs are passed on) will be related to proposed Rule 4659.0100 (emergency disaster and preparedness plan). The Department estimates this amount to be $4,383 average per provider.

84. The Long-Term Care Imperative conducted its own cost analysis (LTCI Cost Analysis).[99] The LTCI Cost Analysis concluded that the average cost for the emergency preparedness rule for providers would be $4,736 for implementation and $3,063 per year for compliance costs.[100] The LTCI Cost Analysis relied upon a 2016 study prepared by the federal government as part of the rulemaking proceeding for 42 C.F.R. § 483.73 (2020) and its related Appendix Z, which the Department adopts and incorporates into proposed Rule 4659.0100.[101] (See full analysis of this proposed rule in the Rule-by-Rule analysis section below.) The federal study determined that the average cost for long-term care facilities to implement the federal rule would be $4,383 for initial implementation costs, consistent with the figure adopted by the Department.[102]The LTCI Cost Analysis then calculated what it believed would be annual compliance costs per facility (this was not included in the federal study).[103] It calculated that amount to be $2,835. The LTCI Analysis then took these costs and converted the figures into 2020 dollars to reach its final calculation of $4,736 implementation costs and $3,063 annual compliance costs.[104]

85. The Long-Term Care Imperative notes that providers with a higher proportion of residents on the Medicare Elderly Waiver program will not be able to raise rates to recoup the new costs and may result in a decrease in the number of providers that are willing to service this population.[105]

86. In regards to proposed Rule 4659.0110 (missing resident plan), the Department asserts that there will be minimal additional costs for stakeholders under this rule and that cost is only associated with the quarterly reviews of the facility's missing person plan.[106] The Department explained that the rule merely implements Minn. Stat. § 144G.42, subd. 10(a)(5), which requires facilities to have a missing person plan, but does not detail what must be included in the plan or how the plan should be orchestrated.[107]

87. The LTCI Cost Analysis did not determine a cost specifically associated with the missing person plan. Instead, it included this cost in with the statutory requirements of 24-hour awake staff and the response time required by statute and rule.[108]

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[99] Comment of Josh Bergstrom (Comment 109) (Analysis of the Costs of Assisted Living Licensure).
[100] *Id.* at 2.
[101] *Id.* at 3.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] Ex. D at 14 (SONAR).
[107] *Id.*
[108] Comment of Josh Bergstrom (Comment 109) (Analysis of the Costs of Assisted Living Licensure) at 2, 5.

88. With respect to proposed Rule 4659.0120 (resident termination and discharge planning), the Department contends that there would be "minimal costs" for stakeholders.[109] The Department identifies one aspect of the proposed rule that might result in increased costs for providers: the summary of the pretermination meeting, which is a creature of rule, not statute.[110] The Department contends that this would require approximately one hour of staff time should a pretermination meeting occur.[111]

89. The Department asserts that the costs of the relocation evaluation, relocation plan, and discharge summary required under the termination procedures are the result of statutory requirements for a relocation plan and move coordination (Minn. Stat § 144G.55, subds. 1-3).[112] The Department's Cost Analysis deemed the costs associated with termination and relocation "circumstantial" and "difficult to generalize" because they would depend on how often a facility terminates a resident.[113]

90. The LTCI's Cost Analysis asserts that termination and relocation costs could be upwards of $21,750 per resident terminated or relocated.[114] The LTCI's estimate assumes that resident termination could take up to six months based upon the termination and relocation procedures set forth in law and rule.[115] To arrive at its $21,750 figure, LTCI calculated the cost per month of housing and care for an average resident ($3,625) and multiplied that number by six.[116] It further asserted that a facility could likely terminate three residents per year, increasing the cost to approximately $60,000.[117] The Administrative Law Judge finds LTCI's cost estimate speculative, excessive, and not specific to the rule costs. The termination and relocation procedures are mainly driven by the statute, not the rules. Therefore, the Judge accepts the Department's analysis on the issues of termination and relocation.

91. Related to the cost of termination are the additional relocation procedures required in proposed Rule 4659.0160 (relinquishing an assisted living facility with dementia care license), Rule 4659.0200 (non-renewal); and Rule 4659.0130 (conditions for planned closures). These are the same procedures required for termination (relocation evaluation, relocation plan, and discharge summary). Because these costs arise out of requirements in statute, the Department determined they are no costs arising out of the proposed rules.[118] The Administrative Law Judge agrees with the Department's analysis.

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[109] Ex. D at 14 (SONAR).
[110] *Id.*
[111] *Id*.
[112] *Id.*
[113] *Id.* at 30.
[114] Comment of Josh Bergstrom (Comment 109) (Analysis of the Costs of Assisted Living Licensure) at 2.
[115] *Id.* at 7.
[116] *Id.*
[117] *Id.*
[118] Ex. D at 14-15 (SONAR).

92. With respect to proposed Rule 4659.0140 (assessments), the Department determined that all cost impacts would be result of the Assisted Living Act, not the rule.[119] Proposed Rule 4659.0140, subps. 2 and 4 require that a registered nurse (RN) conduct all initial assessments and reassessments (quarterly and upon change in condition). The statute does not specifically require an RN to complete reassessments but the rule does.

93. One commenter asserted that this will be costly for providers who have relied upon LPNs to conduct "focused assessments" rather than full reassessments on residents.[120] The LTCI's Cost Analysis asserts that the annual cost of having RNs complete these assessments will be approximately $775 per facility with 50 residents.[121]

94. Similarly, commenters assert that there will be increased cost with the rule requirement for RN assessments on holidays and weekends.[122] The Department responded that Minn. Stat. § 144G.70, subd. 2(c) requires nursing reassessments "as needed based on changes in the needs of the residents."[123] Because a hospital stay inevitably indicates a change in condition, the Department states that the rule simply clarifies the requirements of the statute.[124] As such, it does not impose costs or obligations beyond what the statute, itself, imposes.[125]

95. With respect to proposed Rule 4659.0180 (staffing), the Department asserts that the rules do not require any more staff costs than those imposed by the Assisted Living Act.[126] This proposed rule has six subparts with requirements that commenters assert increase the cost for providers (and subsequently residents).

96. Subpart 2 of the proposed rule requires that the clinical nurse supervisor (CNS) be an RN, but this is required by statute.[127]

97. Subpart 3 of proposed Rule 4659.0180 requires that the CNS prepare staffing plans for the facility. Several commenters assert that this requirement will impose costs for facilities because, currently, many facilities delegate staffing to a non-licensed staff member.[128] The commenters assert that the rule may require facilities to hire an additional RN. None of the commenters provided evidence of this alleged cost.

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[119] *Id.* at 15.
[120] Comments of Mindy Smith (Comment 107).
[121] Comment of Josh Bergstrom (Comment 109) (Analysis of the Costs of Assisted Living Licensure) at 4.
[122] Comments of Michelle Nash, Residential Care Providers Network (Comments 22, 71); Test. of Michelle Nash (Hrg. Tr. Vol. I at 143-145); Comments of Mindy Smith (Comment 107); Comments of Michelle Mohlenbrock (Comment 66); Comments of Anneliese Peterson (Comment 48); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29);
[123] Department Response to Michelle Nash, Residential Care Providers Network (Response 71, Feb. 5, 2021).
[124] *Id.*
[125] *Id.*
[126] Ex. D at 17 (SONAR).
[127] Minn. Stat. § 144G.41, subd. 4.
[128] Comments of Joe Cuoco (Comment 70); Comments of Denise Parker (Comment 67); Comments of Karis Gust (Comment 76); Comments of Kathy Manning (Comment 86); Comments of Andrea Buck (Comment 90); Comments of Delwyn Spronk (Comment 91); Comment of Arlan Swanson and Heidi Appel

98. Subpart 4 of proposed Rule 4659.0180 requires that the CNS post the staffing schedule in a central location in the facility. This cost will be nominal and part of the CNS cost.

99. Subpart 5 of proposed Rule 4659.0180 requires that two direct care staff be available whenever a resident requires the assistance of two direct staff to meet the resident's needs. The Department asserts that this level of staffing is already required under the Act. Minn. Stat. § 144G.41, subd. 1(11)(ii) requires that facilities have sufficient staffing at all times to meet the scheduled and reasonably foreseeable unscheduled needs of residents. Similarly, Minn. Stat. § 144G.91, subd 4(b) makes it a resident's right to receive services from staff in sufficient numbers to adequately provide the services agreed to in the assisted living contract. The Administrative Law Judge agrees with the Department's analysis.

100. Subpart 6 of proposed Rule 4659.0180 requires that during nighttime hours (10 p.m. to 6 a.m.) a facility respond to residents' requests for assistance for health and safety needs as soon as possible but not later than 10 minutes after the request is made. The Department argues that this rule is an extension of Minn. Stat. § 144G.41, subd. 1(12), which requires that staff be available to respond to the requests of residents for assistance with health or safety needs "within a reasonable amount of time."[129] The Department contends that the 10-minute requirement is merely an interpretation of "as soon as possible."[130]

101. Many commenters assert that this 10-minute requirement will result in substantial costs to providers who will need to hire an additional staff member to meet the requirement, at a cost upwards of $50,000 per year.[131] The LTCI Cost Analysis does not differentiate between the costs associated with the rule verses the statute. It contends that the increased cost to facilities to comply with the missing resident plan, 24-hour awake staff requirement, and response time statute and rule is approximately $66,556

(Comment 106); Comment of Mindy Smith (Comment 107); Comments of Kris Backstrom and Tiffany Ziwicki (Comment 108); Comments of Valerie Skarphol (Comment 111); Comment of Bonnie Peplinski (Comment 44); Comments of Wendy Hulsebus (Comment 65); Comment of Josh Berg, Lifesprk (Comment 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Comments of Lore Brownson (Hrg. Tr. Vol. I at 98-103; Vol. II at 211-217); Test. of Nancy Strandlund (Hrg. Tr. Vol. II at 258-270).

[129] Ex. D at 17 (SONAR).

[130] *Id.*

[131] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 17, 2021) Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Comment of Michelle Mohlenbrock (Comment 66); Comments of Karis Gust (Comment 76); Comments of Andrea Buck (Comment 90); Comment of Deb Nobis (Comment 97); Comment of Crystal Holloway (Comment 98); Comments of Lores Vlaminck (Comment 99); Comment of Arlan Swanson and Heidi Appel (Comment 106); Comments of Josh Berg, LIfesprk (Comment 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comment of Karis Gust (Comment 76); Comments of Kathy Manning (Comment 86); Comment of Deb Nobis (Comment 97); Comment of Arlan Swanson and Heidi Appel (Comment 106).

per year. Again, the LTCI does not split out these costs between the statute and rule requirements.

102. The Department does not dispute that some facilities may be required to hire additional staff to meet the statutory requirement of having available awake staff 24-hours per day who can respond to residents' call for assistance.[132] However, the Department argues that this is a function of the staffing requirements by statute, not rule. The Administrative Law Judge agrees with the Department's analysis and no commenter has provided evidence that the proposed rule alone will result in increased costs.

103. With respect to proposed Rule 4659.0190 (training requirements), the Department states that the rule will create "minimal costs" for facilities because it does not impose any new requirements beyond those provided for in the Assisted Living Act.[133] The Department notes, however, that the rule does impose a few additional topics for orientation and training on dementia that are not included in the statutes.[134] The Department calculated these additional annual costs at approximately $300 per facility.[135]

104. The LTCI Cost Analysis calculated the estimated additional cost of annual training per facility at $1,600.[136]

105. Finally, the Department contends that proposed Rule 4659.0210 (termination appeals) will not result in any new costs for stakeholders because it is merely implementing Minn. Stat. § 144G.54, which allows a resident to appeal a termination before an administrative law judge.[137] The Department notes that it assumes all costs of the hearing process.[138]

106. In sum, the Department and MMB determined that the total estimated cost of compliance with the proposed rules will be $5,000 per facility with $4,383 of that associated with the emergency preparedness rule (4659.0100) and the remainder arising out of quarterly review of missing person plans, training, and pretermination meeting summary.[139]

107. The Administrative Law Judge concludes that the Department has undertaken a full and reasonable assessment of the probable costs of complying with the proposed rules and identifying the categories of persons or entities that will be affected by the rules, as required by Minn. Stat. § 14.131(5). The Department's cost determination is approved.

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[132] Ex. N at 3.
[133] Ex. D at 17 (SONAR).
[134] *Id.*
[135] *Id.*
[136] Comment of Josh Bergstrom (Comment 109) (Analysis of the Costs of Assisted Living Licensure) at 2-3.
[137] Ex. D at 17-18 (SONAR).
[138] *Id.* at 18.
[139] *Id. See also* MMB Memorandum of Cost Review (Feb. 16, 2021) (on file and of record at the Minn. Office of Admin. Hearings).

6. Probable Costs or Consequences of not Adopting the Proposed Rules, Including Costs Borne by Individual Categories of Affected Parties

108. In addition to identifying the costs of complying with the rule changes, the SONAR also evaluates the probable costs or consequences of not adopting the proposed rule changes.[140] This analysis reviewed the costs or consequences that could be borne by identifiable categories of affected parties, such as separate classes of government units, business, or individuals.[141]

109. The Department states that the proposed rules clarify how facilities must comply with chapter 144G, and how and to whom residents may report concerns with facilities' noncompliance with chapter 144G and the proposed rules. The topics addressed by these rules include licensure of facilities, health and safety and consumer protections that govern the initial transactions that place residents in assisted living facilities, procedures that must be followed to protect residents during relocations, facility staffing and training requirements, and standards for responding to and planning for emergencies.[142]

110. The Department asserts that the consequences of not adopting the proposed rules would be to inject uncertainty into each of these situations, placing unnecessary burdens on residents and facilities alike who will otherwise have to parse through statutes to understand facilities' obligations and residents' options for redressing grievances.[143]

111. The Department also claims that, without the proposed rules, the Department would face a public that is confused about the regulation of assisted living facilities under chapter 144G. The clarity provided by the rules should limit these burdens and costs placed on the Department.[144]

112. The Department points out that not adopting these rules would result in a failure to satisfy the legislative mandate requiring the Department to issue the proposed rules.[145]

113. With respect to potential costs for identifiable categories of affected parties in not adopting the proposed changes, those costs and parties are discussed in Section IV, G, below.

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[140] Ex. D at 18-19 (SONAR).
[141] *Id.*
[142] *Id.*
[143] *Id.* at 19.
[144] *Id.*
[145] *Id.*

7. Assessment of Differences Between Proposed Rules and Existing Federal Regulations

114. The SONAR states that the proposed rules do not conflict with existing federal regulations because, as the Department notes, there are no federal regulations governing assisted living facilities.[146]

115. There is no evidence in the record that the proposed rules would conflict with any federal regulations.

8. Cumulative Effect of the Rule with Other Federal and State Regulations

116. The SONAR assesses the cumulative effect of the proposed rule changes with other federal and state regulations related to the specific purpose of the proposed rules.[147]

117. The Department states that, because assisted living facilities are established under chapter 144G and will not be separate licensed facilities until August 1, 2021, there are no existing federal or state regulations related to them. Consequently, the Department asserts that there is no cumulative effect of the rules with other federal and state regulations.[148]

118. There is no evidence in the record that that there will be a cumulative effect between the proposed rules and other federal and state regulations.

B. Performance-Based Regulation

119. The Administrative Procedure Act requires an agency to describe in its SONAR how it has considered and implemented the legislative policy supporting performance based regulatory systems.[149] A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[150]

120. According to the Department, a true performance-based rule would establish specific outcomes, and the regulated party would be able to select the approach or manner to achieve the outcomes. In much of public health regulation, however, the Department says that this is not possible without placing the public's health in danger. In this case, for instance, the Department believes it would not be prudent to split the assisted living facility population into separate groups to try different regulatory

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[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] Minn. Stat. §§ 14.002 and 14.131 (2020).
[150] Minn. Stat. § 14.002.

approaches because, if an approach does not work, it may cause significant and possibly fatal outcomes for residents.[151]

121. Furthermore, the Department points to the legislature's mandate in enacting chapter 144G, which gives clear and detailed guidance regarding the requirements that must be placed on assisted living facilities, leaving little room for flexibility in these rules.[152]

122. The Department points to some areas of the proposed rules that give facilities and their owners, licensees, directors, staff, residents and their families, and the Department some flexibility.[153]

123. The rules provide a process for facilities to request variances from a rule requirement. The Department says that this variance procedure gives a regulated party, such as an assisted living facility, flexibility in achieving the Department's regulatory objectives without sacrificing the health, safety, or welfare of those the Department seeks to protect.[154]

124. By statute, the Department must establish a Resident Quality of Care and Outcomes Improvement Task Force (Quality Task Force). The Quality Task Force will include various stakeholders, including residents, consumer advocates, providers, and Department staff, and is charged to periodically provide recommendations to the Commissioner and the legislature on changes needed to promote safety and quality improvement practices in long-term care settings and with long-term care providers. The Department asserts that, to the extent the proposed rules are too prescriptive or inflexible in their practical effect, the Quality Task Force is positioned to alert the Department and will make recommendations to address such problems, including through rule revisions.[155]

C. Consultation with the Commissioner of Minnesota Management and Budget

125. Minnesota Statutes section 14.131 requires that agencies consult with the Commissioner of Minnesota Management and Budget (MMB) to help evaluate the fiscal impact and fiscal benefits of the proposed rule on local units of government.

126. On October 27, 2020, the Department sent a letter to the Commissioner of the MMB, along with the proposed rules and SONAR, seeking the required consultation.[156]

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[151] Ex. D at 19 (SONAR).
[152] *Id.* at 19-20.
[153] *Id.* at 20.
[154] *Id.*
[155] *Id.*
[156] *Id.* at 20; Appx. A (Correspondence with MMB).

127. On February 16, 2021, the MMB issued a Memorandum analyzing the fiscal impacts and benefits on local units of government.[157]

128. The Memorandum opines that the majority of compliance costs associated with the new assisted living licensure framework originate in Minnesota Statutes, chapter 144G, not in the proposed rules.[158] According to the MMB, by making facilities' legal obligations clear, the proposed rules should reduce administrative costs that facilities would otherwise incur deciphering the new regulatory framework around assisted living facility operation and licensure.[159]

129. The MMB cited the Department's estimates that each facility would incur annual costs of around $5,000 to comply with the proposed rules.[160] Of this, MMB asserts that facilities will incur an average of $4,383 to comply with emergency preparedness plan requirements, 4 to 12 hours of senior staff time to conduct quarterly reviews of missing person plans, three additional hours of training for each unlicensed staff member, and approximately one hour of administrative time to hold a pretermination meeting.[161]

130. The MMB cited the Department's determination that there were 20 government-run housing facilities that will have to become licensed under chapter 144G and the proposed rules.[162] The MMB determined that the total impact of compliance costs of the rules for all government-run facilities will not exceed $100,000.[163]

131. Based on information from the Department and consultation with MMB staff, the MMB Memorandum opined that the proposed rules would have "small costs" to local units of government.[164]

132. The Administrative Law Judge finds that the Department fulfilled its legal requirements to consult with the MMB under Minn. Stat. § 14.131.

D. Summary of Requirements Set Forth in Minn. Stat. § 14.131

133. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

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[157] MMB Memorandum of Cost Review, (Feb. 16, 2021) (on file and of record with the Minn. Office of Admin. Hearings).
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*

E. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

134. Minn. Stat. § 14.127 (2020), requires the Department to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[165]

135. The Department determined that the cost of complying with the proposed rule changes will not exceed $25,000 for any business or any statutory or home rule charter city in the first year after the rule takes effect.[166]

136. No business or city has established with evidence that the proposed rules (as opposed to the requirements of the Assisted Living Act) will incur costs exceeding $25,000.

137. Therefore, the Administrative Law Judge finds that the Department has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

F. Adoption or Amendment of Local Ordinances

138. Under Minn. Stat. § 14.128 (2020), the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[167]

139. Typically, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule.[168] Because the Department has been directed by law to commence the rulemaking process, however, the effective date of these proposed rules will not be altered by the determination of whether they require adoption or amendment of ordinances or regulations.[169]

140. The Department concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The proposed rule should not require local governments to adopt or amend those more general ordinances and regulations.[170]

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[165] Minn. Stat. § 14.127, subds. 1 and 2.
[166] Ex. D at 20-21 (SONAR).
[167] Minn. Stat. § 14.128, subd. 1.
[168] Minn. Stat. § 14.128, subds. 2 and 3.
[169] Minn. Stat. § 14.128, subd. 3(2).
[170] Ex. D at 31 (SONAR).

141. There is no evidence in the record that any local ordinance or regulation will be impacted.

142. The Administrative Law Judge finds that the Department has made the determination required by Minn. Stat. § 14.128 and approves that determination.

V. Rulemaking Legal Standards

143. Under the Minnesota Administrative Procedure Act and associated rules, an agency proposing to adopt rules must: (1) establish its statutory authority to adopt the proposed rules; (2) show that it has fulfilled all relevant legal and procedural requirements; and (3) demonstrate the need for and reasonableness of each portion of the proposed rules with an affirmative presentation of facts.[171]

144. Pursuant to Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100 , the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[172] "legislative facts" (namely, general and well-established principles that are not related to the specifics of a particular case, but that guide the development of law and policy),[173] and the agency's interpretation of related statutes.[174]

145. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[175] By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[176]

146. An important corollary to these standards is that, when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.[177] Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[178]

147. A rule must be disapproved if it:

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[171] Minn. Stat. §§ 14.05, subd. 1, .14, subd. 2; Minn. R. 1400.2100.
[172] *See Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).
[173] *Compare generally, U.S.* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).
[174] *See Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[175] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.
[176] *See Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n,* 251 N.W.2d 350, 357-58 (Minn. 1977).
[177] *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).
[178] *Minn. Chamber of Commerce*, 469 N.W.2d at 103.

- was not adopted in compliance with procedural requirements of Minn. Stat. ch. 14 and Minn. R. part 1400 (unless the administrative law judge decides that the error is harmless error under Minn. Stat. §§ 14.15, subd. 5 or 14.26, subd. 3(d));

- is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;

- is substantially different than the proposed rule, and the agency did not follow the procedures of Minn. R. 1400.2110;

- exceeds, conflicts or does not comply with, or grants the agency discretion beyond that which is allowed by law, its enabling statutes or other applicable law;

- is unconstitutional or illegal;

- improperly delegates the agency's powers to another agency, person or group;

- is not a "rule" as defined in Minn. Stat. § 14.02, subd. 4, or by its own terms cannot have the force and effect of law; or

- is subject to Minn. Stat. § 14.25, subd. 2, and the notice that hearing requests have been withdrawn and written response to it show that the withdrawal is not consistent with Minn. Stat. § 14.001(2), (4) and (5).[179]

148. Because the Department made changes to the proposed rule language after the date it was originally published in the *State Register*, it is necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed.[180]

149. At the rule hearing, the Department detailed the revisions it would make to the proposed rules in response to the stakeholder feedback received during the comment period.[181] After the hearing, on February 16, 2021, the Department filed Additional Modifications to the Proposed Rules.[182]

150. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2 (2020). The statute specifies that a modification does not make a proposed rule substantially different if:

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[179] Minn. R. 1400.2100.
[180] Minn. R. 1400.2110 (2019).
[181] Ex. L.
[182] Additional Modifications to Proposed Assisted Living Rules (Feb. 16, 2021) (on file and of record with the Minn. Office of Admin. Hearings).

(1) the differences are within the scope of the matter announced in the notice of hearing and are in character with the issues raised in that notice;

(2) the differences are a logical outgrowth of the contents of the notice of hearing, and the comments submitted in response to the notice; and

(3) the notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.[183]

151. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether:

(1) persons who will be affected by the rule should have understood that the rulemaking proceeding could affect their interests;

(2) the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the hearing notice; and

(3) the effects of the rule differ from the effects of the proposed rule contained in the hearing notice.[184]

VI. Rule-by-Rule Analysis

152. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Agency's regulatory choice or otherwise requires closer examination.

153. The Administrative Law Judge finds that the Agency has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

154. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by law and that there are no other defects that would bar the adoption of those rules.

PART 4659.0020: DEFINITIONS

155. Proposed Rule 4659.0020 sets forth 31 definitions to be used in interpreting the proposed rules. Two of these definitions were challenged by commenters: the definition of "elopement" and the definition of "ombudsman."

[183] Minn. Stat. § 14.05, subd. 2.
[184] *See* Minn. Stat. § 14.05, subd. 2.

Part 4659.0020, Subpart 14: Elopement

156. The originally proposed Rule 4659.0020, subp. 14 defined "elopement" to mean "a resident leaves the premises or a safe area without authorization or necessary supervision to do so." Commenters asserted that this definition was "too broad" because it did not account for residents who do not have restrictions on their comings and goings from the facility and who are not required to seek authorization before leaving.[185] These commenters note that, unlike a nursing home, many residents in assisted living are free to come and go without authorization.[186]

157. Based upon these comments, the Department revised the definition as follows:[187]

> "Elopement" means a resident who lacks self-preservation skills leaves the premises or a safe area without ~~authorization or~~ necessary supervision to do so.

158. Elder Voice Family Advocates supports this modified definition but asks that the words "to do so" be removed.[188] Other commenters, however, assert that the revised definition is too vague.[189] These commenters advocate for the Department to adopt the definition used by the National Institute of Elopement Prevention and Resolution, which reads as follows:[190]

> Elopement means an undetected, unsupervised, and unsafe departure from the assisted living facility by an assisted living client, whose assessment does not permit time alone in the community due to the client's cognitive, physical, mental, emotional, or other impairment.

159. The Administrative Law Judge finds that the Department's revised definition of "elopement" is both too broad and too vague. First, the definition uses the term "premises" instead of facility. It is unclear what the "premises" would be – is it the facility, the facility grounds, or the campus? Second, it is even more unclear what a "safe area"

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[185] Comment of Drew Hood (Comment 69); Comment of Pam Leach (Comment 79); Comments of Joe Cuoco (Comment 70); Comment of Crystal Holloway (Comment 98); Comments of Lore Brownson (Comment 104); Comments of Anneliese Peterson (Comment 48); Comment of Shelli Bakken, Walker Methodist (Comment 49); Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Wendy Hulsebus (Comment 65); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).

[186] *Id.*

[187] Ex. L.

[188] Comments of Elder Voice Family Advocates (Comment 72).

[189] Comments of Anneliese Peterson (Comment 48); Comment of Shelli Bakken, Walker Methodist (Comment 49); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23).

[190] Comments of Anneliese Peterson (Comment 48); Comment of Shelli Bakken, Walker Methodist (Comment 49); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23).

would be – is it a floor, a unit, a room? Third, without reference to other rules, it is unclear if the Department is adopting, for purposes of this definition, the elements of "self-preservation" skills set forth in proposed Rule 4659.0110 (Missing Resident Plan). Finally, there is nothing in the definition to assist in determining what "necessary supervision" would be – is it the supervision required in the assisted living contract or is it the supervision identified in the resident's care or service plan?

160. Because the Department's revised definition is overly broad and vague, the Administrative Law Judge **DISAPPROVES** proposed Rule 4659.0020, subp. 14.

Part 4659.0020, Subpart 19: Ombudsman

161. The term "ombudsman" in the proposed rules is limited to the Ombudsman of Long-Term Care (OOLTC) and not the Ombudsman for Mental Health and Developmental Disabilities (OOMHDD).[191] The OOMHDD and other commenters have requested that the OOMHDD be included in certain proposed rules where the OOLTC has been referenced as requiring notice.[192] The Department has approved the inclusion of the OOMHDD in its modifications to proposed Rule 4659.0130, subps. 1 and 4, but not in other rules where just the OOLTC is referenced (see discussion below).

162. Elder Voice Family Advocates has inquired whether the OOMHDD should be included in the definition of "ombudsman" so that all notices required to be served on the OOLTC are also served on the OOMHDD.[193] However, this would go beyond what the Assisted Living Act requires and would conflict with the definition of "ombudsman" set forth in Minn. Stat. § 144G.08, subd. 46. Therefore, proposed Rule 4659.0020, subp. 19 is **APPROVED**.

Definition of "Serious Injury that Results from Maltreatment"

163. Elder Voice Family Advocates requested that the Department specifically define the term "serious injury that results from maltreatment."[194] The enabling legislation in this case, Minn. Stat. § 144G.09, subd. 3, specifically instructed the Department to adopt rules that include "a definition of serious injury that results from maltreatment." However, the Department has declined to do so in this rulemaking because the definition of "serious injury" is already included in Minn. Stat. § 245.91, subd. 6 (2020), and not all serious injuries are the result of maltreatment.[195] Whether a serious injury results from maltreatment is a legal determination that must be made through the application of law, including what acts constitute maltreatment and whether those acts actually caused the injury.[196] Therefore, the Department did not define "serious injury that results from

[191] Proposed Rule 4659.0010, subp. 19.
[192] Comments of the OOMHDD (Comment 12); Comments of Elder Voice Family Advocates (Comment 10).
[193] Comments of Elder Voice Family Advocates (Comment 10).
[194] Comments of Elder Voice Family Advocates (Comments 10, 72).
[195] Department Response to Kristine Sundberg, Elder Voice Family Advocates (Response 10, Feb. 3, 2021).
[196] *Id*.

maltreatment."[197] Whether the Department has complied with its direction from the legislature is left to the Department and legislature to determine.

Definition of Tenant

164. The Long-Term Care Imperative argues that it is both necessary and reasonable for the Department to define "tenant" in the rules as an individual living in a facility who is not governed by Minn. Stat. ch. 144G or Minn. R. ch. 4659.[198] This group explains that there will be situations in which a facility may house seniors who do not require or request assisted living services (for example, a spouse of someone who does need services).[199] Accordingly, the group believes there is a gap in the statute that rulemaking should fill.

165. The Department declined to include such a definition in the rules. The Department reasoned that the Act already defines "assisted living client"[200] and "resident,"[201] and, thus, the Department "lacks legal authority to modify the statute."[202] The Department's response does not address the commenter's concern because an individual who is living in a facility and does not receive assisted living services does not necessarily fall under the definitions of "assisted living client" or "resident." Those definitions involve individuals who either contracted for, or receive, assistant living services and/or who have signed assisted living contracts.

166. Regardless, the Department has exercised its judgment not to define the term "tenant" and that is a policy decision that the Department is authorized to make. Accordingly, the Department's decision not to define "tenant" is permissible.

PART 4659.0030: RESPONSIBILITY TO MEET STANDARDS

167. Commenter Ian Lewenstein noted that, throughout the proposed rules, the Department has failed to differentiate between the responsible party, using, interchangeably, the terms "facility" and "licensee."[203] An example of this issue is present in this Part 4659.0030, which states, "The facility must operate and provide housing and assisted living services according to this chapter and Minnesota Statutes, chapter 144G."

168. While a facility is licensed under the Assisted Living Act, the party responsible for management, control, and operation of the facility under the Assisted Living Act is the "licensee."[204] Therefore, if the purpose of this proposed rule is, as stated, to identify the party responsible for compliance with the law and rules, the rule should be amended as follows, consistent with the Assisted Living Act:

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[197] *Id*.
[198] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 12, 2021).
[199] *Id.*
[200] Minn. Stat. § 144G.01, subd. 4.
[201] Minn. Stat. § 144G.08, subd. 59.
[202] Department Response to Long-Term Care Imperative (Response 27, Jan. 29, 2021).
[203] Comments of Ian Lewenstein (Comment 54).
[204] *See* Minn. Stat. §§ 144G.08, subd. 32; .10, subd. 1.

> The licensee ~~facility must~~ is responsible for the management, operation~~e~~, and control of the facility, and providing~~e~~ housing and assisted living services according to this chapter and Minnesota Statutes, chapter 144G.

169. This is merely a suggested, not required, change. The purpose of this recommendation is to bring clarity to the rule and make it consistent with the Assisted Living Act. As written, proposed Rule 4659.0030 is not legally defective, but could lead to confusion. If the Department chooses to adopt this suggested modification, it would not render the rule substantially different.

170. Accordingly, proposed Rule 4659.0030 is **APPROVED** with recommendations for clarity and consistency with the Act.

PART 4659.0040: LICENSING IN GENERAL

Part 4659.0040, Subpart 1: License Required

171. Proposed rule 4659.0040 addresses when a license is required and how facilities are licensed. Subpart 1 states:

> Effective August 1, 2021, no individual, organization, or government entity, unless licensed under Minnesota Statutes, chapter 144G, and in accordance to this chapter, may:
>
> A. manage, control, or operate an assisted living facility in Minnesota; or
>
> B. advertise, market, or otherwise promote its facility as providing assisted living services or specialized care for individuals with Alzheimer's disease or other dementias.

172. Commenters identified three issues with Subpart 1. First, Subpart 1 references "individuals, organizations, and governmental entities" as licensees, but does not include not "legal entities," which renders Subpart 1 inconsistent with the definitions of "applicant" and "licensee" in the Assisted Living Act (Minn. Stat. § 144.08, subds. 4, 32). Second, Subpart 1 appears to require all persons and entities involved, in any way, in the management, control, or operation of an assisted living facility be licensed, which is also inconsistent with the Assisted Living Act. Third, Subpart 1 prohibits advertising, marketing, and promotion of assisted living and specialized services by any party who is not a licensee, which goes beyond the prohibitions included in the Act.[205] As these commenters noted, each of these issues presents a defect in the proposed rule.

[205] Comments of Aisha Elmquist, OOLTC (Comment 47); Comments of Barb Blumer (Comment 102); Comments of Sarah Duniway and Greg Larson, Lathrop GPM (Comment 81); Comments of Crystal Holloway (Comment 98); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Rebuttal Comments of Kari Thurlow, LeadingAge Minnesota (Feb. 17, 2020).

173. With respect to which parties may hold a license, Subpart 1 is inconsistent with the definitions of "applicant" and "licensee" in the Act. Subpart 1 references "individuals, organizations, and government entities," as the parties who must be licensed. In contrast, "applicant" is defined in the Act as "an *individual, legal entity, or other organization* that has applied for licensure. . . ."[206] "Licensee" is defined in the Act as "a *person or entity* to whom the commissioner issues a license for an assisted living facility and who is responsible for the management, control, and operation of a facility."[207] Accordingly, to be consistent with the Assisted Living Act, Subpart 1 of the rule should be modified to reference these same parties: individuals (or persons), *legal entities*, and other organizations.

174. Subpart 1 is also inconsistent with the Act in regard to who may perform services and who is ultimately responsible for compliance with the Act. As recently amended, Minn. Stat. § 144G.10, subd. 1 expressly provides:

> (a)(1) Beginning August 1, 2021, no assisted living facility may operate in Minnesota unless it is licensed under this chapter.
>
> (2) No facility or building on a campus may provide assisted living services until obtaining the required license under paragraphs (c) to (e).
>
> (b) The licensee is legally responsible for the management, control, and operation of the facility, *regardless of the existence of a management agreement or subcontract.* Nothing in this chapter shall in any way affect the rights and remedies available under other law.[208]

175. Proposed Rule 4659.0040, subp. 1 conflicts with this statute. The proposed rule states that no individual, organization, or government entity may manage, control, or operate an assisted living facility without being licensed. While this may be what the Department wishes to impose, it is contrary to what the law actually allows.

176. Several commenters noted that there are a wide variety of business arrangements involved in owning and operating an assisted living facility, including real estate investment trust (REITs) that could own the real estate upon which the facility is built and other legal entities providing staffing (including temporary staffing),[209] specialized services, and management of the facility itself.[210] Similarly, there may be

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[206] Minn. Stat. § 144.08, subd. 4 (emphasis added).
[207] Minn. Stat. § 144G.08, subd. 32 (emphasis added).
[208] H.F. No. 19, 7th Spec. Sess., art. 6, § 10 (Minn. 2020) (emphasis added).
[209] Elder Voice Family Advocates questioned whether facilities can hire non-licensed temporary workers. See Comments of Elder Voice Family Advocates (Comment 10). The Department indicated that facilities may utilize temporary and contract workers but that the licensee remains ultimately responsible for the compliance with all laws and rules. See Department Response to Elder Voice Family Advocates (Response 10, Feb. 3, 2021).
[210] Comments of Sarah Duniway and Greg Larson, Lathrop GPM (Comment 81); Comment of Barb Blumer (Comment 102); Comments of Crystal Holloway (Comment 98).

situations where third parties would "advertise, market, or promote" a facility during construction and before such facility is operational or licensed. Therefore, these providers objected to the scope of Subpart 1.[211]

177. The statute expressly recognizes that licensees may enter into management agreements and subcontract with other parties to provide licensed services.[212] Moreover, the Act does not prohibit such agreements.[213] Instead, the Act holds the licensee ultimately responsible for those services provided by others.[214] The proposed rule attempts to prohibit such contractual relationships and require a license for all parties who are involved in the operation, management, and control of the facility. The Department must, thus, reconcile its rule with the law before it can be approved. Left as is, the rule injects ambiguity and uncertainty for facilities and their contractors.

178. The rule also prohibits any party from advertising, marketing, and promoting a facility unless that party has an assisted living license. This goes beyond the scope of the Assisted Living Act.

179. Commenters note that there are various situations in which a third party may work to advertise an assisted living facility before it is fully constructed and licensed.[215] In addition, those marketing, advertising, and promoting the facility are often not the party holding the assisted living license; they are entities hired by the licensee.[216]

180. In its response to these comments, the Department deflected the issue and simply referred the commenters to Minn. Stat. § 144G.08, subd. 32 (definition of licensee) and § 144G.10 -.19 (statutes related to licensing), as well as the SONAR at pages 25 and 27.[217] But this response does not address the commenters' concerns because the

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[211] Comments of Sarah Duniway and Greg Larson, Lathrop GPM (Comment 81); Comment of Barb Blumer (Comment 102); Comment of Crystal Holloway (Comment 98); Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45) (questioning the definition of "advertising"); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Rebuttal of Long-Term Care Imperative (undated). Similarly, these commenters questioned whether all staff of a facility must be W-2 employees of the licensee. *See* Comments of Sarah Duniway and Greg Larson, Lathrop GPM (Comment 81); Comment of Barb Blumer (Comment 102)The Department did not directly address these questions and, again, simply referred commenters to the definition of "licensee" in Minn. Stat. § 14G.08, subd. 32 and Minn. Stat. § 144G.10, subd. 1 (amended by H.F. No. 19, 7th Spec. Sess., art. 6, § 10 (Minn. 2020)). *See* Department response to Sarah Duniway (Response 81, Feb. 5, 2021). This response does not address the problem presented.

[212] H.F. No. 19, 7th Spec. Sess., art. 6, § 10 (Minn. 2020).

[213] *Id.*

[214] *Id.*

[215] Comment of Barb Blumer (Comment 102); Comment of Crystal Holloway (Comment 98); Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45) (questioning the definition of "advertising"); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23).

[216] Comment of Barb Blumer (Comment 102); Comment of Crystal Holloway (Comment 98); Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45) (questioning the definition of "advertising"); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Rebuttal Comments of Long-Term Care Imperative to Legal Services Advocacy Project (undated).

[217] Department response to Sarah Duniway (Response 81, Feb. 5, 2021).

statutes referenced are silent as to the marketing, advertising, or promotion of assisted living facility. The Department's response was deficient to defend its proposed rule.

181. In short, the Department is attempting to impose a new restriction in law that is not provided for in statute and goes beyond what has been delegated to the Department in its rule-making authority (*see* Minn. Stat. § 144G.09, subd. 3). Nowhere in the enabling legislation does the legislature grant the Department authority to impose these new restrictions or contradict the clear directive of Minn. Stat. § 144G.10, subd. 1. The Act anticipates that licensees may, in fact, delegate certain actions through subcontracts and management agreements, so long as the licensee remains ultimately responsible for the delivery of care. In addition, the rule inserts confusion and ambiguity into the statutory framework. Accordingly, proposed Rule 4659.0040, subp. 1 is **DISAPPROVED**.

Part 4659.0040, Subpart 2: Issuance of Assisted Living Facility License

182. In response to a legislative change that occurred to the Assisted Living Act in December 2020, the Department has modified Subp. 2B and Subp. 2B, items (1) and (2).[218] Subpart 2B and its items (1) and (2) are deleted.[219] Subpart 2B is replaced with:

> For purposes of this part, "campus" has the meaning given in Minnesota Statutes, section 144G.08, subdivision 4a.[220]

183. In addition, in response to a comment made by Elder Voice Family Advocates, the Department also deleted Subpart 2B(3), because it was inconsistent with Subpart 1B.[221] Subpart 1B prohibited the advertisement, market, promotion of assisted living serves and specialized dementia care until a license is granted under Minn. Stat. ch. 144G. The newly deleted Subpart 2B(3) permitted advertising, marketing, and promotion of specialized care once a licensing application was submitted (as opposed to granted).[222] The Department is correct, that the two subparts were in conflict and, thus, the deletion of Subpart 2B(3) is appropriate.[223]

184. The Administrative Law Judge finds that these changes are reasonable and necessary based upon the legislature's actions and the conflict created by now-deleted Subpart 2B(3). The Department's changes do not render the rule substantially different from the originally proposed rule and are, therefore, permitted under Minn. Stat. § 14.05, subd. 2, without additional notice required. The Department's proposed changes to proposed Rule 4659.0040, subp. 2B are **APPROVED**.

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[218] Ex. L.
[219] *Id.*
[220] *Id.* Because the definition of "campus" has been incorporated by statute, all comments related to the definition in the rules have been rendered moot. *See* Comment of Michelle Wincell O'Leary (Comment 3).
[221] Department Additional Modification (Feb. 16, 2021); Comments of Elder Voice Family Advocates (Comment 10).
[222] *Id.*
[223] This deletion further underscores the defects in proposed Rule 4659.0040, subp. 1 related to advertising, marketing, and promotion.

Part 4659.0040, Subpart 3: License to be Posted

185. Consistent with the modifications made to Subpart 2, the Department proposes to modify Subpart 3B as follows:[224]

> ~~For a license issued under subpart 2, item B, a~~ A campus with multiple buildings must post the original license certificate issued by the commissioner at the main public entrance of each building licensed as a facility on the campus. A separate license certificate shall be issued for each building on the campus.

186. This change is necessary due to the modifications to Subpart 2B approved above. The change does not render the rule substantially different from the originally proposed rule and is, therefore, permitted under Minn. Stat. § 14.05, subd. 2, without additional notice required. The Department's proposed change to proposed Rule 4659.0040, subp. 3B is **APPROVED**.

PART 4659.0060: ASSISTED LIVING LICENSURE; CONVERSION OF EXISTING ASSISTED LIVING PROCEDURES

187. The Department proposes to modify Part 4659.0060 by deleting it in its entirety and replacing it with:[225]

> Upon approval of a license application submitted under Minnesota Statutes, section 144G.191, subdivision 4(a), the commissioner shall issue a license that is not a provisional license as defined in Minnesota Statutes, section 144G.08, subdivision 55.

188. In December 2020, the legislature adopted into statute the deleted portions of proposed rule 4659.0060.[226] The Department's modification of proposed Rule 4659.0060 is needed and reasonable. Further, the change does not render the rule substantially different from the originally proposed rule and is, therefore, permitted under Minn. Stat. § 14.05, subd. 2, without additional notice required. The Department's proposed change to Minn. R. 4659.0060 is **APPROVED**.

[224] Department Additional Modification (Feb. 16, 2021).
[225] Ex. L.
[226] H.F. No. 19, 7th Spec. Sess., art. 6 §§ 4, 10 (Minn. 2020). According to the Department, the newly-enacted section 144G.191, subd. 4(a) contains a typographical error in that it cites to "section 144G.16" instead of section 144G.15. Ex. L. The Department is working to fix this error with the legislature. Ex. L. This error is irrelevant to this rule proceeding.

PART 4659.0070: ASSISTED LIVING LICENSURE; INITIAL LICENSE RENEWAL

189. The Department proposes to modify this rule part by deleting it entirely.[227] This deletion is needed and reasonable because the legislature adopted the proposed rule language into statute at Minn. Stat. § 144G.191, subd. 5.[228] The Department's deletion of proposed Rule 4659.0070 is, therefore, **APPROVED**.

PART 4659.0080: VARIANCE

190. Proposed Rule 4659.0080 permits a licensee or applicant to seek a variance from any provision of the proposed rules. This proposed rule was written in conjunction with Minn. Stat. § 144G.33, which permits "innovation variances" from the Assisted Living Act and rules.

191. AARP argues that proposed Rule 4659.0080 exceeds the Department's statutory authority because the Assisted Living Act, Minn. Stat. § 144G.33, only allows for "innovation variances," not variances from regulations that cause "undue burden," as the proposed rule provides.[229] As described in Minn. Stat. § 144G.33, subd. 1(b), an "innovation variance" is one that will allow a facility to offer services of a type or manner that is: (1) "innovative;" (2) will not impair the services provided; (3) will not adversely affect the health, safety, or welfare of the residents; and (4) is likely to improve the services provided.

192. Unlike Minn. Stat. § 144G.33, the proposed Rule 4659.0080 does not limit variances to just "innovations" that improve the services provided. It allows a licensee to request a variance from any of the proposed rules.

193. The Department asserts that its authority to grant variances from its rules is established not in the Assisted Living Act, but rather, in the Administrative Procedure Act (APA), Minn. Stat. §§ 14.055 and 14.056 (2020), which permit persons or entities to petition an agency for a variance from any rule.[230] The Department is correct in this authority.

194. Minn. Stat. § 14.055, subd. 5 expressly authorizes agencies to establish their own general standards for granting variances. Agencies may also grant variances based on standards specified in other laws, such as the "innovation variance" standards established in Minn. Stat. §144G.33.[231]

195. Proposed Rule 4659.0080 establishes the Department's own procedures and criteria for granting variances of its rules. In drafting this rule, the Department decided

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[227] Ex. L.
[228] H.F. No. 19, 7th Spec. Sess., art. 6 § 12 (Minn. 2020).
[229] Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16); Test. of Mary Jo George, AARP (Hrg. Tr. Vol. I at 64-69).
[230] Department Response to Mary Jo George, AARP (Response 16, Feb. 9, 2021).
[231] Minn. Stat. § 14.055, subd. 5.

to allow parties to request variances from all of the rules in Part 4659. In addition, the criteria established by the Department does not limit variances to "innovation variances," although the criteria is closely aligned with that provided in Minn. Stat. § 144G.33.

196. Because the APA, Minn. Stat. § 14.055, subd. 5, allows agencies to promulgate their own rules establishing standards for granting variances from their own rules, proposed Rule 4659.0080 is lawful and within the scope of the Department's rulemaking authority.

Part 4659.0080, Subpart 1: Request for Variance

197. Subpart 1 of proposed Rule 4659.0080 sets forth the information that must be contained in a request for a variance under Part 4659. The proposed rule varies, however, from the content required for variance petitions set forth in Minn. Stat. § 14.056, subd. 1 (the APA). For example, under the APA, a variance petition must identify persons who would be adversely affected by the grant of the petition, a history of the agency's actions relative to the petitioner, and information regarding the agency's treatment of similar cares.[232] In addition, under the APA's variance statute, "the agency shall make reasonable efforts to ensure that persons or entities who may be affected by the variance have timely notice of the request for a variance."[233]

198. The Department has chosen to institute its own rule variance procedures, as permitted under Minn. Stat. § 14.055, subd. 5. However, proposed Rule 4659.0080 does not require that a party seeking a variance to identify the individuals who would be adversely affected by the variance. Nor does the proposed rule impose notice requirements for those affected parties. This is a necessary step in the variance process that the Department has neglected to include.

199. Several commenters expressed concern that proposed Rule 4659.0080 should be amended to require that notice be served on all residents of the facility requesting the variance.[234] The OOLTC, Elder Voice Family Advocates, and AARP requested that the Department add a provision requiring facilities to: (1) notify residents, prospective residents, residents' representatives, and the OOLTC when a variance request has been made; (2) allow these same parties an opportunity to be heard before granting the variance; and (3) notify these same interested parties when a variance has been granted.[235] These parties also request that time limitations for the duration of

[232] Minn. Stat. § 14.056, subd. 1(7).
[233] *Id.*, subd. 3.
[234] Comments of Aisha Elmquist, OOLTC (Comment 47); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16); Comments of Elder Voice Family Advocates (Comment 72); Comments of Beth McMullen, Alzheimer's Association (Comment 28, 60).
[235] Comments of Aisha Elmquist, OOLTC (Comment 47); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16); Comments of Elder Voice Family Advocates (Comment 72); Comments of Beth McMullen, Alzheimer's Association (Comment 28, 60); Test. of Mary Jo George, AARP (Hrg. Tr. Vol. I at 64-69).

variances be included in the rule.[236]In addition to these comments, Elder Voice Family Advocates is concerned that facilities may attempt to obtain variances from Minn. Stat. § 144G.41, subd. 4, which requires that all assisted living facilities have a CNS who is an RN licensed in Minnesota.[237] This concern is alleviated by Minn. Stat. § 14.055, subd 2(4), which prohibits agencies from granting variances from a statute.

200. The Department has declined to incorporate such provisions into the proposed rule, citing the requirements of Minn. Stat. § 14.056, subd.3, which states:[238]

> In addition to any notice required by other law, an agency shall make reasonable efforts to ensure that persons or entities who may be affected by the variance have timely notice of the request for a variance. The agency may require the petitioner to serve notice on any other party or entity in the manner specified by the agency.

201. Under this statute, the Department would be required to notify residents if a variance request is made by a facility that could impact its residents. The Department therefore contends that additional notice provisions in the proposed rules are not necessary. The Department is incorrect in this assessment, however.

202. Minn. Stat. § 14.055, subd. 6 states that neither § 14.055 or 14.056 apply if "another state or federal law *or rule* authorizes or requires the granting of variances by an agency. . . ."[239] Because the Department has elected to establish, by rule, its own variance standards and procedures under the authority of Minn. Stat. § 14.055, subd. 5, the requirements of Minn. Stat. §§ 14.055 and 14.056 would not apply. If the Department seeks to have the requirements of §§ 14.055 and 14.056 apply, then it must specifically incorporate them into the proposed rule. The Department cannot have it both ways – it cannot establish its own governing variance standards and procedures but then rely on the procedures of Minn. Stat. §§ 14.055 and 14.056.

203. To reconcile the requirements of Minn. Stat. §§ 14.055 and 14.056 with the proposed rule, the Administrative Law Judge requires the following additions to the proposed rule:

> Subp. 1 **Request for variance.** A license applicant or licensee may request at any time that the commissioner grant a variance from the provisions of this chapter. The request must be made in writing to the commissioner and must specify the following:
>
> [***unchanged***]

[236] *See* Test. of Mary Jo George, AARP (Hrg. Tr. Vol. I at 64-69).
[237] Comments of Elder Voice Family Advocates (Comment 72).
[238] Department Response to Beth McMullen, Alzheimer's Association (Response 28, Feb. 5, 2021)
[239] Emphasis added.

C. the variance requested and the time period for which the variance is requested

[***unchanged***]

F. the name, address, and contact information of any person or entity the license applicant or licensee knows would be adversely affected by the granting of the variance, including prospective residents, residents, and their representatives.

The commissioner may require additional information from the license applicant or licensee before acting on the request.

Subp. 1a. **Notice**. The commissioner shall make reasonable efforts to ensure that persons or entities who may be affected by the variance have timely notice of the variance request, including affected prospective residents, residents, and their representatives. In addition, the agency shall notify the ombudsman of all variance requests. The commissioner may require the license applicant or licensee requesting the variance to serve notice on the persons or entities entitled to notice under this subpart.

[***unchanged***]

Subp. 2. **Criteria for evaluation**. The decision to grant or deny a variance or variance renewal request must be based on the department's evaluation of the following criteria: [240]

[***unchanged***]

Subp. 3. **Duration and conditions**. The commissioner may limit the duration of any variance. The commissioner may impose conditions on granting a variance that the commissioner considers necessary to protect public health, safety, or the environment. A variance has prospective effect only. The commissioner may not grant a variance from a statute or court order.[241] Conditions attached to the variance are an enforceable part of the rule to which the variance applies.

Subp. 4. ~~**Grant of**~~ **Decision and timing** ~~**a variance**~~. (a) The commissioner must notify the license applicant or licensee and all persons or entities entitled to notice under Subpart 1a, in writing, of the commissioner's

[240]Commenter AARP argues that the term "unreasonable burden," as used in proposed Rule 4659.0080, subp. 2B, should be defined in the rules. *See* Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16). The Administrative Law Judge finds no need to define "unreasonable burden," which is generally a fact-specific determination. It is also consistent with Minn. Stat. § 14.055, subd. 4, which requires an agency to consider whether the rule, when applied to the petitioner, "would result in hardship or injustice."

[241] This is an important provision that should not be neglected. An agency cannot grant a variance from a statute.

decision to grant or deny a variance or variance renewal request, or to revoke a variance. ~~and~~ If the variance request is granted, the notification must specify the period of time for which the variance is effective and the alternative measures or conditions, if any, to be met by the license applicant or licensee. If the commissioner denies, revokes, or refuses to renew a variance, the commissioner must notify the license applicant or licensee, in writing, of the reasons for the decision and the right to appeal the decision under subpart 8.

(b) The commissioner shall grant or deny a variance request or variance renewal request as soon as practicable, and within 60 days of receipt of the completed variance application, unless the license applicant or licensee agrees to a later date. Failure of an agency to act on a request for a variance within 60 days constitutes approval of the variance.

[***unchanged***]

Subp. 7. **Denial, revocation, or refusal to renew**. The commissioner shall deny, revoke, or refuse to renew a variance if:

[***unchanged***]

~~The commissioner must notify the license applicant or licensee in writing of the reasons for the decision to deny, revoke, or refuse to renew a variance and the right to appeal the decision under subpart 8,~~

204. The Department should note that, because it has established its own variances procedures and standards, Minn. Stat. § 14.056, subd. 2 regarding fees and costs has not been incorporated into its rule. Therefore, the Department may wish to incorporate these provisions or incorporate Minn. Stat. § 14.056 into the proposed rule.

205. Subject to the recommendations set forth above, proposed Rule 4659.0080, subp. 1 is **APPROVED**.

Part 4659.0080, Subpart 8: Appeal Procedure

206. Proposed Rule 4659.0080, subp. 8 sets forth the procedure for appealing the Department's denial, revocation, or refusal to renew a variance by requesting a hearing from the Commissioner. Subpart 8 limits the time to appeal to 10 calendar days from the date the licensee or applicant receives notice of the denial, revocation, or nonrenewal.

207. Subpart 8 adopts a "preponderance of the evidence" standard of proof for both the Department and the licensee or applicant at hearing. Where a variance is denied or not renewed, the applicant or licensee has the burden of proving by a preponderance of the evidence that the variance should be granted or renewed. Where a variance is

revoked, the Department has the burden of proving by a preponderance of the evidence that a revocation of the variance is appropriate.

208. AARP and Elder Justice Center argue that licensees and applicants seeking a variance should be held to a "clear and convincing" standard of proof.[242] The Administrative Law Judge finds that a "preponderance of the evidence" standard is appropriate and reasonable as applied to both the Department (when revoking a variance) and licensees and applicants (when a variance has been denied or not renewed). The preponderance of the evidence standard is consistent with the standard of proof used by the Office of Administrative Hearings in contested case hearings where these variance appeals will be heard.[243]

209. With respect to the appeal hearing, Subpart 8 incorporates the hearing procedures for the Minnesota Revenue Recapture Act (Minn. R. 1400.8505-.8612 (2019)), as opposed to the full contested case hearing procedures set forth in the APA and related rules (Minn. Stat. § 14.57-.62 (2020) and Minn. R. 1400.5010-.8401 (2019)). The procedural rules of the Revenue Recapture Act abbreviate the procedures found in the APA. For example, under the Revenue Recapture Act rules, there are narrower limits on discovery than other contested cases.

210. The Long-Term Care Imperative argues that: (1) the 10-day appeal deadline is arbitrary and without statutory authority; and (2) the use of the Revenue Recapture Act rules is similarly without statutory authority.[244]

211. With respect to the 10-day appeal deadline, the Long-Term Care Imperative asserts that, because the Assisted Living Act does not provide for appeals of variances or deadlines for such appeals, no such deadline can be imposed by rule.[245] The commenter is correct that the Act does not provide for variance appeals. Minn. Stat. § 144G.33 only addresses "innovation variances" and does not provide for any appeal or contested case hearing. Nor do the APA rules, Minn. Stat. § 14.055 and 14.056, allow for a right to a contested case hearing for general rule variances.

212. However, as set forth above, Minn. Stat. § 14.055, subd. 5 authorizes agencies to adopt rules establishing general standards for granting mandatory or discretionary variances from their own rules.[246] This is exactly what the Department has done with proposed Rule 4659.0080. It has established a variance appeal process both

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[242] Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16); Comments of Sean Burke and Amanda Vickstrom, Elder Justice Center (Comment 30); Test. of Mary Jo George, AARP (Hrg. Tr. Vol. I at 64-69).

[243] *See* Minn. R. 1400.7300, subp. 5 (2019).

[244] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49). *See also* Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).

[245] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

[246] Minn. Stat. § 14.055, subd. 5 states that agencies may adopt rules under Minn. Stat. § 14.389 to establish variance standards. Section 14.389 applies to expedited rules. It is reasonable that agencies can also adopt rules related to variances under the standard (non-expedited) rulemaking processes.

for "innovation variances" under Minn. Stat. § 144G.33 and general rule variances, which would otherwise be brought under Minn. Stat. §§ 14.055 and 14.056. Because Minn. Stat. § 14.055 expressly allows agencies to establish their own standards for granting variances, the 10-day appeal deadline is within the agency's rule-making authority. Notably, it is established practice that agencies will use rules to institute an appeal procedure for variance denials, revocations, and non-renewals. *See, e.g.,* Minn. R. 4626.1715B, 4658.0040, subp. 7 (2019). Therefore, Long-Term Care Imperative's argument that the 10-day appeal deadline exceeds the Department's rulemaking authority is without merit.

213. The same is not true for the provisions of Subpart 8 that require the use of the Revenue Recapture Act rules for conducting the variance appeal hearing. The Revenue Recapture Act rules, Parts 1400.8505-.8612, govern hearings based on the Revenue Recapture Act (Minn. Stat. §§ 270A.01-.12), hearings brought under Minn. Stat. §§ 114C.23, 115.076, 116.072, subd. 6, 144.991, and "*for other hearings as directed by statute*."[247]

214. There is no statute authorizing the Department to conduct variance appeals using the truncated procedures set forth in the Revenue Recapture Act. Therefore, without such statutory authority, a directive that all variance appeals be conducted under the Revenue Recapture Act rules is without proper legal authority.

215. There is no prohibition, however, on the Department incorporating the standard contested case procedures under the APA for variance appeals. Therefore, if the Department merely modifies the last sentence of Subpart 8, as follows, the rule defect will be remedied:

> Hearings under this subpart must be ~~held under the Minnesota Revenue Recapture Act, Minnesota Rules, parts 1400.8505 to 1400.8612~~ conducted under the Minnesota Administrative Procedure Act, Minnesota Statutes, chapter 14, and the rules of the Office of Administrative Hearings related to contested case proceedings, Minnesota Rules parts 1400.5010 to 1400.8401.

216. In sum, Department has elected to institute its own rules regarding variance standards and procedures. Accordingly, the Department is authorized to enact the proposed rule under Minn. Stat. § 14.055, subd. 5. However, to remain consistent with the requirements of the APA's variance laws, the Administrative Law Judge has made recommendations for modifications to the proposed rule subparts. In addition, because the there is no statute authorizing the Department to use the Revenue Recapture rules, the Department is without authority to institute that requirement. Subject expressly to the Department adopting the changes recommended by the Administrative Law Judge, proposed Rule 4659.0080, subps. 1 and 8 are **APPROVED**.

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[247] Minn. R. 1400.8505 (emphasis added). The Revenue Recapture Act procedures may also be used to conduct other hearings at the Office of Administrative Hearings "if all parties to a particular hearing and the administrative law judge agree to use them." *Id.*

PART 4659.0090: UNIFORM CHECKLIST DISCLOSURE SERVICES

217. Proposed Rule 4659.0090 addresses the Uniform Checklist Disclosure of Services that is required to be developed and posted by the Commissioner under Minn. Stat. § 144G.40, subd. 2.

218. A few commenters were confused about whether the Commissioner had actually created a disclosure checklist form and suggested that the Department prepare a template for use by all facilities.[248] The Commissioner has, in fact, created such a checklist template and attached it to the SONAR as Appendix B. However, the Administrative Law Judge was unable to locate such a checklist on the Department's website at this time.

219. AARP suggested that the checklist form be incorporated into the rule itself for easy access to all parties.[249] Due to the size of the document and the fact that the form is subject to change "as needed," it is reasonable that the Department makes the checklist available to the public on its website.

220. Elder Voice Family Advocates questioned whether the checklist requirement applies to both assisted living facilities and those with dementia care.[250] The Department confirmed that the definition of "assisted living facility" in Minn. Stat. § 144B.08, subd. 7, would include a facility offering dementia care.[251]

221. Both Elder Voice Family Advocates and AARP suggested adding some additional items on the checklist.[252] The Department declined to revise its checklist form.[253] The Administrative Law Judges finds that the content of the checklist is needed and reasonable, as presented, without the additional suggestions made by the commenters.

Part 4659.0090, Subpart 3: Submission of Checklist to Commissioner

222. Proposed Rule 4659.0090, subp. 3 requires a facility to submit an updated checklist to the Commissioner within 30 calendar days of any change in services offered by the facility.

223. Elder Voice Family Advocates urged the Department to consider notifying residents of changes to the disclosure 30 days prior to the change in services.[254] The

[248] Comment of Tom Rinkoski (Comment 8); Comments of Robin Rohr, Hennepin County Human Services (Comment 85); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Test. of Mary Jo George, AARP (Hrg. Tr. Vol. I at 64-69).
[249] Comments of Mary Jo George, AARP Minnesota (Comment 16).
[250] Comments of Elder Voice Family Advocates (Comment 10).
[251] Department Response to Elder Voice Family Advocates (Response 10, Feb. 3, 2021).
[252] Comments of Elder Voice Family Advocates (Comment 10, 72); Comments of Mary Jo George, AARP Minnesota (Comment 16).
[253] Department Response to Elder Voice Family Advocates (Response 10, Feb. 3, 2021).
[254] Comments of Elder Voice Family Advocates (Comment 10, 72).

Department did not respond to this comment and declined to make any changes to the proposed rule. While this suggestion is a good one, the rule, as written is needed and reasonable. The Uniform Checklist is meant to inform perspective residents and their representatives,[255] and assist them in choosing a facility that can meet their needs, including determining whether the services in the contract equate with those marked as available in the checklist. Therefore, it is unnecessary that the rules require notice be given to existing residents when the disclosure form is changed.

224. Finally, LeadingAge Minnesota suggested that only "material" changes should trigger the resubmission of the checklist to the commissioner.[256] The Administrative Law Judge finds no need to amend the proposed rule to require only "material" changes, as that would present additional issues with what is, and is not, a "material" change.

225. The Administrative Law Judge finds proposed Rule 4659.0090, as written, need and reasonable. Accordingly, this rule is **APPROVED**.

PART 4659.0100: EMERGENCY DISASTER AND PREPAREDNESS PLAN

226. Proposed Rule 4659.0100 requires that all facilities comply with the federal emergency preparedness regulations for long-term care facilities established under 42 C.F.R. § 483.73 and its "successor requirements." The rule also incorporates by reference the specifications contained in State Operations Manual (SOM) Appendix Z – Emergency Preparedness for All Provider and Certified Supplier Types: Interpretive Guidance" issued by the U.S. Centers for Medicare and Medicaid Services (Appendix Z).

227. The incorporated federal regulation, 42 C.F.R. § 483.73, provides that long-term care facilities must establish and maintain an emergency preparedness program consisting of: (1) an emergency plan; (2) policies and procedures for implementing the plan; (3) a communication plan; (4) training and testing of the plan, policies, and procedures; and (5) a plan for implementation of emergency and standby power systems. The federal rule also allows these facilities to join in plans developed by "integrated healthcare systems" to which these facilities belong.[257] Appendix Z of the SOM provides guidance for CMS surveyors on how to review and enforce the federal regulation, including specifications for compliance.

228. Proposed rule 4659.0100 received the most comments in opposition of any of the proposed rules, with very few, if any supporters. The comments addressed the need, reasonableness, and significant cost of the emergency disaster and preparedness plan requirements set forth in proposed Rule 4659.0100.

229. Many commenters, especially smaller facilities, inquired about how much these requirements would cost them and what exactly they would need to do to comply

[255] *See* Minn. Stat. § 144G.40, subd. 2.
[256] Comments of LeadingAge Minnesota (Comment 29).
[257] 42 C.F.R. § 483.73(f).

with the federal requirements.[258] Overall, these providers and commenters expressed concern that: (1) the federal standards were drafted to apply to long-term care facilities, such as nursing homes and hospitals that provide significant medical services and that accept Medicare and Medicaid, not the hybrid type of assisted living facilities existing in Minnesota; (2) the costs to the facilities to comply with the requirements would be prohibitive and would have significant effect on their ability to offer affordable care for their residents; (3) the added costs would not be covered by the Medicare Elderly Waivers; (4) there will be a disproportionate impact on small, providers (those with 4-6 residents) who will likely need to retrofit residential homes to comply; (5) there will not be adequate time for facilities to come into compliance by the effective date of August 1, 2021; (6) the updates to the federal regulations and Appendix Z will not be specific to Minnesota's assisted living facilities and there will be no opportunity for public comment when those federal updates occur; and (7) CMS has no oversight of, or financial connection to, the Minnesota-regulated assisted living facilities.[259]

230. The Long-Term Care Imperative asserts that the Department is exceeding its statutory authority by incorporating the federal regulations because the legislature specifically directed the Department in Minn. Stat. § 144G.09, subd. 3(c)(5) to develop rules "for emergency disaster and preparedness plans," not incorporate a federal

[258] *See, e.g.,* Comments of Lenny Frolov (Comment 2); Comments of Michelle Nash, Residential Care Providers Network (Comments 22, 71).

[259] Comment of Lenny Frolov (Comment 2); Comment of Dawn Kuzma (Comment 7); Comments of Lore Brownson (Hrg. Tr. Vol. I at 98-103; Vol. II at 211-217); Comment of Jenny Morgan (Comment 9); Comment of Muriel Carpenter (Comment 11); Comment of Chris Kunz (Comment 13); Comment of Scott Carpenter (Comment 14); Comment of Luann Fehn (Comment 17); Comment of Jill Peterson (Comment 18); Comment of Scott Carlson (Comment 19); Comment of Tim Beutell (Comment 20); Comment of Luann Phillpich (Comment 21, Jan. 14, 2021); Comments of Robert Phillipich (Comment 68); Comments of Michelle Nash, Residential Care Providers Network (Comments 22, 71); Comments of Residential Care Provider's Network (Jan. 29, 2021); Comments of Care Providers of Minnesota (Jan. 15, 2021); Comments of Ranae Noble (Comment 26); Comments of David Pederson (Comment 31); Comments of Joe Cuoco (Comment 70); Comments of Ilitch Diaz-Gutierrez (Comment and Response 75); Comment of Karis Gust (Comment 76); Comment of Jullene Kallas; Comment of Joni Bastable (Comment 78); Comment of Dave Zollar (Comment 88); Comment of Ben Woit, Benedictine (Comment 92); Comments of Valerie Skarphol (Comment 111); Comments of Pam Leach (Comment 79); Comments of Kathy Manning (Comment 86); Comments of Andrea Buck (Comment 90); Comments o4f Delwyn Spronk (Comment 91); Comments of Lore Brownson (Comment 104); Comment of Arlan Swanson and Heidi Appel (Comment 106); Comment of Mindy Smith (Comment 107); Comments of Valerie Skarphol (Comment 111); Comment of John Zollar (Comment 38); Comment of Pamela Klingus (Comment 39); Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45); Comments of Josh Cesaro Moxley, Heart to Home (Comment 46); Comments of Anneliese Peterson (Comment 48); Comments of Darla Lundell (Comment 56); Comment of Mandy Brecher (Comment 57); Comment of Greta Marston (Comment 64); Comments of Darla Lundell (Comment 56); Comment of Mandy Brecher (Comment 57); Comments of Shelli Bakken, Walker Methodist (Comment 58); Comments of Shauna Kapsner (Comment 53); Test. of Shauna Kapsner (Hrg. Tr. Vol. I at 82-97); Comments of Lindsey Sand, Population Health, Knute Nelson (Comment 55); Comments of Wendy Hulsebus (Comment 65); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Comments of Sean Burke and Amanda Vickstrom, Elder Justice Center (Comment 30); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Test. of Lindsey Sand (Hrg. Tr. Vol. I at 126-137); Test. of Lores Vlaminck (Hrg. Tr. Vol. II at 190-208); Test. of Scott Carpenter (Hrg. Tr. Vol. II at 218-233); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

regulatory scheme that did not contemplate assisted living facilities.[260] According to this commenter, had the legislature wanted the Department to simply adopt inapplicable federal standards, it could have done that itself in the statute.[261] Instead, the legislature directed the Department to promulgate rules specific to Minnesota's assisted living facilities and the policy directives specific to the Assisted Living Act.[262] Quoting the U.S. Supreme Court, this commenter notes that legislatures should not "hide elephants in mouseholes," meaning that the Minnesota Legislature did not intend for the Department to use its rulemaking authority to introduce a complex federal regulatory scheme into the rules for assisted living facilities.[263]

231. The Long-Term Care Imperative and other provider groups explain that Appendix Z is a 72-page document applicable to 17 types of care providers who are subject specifically to CMS oversight because they receive Medicare and Medicaid resources to help cover the costs of these detailed regulations. The organization notes that none of the 17 types of providers identified in Appendix Z are assisted living facilities. Because this document is merely incorporated into federal regulations, it is also subject to revision and future changes that do not require rulemaking and would not be specific to Minnesota's assisted living facilities.[264]

232. The Long-Term Care Imperative also notes that the SONAR does not explain how Appendix Z may conflict with the Act or the other rules. This commenter asserts that Appendix Z introduces different concepts, terms, and definitions into the rule that may conflict or cause confusion with Minnesota's statutory and regulatory scheme.[265]

233. Commenters explain that assisted living facilities are not "institutional-type settings" that are contemplated by Appendix Z, because many residents in Minnesota assisted living facilities do not receive any medical services.[266] Thus, assisted living facilities should be treated more like multifamily residential buildings, not nursing homes.[267] This is why, continues the commenter, most residents choose assisted living over nursing homes.[268]

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[260] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).
[261] *Id.*
[262] *Id.*
[263] *Id.*
[264] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).
[265] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).
[266] Comments of Josh Berg, Lifesprk (Comment 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).
[267] Comments of Josh Berg, Lifesprk (Comment 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).
[268] Comments of Josh Berg, Lifesprk (Comment 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

234. One commenter asserted that the Department has not thoroughly analyzed Appendix Z to discuss how each of the requirements would impact assisted living facilities in Minnesota.[269] Similarly, commenter Ilitch Diaz-Guierrez noted that the Department's Cost Baseline and Impact Analysis was "fundamentally inaccurate and not representative of what the true costs will be" as a result of the rules and statute.[270] Ms. Diaz-Guierrez notes that the Department's cost study was based upon surveys of just a fraction of the state's facilities and states merely "opinions" of the study's authors, rather than an objective analysis.[271] The Long-Term Care Imperative asserts that the Department's costs analysis is too low because it does not include the ongoing compliance costs, estimated by the Long-Term Care Imperative to be $3,063 annually.[272]

235. The cost items of particular concern to commenters were requirements for sprinkler systems, alternative energy sources (or generators), and emergency lighting; requirements to conduct an annual regional full scale exercise; the requirements to track residents; and the requirement to maintain electronic health records for all residents – even those who do not receive any assisted living services.[273] Some of these upgrades are estimated to be upwards of $10,000 for small facilities.[274]

236. Another commenter noted that, the fact that training is available for providers who are members of two trade associations (Care Providers of Minnesota and LeadingAge Minnesota Minnesota), is not persuasive because only one-third of Minnesota providers belong to those two trade associations.[275]

237. Commenters argue that the Assisted Living Act already addresses emergency planning and safety requirements in various provisions, such as Minn. Stat. §§ 144G.41, subd. 1(11)(iii); .42, subd. 7(1); .42, subd. 10; .45; .53, subd. 9; .60, subd. 6; .61, subd. 2(14); and .63, subd. 2(3). According to these providers, there is no need for the extensive regulations provided for in the federal rules.[276]

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[269] Comments of Lindsey Sand, Population Health, Knute Nelson (Comment 55).
[270] Comments of Ilitch Diaz-Gutierrez (Comment and Response 75).
[271] *Id.*
[272] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Analysis of Costs of Assisted Living Licensure submitted by the Long-Term Care Imperative (Feb. 9, 2021).
[273] Comment of Chris Kunz (Comment 13); Comment of Chris Carpenter (Comment 14); Comment of Luann Fehn (Comment 17); Comment of Scott Carlson (Comment 19); Comment of Tim Beutell (Comment 20); Comments of Michelle Nash, Residential Care Providers Network (Comment 22, 71); Test. of Michelle Nash (Hrg. Tr. Vol. I at 143-145); Comments of Josh Cesaro Moxley, Heart to Home (Comment 46); Comments of Shelli Bakken, Walker Methodist (Comment 58); Comments of Wendy Hulsebus (Comment 65); Comments of Kathy Manning (Comment 86); Comments of Andrea Buck (Comment 90); Comment of Delwyn Spronk (Comment 91); Comments of Lindsey Sand, Population Health, Knute Nelson (Comment 55).
[274] Comments of Wendy Hulsebus (Comment 65).
[275] Comments of Josh Berg, Lifesprk (Comment 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243).
[276] Comments of Karis Gust (Comment 76); Comments of Kathy Manning (Comment 86); Comments of Andrea Buck (Comment 90); Comments of Delwyn Spronk (Comment 91); Comment of Deb Nobis (Comment 97); Comment of Crystal Holloway (Comment 98); Comments of Lores Vlaminck (Comment 99);

238. Several comments rightly questioned why the Department abandoned the emergency preparedness draft rule that was developed by stakeholders (before the formal initiation of the rulemaking process) and was distributed as part of the request for comments published on December 12, 2019 (referred to herein as the "Working Draft").[277] According to these commenters, this draft was agreed to by most stakeholders, including AARP, the OOLTC,[278] Elder Voice Family Advocates, LeadingAge Minnesota, Care Providers of Minnesota, and others.[279] The commenters assert that the Working Draft is significantly superior to the proposed rule because it is: understandable and not overly complicated; not subject to federal amendment; specific to Minnesota's assisted living facilities; consistent with the Assisted Living Act and the other proposed rules; and scalable to Minnesota's facilities, both large and small.[280]

239. The Long-Term Care Imperative emphasizes that Minn. Stat. § 14.131 requires that the Department, in its SONAR, describe "any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule."[281] Clearly, the Working Draft was seriously considered by the Department if it was published as part of the request for comments.[282] Therefore, the commenters question why the Department did not explain its reasoning for incorporating federal regulations into the rule, as opposed to modifying the draft the agency and stakeholders spent considerable time crafting.[283]

240. Overall, these commenters make two legal arguments against the proposed rule: (1) that the Department exceeded its authority by incorporating federal regulations not contemplated by the legislature; and (2) that the proposed rule is not reasonable as

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Comment of Mary Jo Thorne (Comment 112); Comment of Charles Pederson (Comment 34); Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Wendy Hulsebus (Comment 65); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

[277] Comments of Joe Cuoco (Comment 70); Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45); Comments of Shelli Bakken, Walker Methodist (Comment 58); Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

[278] The OOLTC notes that if the proposed Rule 4659.0100 is found to be unreasonable, that it is agreeable with the implementation of the December 12, 2019 Working Draft of the rule. Comments of Aisha Elmquist, OOLTC (Comment 47).

[279] Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

[280] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

[281] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

[282] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

[283] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal comments of Sam Orbobvich (Feb. 12, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

applied because it is not rationally related to the goals that the Department is attempting to achieve.

241. In its SONAR, the Department explains its policy decision to incorporate the federal regulations, as opposed to crafting its own rule, as the Department attempted to do with the Working Draft. First, the Department contends that the federal regulations allow flexibility rather than a one-size-fits-all-facilities approach because it requires facilities to develop their own plans tailored to the needs of their facility while meeting all elements of the federal regulations. Second, 17 types of federal providers currently follow this federal rule, including long-term care facilities for vulnerable adults, nursing homes, hospices, and intermediate care facilities for adults with intellectual disabilities. Third, this approach was recommended by the Department's expert, Judy Seaberg, a program manager in the Department's Center for Emergency Preparedness and Response. She and the program manager for the Department's Licensing and Certification program support the incorporation of the federal rules because Department surveyors are accustomed to using the CMS guidance (SOM) when evaluating facilities that must comply with CMS requirements. Fourth, Care Providers of Minnesota and LeadingAge currently provide training and workshops for members on how to comply with these regulations. Fifth, CMS regularly updates the regulations to best serve and protect the public. Therefore, assisted living facilities will always be following "the most up-to-date requirements."[284]

242. In response to comments received, the Department asserts that only the federal requirements applicable to long-term care facilities in Appendix Z would be incorporated into the proposed rule. Therefore, regulations related to other types of facilities (i.e., nursing homes and hospitals) would not apply. According to the Department, the federal requirements "were intentionally written to accommodate a variety of settings from the small facility in a single-family residence, to a large facility with hundreds of residents." Because these requirements apply to facilities that participate in federal Medicare and Medicaid programs, the regulations are widely known and many providers already have developed the education and documentation required by CMS. Moreover, the Department contends that Appendix Z gives providers consistent and transparent interpretive guidance for implementing the federal requirements.[285]

243. With respect to specific questions regarding how the proposed rule will impact small facilities, the Department clarified that generators will not be required in assisted living facilities unless the facility determines that a loss of electrical power would result in major injury or death to its residents (for example, if residents at the facility require ventilators). As for fire alarm systems and emergency lighting, the Department contends that facilities are likely already required to maintain battery backup systems under Minnesota's Fire Code. For most small facilities (4-16 residents), the proposed rules will not require an alternative energy source in the event of a power outage. In addition, most small facilities will not be expected to install fire extinguishing or alarm systems. The

[284] SONAR at 36-37.
[285] Department Response to Michelle Nash, Residential Care Providers Network (Response 71, Feb. 5, 2021); Department Response to Lenny Frolov (Response 2, Feb. 5, 2021).

Department did not address concerns regarding maintaining electronic medical records and medication information on residents who do not receive assisted living services.[286]

244. Finally, the Department defended its Cost Baseline and Impact Analysis arguing that it sent surveys to all potentially impacted facilities. The Department could not control a lack of response by certain sectors, but, nonetheless incorporated the responses from all those who did partake in the survey.[287]

245. The Administrative Law Judge finds that, although the Department abandoned its attempt to create its own rules on emergency preparedness, it has properly shown that it has the requisite legislative authority to incorporate the federal requirements into its rule. The Department has also shown that the proposed rule is reasonable rationally related to the goals of the Department.

246. The incorporated federal regulations are generally applicable to the type of facilities (long-term care facilities) that are regulated under the Assisted Living Act. These federal regulations are well-known, established, and transparent for providers. In addition, state regulators have the requisite guidance and experience to enforce the rules, as they do for facilities that are already required to follow the regulations because they accept Medicare and Medicaid.

247. Clearly there will be increased cost to providers to comply with the rule. That amount has been reasonably calculated by the Department using surveys from those who will be impacted by the rules.[288] But there would likely be initial and ongoing costs of any alternative emergency preparedness rules the Department would adopt, including the Working Draft of the rule. The variance provisions of the proposed rules (Rule 4659.0080) will allow providers some ability to avoid regulations that prove too burdensome, so long as alternative measures to ensure safety are in place.

248. The enabling statute, Minn. Stat. § 144G.09, subd. 3(c)(5) granted the Department wide discretion to enact rules related to "emergency disaster and preparedness plans." While the legislature could have incorporated into the Assisted Living Act the requirements of 42 C.F.R. § 483.73, the fact that it did not does not amount to evidence that the legislature considered the federal regulations and found them inapplicable, inappropriate, or overly burdensome. The legislature expressly left the determination of what types of emergency and disaster preparedness regulations to apply to assisted living facilities to the Department in the enabling statute.

249. The Department has also complied with all requirements under Minn. Stat. § 14.07, subd. 4 (2020) to incorporate into the rule the federal regulations, and the rule

[286] Department Response to Michelle Nash, Residential Care Providers Network (Response 71, Feb. 5, 2021); Department Response to Lenny Frolov (Response 2, Feb. 5, 2021).
[287] Department Response to Michelle Nash, Residential Care Providers Network (Response 71, Feb. 5, 2021).
[288] *See* Ex. N (Cost Baseline and Impact Analysis); Ex. D at 18 (SONAR).

has been approved as compliant by the Revisor of Statutes. Therefore, the proposed rule does not exceed the authority vested in the Department under the law.

250. With respect to the need and reasonableness of the rule, the Department has sufficiently explained why the emergency preparedness rules are needed to protect the safety of residents in assisted living facilities. Such specific protections are not already included in the Assisted Living Act, otherwise the legislature would not have delegated to the Department the task of developing such rules.

251. The rules are also reasonable under legal standards. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[289] The Department has sufficiently explained that it incorporated the federal standards because they are already widely applicable to other types of long-term care facilities in the state housing the elderly and vulnerable adults.

252. While it would have been helpful for the Department to have explained why it decided against the Working Draft version of the proposed rule, the Department has adequately articulated the reasons and rationale for its incorporation of the federal regulations. By following the required rulemaking notice procedures, the Department gave all stakeholders an opportunity to comment on its final proposed rule and the Department has established that it considered those responses.

253. An agency is legally entitled to make choices between possible regulatory approaches so long as its choice is rational and reasonable.[290] It is not the role of the Administrative Law Judge to determine which policy alternative represents the best approach, because this would invade the policy-making discretion of the agency.

254. Thus, while reasonable minds may differ as to whether adoption of the federal regulations is better than the creation of state-specific standards, the Department's approach is not unreasonable or irrational. The Department has therefore satisfied its burden in establishing the need and reasonableness of its policy determination. Accordingly, proposed Rule 4659.0100 is **APPROVED**.

PART 4659.0110: MISSING RESIDENT PLAN

255. Proposed Rule 4659.0110 addresses the creation and maintenance of the missing resident plan. The Assisted Living Act, Minn. Stat. § 144G.42, subd. 10(a)(5), requires that all facilities "have a written policy and procedure regarding missing tenant residents."[291]

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[289] *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 240, 244 (Minn. 1984).

[290] *See Peterson v. Minn. Dept. of Labor & Industry*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

[291] One commenter noted that the rule was ambiguous as to whether a missing resident plan must be made for each resident or for the facility as a whole. *See* Comments of Pam Leach (Comment 79). Minn. Stat. § 144G.42, subd. 10(a)(5) makes it clear that each facility must have such a plan, not that each facility must have a plan for each resident.

256. One commenter noted that the statute is sufficiently specific and that the proposed rule "goes beyond what is necessary and reasonable for a rule." [292] The Administrative Law Judge rejects this criticism because the statute requires facilities to have a written policy and procedure for missing residents but does not detail the requirements for such policies or procedures. Therefore, proposed Rule 4659.0110 is needed and reasonable to detail the specifics of the statutory requirement.

Part 4659.0110, Subpart 1: Applicability

257. Proposed Rule 4659.0110, subp. 1 explains when a missing resident plan is required for a facility. Such a plan is required for two groups of residents: (1) those "incapable of taking appropriate action for self-preservation under emergency conditions;" and (2) those who are identified as at risk for wandering or elopement under their most recent assessment or review.

258. Subpart 1B details which residents are "incapable of taking appropriate action for self-preservation under emergency conditions." Under Subpart 1B(2), these residents include those who lack physical or cognitive capability to "initiate and complete the evacuation without requiring more than sporadic assistance from another person, such as help in opening a door or getting into a wheelchair."

259. Hennepin County Human Services recommended that Subpart 1B(2) be modified to include the word "mental" when describing the types of incapacities that would cause someone to be incapable of self-preservation.[293] The OOLTC requested that Subpart 1B(2)(b) be revised to remove the example of "such as help in opening a door or getting into a wheelchair."[294] OOLTC explains that, in an emergency situation, a person who cannot open a door on their own or get into a wheelchair on their own is not capable of taking appropriate action for self-preservation.[295]

260. The Department did not respond to these comments.

261. The Administrative Law Judge finds that the changes recommended by both the OOLTC and Hennepin County are reasonable. However, the comments by the OOLTC are needed to clarify the rule. Individuals who are incapable of opening doors or getting into their own wheelchairs cannot be considered capable of self-preservation in emergency situations. In addition, the word "sporadic" is subject to various interpretations and injects confusion into the rule, especially when used in conjunction with the examples given (needing help opening doors or getting into a wheelchair).

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[292] Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243).
[293] Comments of Robin Rohr, Hennepin County Human Services (Comment 85).
[294] Comments of Aisha Elmquist, OOLTC (Comment and Rebuttal 47).
[295] *Id.*

262. To this end, the Administrative Law Judge recommends that Subpart 1B(2) be modified as follows:

> (2) lacks the physical, mental, or cognitive capacity to:
>
> ***
>
> (b) initiate and complete the evacuation without requiring more than ~~sporadic~~ minimal assistance from another person~~, such as help in opening a door or getting into a wheelchair~~;

263. The Department has established that proposed Rule 4659.0110, subp. 1 is needed and reasonable. However, the rule is defective because it creates ambiguity by including an example that is incongruent with the remainder of the rule. Therefore, proposed Rule 4659.0110, subp. 1 is **DISAPPROVED.** For clarity and to prevent confusion, the Administrative Law Judge recommends the modifications set forth above. Incorporating these changes will not render the rule substantially different from the earlier version noticed in the *State Register.*

Part 4659.0110, Subpart 2: Missing Resident Policies and Procedures

264. Proposed Rule 4659.0110, subp. 2 requires that facilities develop and follow a missing resident plan; set out what must be included in the plan; and identify the steps that must be initiated in the case of a missing resident. Subpart 2A requires the missing resident plan to (among other things):

> (1) identify a staff member for each shift who is responsible for implementing the missing resident plan, and ensure at least one staff member who is responsible for implementing the missing-resident plan is on site 24 hours a day, seven-days a week;
>
> (2) require that staff alert the staff member identified in subitem (1) immediately if it is suspected that a resident may be missing;

265. Hennepin County asserts that Subpart 2A (1) and (2) are "confusing" because they do not specifically identify which staff member is required to fulfill these functions.[296] However, the rules allow the facility to identify its own staff member, presumably by title. Therefore, the staff member will vary from facility-to-facility. This is not a defect in the rule.

266. Subpart 2A(4) provides that the first step when a resident cannot be found is that the staff conduct a search of the facility, the premises, and the surrounding neighborhood. If the resident is not found after the initial search, the rule requires that the staff consider the resident "missing" and notify law enforcement and the resident's representatives. One commenter noted that instead of starting with a search of the facility, the plan should have a first step of contacting the police and the family.[297] This comment

[296] Comments of Robin Rohr, Hennepin County Human Services (Comment 85).
[297] Comment of Drew Hood (Comment 69).

is not reasonable as it is most likely that a resident would be found within the facility, thereby negating the need to involve the police.

267. Another commenter asserted that the rule is "overly complicated" and "confusing" because it appears to require that law enforcement must be notified even if the resident is located within the facility during the first step in the process [298] This commenter misreads the rule. A resident is only considered "missing" if that resident cannot be found in the facility, its premises, or immediate neighborhood. It is only after the resident is considered "missing" (not found in or near the facility) that law enforcement and resident representatives must be notified.

268. The Administrative Law Judge finds no defects in Subpart 2 of the proposed rule. Accordingly, proposed Rule 4659.0110, subp. 2 is **APPROVED**.

Part 4659.0110, Subpart 4: Review Missing Resident Plan

269. Propose Rule 4659.0110, subp. 4 requires that missing resident plans be reviewed at least quarterly by the facility. Several commenters noted that quarterly review of the plan is excessive and unnecessary.[299] These commenters advocate, instead, for an annual review of the plan or whenever the plan is amended or implemented for a missing resident.[300] The Department rejected that recommendation.

270. In the SONAR, the Department explained that residents receiving assisted living services are required to undergo quarterly assessments to review their physical and cognitive abilities.[301] Because changes in residents' assessments may impact who is subject to the facility's missing resident plan, the Department is also requiring that the plan be reviewed quarterly.[302] This will allow the facility to identify those residents whose assessments may have changed and rendered them subject to the plan.[303]

271. The Department has established that quarterly review of the missing person plan is rationally related to the Department's stated objective: to update the missing person plan consistent with quarterly updates in residents' assessments. Accordingly, Subpart 4 is not defective. Proposed Rule 4659.0110, subp. 4 is **APPROVED**.

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[298] Comments of Anneliese Peterson (Comment 48).
[299] Comments of Pam Leach (Comment 79); Comments of Kathy Manning (Comment 86); Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45); Comments of Anneliese Peterson (Comment 48); Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).
[300] Comments of Pam Leach (Comment 79); Comments of Kathy Manning (Comment 86); Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45); Comments of Anneliese Peterson (Comment 48); Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).
[301] Ex. D at 40 (SONAR).
[302] *Id.*
[303] *Id.*

PART 4659.0120: PROCEDURES FOR RESIDENT TERMINATION AND DISCHARGE PLANNING

272. The Assisted Living Act, Minn. Stat. § 14G.52-54, set forth requirements for initiating facility-initiated terminations of housing and assisted living services, as well as non-renewal of assisted living services. The enabling legislation, Minn. Stat. § 144G.09, subd. 3(c)(9), grants the Department authority to adopt rules establishing "procedures and timelines for the commissioner regarding termination appeals between the facilities and the Office of Administrative Hearings." Proposed Rule 4659.0120 establishes these termination procedures and timelines, and is intended to fill in the detail for these requirements.

Part 4659.0120, Subpart 1A: Pretermination Meeting Notice

273. Minn. Stat. § 144G.52 set forth provisions applying to: (1) facility-initiated termination of housing provided to a resident of an assisted living facility; and (2) facility-initiated termination and nonrenewal of assisted living services. Subdivision 2(a) of the statute provides that, before issuing a notice of termination, a facility must "schedule and participate in a meeting with the resident and the resident's legal representative and designated representative."[304] This meeting "must be scheduled to take place at least seven days before a notice of termination is issued."[305] In addition, "[t]he facility must take reasonable efforts to ensure that the resident, legal representative, and designated representative are able to attend the meeting."[306]

274. Proposed Rule 4659.0120, subp. 1A addresses the pretermination meeting procedures. The proposed rule adds an additional step in the termination process that is not included in Minn. Stat. § 144G.52. Proposed Rule 4659.0120, subp. 1A requires that the facility give notice of the pretermination meeting to the resident and the resident's representatives "at least five business days in advance" of the meeting.[307] Subpart 1B of the proposed rule further provides that "[t]he facility must arrange the pretermination meeting to occur on a day that the resident and the resident's representatives are able to attend."

275. The Department asserts that five business days' notice of the meeting is a reasonable extension of the statute because it ensures that the resident and their representatives have sufficient time to prepare for the meeting.[308] The Department contends that five business days' notice is needed and reasonable because: (1) the meetings must be conducted swiftly, as they typically relate to contract violations, resident nonpayment, and, occasionally, health and safety issues; and (2) the meetings can result

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[304] Minn. Stat. § 144G.52, subd. 2(a).
[305] *Id.*, subd. 2(b).
[306] *Id.*
[307] One commenter questioned whether the pretermination meeting can occur within the five-day notice period or whether the facility and resident must actually wait for five days before having the meeting. *See* Comments of Pam Leach (Comment 79). The Department may wish to clarify this with the stakeholders.
[308] Ex. D at 41 (SONAR).

in substantial consequences for the resident where the resident will need to arrange for representation, gather evidence, and prepare their case to present to the facility.[309]

276. A large number of commenters objected to the requirements of a pretermination meeting and the number of steps required to terminate a resident's care under the rules.[310] Commenters note that the rule fails to strike an appropriate balance between providing residents with smooth transitions and the ability of providers to act within a reasonable timeframe to terminate an agreement, when necessary.[311] Commenters question why there needs to be five additional days' notice of the meeting when the statute, itself, sets a reasonable deadline for the meeting (seven days before the service of the termination notice).[312] These commenters note that five business days actually equates to approximately seven calendar days, thereby extending the termination procedure beyond what was dictated by statute.[313] In short, those objecting to the rule argue that the five-day requirement is arbitrary, unreasonable, and unnecessary given the statutory structure.[314]

277. Commenters explained that if a facility finds that it is ill equipped to handle a resident's care needs, the time that would take to terminate the resident could place

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[309] *Id.*

[310] Comment of Drew Hood (Comment 69); Comment of Joe Cuoco (Comment 70); Comments of Anna Petersmeyer (Comment 73) (Hrg. Tr. Vol. I at 112-118); Comments of Karis Gust (Comment 76); Comments of Pam Leach (Comment 79); Comments of Brianna Olson (Comment 80); Comments of Kathy Manning (Comment 86); Comments of Andrea Buck (Comment 90); Comment of Deb Nobis (Comment 97); Comment of Crystal Holloway (Comment 98); Comments of Lore Brownson (Comment 104); Comment of Arlan Swanson and Heidi Appel (Comment 106); Comments of Valerie Skarphol (Comment 111); Comment of Mary Jo Thorne (Comment 112); Comment of Pamela Klingus (Comment 39); Comments of Anneliese Peterson (Comment 48); Comments of Shelli Bakken, Walker Methodist (Comment 58); Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Shauna Kapsner (Comment 53); Test. of Shauna Kapsner (Hrg. Tr. Vol. I at 82-97); Comments of Wendy Hulsebus (Comment 65); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Comments of Lore Brownson (Hrg. Tr. Vol. I at 98-103; Vol. II at 211-217); Test. of Anna Petersmeyer (Hrg. Tr. Vol. I at 112-118).

[311] Comments of Anna Petersmeyer (Comment 73) (Hrg. Tr. Vol. I at 112-118); Comments of Karis Gust (Comment 76); Comments of Brianna Olson (Comment 80); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Comments of Lore Brownson (Hrg. Tr. Vol. I at 98-103; Vol. II at 211-217); Test. of Anna Petersmeyer (Hrg. Tr. Vol. I at 112-118).

[312] Comments of Anna Petersmeyer (Comment 73) (Hrg. Tr. Vol. I at 112-118); Comments of Pam Leach (Comment 79); Comments of Anneliese Peterson (Comment 48); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Test. of Anna Petersmeyer (Hrg. Tr. Vol. I at 112-118).

[313] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

[314] Comments of Anna Petersmeyer (Comment 73) (Hrg. Tr. Vol. I at 112-118); Comments of Pam Leach (Comment 79); Comments of Anneliese Peterson (Comment 48); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Test. of Anna Petersmeyer (Hrg. Tr. Vol. I at 112-118).

that resident in harm.[315] One commenter gave a hypothetical example of a resident who falls and breaks a hip and needs a mechanical lift or the assistance of two staff persons to return to the building.[316] Such a situation would be an immediate change of condition that many facilities would be unable to accommodate.[317] In such a situation, the process set forth in the rule would take a substantial amount of time and place the resident at risk.[318]

278. With respect to the need and reasonableness of implementing a five-business-day notice requirement,[319] the Department has established that the timeline is rationally related to the Department's goal of ensuring that residents and their representatives have sufficient time to prepare for the meeting, given the significant consequences the residents may face in having to potentially locate new housing and services or challenge the termination at the meeting.

279. As to the Department's authority for adding this additional five-day notice period, the enabling legislation is key. The enabling statute, Minn. Stat. § 144G.09, subd. 3, directs the commissioner to adopt rules that "ensure resident rights are protected," among other things. In addition, subdivision 3(c)(9) grants the Department wide authority to establish the "procedures and timelines" for "termination appeals."[320] The pretermination meeting is the start of the termination appeal process. Therefore, the Department has the legal authority to impose the additional five-day notice period for this meeting.

280. The five-day pretermination meeting notice requirement in the rule and the seven-day pretermination meeting requirement in statute serve two different purposes. The statutory requirement that a pretermination meeting occur seven days prior to the issuance of a notice of termination is intended to give the facility and the resident an opportunity to confer and attempt to reach a resolution. Whereas, the rule requirement that the facility give the resident and resident's representatives five days' notice of the pretermination meeting is to ensure that the resident and resident's representatives are prepared for, and able to effectively engage in, the meeting's conciliatory purpose. Thus,

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[315] Comments of Drew Hood (Comment 69); Comments of Anna Petersmeyer (Comment 73) (Hrg. Tr. Vol. I. at 112-118); Comments of Brianna Olson (Comment 80); Comments of Andrea Buck (Comment 90); Comment of Arlan Swanson and Heidi Appel (Comment 106); Comment of Mary Jo Thorne (Comment 112); Comment of Pamela Klingus (Comment 39); Comments of Shelli Bakken, Walker Methodist (Comment 58); Comments of Shauna Kapsner (Comment 53); Test. of Shauna Kapsner (Hrg. Tr. Vol. I at 82-97); Comments of Wendy Hulsebus (Comment 65); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Test. of Anna Petersmeyer (Hrg. Tr. Vol. I at 112-118).

[316] Comments of Shauna Kapsner (Comment 53).

[317] *Id*.

[318] *Id*.

[319] Elder Voice Family Advocates requested that the five-day notice period be extended to seven days. See Comment of Suzanne Scheller, Elder Voice Family Advocates (Comment 10). The Administrative Law Judge finds that the Department has sufficiently established the need and reasonableness for a five-day notice over a seven-day notice.

[320] Minn. Stat. § 144G.09, subd. 3(c)(9).

these two time periods have different purposes and serve different goals, both aimed at protecting the rights of the resident.

281. The Department has explained that it selected five business days to balance the need for the facility to take swift action while still allowing the resident sufficient time to prepare.[321] The proposed rule strikes that delicate balance. Adding an additional five business days to the termination procedure (equating to approximately one calendar week) is not unreasonable under these circumstances. Accordingly, proposed Rule 4659.0120, subp. 1A is **APPROVED**.

Part 4659.0120, Subpart 1B: Pretermination Meeting Notice

282. A larger issue exists, however, as to Subpart 1B of the proposed rule. Subpart 1B reads:

> B. The facility must arrange the pretermination meeting to occur on a day that the resident and the resident's representatives are able to attend.

283. The statute only requires that the facility "schedule and participate in the meeting,"[322] and "make reasonable efforts" to ensure the resident and their representatives "are able to attend."[323] In contrast, the rule is written in a manner that indicates that the facility must ensure the attendance of the resident and the representatives.[324]

284. As many commenters point out, this is not always possible, especially under short timeframes and in circumstances where the resident and/or the resident's representatives may have a motive to drag out the meeting and not make themselves available, thereby delaying the termination.[325] The proposed rule would allow the resident

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[321] Ex. D at 41 (SONAR).
[322] Minn. Stat. § 144G.52, subd. 2(a).
[323] *Id.*, subd. 2(b).
[324] Some commenters proposed allowing the pretermination meeting be held by telephone, video, or other remote means to make it easier for all parties to attend. Comments of Pam Leach (Comment 79); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29) The statute only allows this to occur in the event of emergency relocations. *See* Minn. Stat. § 144G.52, subd. 2(d). The statute does not extend this to other types of terminations. Therefore, the rule is consistent with the statute. However, it would be reasonable to allow given the increased use of videoconferencing that has occurred since these rules were originally drafted (pre-pandemic). Should the Department decide to allow this, it would be approved upon resubmittal.
[325] Comments of Anna Petersmeyer (Comment 73) (Hrg. Tr. Vol. I at 112-118); Comments of Pam Leach (Comment 79); Comments of Brianna Olson (Comment 80); Comment of Crystal Holloway (Comment 98); Comments of Lore Brownson (Comment 104); Comment of Pamela Klingus (Comment 39); Comments of Shauna Kapsner (Comment 53); Test. of Shauna Kapsner (Hrg. Tr. Vol. I at 82-97); Comments of Wendy Hulsebus (Comment 65); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Comments of Lores Vlaminck (Comment 99); Comments of Valerie Skarphol (Comment 111); Comments of Shelli Bakken, Walker Methodist (Comment 49, 58); Comments of Joe Cuoco (Comment 70); Test. of Anna Petersmeyer (Hrg. Tr. Vol. I at 112-118); Test. of Shelli Bakken, Walker Methodist (Hrg. Tr. Vol. II at 244-248).

or the resident's representatives to "game the system."[326] There could be a danger to the resident when these delays occur.[327] Also, facilities note that they should not be left to carry months of unpaid balances while the termination procedures proceed waiting for a resident or resident's representatives to meet.[328] This is especially true in cases where the resident's representative may be the reason why the facility is not being paid, for example, in the case of financial exploitation by the resident's family members.[329]

285. These commenters are correct: the rule goes beyond what is required by the statute and presents a conflict of law. Minn. Stat. § 144G.52, subd. 2(b) only requires that the facility "make *reasonable efforts* to ensure that the resident, legal representative, and designated representative *are able to attend* the meeting."[330] But proposed Rule 4659.0120, subp. 1B goes further and requires that "[t]he facility *must arrange* the pretermination meeting to occur on a day that the resident and resident's representatives *are able to attend*."[331] Not only does the rule contradict the statute, it imposes an unreasonable burden on facilities. As a result, Subpart 1B is **DISAPPROVED**.

286. The Department can modify the subpart as follows, to be consistent with the statute:

> B. The facility must schedule and participate in[332] ~~arrange~~ the pretermination meeting, ~~to occur on a day~~ and make reasonable efforts to ensure that the resident and resident's representatives are able to attend the meeting.

287. This modification will not render the rule substantially different and will make the rule part consistent with the statute.

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[326] Comments of Anna Petersmeyer (Comment 73) (Hrg. Tr. Vol. I at 112-118); Comments of Pam Leach (Comment 79); Comments of Brianna Olson (Comment 80); Comment of Crystal Holloway (Comment 98); Comments of Lore Brownson (Comment 104); Comment of Pamela Klingus (Comment 39); Comments of Shauna Kapsner (Comment 53); Test. of Shauna Kapsner (Hrg. Tr. Vol. I at 82-97); Comments of Wendy Hulsebus (Comment 65); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Comments of Lores Vlaminck (Comment 99); Comments of Valerie Skarphol (Comment 111); Comments of Shelli Bakken, Walker Methodist (Comment 49, 58); Comments of Lore Brownson (Hrg. Tr. Vol. I at 98-103; Vol. II at 211-217); Test. of Anna Petersmeyer (Hrg. Tr. Vol. I at 112-118); Test. of Shelli Bakken, Walker Methodist (Hrg. Tr. Vol. II at 244-248).

[327] Comments of Lore Brownson (Comment 104); Comments of Valerie Skarphol (Comment 111); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Test. of Anna Petersmeyer (Hrg. Tr. Vol. I at 112-118).

[328] Comments of Shauna Kapsner (Comment 53); Test. of Shauna Kapsner (Hrg. Tr. Vol. I at 82-97).

[329] Test. of Shelli Bakken, Walker Methodist (Hrg. Tr.Vol. II at 244-248).

[330] Emphasis added.

[331] Emphasis added.

[332] The inclusion of the words "schedule and participate" is in response to the comments of Legal Services Advocacy Project and AARP, which urged the Department to incorporate the language of the statute, Minn. Stat. § 144G.052, subd. 2(a). *See* Comments of Ron Elwood, Legal Services Advocacy Project (Comment 25); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16).

288. Commenters had other logistical questions about what would occur if the resident fails to comply with agreements made at the pretermination meeting: Specifically, would the process need to start over with a new pretermination meeting scheduled?[333] Other commenters questioned if the additional procedures in the termination rules must occur if the resident voluntarily agrees to relocate after the pretermination meeting.[334] One commenter suggested that the rule make clear that a resident's failure to cooperate with agreements made at the pretermination meeting do not prevent the facility from proceeding with the notice of termination in seven days if the resident does not comply with the agreements made.[335] The Department should consider these questions and comments before resubmitting the rule for final approval to ensure that the rule addresses these ambiguities.

Part 4659.0120, Subpart 1C: Home and Community-Based Waivers

It appears that there is a typographical error in the proposed rule. Subpart 1C should be revised as follows: "For a resident that receives **a** home and community-based services waiver. . . ." [336]

Part 4659.0120, Subpart 1D: Pretermination Meeting Notice

289. With respect to proposed Rule 4659.0120, subp. 1D, the Legal Services Advocacy Project and AARP suggest that the subpart be revised to mirror the statute, Minn. Stat. § 144G.52, subd. 2(c). The statute requires the facility notify the resident that the resident may "invite family members, relevant health professionals, a representative of the Office of Ombudsman for Long-Term Care, or other persons of the resident's choosing . . . " to the pretermination meeting.[337]

290. In contrast, proposed Subpart 1D requires that the pretermination meeting notice include (among other things):

> (4) an explanation that the resident may invite family members, representatives, health professionals, and other individuals to participate in the pretermination meeting.
>
> (5) contact information for the Office of Ombudsman for Long-Term Care and the Office for Ombudsman for Mental Health and Developmental Disabilities and a statement that the ombudsman offices provide advocacy services to residents;

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[333] Comments of Karis Gust (Comment 76); Comments of Brianna Olson (Comment 80); Comments of Andrea Buck (Comment 90).
[334] Comment of Joe Cuoco (Comment 70); Comments of Lore Brownson (Comment 104).
[335] Comments of Brianna Olson (Comment 80).
[336] Comments of Ian Lewenstein (Comment 54).
[337] Comments of Ron Elwood, Legal Services Advocacy Project (Comment 25); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16); Test. of Ron Elwood, Legal Services Advocacy Project (Hrg. Tr. Vol. I. at 138-141).

291. Subpart 1D (4) and (5) do not specifically state that a representative of the OOLTC can attend the meeting with the resident and resident's representatives.

292. The commenters are correct that the statute and the rule are not entirely consistent. To ensure compliance with Minn. Stat. § 144G.52, subd. 2(c), the Department should amend Subpart 1D as follows:

> (4) an explanation that the resident may invite family members, representatives, relevant health professionals, a representative from the Office of Ombudsman for Long-Term Care, or ~~and~~ other individuals of the resident's choosing to participate in the pretermination meeting.

293. Amending Subpart 1D in this matter will not result in a substantially different rule and will bring the subpart into compliance with the statute.

294. Subject to this recommended modification, proposed Rule 4659.0120, subp. 1D is **APPROVED**.

Part 4659.0120, Subpart 4: Summarizing Pretermination Meeting Outcomes

295. Proposed Rule 4659.0120, subp. 4 provides:

> Within 24 hours after the pretermination meeting, the facility must provide the resident with a written summary of the meeting, including any agreements reached about any accommodation, modification, intervention, or alternative that will be used to avoid terminating the resident's assisted living contract.

296. Commenters objecting to this subpart argue that the 24-hour meeting summary requirement is arbitrary, outside of the scope of the Department's rulemaking authority, and unreasonable because it adds yet another day to the termination procedures that is not required by the Assisted Living Act.[338] Along with the pretermination meeting notice requirement of five business days, this would add a minimum of eight calendar days onto the appeal process, not contemplated by the Assisted Living Act.[339]

297. The Department did not respond to this comment specifically.[340]

298. In the SONAR, the Department explained that the pretermination meeting summary is necessary to memorialize any agreements made, thereby helping to eliminate

[338] Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).
[339] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).
[340] *See* Department Response to Long-Term Care Imperative (Response 27, Feb. 12, 2021); Department Response to LeadingAge Minnesota (Response 29, Feb. 2, 2021).

confusion, conflict, and ambiguity with respect to each party's responsibilities in any resolution reached.[341] The short timeframe for the summary (24 hours) ensures that the process proceeds swiftly and efficiently for the facility, while still protecting the rights of the resident.[342]

299. As set forth above, the enabling statute, Minn. Stat. § 144G.09, subd. 3, directs the commissioner to adopt rules that "ensure resident rights are protected," among other things. In addition, subdivision 3(c)(9) grants the Department wide authority to establish the "procedures and timelines" for "termination appeals."[343] The pretermination meeting is the start of the termination appeal process. Therefore, the Department has the legal authority to impose the additional one day required for preparation of the pretermination meeting summary.

300. The Department has also established that a summary of the pretermination meeting is rationally related to the Department's objectives of ensuring that resident's rights are protected and that the appeal process proceeds efficiently and effectively. Adding one additional day to the appeal process strikes a reasonable balance between the rights of residents and the rights of the facility to terminate their obligations, when necessary.

301. In total, the Department adds six business days to the termination appeal process in proposed Rule 4659.0120: five business days for the pretermination meeting notice and one day for the meeting summary. Given the broad grant of authority given to the Department by the legislature in Minn. Stat. § 144G.09, subd. 3(a) and (c)(9), the termination procedures established by rule are permissible.

302. There were some comments requesting clarity on the pretermination meeting process.[344] One commenter suggested that Subpart 1 make clear that any agreements reached at the pretermination meeting should not negate the provider's ability to issue a termination notice at least seven days after the meeting.[345] This would prevent the facility from having to restart the process if a resident failed to follow through on agreements made at the pretermination meeting.[346] Another commenter suggested that the subpart include a statement that a provider need not hold more than one pretermination meeting within a stated timeframe.[347]

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[341] Ex. D at 43 (SONAR).
[342] *Id.*
[343] Minn. Stat. § 144G.09, subd. 3(c)(9).
[344] Some commenters suggested that the Subpart be revised to require the facility to make a reasonable attempt at scheduling the meeting and if the resident or resident's representative fails to appear, only then would a written summary of the meeting be required. Comments of Shelli Bakken, Walker Methodist (Comment 49); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29). The Department reasonably rejected this suggestion because the purpose of the summary is to ensure that all parties, including those present at the meeting, have a memorial of the agreements reached.
[345] Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).
[346] *Id.*
[347] Comments of Shelli Bakken, Walker Methodist (Comment 58); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).

303. While these are helpful comments, the Department declined to include such provisions.[348] As written, the Department has established that it has legislative authority to establish the procedures in proposed Rule 4659.0120, that the rule is both needed and reasonable, and that it is rationally related to the purpose of providing for an appeal process that balances the rights of residents and facilities, alike. That being said, the Department might consider adding one sentence to Subpart 1 to clarify what occurs if agreements made by the parties in the pretermination meeting are breached.

304. Finally, Hennepin County suggested that Subpart 4 also require that the resident's representatives and case manager, if any, receive a copy of the pretermination meeting summary.[349] Because proposed Rule 4659.0120, subp. 1 allows residents to include representatives and case managers in the meeting, it is reasonable that the summary be provided to those individuals, should they be part of the pretermination meeting. Accordingly, the Administrative Law Judge recommends that the Department revise Subpart 4 as follows:

> Within 24 hours after the pretermination meeting, the facility must provide the resident and the resident's representatives and case manager, if present at the pretermination meeting, with a written summary of the meeting, including any agreements reached about any accommodation, modification, intervention, or alternative that will be used to avoid terminating the resident's assisted living contract.

305. Such a modification will not result in a substantially different rule and will be consistent with the other provisions in proposed Rule 4659.0120. The Department is not required to make this change. It is merely a recommendation. Accordingly, proposed Rule 4659.0120, subp. 4 is **APPROVED** alongside recommendations for improving the clarity of the rule text.

306. The Administrative Law Judge also recommends that the Department revise the proposed rules to make consistent use of the defined term "representatives." The word "representative" should be changed to "representatives" in the following proposed Rules:

4659.0120, subp. 2B (line 17.14)
4659.0120, subp. 5C (line 18.25)
4659.0120, subp. 7A (line 19.19)
4659.0130, subp. 2G(6) (line 24.13)
4659.0130, subp. 6A (line 26.8)
4659.0130, subp. 7 (line 26.21)
4659.0160, subp. 3 (line 35.22)
46459.0200, subp. 2B(4) (line 43.12)

[348] *See* Department Response to Long-Term Care Imperative (Response 27, Feb. 12, 2021); Department Response to LeadingAge Minnesota (Response 29, Feb. 2, 2021).
[349] Comments of Robin Rohr, Hennepin County Human Services (Comment 85).

Part 4659.0120, Subpart 5: Providing Notice

307. Proposed Rule 4659.0200, subp. 5 sets forth the requirements for providing a notice of termination.[350] The companion statute, Minn. Stat. § 144G.44, subd. 7, requires that the OOLTC be sent a copy of all termination notices as well.[351]

308. Under the proposed rule, Subpart 5, adds that the facility must provide the notice to the OOLTC "as soon as practicable, but in any event no later than two business days after the facility provided notice to the resident."

309. There is no requirement in the rule or statute that the Office of Ombudsman of Mental Health and Developmental Disabilities receive a copy of the termination notice. The OOMHDD requests that it's contact information be included in the termination notice, as it appears in the pretermination meeting notice.[352] The OOMHDD argues that individuals with mental health issues, developmental disabilities, and chemical dependency are often residents of assisted living facilities and the OOMHDD could provide valuable assistance to those individuals in cases of termination.[353] The OOMHDD does not suggest that the rules require the notice of termination to be served with notice.[354]

310. The Department did not respond to this particular request in its response to OOMHDD's comments.[355]

311. The OOMHDD's request to change the contents of the notice of termination is duly noted. Including contact information for the OOMHDD in the termination notice may be valuable information for some residents. This is especially true considering that: (1) both the OOLTC's and OOMHDD's contact information is included in the pretermination meeting notice (*see* proposed Rule 4659.0120, subp. 1D(5)); and (2) the OOLTC's contact information is included in the notice of termination pursuant to Minn. Stat. § 144G.52, subd. 8(7).

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[350] Two commenters questioned the requirement in proposed Rule 4659.0120, subp. 5A that requires a facility maintain an affidavit of service documenting service of the notice of termination. *See* Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Pam Leach (Comment 79). Requiring documentation in the form of an affidavit of service is standard practice in civil litigation. A material fact that a facility will need to document in any termination hearing is that it properly complied with all procedural requirements. Accordingly, the Department has established that this requirement is both needed and reasonable.

[351] A couple commenters questioned whether the notice to the ombudsman must be a separate document from that served on the resident and resident's representatives. *See* Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Pam Leach (Comment 79). The statute, Minn. Stat. § 144G.52, subd. 7(a), makes clear that the ombudsman need only receive "a copy" of notice, not a separate type of notice or document.

[352] Comments of the OOMHDD (Comment 12).

[353] *Id.*

[354] *Id.*

[355] *See* Department Response 12 (Feb. 9, 2021).

312. That being said, the content of the notice of termination is dictated by Minn. Stat. § 144G.52, subd. 8. The statute does not require providing contact information for the OOMHDD. Therefore, when drafting the accompanying rule, the Department was entitled to limit the notice features to those items in the statute. As written, proposed Rule 4659.0120, subp. 5 is **APPROVED**.

Part 4659.0120, Subpart 6: Resident Relocation Evaluation
Part 4659.0120, Subpart 7: Resident Relocation Plan[356]

313. Proposed Rules 4659.0120, subps. 6 and 7 are related and will be first addressed together. Subparts 6 and 7 require a facility to conduct a resident relocation evaluation (Subpart 6) and prepare a resident relocation plan (Subpart 7) if the facility terminates the resident's contract *or* "the resident plans to move out of the facility because the facility has initiated the pretermination or termination process."

314. Minn. Stat. § 144G.55 addresses "coordinated moves." Under the statute, a facility must assist in a coordinated move with the resident if the facility: (1) "terminates an assisted living contract;" (2) "reduces services to the extent that a resident needs to move;" or (3) "conducts a planned closure" of the facility under Minn. Stat. § 144G.57.[357] Subdivision 3 of the statute requires that a facility "prepare a relocation plan to prepare for the move to the new location or service provider."[358]

315. While the Act only requires relocation plans where the facility "terminates" the contract (or reduces services), the proposed rule parts require relocation evaluations and plans in all cases where the facility has initiated the termination process by serving a pretermination notice. Therefore, even if a resident voluntarily decides to move during the pretermination meeting, the facility will still need to conduct a relocation evaluation and plan.

316. Commenters argue that it would be unnecessary, unreasonable, and burdensome to engage in relocation planning and evaluations for residents who voluntarily decide to move during or after the pretermination meeting.[359] These commenters suggest that, due to the cost and staff necessary to engage in relocation services, relocation evaluations and plans should only be required if the facility proceeds with a termination notice, consistent with the Assisted Living Act.[360]

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[356] Elder Voice Family Advocates requested that the Department include a requirement that RNs conduct the relocation evalution and provide a copy of the relocation plan to the receiving facility. The Department rejected this request for all rules involving relocation evaluations and relocation plans. *See* Comment of Suzanne Scheller, Elder Voice Family Advocates (Comment 10).
[357] Minn. Stat. § 144G.55, subd. 1(a).
[358] *Id.*, subd. 3.
[359] Comments of Shelli Bakken, Walker Methodist (Comment 58); Comments of Joe Cuoco (Comment 70); Comments of Brianna Olson (Comment 80); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).
[360] Comments of Shelli Bakken, Walker Methodist (Comment 58); Comments of Joe Cuoco (Comment 70); Comments of Brianna Olson (Comment 80); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

317. The Department acknowledges that it is extending the relocation requirements in the Act to all cases where a facility has initiated a termination, including those where a resident voluntarily moves after the pretermination meeting.[361] The Department reasons that such relocation assistance is needed anytime a facility initiates a move, on the grounds that residents are vulnerable and lack of equal bargaining power with the facility.[362] According to the Department, often, when a facility initiates a termination, residents will be persuaded or feel compelled to move before the facility issues a formal termination notice.[363] Therefore, even for residents who agree to move during or after the pretermination meeting, relocation planning and services will ensure that the resident's move is safe, meets the resident's needs, and minimizes trauma.[364]

318. Minn. Stat. § 144G.52, subd. 1 defines "termination" to mean when a facility-*initiated* termination of housing or facility-*initiated* termination or nonrenewal of assisted living services that the facility provides.[365] The initiation of termination begins with the pretermination meeting. Once that has begun, the termination has been initiated and it is reasonable that all discharge planning requirements be invoked, consistent with Minn. Stat. § 144G.55.

319. Accordingly, the Administrative Law Judge finds that proposed Rule 4659.0120, subps. 6 and 7 are reasonable and necessary to ensure the safe transfer of residents after a facility initiates a termination. The rule is rationally related to this goal, does not conflict with the Act, and is within the agency's grant of authority. Under the enabling statute, Minn. Stat. § 144G.09, subd. 3(c)(3), the Department is delegated with broad authority to establish "procedures for discharge planning." Proposed Rule 4659.0120, subps. 6 and 7 do not exceed the authority provided for in statute. Therefore, proposed Rule 4659.0120, subps. 6 and 7 are **APPROVED.**

Part 4659.0120, Subpart 7: Resident Relocation Plan

320. The Legal Services Advocacy Project and AARP assert a different challenge to Subpart 7. These commenters argue that Subpart 7 is inconsistent with the Assisted Living Act because it does not provide requirements for relocation plans in all three situations required in Minn. Stat. § 144G.55.[366]

321. As set forth above, under Minn. Stat. § 144G.55, subd. 1, a facility must engage in a coordinated move and create a relocation plan in three situations: (1) when the facility terminates the assisted living contract; (2) when the facility reduces services

[361] Ex. D at 44-45 (SONAR).
[362] *Id.* at 44.
[363] *Id.*
[364] *Id.*
[365] Emphasis added.
[366] Comments of Ron Elwood, Legal Services Advocacy Project (Comment 25); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16).

to the extent the resident needs to move; and (3) when the facility conducts a planned closure.[367]

322. These organizations claim that, to make the rules consistent with the statute, the rules should be amended to address all three situations: facility contract terminations, reduction in services, and planned closures.[368] However, the proposed rules do that in three different locations: Rule 4659.0120, subps. 6 and 7 address facility terminations; Rule 4656.0130, subps. 5 and 6 address planned closures; and Rule 4659.0200, subp. 1 addresses reduction in services.[369] The only difference is that the reduction in services rule does not require an evaluation, just a relocation plan. This appears to be an oversight or typographical error. To make the rules consistent, proposed Rule 4659.0200, subp. 1 should be amended to reference and incorporate Rule 4659.0120, subps. 6 to 9 (addressed below), not Rule 4659.0130, subps. 6 to 9.

323. The Legal Services Advocacy Project and AARP further argue that proposed Rule 4659.0120, subp. 7A should require the facility to not only hold a planning conference to *develop* a written relocation plan, but it must actually create the plan.[370] As written, proposed Subpart 7A only requires a facility to "hold a planning conference to *develop* a written relocation plan."[371]

324. For clarity, Subpart 7A should be amended as follows:

> If the facility terminates the resident's contract or the resident plans to move out of the facility because the facility has initiated the pretermination or termination process, the facility must hold a planning conference and ~~to~~ develop a written relocation plan with the resident, the resident's representatives and case manager, if any, and other individuals invited by the resident.

325. The Legal Services Advocacy Project made two other recommendations. The first recommendation was that the Department set a deadline for the relocation plan completion: no later than 15 days before termination (for 30-day terminations) and no later than 8 days before termination (for 15-day terminations).[372] The second recommendation was to clarify Subpart 7C, related to transfer of financial accounts and assets, transportation, and how additional services and supports will be obtained.[373] The

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[367] Comments of Ron Elwood, Legal Services Advocacy Project (Comment 25); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16).
[368] Comments of Ron Elwood, Legal Services Advocacy Project (Comment 25); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16).
[369] Proposed Rule 4659.0200, subp. 1 incorporates the relocation evaluation and plan requirements from Rule 4659.0130, subp. 6.
[370] Comments of Ron Elwood, Legal Services Advocacy Project (Comment 25); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16).
[371] Emphasis added.
[372] Comments of Ron Elwood, Legal Services Advocacy Project (Comment 25).
[373] *Id.*

Department declined to make these recommended changes and The Department's decision is reasonable because Subpart 7 adequately addresses relocation.

326. Finally, one commenter noted that the provision in Subpart 7D requiring the facility to "implement the relocation plan" could be read to mean that the facility has an obligation to complete all the parts of the relocation plan, such as reconnecting a resident's telephone, etc.[374] However, the relocation plan just explains what arrangements have been made and who is responsible for performing those takes. It does not require the facility to perform particular tasks.

327. For the reasons set forth above, proposed Rule 4659.0120, subp, 7 is **APPROVED**, subject to the minor modification recommended for clarity in Subpart 7A.

Part 4659.0120, Subpart 8: Providing Resident Relocation Information to Receiving Facility

328. Commenter Pam Leach notes that proposed Rule 4659.0120, subp. 8C references the resident's "most recent service or care plan."[375] Ms. Leach asserts that assisted living facilities utilize the term "care plan" and not "service plan."[376] Therefore, she recommends that the term "service" be removed from Subpart 8C.[377] Because Minn. Stat. § 144G.08, subd. 63 expressly defines "service plan," proposed Rule 4659.0180, subp. 8C is consistent with the law and no change is warranted. Proposed Rule 4659.0120, subp. 8 is **APPROVED**.

Part 4659.0120, Subpart 9: Resident Discharge Summary

329. Proposed Rule 4659.0120, subp. 9 requires the facility, at the time of discharge, provide the resident and the resident's representatives and case manager (if applicable) with a written discharge summary. There are two items in the discharge plan requirements that received critical comments.

330. First, Item A requires a summary of the resident's stay at the discharging facility, including "all diagnoses, courses of illness, treatments, and lab results."[378] Second, Item D requires that the "postdischarge *care plan* must indicate where the resident plans to reside, any arrangements that have been made for the resident's follow-up care, and any postdischarge medical and nonmedical services the resident will need."

331. With respect to Item A, commenters expressed concern about summarizing a resident's entire stay, including "all diagnoses, courses of illness, treatments, and lab

[374] Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).
[375] Comments of Pam Leach (Comment 79).
[376] *Id.*
[377] *Id.*
[378] Comments of Kathy Manning (Comment 86); Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).

results."[379] According to these commenters, such a summary could result in pages of "unnecessary and non-pertinent information" and hours of work from a RN, especially for residents who have lived in a facility for years.[380] This is a valid criticism of the rule and the Department should consider addressing how this summary could be narrowed or, alternatively, made more general and easier to complete. The requirement that the summary be comprehensive, however, is not defect in the rule. The Department has made a policy decision, which it was authorized to do in the enabling statute, Minn. Stat. § 144G.09, subd. 3(c)(9), to determine termination appeal procedures.

332. With respect to Item B, commenters note that the current facility cannot determine what postdischarge services the resident will receive from the receiving facility because post-discharge care will be left up to the new service provider.[381] However, a careful reading of Item B just requires the discharging facility to identify the arrangements that have been made for follow-up care and what services the resident will need. It does not require the discharging facility to create a specific care plan for the discharged resident.

333. Finally, the Alzheimer's Association recommends that the discharge plan include legal paperwork (such as Powers of Attorney) and any individualized activity plan, resident profile, and life story for dementia patients.[382]

334. The Department did not specifically respond to these comments. However, the Department did propose to modify Subpart 9D as follows:[383]

> A postdischarge ~~care~~ plan that is developed with the resident and, with the resident's consent, the resident's representatives, which will help the resident adjust to a new living environment. The post discharge ~~care~~ plan must indicate where the resident plans to reside, any arrangements that have been made for the resident's follow-up care, and any postdischarge medical and nonmedical services the resident will need.

335. The Department explains that this modification is necessary to avoid confusion because "care plan" is a technical term used in the nursing profession to detail care provided.[384] A "care plan" is different from the "postdischarge plan" that the Department requires in this proposed rule part.[385]

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[379] Comments of Kathy Manning (Comment 86); Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).
[380] Comments of Kathy Manning (Comment 86); Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45).
[381] Comments of Pam Leach (Comment 79); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).
[382] Comments of Beth McMullen, Alzheimer's Association (Comment 28, 60).
[383] Ex. L.
[384] *Id.*
[385] *Id.*

336. The Administrative Law Judge finds that this change is necessary and reasonable to bring clarity to the rule. This should address the issue identified by commenters with Subpart 9D and signal that the discharge plan is not meant to require the discharging facility to detail what cares the resident will receive from the next provided.

337. The Department's proposed modifications to Subpart 9 do not render the rule substantially different from the originally proposed rule. Accordingly, proposed Rule 4659.0120, subp. 9 is **APPROVED**, as modified.

Part 4659.0120, Subpart 10: Services Pending Appeal[386]

338. The Department has modified proposed Rule 4659.0120, subp. 10 to include notice to the "resident's representative."[387]

339. To ensure consistency with other rules, the Administrative Law Judge makes two additional recommendations for modifications: (1) that the word "representative" be made plural to make it consistent with the definition of "representatives" in Rule 4659.0020, subp. 22; and (2) that "if any" be added after case manager to make the rule consistent with other rules referencing case managers (as not all residents have case managers).[388] The Judge recommends Subpart 10 be further modified, as set forth below (Judge's recommendations in **bold**, Department's modification underscored):

> Subp. 10. **Services pending appeal.** If the resident needs additional services during a pending termination appeal, the facility must contact and inform the resident's representative**s** and the resident's case manager**, if any,** of the resident's responsibility to contract and ensure payment for those services according to Minnesota Statutes, section 144G.54, subdivision 6.

340. The Judge finds these changes necessary and reasonable. These changes do not render the subpart substantially different from the originally proposed rule. Subject to these recommendations, proposed Rule 4659.0120, subp. 10 is **APPROVED**, as modified by the Department.

Part 4659.0120, Subpart 11: Expedited Termination

341. Proposed Rule 4659.0120, subp. 11 addresses expedited terminations. Subpart A makes clear that all of the termination procedures in the remainder of Rule 4659.0120 also apply to expedited terminations. Subpart B addresses, specifically,

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[386] Hennepin County suggested that the rule clarify that the facility can increase the charges for the additional services provided pending appeal. *See* Comments of Robin Rohr, Hennepin County Human Services (Comment 85). The Department did not adopt that suggestion. Because neither the statute nor the rule prohibit the facility for charging for these additional services, there is no need to modify the rule.
[387] Department Additional Modification (Feb. 16, 2021).
[388] *See* Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).

terminations occurring when a resident's "assessed needs exceed the scope of services agreed upon in the assisted living contract and are not included in the services the facility disclosed in the uniform checklist."[389]

342. LeadingAge Minnesota argues that expedited terminations should not be subject to all the procedural and notice requirements in Rule 4659.0120 because these situations require immediate action.[390] The Department explains that even though an expedited termination has a shortened 15-day termination notice requirement, it is still reasonable that all other procedural protections under the rule apply.[391] Because the Assisted Living Act only shortens the notice period for expedited terminations and does not exempt them from the procedural requirements of the law, the Department's rule is not inconsistent with the statute. In addition, the Department has established the need and reasonableness of this subpart.

343. With respect to Subpart 11B, LeadingAge Minnesota asserts that facilities should not have to provide a copy of "the assessment" to the resident when terminating a resident based upon the resident's assessed needs exceeding the scope of services agreed upon in the contract.[392] LeadingAge Minnesota argues that Minn. Stat. § 144G.52, subd. 8(2) only requires a narrative explanation of the reason for termination in the notice, not a copy of the assessment upon which the facility is basing its termination decision.[393]

344. This argument misrepresents the statute. Minn. Stat. § 144G.52, subd. 8(2) requires a facility to give "a detailed explanation of the basis for the termination, *including the clinical or other supporting rationale.*"[394] If a facility is terminating a resident based upon a claim that the resident's assessed needs exceed the scope of services agreed upon in the contract and not included in the uniform checklist, then it is reasonable for the facility to provide that assessment to the resident as part of "the clinical or other supporting rationale."

345. The Administrative Law Judge finds that proposed Rule 4659.0120, subp. 11 is needed and reasonable, is rationally related to the objectives of the Assisted Living Act and is consistent with the statute. Accordingly, Subpart 11 is **APPROVED**.

Summary of Proposed Rule 4659.0120

346. In sum, with respect to proposed Rule 4659.0120, the Administrative Law Judge finds:

Subpart 1A: Approved

[389] *See* Minn. Stat. § 144G.52, subd. 5(b)(2).
[390] Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).
[391] Ex. D at 49 (SONAR).
[392] Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).
[393] *Id*.
[394] Emphasis added.

Subpart 1B is Disapproved, but subject to approval upon modification as recommended by the Judge

Subpart 1D: Approved, subject to recommended changes

Subpart 4: Approved with optional recommendations from the Judge

Subpart 5: Approved

Subpart 6: Approved

Subpart 7: Approved subject to minor recommendation for clarity

Subpart 8: Approved

Subpart 9: Approved, as modified by the Department

Subpart 10: Approved, as modified by the Department and subject to recommendations by the Judge

Subpart 11: Approved

PART 4659.0130: CONDITIONS FOR PLANNED CLOSURES

Part 4659.0130, Subpart 1: Planned Closure; Notifying Commissioner and Ombudsman[395]

347. In response to comments submitted by the OOMHDD[396] and LeadingAge Minnesota,[397] the Department proposes to modify Rule 4659.0130, subp. 1A, as follows:[398]

> A. Before voluntarily closing, a facility must submit to the commissioner, the Office of Ombudsman for Mental Health and Developmental Disabilities, and the ombudsman the following in writing:
>
> ***
>
> (2) the name and contact information ~~of another individual, in addition to the facility director,~~ for a facility staff person who is responsible for ~~the daily operations and management of~~ managing the facility during the facility's closure process.

[395] In light of the proposed changes to this rule, it is recommended that the subpart be renamed "Planned closure; notifying commissioner and ombudsman offices."
[396] Comments of OOMHDD (Comment 12).
[397] Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).
[398] Department Additional Modification (Feb. 16, 2021). *See also* Comments of Elder Voice Family Advocates (Comment 10).

348. Given the complex needs of individuals with mental health and developmental disabilities, and the challenges for relocating these individuals, the OOMHDD explained that it is important that it be notified of a facility closing to assist residents with mental health or developmental disabilities.[399] The Department agreed.[400] The Judge finds this to be a needed and reasonable change.

349. In addition, based upon comments from LeadingAge, the Department was advised that most smaller facilities only have one staff member who handles operational management.[401] Accordingly, the Department's proposed modification related to contact information for facility staff is needed and reasonable.

350. Neither of the modifications to Subpart 1A would result in a substantially different rule and would not require additional notice.

351. In response to additional comments from LeadingAge,[402] the Department also proposes to modify proposed Rule 4659.0130, subp. 1C as follows:[403]

> A licensee must comply with the requirements of this part when the licensee decides to not renew the ~~housing~~ assisted living contracts of all its residents.

352. According to the Department, this change is necessary to correct a drafting error.[404]

353. None of the changes to Subpart 1 proposed by the Department render the rule substantially different from the originally proposed rule. Accordingly, the Department's proposed modifications to proposed Rule 4659.0130, subp. 1 are **APPROVED**.

Part 4659.0130, Subpart 4: Notice to Residents

354. For the same reasons articulated above, the Department modified proposed Rule Subpart 4 to include the OOMHDD, as follows:[405]

> The licensee shall provide the same written notice of the closure to each resident and the resident's representatives and case manager that was submitted in subpart 1 and approved by the commissioner. The notice must include contact information for the ombudsman, the Office of Ombudsman for Mental Health and Developmental Disabilities, and a primary facility contact that the resident and the resident's representatives and case

[399] Comments of OOMHDD (Comment 12).
[400] Department Additional Modification (Feb. 16, 2021).
[401] *Id.*
[402] Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).
[403] Ex. L.
[404] *Id.*
[405] Department Additional Modifications (Feb. 16, 2021).

manager can contact to discuss relocating the resident out of the facility due to the planned closure.

355. Because both the OOLTC and the OOMHDD could provide valuable assistance to residents upon the closure of a facility, this change is needed and reasonable. This change will not result in a substantially different rule. Accordingly, proposed Rule 4659.0130, subp. 4 is **APPROVED**, as modified.

Part 4659.0130, Subpart 6: Resident Relocation Plan

356. For the reasons articulated above with respect to proposed Rule 4659.0120, subp. 7A, the Administrative Law Judge recommends the Department modify proposed Rule 4659.0130, subp. 6A, as follows:

> A. The facility must hold a planning conference ~~to~~ and develop a written resident- relocation plan with each resident and the resident's representatives, case manager, and other individuals invited by the resident to the planning conference.

357. Subject to this recommended change, proposed Rule 4659.0130, subp. 6 is **APPROVED**.

PART 4659.0140: INITIAL ASSESSMENT AND CONTINUING ASSESSMENTS

358. Proposed Rule 4659.0140 addresses the assessments required for residents and prospective residents to facilities. These assessments include both the initial assessments and the ongoing assessments required by law and who is qualified to conduct these various types of assessments.

359. Comments on proposed Rule 4659.0140 generally discussed: (1) who should perform the various type of assessments (either a licensed registered nurse (RN) or a licensed practical nurse (LPN); (2) who should be included in the development of care plans (including resident representatives); (3) how the assessments should occur (face-to-face or via video or telephonic means); and (4) whether new assessments are required when there is a significant change in a resident's condition or when a resident returns to a facility from a hospital stay.

Part 4659.0140, Subpart 1: Admissions

360. Proposed Rule 4659.0140, subp. 1 addresses the requirements of admitting a new resident. Subpart 1B provides:

> *Unless otherwise provided by law*, an assisted living facility must not admit or retain a resident unless it can provide sufficient care and supervision to

meet the resident's needs, based on the resident's known physical, mental, or behavioral condition.[406]

361. The OOLTC asserts that Subpart 1B is in conflict with the Assisted Living Act because the Act contemplates that residents retain a right to obtain services from outside service providers and that the facility not be required to provide all services needed by a resident.[407] The OOLTC cites to three provisions in the Act to support its argument.[408]

362. First, Minn. Stat. § 144G.70, subd. 1 requires that an assisted living facility only provide the services required in the contract with the resident. The Act states:

> An assisted living facility may not accept a person as a resident unless the facility has staff sufficient in qualifications, competency, and numbers to adequately provide the services *agreed to in the assisted living contract*.[409]

363. Second, Minn. Stat. § 144G.50, subd. 2(e)(4) provides that all assisted living contracts advise a resident of "the resident's right to obtain services from an unaffiliated service provider."

364. Third, the termination provisions of the Act, expressly acknowledge a resident's right to receive outside service where the facility is unable to meet the resident's needs. Minn. Stat. § 144G.52, subd. 6 states:

> A facility may not terminate the assisted living contract if the underlying reason for termination may be resolved by the resident obtaining services from another provider of the resident's choosing and the resident obtains those services.

365. Based upon these provisions in the Act, the OOLTC requests that the Department add a clarifying sentence to Subpart 1B acknowledging a resident's right to seek services from unaffiliated service providers pursuant to Minn. Stat. § 144G.50, subd. 2(e)(4).[410]

366. The Department responded that such a change was not needed because proposed Rule 4659.0140, subp. 1B "conforms with Minn. Stat. § 144G.70, subd. 1."[411] The Department went on to state that such a clarification was "unnecessary and redundant" because Minn. Stat. § 144G.50, subd. 1(b)(2) "already requires assisted living facilities to advise residents in their contracts about "assisted living services, whether provided directly by the facility or by management agreement or other agreement."[412]

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[406] Emphasis added.
[407] Comments of Aisha Elmquist, OOLTC (Comment 47).
[408] *Id.*
[409] Minn. Stat. § 144G.70, subd. 1 (emphasis added).
[410] Comments of Aisha Elmquist, OOLTC (Comment 47).
[411] Department Response to Aisha Elmquist (Response 47, Feb. 8, 2021).
[412] *Id.*

367. The Administrative Law Judge disagrees with the Department's interpretation of law and finds that proposed Subpart 1B presents a conflict with the Act, unless clarified. As written, Subpart 1B indicates that a facility must provide care and supervision to meet all of the resident's needs. This is not the case. Under Minn. Stat. § 144G.70, subd. 1, a facility is only required "to adequately provide the services agreed to in the contract." The fact that proposed Subpart 1B contains the words "unless provided by law" does not remedy the confusion created and the Judge could foresee legal challenges to interpret this provision.

368. To that end, the Judge **DISAPPROVES** proposed Rule 4659.0140, subp. 1B. To clarify Subpart 1B and make it consistent with the law, the Judge recommends that it be modified as follows:

> Unless otherwise provided by law, an assisted living facility must not admit or retain a resident unless it can provide sufficient care and supervision to meet the resident's needs, based on the resident's known physical, mental, or behavioral condition.[413] <u>The facility is in compliance with this provision if the resident has voluntarily elected to receive care and supervision for a need through the use of an unaffiliated service provider, as permitted under Minnesota Statutes, section 144G.50, subdivision 2, paragraph (e)(4).</u>

369. The Alzheimer's Association asks that the word "cognitive" be added to Subpart 1.[414] This would be consistent with other areas of the rules and Act where the word "cognitive" is included to describe the conditions for which care or services are provided by assisted living facilities. This is a reasonable addition that the Department should consider when it resubmits the rule for approval.

370. As written, proposed Rule 4659.0140, subp. 1 is **DISAPPROVED** because it is inconsistent with Minn. Stat. § 144G.70, subd. 1.

Part 4659.0140, Subpart 2: Nursing Assessments[415]

371. Proposed Rule 4659.0140, subp. 2 requires that "nursing assessments and reassessments" be conducted on prospective residents and residents receiving certain assisted living services, including: nursing services; specialized health care services,

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[413] Elder Voice Family Advocates suggested that the term "behavior" be changed to "mental health" to be consistent with other rules and the Act. *See* Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10). Should the Department choose to do that when revising the rule, it would not result in a substantially different rule and would be permissible.

[414] Comments of Beth McMullen, Alzheimer's Association (Comment 28, 60).

[415] The OOMHDD commented that it believes that frequent and long assessments may be difficult for certain individuals with mental illness and developmental disabilities. *See* Comments of OOMHDD (Comment 12). The OOMHDD suggested that the Department consider allowing a review of assessments to occur every 90 days, as opposed to the performance of a full assessment. Because OOMHDD's comments conflict with the requirements set forth in Minn. Stat. § 144G.70, subd. 2, the Department was correct in not drafting an exception responsive to OOMHDD's comment.

treatments and therapies; medication management; and assistance with transfers or eating.

372. Subpart 2 must be read in conjunction with Minn. Stat. § 144G.70, which requires that initial nursing assessments, by RNs, occur before a resident signs a contract with the facility or moves in, whichever is later.[416] The statute further provides that the resident must be reassessed within 14 days after initiation of services and be subject to ongoing "reassessment and monitoring" "as need based on changes in needs" at least every 90 days.[417] The statute does not require that an RN complete the reassessments or monitoring.[418] (This issue will be addressed in more detail in the discussion of Subpart 4, below.)

373. Subpart 2B(2) requires that nursing assessments and reassessments be conducted "in person" unless an exception under Minn. Stat. § 144G.70, subd. 2(b) applies. Minn. Stat. § 144G.70, subd. 2(b) states that:

> If necessitated by either the geographic distance between the prospective resident and the facility, or urgent or unexpected circumstances, the assessment may be conducted using telecommunication methods. . . .

374. A couple of commenters suggested that, in light of the COVID-19 Pandemic and increased use of telehealth options, that all assessments be able to be conducted by virtually, as opposed to in person, without limitation.[419] Minn. Stat. § 144G.70, subd. 2(b) is clear on when telehealth assessments are permitted. The proposed rule is consistent with the law. Therefore, proposed Rule 4659.0140, subp. 2 is **APPROVED**, as written.

375. Several commenters urge the Department to impose requirements that allow prospective residents, residents, and their representatives to be more involved in the assessment process.[420] These commenters argue that resident representatives can offer significant assistance in identifying issues and concerns for a resident.[421] The

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[416] Minn. Stat § 144G.70, subd. 1(b).
[417] *Id.*, subd. 1(c).
[418] *See generally* Minn. Stat. § 144G.70.
[419] Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Test. of Nancy Strandlund (Hrg. Tr. Vol. II at 258-270).
[420] Comments of Nancy Haugen (Comments 5 and 82); Test. of Nancy Haugen (Hrg. Tr. Vol. II at 249-255); Comment of Tom Rinkoski (Comment 8); Comments of Elder Voice Family Advocates (Comment 10, 72); Comments of Sean Burke and Amanda Vickstrom, Elder Justice Center (Comment 30); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16); Comments of Mary Jo George, AARP Minnesota (Comment 16); Comments of Beth McMullen, Alzheimer's Association (Comment 28, 60); Test of Beth McMullen, Alzheimer's Association (Hrg. Tr. Vol. I at 120-125) (also recommending that the time of day is considered in the assessment, as many people with dementia have certain times of day where they are more lucid.); Test of Beth McMullen, Alzheimer's Association (Hrg. Tr. Vol. I at 120-125); Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10).
[421] Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16); Comments of Mary Jo George, AARP Minnesota (Comment 16); Comments of

Department declined to modify the rule to include such a provision and such decision is within the scope of the Department's rulemaking authority and policy-making discretion.

376. As noted above, an agency is legally entitled to make choices between possible regulatory approaches so long as its choice is rationally related to the goals to be achieved.[422] It is not the role of the Administrative Law Judge to determine which policy alternative represents the "best" approach, because this would invade the policy-making discretion of the agency. The question, rather, is whether the choice made by the agency is one that a rational person could have made. The Administrative Law Judge finds that the proposed Subpart 2 is rationally related to the goas to be achieved even without the suggestions made by the commenters related to the involvement of residents and their representatives in the assessment process.

Part 4659.0140, Subpart 4: Assessor; Qualifications[423]

377. Proposed Rule 4659.0140, subp. 4 identifies the qualifications for the staff members conducting the nursing assessments and reassessments identified in Subpart 2 (above) and Minn. Stat. § 144G.70, subd. 2(b) and (c).

378. Minn. Stat. § 144G.70, subd. 2(b) requires that initial nursing assessments be conducted by RNs before a resident signs a contract with the facility or moves in, whichever is later.[424] Subdivision 2(c) of the statute addresses reassessments and ongoing monitoring of residents. This provision states that residents must be reassessed within 14 days after initiation of services and be subject to ongoing "reassessment and monitoring" "as needed based on changes in needs" at least every 90 days.[425] The statute does not require that an RN complete the reassessments or monitoring.[426] Proposed Rule 4659.0140, subp. 4, however, requires that an RN perform all nursing assessments *and reassessments*. The rule does not address "monitoring."

379. A number of commenters assert that Subpart 4 conflicts with the Assisted Living Act and the Nurse Practice Act because it prohibits LPNs from conducting certain types of reassessments that may be within their scope of practice.[427] These commenters

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Beth McMullen, Alzheimer's Association (Comment 28, 60); Test of Beth McMullen, Alzheimer's Association (Hrg. Tr. Vol. I at 120-125).

[422] *Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999); *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

[423] Elder Voice Family Advocates urges the Department to also require that RNs conduct individualized reviews under Subpart 4B. Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10). The Department has declined to make this change in the exercise of its policy-making discretion.

[424] Minn. Stat § 144G.70, subd. 1(b).

[425] *Id.*, subd. 1(c).

[426] *See generally* Minn. Stat. § 144G.70.

[427] Comments of Lynn Gerard (Comment 94); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Anneliese Peterson (Comment 48); Comment of Crystal Holloway (Comment 98); Comments of Lores Vlaminck (Comment 99); Comment of Zahnia Harut (Comment 105); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23). *See also* Comment of Mariclaire England, Minnesota Board of Nursing (Comment 4).

note that, given the current nursing shortage, RNs should be used to conduct admission and readmission assessments, as well as assessments where there has been a change in the resident's condition. Whereas, LPNs should be allowed to conduct "focused assessments" at 90-day intervals to determine if there has been a change in condition based upon the comparison of current status to prior reported status. If such change has occurred, the RN should complete a new assessment.[428]

380. Other commenters argue that more clarity in the rule is necessary to explain which types of assessments LPNs can legally perform because the Assisted Living Act does not provide such direction.[429] Some commenters urged the Department to allow LPNs to conduct routine reassessments under the direction of an RN for residents who show no significant change.[430] One commenter further notes that the increase in cost to have RNs complete all assessments will be passed on to the residents, causing care to be more expensive.[431]

381. The Department contends that Subpart 4 is, in fact, consistent with the Nurse Practice Act because under Minn. Stat. § 148.171, subd. 15, only an RN is authorized to conduct "comprehensive assessments."[432] The Department, therefore, asserts that quarterly assessments, as well as reassessments based upon a change in a patient's condition, are not "focused assessments" but rather "comprehensive assessments" requiring the skills of an RN.[433]

382. The Nurse Practice Act, Minn. Stat. § 148.171 delineates the types of services that RNs and LPNs can provide. Under § 148.171, subd. 15, RNs are authorized to perform:

> comprehensive assessment[s] of the health status of a patient through the collection, analysis, and synthesis of data used to establish a health status baseline and plan of care, and address changes in a patient's condition.

383. In contrast, under Minn. Stat. § 148.171, subd. 14, LPNs are authorized to:

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[428] Comments of Lynn Gerard (Comment 94); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Anneliese Peterson (Comment 48); Comment of Crystal Holloway (Comment 98); Comments of Lores Vlaminck (Comment 99); Comment of Zahnia Harut (Comment 105) Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23). *See also* Comment of Mariclaire England, Minnesota Board of Nursing (Comment 4).

[429] Comments of Mariclaire England, Minnesota Board of Nursing (Comment 4); Comments of Crystal Holloway (Comment 98); Comments of Lores Vlaminck (Comment 99); Comments of Zahnia Harut (Comment 105); Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10).

[430] Comments of Lynn Gerard (Comment 94); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Anneliese Peterson (Comment 48); Comment of Crystal Holloway (Comment 98); Comments of Lores Vlaminck (Comment 99); Comment of Zahnia Harut (Comment 105) Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23).

[431] Comments of Mindy Smith (Comment 107).

[432] Ex. D at 64 (SONAR).

[433] *Id.*

> Conduct[ ] *a focused assessment* of the health status of an individual patient through the collection and comparison of data to normal findings and the individual patient's current health status, *and reporting changes* and responses to interventions *in an ongoing manner to a registered nurse* or the appropriate licensed health care provider for delegated or assigned tasks or activities[.][434]

384. Pursuant to these statutes, it appears that an LPN can conduct monitoring of residents to determine if there has been a change in condition by comparing a resident's existing assessment (prepared by an RN) to the resident's current condition. Additionally, an LPN can conduct "focus assessments" and monitoring when needed; but only an RN can conduct assessments that determine baseline health status, care plans, and the response to changes in condition.

385. The Department has made the policy decision that the quarterly reassessments required in Minn. Stat. § 144G.70, subd. 2(c) must be more than just "focused assessments" and must be "comprehensive assessments" conducted by RNs. This decision does not conflict with the Nurse Practice Act or the Assisted Living statute.

386. The proposed rule does not conflict with the Assisted Living Act because Minn. Stat. § 144G.70, subd. 2(c) is silent as to what kind of nurse must perform reassessments or how comprehensive the "reassessment" must be. It also does not conflict with the Nurse Practice Act because it does not prohibit LPNs from still conducting "focus assessments" or monitoring, when needed.

387. By making the policy determination that reassessments must be comprehensive assessments conducted by RNs, the Department was also acting within the authority granted by the legislature. The enabling legislation, Minn. Stat. § 144G.09, subd. 3(c)(4) specifically delegated to the Department the authority to adopt rules addressing "initial assessments, continuing assessments and a uniform assessment tool."

388. As the Minnesota Board of Nursing pointed out, clarity in the rule is necessary to ensure that providers understand what level of nursing is required for each type of assessment.[435] Given the comments received, it is apparent that the rule, when read in conjunction with the Act, is not clear and requires additional clarification. To avoid legal challenges in the future, it is, therefore, recommended that the Department modify Subpart 4A as follows:

> A registered nurse shall complete the nursing assessments and reassessments <u>required under Minnesota Statutes, section 144G.70, subdivisions 2(b) and (c). Ongoing monitoring may be completed by</u>

[434] Emphasis added.
[435] Comments of Mariclaire England, Minnesota Board of Nursing (Comment 4).

other licensed nurses acting within the scope of their licenses under Minnesota Statutes, section 148.171.

389. AARP, Elder Voice Family Advocates, the Elder Justice Center, and other advocates identified other concerns with the rule. They assert that the subpart does not make clear that an RN assessment is required whenever there is a change in condition.[436] The Department noted that the statute, Minn. Stat. § 144G.70, subd. 2(c), sets forth that requirement, providing that, "[o]ngoing resident reassessment and monitoring must be conducted as needed *based upon changes in the needs of the residents*. . . ."[437]

390. These commenters also noted that, while the rule refers to the statutory requirement of conducting reassessments every 90 days, the rule lacks specificity about how these on-going assessments should be conducted. They claim that the rule does not instruct how these assessments should address new issues or changes in conditions; or what qualifications are required for the nurse conducting the ongoing assessment.[438] While these commenters point out more items that could be included in the rule, it has not identified any defects preventing approval of the rule, as written.

391. Given the confusion and ambiguity presented in Subpart 4 and Minn. Stat. § 144G.70, subd. 2(c), proposed Rule 4659.0140, subp. 4 is **DISAPPROVED**. In correcting this defect, the Department should specifically address the role of LPNs in the reassessment and monitoring process set forth in Minn. Stat. § 144G.70, subd. 2(c).

Part 4659.0140, Subpart 7: Weekend Assessments

392. In response to comments,[439] the Department has modified proposed Rule 4659.0140, subp. 7 as follows:[440]

An assisted living facility must be able to conduct a nursing assessment during a holiday and the weekend for a resident who is ready to be discharged from the hospital and return to the facility.[441]

[436] Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16); Comments of Sean Burke and Amanda Vickstrom, Elder Justice Center (Comment 30); Test. of Mary Jo George, AARP (Hrg. Tr. Vol. I at 64-69); Comments of Elder Voice Family Advocates (Comment 10, 72) . *See also* Comments of Nancy Haugen (Comments 5 and 82); Test. of Nancy Haugen (Hrg. Tr. Vol. II at 249-255); Comment of Tom Rinkoski (Comment 8); Comment of Ann Sterner; Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10).
[437] Department Response to AARP (Response 16, Feb. 8, 2021) (emphasis added).
[438] Comments of Mary Jo George, AARP Minnesota (Comment 16); Comments of Sean Burke and Amanda Vickstrom, Elder Justice Center (Comment 30); Test. of Mary Jo George, AARP (Hrg. Tr. Vol. I at 64-69); Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10).
[439] Test. of Suzanne Scheller, Elder Voice Family Advocates (Hrg. Tr. Vol. I at 50-63).
[440] Department Additional Modification (Feb. 16, 2021).
[441] The Department should also consider modifying the name of Subpart 7 to "Weekend and Holiday Assessments."

393. The Department asserts that holidays were inadvertently left out of the originally proposed rule.[442]

394. Commenters, including Elder Voice Family Advocates, explain that the need for assessments over holidays are equally important as those over the weekend because residents are frequently discharged from hospitals on weekends and holidays when RNs may not be on duty.[443] In which case, an RN will be needed to conduct the assessment.[444] If an assessment is not available, the resident must wait in the hospital, needlessly increasing the hospital bill.[445]

395. Several commenters assert that having an RN available on weekends and holidays to perform assessments will be difficult for providers due to the current shortage of qualified nurses, and will also be expensive, especially for small providers, who do not normally have RNs on duty during those times.[446] The Department responded by explaining that the weekend assessments described in Subpart 7 are already required in Minn. Stat. § 144G.70, subd. 2(c).[447] Minn. Stat. § 144G.70, subd. 2(c) requires nursing reassessments "as needed *based on changes in the needs* of the residents."[448] Because a hospital stay inevitably indicates a change in condition, the Department states that the rule simply clarifies the requirements of the statute.[449] As such, it does not impose costs or obligations beyond what the statute, itself, imposes.[450]

396. A few commenters suggested that the weekend assessments be allowed to be completed virtually through telehealth.[451] As explained earlier in the Report, Minn. Stat. § 144G.70, subd. 2(b) only allows for the use of telehealth for initial assessments in specific circumstances. All other assessments and reassessments are required to be conducted in-person under proposed Rule 4659.0140, subp. 2. Due to the change in condition associated with a hospital stay, it is reasonable that the Department requires that these assessments be conducted in person.

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[442] Department Additional Modification (Feb. 16, 2021). Commenter Lores Vlaminck questioned whether this rule applies to existing residents or just new residents. *See* Test. of Lores Vlaminck (Hrg. Tr. Vol. II at 190-208). Because the statute and rule define "resident," the proposed rule is not ambiguous.
[443] Comments of Elder Voice Family Advocates (Comment 10, 72).
[444] *Id.*
[445] *Id.*
[446] Comments of Michelle Nash, Residential Care Providers Network (Comments 22, 71); Test. of Michelle Nash (Hrg. Tr. Vol. I at 143-145); Comments of Mindy Smith (Comment 107); Comments of Michelle Mohlenbrock (Comment 66); Comments of Anneliese Peterson (Comment 48); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).
[447] Department Response to Michelle Nash, Residential Care Providers Network (Response 71, Feb. 5, 2021).
[448] *Id.* (emphasis added).
[449] *Id.*
[450] *Id*.
[451] Comment of Crystal Holloway (Comment 98); Comments of Lores Vlaminck (Comment 99); Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45); Test. of Lores Vlaminck (Hrg. Tr. Vol. II at 190-208).

397. The Department has established that Subpart 7 and its modification is needed and reasonable. The modification does not result in a substantially different rule. Accordingly, proposed Rule 4659.0140, subp. 7 is **APPROVED**, as modified.

PART 4659.0150: UNIFORM ASSESSMENT TOOL[452]

398. Proposed Rule 4659.0150 requires that all facilities develop a "Uniform Assessment Tool" to comprehensively evaluate residents and prospective residents as required by proposed Rule 4659.0140 and Minn. Stat. § 144G.70, subd. 2.[453] Unlike the Uniform Checklist Disclosure of Services required in proposed Rule 4659.0090, the Department does not provide a Uniform Assessment Tool template for use by facilities. Rather, facilities must develop their own assessment tool that includes all of the elements delineated in Subpart 2 of the proposed rule. Only Subparts 1 and 2 of the proposed rule received substantive comment. Therefore, those sections are addressed below.

Part 4659.0150, Subpart 1: Definition

399. Proposed Rule 4659.0150, subp. 1 defines the "Uniform Assessment Tool" as "an assessment tool that meets the requirements of this part and is used by a licensee to comprehensively evaluate a resident's or prospective resident's *physical and cognitive needs*."[454]

400. Hennepin County recommends that the definition of the tool include mental needs because, frequently, assisted living residents have mental health issues as well.[455] Hennepin County notes that the word "cognitive" does not capture the range of needs that an individual with mental illness may have.[456] This recommended change is consistent with Hennepin County's recommendation for proposed Rule 4659.0110, subp. 1B(2), related to missing resident plans.[457] The Department did not respond to this comment.

401. Hennepin County's recommendation is also consistent with the elements required to be assessed under proposed Rule 4659.0150, subp. 2E (emotional and mental health conditions). Therefore, the Administrative Law Judge recommends that this change be incorporated into the definition of the checklist but does not find that the absence of this text a legal defect in the rule. To make Subpart 1 consistent with the elements in Subpart 2, the Judge recommends that the Department modify it as follows:

> Subpart 1. **Definition**. For purposes of this part "Uniform Assessment Tool" means an assessment tool that meets the requirements of this part and is

[452] Pursuant to the Comments of Ian Lewenstein (Comment 54), the Department should be consistent with either capitalizing "Uniform Assessment Tool" or not capitalizing the phrase throughout the rules.
[453] Proposed Rule 4659.0150, subp. 1.
[454] Emphasis added.
[455] Comment of Robin Rohr, Hennepin County Human Services (Comment 85).
[456] *Id.*
[457] *Id.*

used by a licensee to comprehensively evaluate a resident's or prospective resident's physical, mental, and cognitive needs.

402. This modification will not render the rule substantially different.

403. Proposed Rule 4659.0150, subp. 1 is **APPROVED** with recommendations from the Judge to improve the clarity and consistency of the proposed rule.

Part 4659.0150, Subpart 2: Assessment Tool Elements

404. Proposed Rule 4659.0150, subp. 2 identifies the essential elements that all facilities' assessment tools must contain. The legislature granted the Department wide authority to establish the requirements for assessment and to develop a "uniform assessment tool" under Minn. Stat. § 144G.09, subd. 3(c)(4).

405. The Department relied upon the Oregon Administrative Rules for Residential Care and Assisted Living Facilities in developing the essential elements of the assessment tool but tailored some of the elements to address specifications contained in Minn. Stat. ch. 144G. The Minnesota statute allows residents to obtain services from other providers while living in an assisted living facility.[458] The Department originally looked to the Washington State Comprehensive Assessment Reporting Evaluation in an attempt to create a universal form for facilities to use.[459] However, the Assisted Living Rules Advisory Committee provided feedback that the Washington-based tool was "overly burdensome" and would prevent some providers from using their existing assessment software programs.[460] The Department agreed and determined its approach was "too complex, costly, and inflexible."[461] Accordingly, the Department abandoned its attempt to create a unform tool.[462] Instead, the Department opted to establish the essential elements that all tools must contain and allow facilities to develop their own methods to administer the evaluations.[463]

406. Several commenters suggested that the Department provide a form assessment tool for use by all facilities, like the Commissioner provides for the Uniform Disclosure Checklist.[464] While a form would likely be useful for providers and bring consistency across all facilities, the Department explained that it declined to develop its own tool "due in part to the unrealistic cost and time investment associated with the

[458] Ex. D at 66-68 (SONAR).
[459] *Id.* at 67.
[460] *Id.*
[461] *Id.*
[462] *Id.*
[463] *Id.*
[464] Comment of Anne Sterner (also suggesting that the tool include history of inappropriate sexual behaviors); Comment of Drew Hood (Comment 69); Test. of Suzanne Scheller, Elder Voice Family Advocates (Hrg. Tr. Vol. I at 50-63); Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10); Comments of Deborah Jacobi, Apple Tree Dental (Comment 110) (also suggesting that the Uniform Assessment Tool develop an oral care plan for residents and require training competencies related to dental hygiene).

development of the tool."[465] Instead, the Department elected to identify the essential elements that must be included in all facilities' assessment tool and has allowed the facilities to fashion their own assessment forms.[466] According to the Department, this allows providers to have flexibility to use their existing software, while still achieving general consistency in the content of assessments from facility-to-facility.[467] The Administrative Law Judge finds the Department's decision to establish required contents for the tool, as opposed to creating the tool itself, to be a reasonable and needed compromise.

407. There were a handful of commenters who suggested changes to the elements of the uniform assessment tool. Some commenters asserted that the number of items in the uniform assessment tool are too detailed and burdensome, and could delay admission or "crowd out" the more important elements in the assessment.[468] For example, one commenter noted that information related to dental status, neurocognitive evaluations and diagnoses, and past medical visits and hospitalizations would likely be difficult and time-consuming to obtain for new residents.[469] Also, some commenters noted that residents tend not to have particularly good memories in relating their health histories.[470] These commenters also noted that some elements of the assessment tool lack specificity, such as nutritional and hydration status and preferences.[471] One commenter requested that the term "nursing diagnosis" be removed from Subpart 2D(1) because it is too broad of a term.[472] AARP asked that the Department give "more robust attention to cultural linguistic competence" in the Uniform Assessment Tool.[473] AARP, however, offered no specific language to include in the rule.[474,475]

408. The Department did not address specific comments related to recommended changes to the Uniform Assessment Tool. Notwithstanding, the Administrative Law Judge does not find these criticisms persuasive. The required review of medical and nursing diagnoses only requires a review of "relevant" health history and

[465] Ex. D at 67 (SONAR).
[466] *Id.*
[467] *Id.* at 67-68.
[468] Comment of Drew Hood (Comment 69); Comments of Lores Vlaminck (Comment 99); Comments of Anneliese Peterson (Comment 48).
[469] Comment of Drew Hood (Comment 69).
[470] Comments of Lores Vlaminck (Comment 99); Comments of Anneliese Peterson (Comment 48); Test. of Lores Vlaminck (Hrg. Tr. Vol. II at 190-208).
[471] Comment of Drew Hood (Comment 69).
[472] Comments of Pam Leach (Comment 79); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).
[473] Comments of Art Serotoff, AARP Chapter 5203 (Comment 15).
[474] *Id.*
[475] Elder Voice Family Advocates suggested a number of changes to the Uniform Assessment Tool, none of which indicated a defect in the content of the rule, as written. *See* Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10).

current health conditions.[476] The review of medical, dental, and emergency room visits has a look-back of only 12 months.[477] The same is true for cognitive evaluations.[478]

409. There is a bit of inconsistency, however, in Subpart 2 that the Department may want to address. Subpart 2D(6) only requires a review of "cognitive evaluations within the last 12 months." However, Subpart 2F(1) ("review of any neurocognitive evaluations and diagnoses") does not have a 12-month limitation. The Department may want to address this discrepancy to ensure consistency in the rule. This is not a defect, but merely a recommendation.

410. There is one item in the assessment tool elements that the Department has decided to modify. In response to comments received from the OOMHDD,[479] the Department proposed to modify proposed Rule 4659.0150, subp. 2C, as follows, to fix a drafting error:[480]

~~independent~~ instrumental activities of daily living including . . . .

411. This change is reasonable and does not render the rule substantially different from the originally proposed rule.

412. The Department has established that it has the necessary legislative authority to implement a uniform assessment tool, that the rule is needed and reasonable to effectuate the assessment provisions of the Assisted Living Act, and that the Department engaged in a thoughtful process with stakeholders to develop the essential elements of the tool. While not every element will be agreeable to all stakeholders, the tool itself is rationally related to the Department's goals and reasonably accomplishes the purposes of the statute. The tool elements provide guidance and flexibility to providers while ensuring that assisted living residents obtain a safe and consistent type of assessment to address a wide range of needs.

413. Therefore, proposed Rule 4659.0150, subp. 2 is **APPROVED**, as modified, with recommendations for the Department to consider.

[476] *See* proposed Rule 4659.0150, subp. 2(D)(5). If the Department were to remove the word "nursing" and leave "medical diagnoses" in Subpart 2 D(1), it would not render the rule substantially different.
[477] *See* proposed Rule 4659.0150, subp. 2(D)(5).
[478] *Id.* at subp. 2(D)(6).
[479] *See* Comment of OOMHDD (Comment 12).
[480] Ex. L.

PART 4659.0160: RELINQUISHING AN ASSISTED LIVING FACILITY WITH DEMENTIA CARE LICENSE[481]

414. For the reasons articulated above with respect to proposed Rule 4659.0120, subp. 7A, the Administrative Law Judge recommends the Department modify proposed Rule 4659.0160, subp. 5, as follows:

> For each resident identified in subpart 2, item D, whose contract the facility terminates, the facility must hold a planning conference ~~to~~ and develop a written relocation plan and comply with part 4659.120, subp. 7.

415. This change does not result in a substantially different rule. Proposed Rule 4659.0160 is **APPROVED** subject to this recommended change.

PART 4659.0170: DISEASE PREVENTION AND INFECTION CONTROL

416. The Department proposes to modify proposed Rule 4659.0170 by deleting it entirely.[482] In December 2020, the legislature adopted the provisions of the proposed rule into statute at Minn. Stat. §§ 144G.41, subd. 3 and 144G.42, subd. 9a[483] Therefore, the proposed rule is unnecessary. The Department's proposed deletion is thus **APPROVED**.

PART 4659.0180: STAFFING[484]

417. Many commenters voiced concern for the need and reasonableness of proposed Rule 4659.0180. Comments were received on the following topics:

- requiring the staff daily work schedule to be posted at the beginning of each shift on each floor of a facility, accessible to staff, residents, volunteers, and the public.
- requiring the CNS, an RN, to create and oversee the staffing plans, rather than allow the CNS to delegate this task to administrative staff;
- Ensuring proper staffing 24 hours per day, seven days per week;
- Ensuring that staffing plans are resident-centered, not facility-centered;

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[481] Elder Voice Family Advocates suggested that the notice to residents under Subpart 3 of the proposed rule require that facilities document the time and date that the notice was given and require that residents acknowledge receipt of the notice. *See* Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10). The Department did not adopt this change. Under Minn. Stat. § 144G.80, subd. 3, a facility must give residents and their respresentatives 60 calendar days' notice of the relinquishment. Therefore, any notice that facilities provide will likely need to include evidence of the date the notice was provided, to whom it was delivered, and by what method delivery occurred.

[482] Ex. L.

[483] H.F. No. 19, 7th Spec. Sess., art. 6 §§ 14, 16 (Minn. 2020).

[484] Pursuant to the Comments of Ian Lewenstein (Comment 54), the Department should include a period at the end of Subpart 2.

- Creating standards to measure staffing adequacy and ensuring accountability;

- How staffing plans will be enforced and who will enforce them;

- Advocating for accountability for staffing on the assisted living director and license holders, not just the RN or CNS; and

- Asking that the assessment duties of RNs and LPNs be better articulated and compliant with the Nurse Practice Act.

Part 4659.0180, Subpart 3: Direct-Care Staffing;[485] Plan Required

418. Proposed Rule 4659.0180, subp. 3 requires that the facility's CNS develop and implement a written staffing plan that provides an adequate number of qualified direct-care staff to meet residents' needs 24 hours a day, seven days per week. Pursuant to Minn. Stat. § 144G.41, subd. 4 and proposed Rule 4659.0020, subp. 8, the CNS must also be an RN.

419. A small number of commenters argued for the imposition of staffing ratio in this subpart.[486] The overwhelming number of commenters, however, argued against the imposition of ratios for staffing. They emphasize that the Assisted Living Act authorizes the Department to adopt rules that "promote person-centered planning and service delivery."[487]

420. Several commenters expressed concern about Subpart 3 requiring the CNS to create the written staffing plans. They assert that this requirement is overly burdensome, costly, and an inefficient use of RN time. These commenters noted that it is a standard practice in assisted living homes that an RN oversee staffing sufficiency, but that a non-licensed employee is generally in charge of the administrative aspects of nursing schedules. These commenters note that RNs are expensive and in short supply. For some facilities, this may require the hiring of an additional RN. In addition, these administrative duties would take an RN away from the care of patients, for which the RNs are specially trained. These commenters argue that a CNS's time would be better spent providing training and oversight verses the administrative management of schedules

[485] Both the Elder Justice Center and Elder Voice Family Advocates note that Subpart 3 makes a reference to the "direct-care staffing plan." *See* Comments of Sean Burke and Amanda Vickstrom, Elder Justice Center (Comment 30); Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10). These commenters assert that both the statute and the remainder of the rules only reference "staffing plan" not "direct care staffing plan." Accordingly, the the commenters asks that the words "direct-care" be removed from line 38.11. This is a reasonable request as it is the only place in the rules where there is a reference to a "direct care staffing plan."

[486] Comments of Nancy Haugen (Comments 5 and 82); Test. of Nancy Haugen (Hrg. Tr. Vol. II at 249-255); Comments of Elder Voice Family Advocates (Comment 10); Comments of Sean Burke and Amanda Vickstrom, Elder Justice (Comment 30); Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16); Comments of Eilon Caspi (Comment 61); Test. of Eilon Caspi (Hrg. Tr. Vol. II. at 177-190).

[487] Minn. Stat. § 144G.09, subd. 3(a).

Accordingly, the commenters urge the Department to allow a CNS to delegate the scheduling duties to a staff member and review the schedule or oversee the adequacy of the staffing.[488]

421. Other commenters assert that, while the rule makes the CNS responsible for the creation of staffing plans, the rule should make the assisted living facility director and licensee accountable for ensuring that staffing plans meet residents' needs.[489] The Administrative Law Judge notes that, while the proposed rules make the CNS responsible for creating the staffing plan, under the Assisted Living Act, the licensee remains ultimately responsible for the management, control, and operation of the facility.[490] In addition, the Assisted living director is responsible for administering, managing, and overseeing the assisted living facility.[491] Therefore, this issue is addressed in the Act itself.

422. AARP and the Elder Justice Center make the following suggestions for strengthening the proposed rule:[492]

- require that staffing plans distinguish between licensed and unlicensed staff working in a seven-day period, and distinguish staff by license type (RN, LPN, social worker, etc.);
- clarify, consistent with Minn. Stat. § 144G.41, subd. 4, when an RN is required to be on-site and what "on-call" means;
- identify which staff are available 24-hours-a-day and awake pursuant to Minn. Stat. § 144G.42, subd. 1(12);[493]
- incorporate Minn. Stat. § 144G.60 requirements for staff training, competencies, and requirements for delegation;

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[488] Comments of Joe Cuoco (Comment 70); Comments of Denise Parker (Comment 67); Comments of Karis Gust (Comment 76); Comments of Kathy Manning (Comment 86); Comments of Andrea Buck (Comment 90); Comments of Delwyn Spronk (Comment 91); Comment of Arlan Swanson and Heidi Appel (Comment 106); Comment of Mindy Smith (Comment 107); Comments of Kris Backstrom and Tiffany Ziwicki (Comment 108); Comments of Valerie Skarphol (Comment 111); Comment of Bonnie Peplinski (Comment 44); Comments of Wendy Hulsebus (Comment 65); Comment of Josh Berg, Lifesprk (Comment 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Comments of Lore Brownson (Hrg. Tr. Vol. I at 98-103; Vol. II at 211-217); Test. of Nancy Strandlund (Hrg. Tr. Vol. II at 258-270).

[489] Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16); Comment of Tom Rinkoski (Comment 8); Comment of Sean Burke and Amanda Vickstrom, Elder Justice Center (Comment 30); Test. of Sean Burke, Elder Justice Center (Hrg. Tr. Vol. I at 32-37); Test. of Mary Jo George, AARP (Hrg. Tr. Vol. I at 64-69).

[490] *See* Minn. Stat. §§ 144G.08, subd. 32 and 144G.10, subd. 1.

[491] Minn. Stat. § 144G.08. subd. 6.

[492] Comments of Mary Jo George, AARP Minnesota (Comment 16); Comments of Sean Burke and Amanda Vickstrom, Elder Justice Center (Comment 30); Test. of Sean Burke, Elder Justice Center (Hrg. Tr. Vol. I at 32-37).

[493] *See also* Test of Beth McMullen, Alzheimer's Association (Hrg. Tr. Vol. I at 120-125).

- reflect changes in the facility census (new admissions and discharges) in the staffing plan;
- document and account for temporary staff in the staffing plan;
- allow public access to the facility's staffing plan (as opposed to the staffing schedule); and
- dictate when a staffing plan must be updated.

423. AARP and the Elder Justice Center further urge the Department to rigorously review staffing plans as part of enforcement actions and issue corrective actions where there is a violation of the standards.[494] Several other commenters noted that the rules do not go far enough in creating standards to measure staffing adequacy and ensure accountability.[495] The commenters questioned how staffing plans will be enforced and who will enforce them.[496]

424. The Alzheimer's Association asked that the Department consider adding a requirement that the staffing plan identify the procedure to be followed if nursing care is needed when a nurse is not available.[497]

425. Elder Voice Family Advocates urge that the Department make clear that the CNS be a RN and prohibit a variance from this requirement.[498] The Assisted Living Act, Minn. Stat. § 144G.41, subd. 4 makes its sufficiently clear that the CNS must be an RN. In addition, Minn. Stat. § 14.055, subd. 2(4) prohibits an agency from issuing a variance from a statute or court order. (The Administrative Law Judge has further recommended that this provision be included in proposed Rule 4659.0080 above.) Accordingly, this commenter's concerns are sufficiently addressed by the statutes and Judge's recommendations.

426. The Department explained that while Minn. Stat. § 144G.41, subd. 1(11) requires a facility to develop a staffing plan that will, in part, "ensure[] sufficient staffing at all times to meet the scheduled and reasonably foreseeable unscheduled needs of each resident. . . ," the statute does not direct who must develop the plan and provides minimal guidance on what the plan must consider.[499] The Department contends that its proposed rule is necessary given: (1) the chronic shortage of nurses and low-wage workers, which can result in staffing levels being too low to handle residents' needs; (2) the marked increase in maltreatment cases related to inadequate staffing; and (3) a recent University

[494] Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Sean Burke and Amanda Vickstrom, Elder Justice Center (Comment 30); Test. of Mary Jo George, AARP (Hrg. Tr. Vol. I at 64-69).
[495] Comment of JacLynn Herron (Comment 6); Comment of Anne Sterner; Comments of OOMHDD (Comment 12); Test. of Mary Jo George, AARP (Hrg. Tr. Vol. I at 64-69).
[496] Comment of Tom Rinkoski (Comment 8); Comments of OOMHDD (Comment 12); Elder Justice Center (Comment 30); Test. of Mary Jo George, AARP (Hrg. Tr. Vol. I at 64-69).
[497] Comments of Beth McMullen, Alzheimer's Association (Comment 28, 60); Test of Beth McMullen, Alzheimer's Association (Hrg. Tr. Vo. I at 120-125); Elder Justice Center (Comment 30).
[498] Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10).
[499] Ex. D at 76-77 (SONAR).

of Minnesota survey indicating that staff quality is the second most important factor affecting the quality of assisted living facilities.[500]

427. The Department further asserts that it is reasonable that the CNS, an RN, be responsible for developing staffing plans because under the Nurse Practice Act, Minn. Stat. § 148.171, subd. 15, RNs are responsible for "collaborating with the health care team to develop and coordinate an integrated plan of care" for patients.[501] Therefore, it is the facility's RNs that are responsible for ensuring that residents' care plans adequately meet the residents' needs.[502] It follows, then, that the facility's nursing supervisor should be the staff member responsible for ensuring that the facility's staff plan meets the requirements of the residents' care and service plans.[503]

428. Subpart 1 reasonably places responsibility on the CNS to ensure that staffing levels at the facility are appropriate to provide the care required for all of the facility's residents. This is a reasonable alternative to imposing staffing ratios on all facilities without regard to the number of residents or specific populations served by each facility. Delegating important staffing responsibilities to a non-licensed or non-RN level staff member would not have the same efficacy or reliability. Thus, while this rule may take a CNS away from direct patient care responsibilities, creating effective staffing plans is nonetheless a critical task for facilities that should rest with a licensed medical provider. The Department has established the need and reasonableness for proposed Rule 4659.0180, subp. 1, and that ensuring adequate staffing is rationally related to the provisions of the rule part.

429. The legislature granted the Commissioner broad authority to adopt rules to ensure "staffing appropriate for each licensure category to best protect the health and safety of resident no matter their vulnerability."[504] Proposed Rule 4659.0180, subp. 1 is rationally related to that goal. Accordingly, proposed Rule 4659.0180, subp. 1 is **APPROVED**.

Part 4659.0180, Subpart 4: Daily Staffing Schedule

430. Proposed Rule 4659.0180, subp. 4A requires that the CNS develop a 24-hour daily staffing schedule that: (1) includes direct-care staff work schedules for each direct-care staff member showing all work shifts, including days and hours worked; and (2) identifies the direct-care staff member's resident assignments or work location. Subpart B of the rule requires that the daily work schedule be posted at the beginning of each work shift in a central location on each floor of the facility, accessible to staff, residents, volunteers, and the public.

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[500] *Id.* at 77-78.
[501] *Id.* at 78, 80; Department Response to Long-Term Care Imperative (Response 27, Feb. 12, 2021).
[502] *Id.*
[503] *Id.*
[504] Minn. Stat. § 144G.09, subd. 3(c)(1).

431. Many commenters expressed concern about the burden of placing the staff schedule on every floor of every building for every shift.[505] In addition, these commenters explained that staff assignments change frequently based upon sick calls from staff and the emergent needs of residents, rendering the schedules subject to frequent revision.[506] Commenters note that this "busy work" for an RN to post the changing schedules would divert nursing attention away from providing resident care, especially in larger facilities.[507] In addition, such postings could result in residents requesting certain staff members or adjusting their care needs based upon staff assignments.[508]

432. Commenters also noted that the subpart creates issues with patient privacy rights and the privacy and safety rights of staff.[509] Commenters cite to the Health

[505] Comment of Joe Cuoco (Comment 70); Comments of Anna Petersmeyer (Comment 73) (Hrg. Tr. Vol. I at 112-118); Comments of Karis Gust (Comment 76); Comments of Pam Leach (Comment 79); Comments of Brianna Olson (Comment 80) ; Comments of Kathy Manning (Comment 86); Comments of Andrea Buck (Comment 90); Comment of Delwyn Spronk (Comment 91); Comment of Deb Nobis (Comment 97); Comment of Deb Nobis (Comment 97); Comments of Lores Vlaminck (Comment 99); Comments of Lore Brownson (Comment 104); Comment of Arlan Swanson and Heidi Appel (Comment 106); Comment of Mindy Smith (Comment 107); Comments of Kris Backstrom and Tiffany Ziwicki (Comment 108); Comment of Mary Jo Thorne (Comment 112); Comment of Pamela Klingfus (Comment 39); Comment of Bonnie Peplinski (Comment 44); Comment of Shelli Bakken, Walker Methodist (Comment 49); Comments of Lindsey Sand, Population Health, Knute Nelson (Comment 55); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49) Test. of Anna Petersmeyer (Hrg. Tr. Vol. I at 112-118); Test. of Lindsey Sand (Hrg. Tr. Vol. I at 126-137); Test. of Lores Vlaminck (Hrg. Tr. Vol. II at 190-208).

[506] Comments of Anna Petersmeyer (Comment 73) (Hrg. Tr. Vol. I at 112-118); Comment of Karis Gust (Comment 76); Comments of Shauna Kapsner (Comment 53); Test. of Shauna Kapsner (Hrg. Tr. Vol. I at 82-97); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Test. of Anna Petersmeyer (Hrg. Tr. Vol. I at 112-118); Test. of Lindsey Sand (Hrg. Tr. Vol. I at 126-137); Test. of Lores Vlaminck (Hrg. Tr. Vol. II at 190-208).

[507] Comments of Lore Brownson (Comment 104); Comment of Arlan Swanson and Heidi Appel (Comment 106); Comment of Mindy Smith (Comment 107). Comment of Pamela Klingus (Comment 39); Comments of Lore Brownson (Hrg. Tr. Vol. I at 98-103; Vol. II at 211-217); Test. of Lindsey Sand (Hrg. Tr. Vol. I at 126-137).

[508] Comments of Kathy Manning (Comment 86); Comments of Anneliese Peterson (Comment 48); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

[509] Comments of Anna Petersmeyer (Comment 73) (Hrg. Tr. Vol. I at 112-118); Comments of Brianna Olson; Comment of Kathy Manning (Comment 86); Comments of Andrea Buck (Comment 90); Comment of Deb Nobis (Comment 97); Comments of Lore Brownson (Comment 104); Comment of Mindy Smith (Comment 107); Comment of Pamela Klingus (Comment 39); Comments of Josh Cesaro Moxley, Heart to Home (Comment 46); Comments of Anneliese Peterson (Comment 48); Comment of Shelli Bakken, Walker Methodist (Comment 49); Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Shauna Kapsner (Comment 53); Test. of Shauna Kapsner (Hrg. Tr. Vol. I at 82-97); Comments of Lindsey Sand, Population Health, Knute Nelson (Comment 55); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Test. of Anna Petersmeyer (Hrg. Tr. Vol. I at 112-118); Test. of Lindsey Sand (Hrg. Tr. Vol. I at 126-137); Test. Of Aisha Elmquist, OOLTC (Hrg. Tr. Vol. II at 171-177) (noting that this defect can be remedied by better language in the rule); Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10) (urging that the Department modify the rule to ensure that no protective health information be included in the posted staffing plan).

Insurance Portability and Accountability Act (HIPAA)[510] and the Assisted Living Bill of Rights at Minn. Stat. § 144G.91, subds. 13, 15, which state that residents have the right to respect and privacy regarding their service plans.[511] Other commenters note that staff members may have safety reasons for not wanting their exact work location known by the public, for example, in situations involving domestic violence, restraining orders, or aggressive creditors.[512] One commenter described a situation where a nursing assistant was gunned down at work by her domestic partner and how a staffing schedule would make such a situation easier for those attempting to find staff members within a facility.[513]

433. Other commenters recommended a compromise: that the work schedule be posted in a single location in the building and not include resident assignments; or that it be accessible to the Department staff, residents, and the public at one location upon request.[514]

434. The Alzheimer's Association recommended that the daily staffing schedule identify which staff member is the awake person who is physically present in a secured dementia care unit, as required by Minn. Stat. § 144G.41, subd. 1(12)(i) and 144.81, subd. 4.[515]

435. Based on the comments received, the Department agreed to modify Subpart 4B to requiring posting only in one central location at a facility, as opposed to on each floor.[516] Subpart 4B was modified as follows:[517]

> The daily work schedule in item A must be posted at the beginning of each work shift in a central location[518] ~~on each floor of the~~ <u>in each building of a</u> facility <u>or campus</u>, accessible to staff, residents, volunteers, and the public.

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[510] No commenter cited to a specific HIPPA provision that may be violated by the postings.
[511] Comments of Josh Berg, Lifesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Shauna Kapsner (Comment 53); Test. of Shauna Kapsner (Hrg. Tr. Vol. I at 82-97); Comments of Lindsey Sand, Population Health, Knute Nelson (Comment 55); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Test. of Anna Petersmeyer (Hrg. Tr. Vol. I at 112-118); Test. of Lindsey Sand (Hrg. Tr. Vol. I at 126-137).
[512] Comments of Lore Brownson (Comment 104); Comments of Lore Brownson (Hrg. Tr. Vol. I at 98-103; Vol. II at 211-217); Test. of Lindsey Sand (Hrg. Tr. Vol. I at 126-137).
[513] Comments of Lore Brownson (Comment 104); Comments of Lore Brownson (Hrg. Tr. Vol. I at 98-103; Vol. II at 211-217).
[514] Comments of Brianna Olson (Comment 80); Comment of Mary Jo Thorne (Comment 112); Comment of Pamela Klingus (Comment 39); Comment of Bonnie Peplinski (Comment 44); Comments of Anneliese Peterson (Comment 48); Comment of Shelli Bakken, Walker Methodist (Comment 49); Comments of Lindsey Sand, Population Health, Knute Nelson (Comment 55); Test. of Lindsey Sand (Hrg. Tr. Vol. I at 126-137).
[515] Comments of Beth McMullen, Alzheimer's Association (Comment 28, 60); Test of Beth McMullen, Alzheimer's Association (Hrg. Tr. Vol. I at 120-125).
[516] Ex. L.
[517] *Id.*
[518] Some commenters emphasized the need for a "centralized and easily accessible location" if the Department reduced the rule to only one posting. *See* Rebuttal of AARP, Alzheimer's Association, Legal Services Advocacy Project, Elder Justice Center (Jan. 12, 2021).

436. The Department argues that the daily posting of staffing schedules is needed and reasonable because it: (1) informs staff members of their work responsibilities; (2) enables residents and family members to know who is caring the resident, where that staff member can be found, and how many staff members are present in the facility at any given time; (3) provides the Department with information needed during a survey or investigation; (4) clarifies for staff where other staff members are working in case additional assistance is needed or in case of an emergency; and (5) gives residents and their representatives information as to what specialty providers may be available on premises on a particular day (such as physical therapists, social workers, RNs, etc.).[519]

437. While the Department has shown that an accessible staffing schedule would provide helpful information for staff, residents, and their family members, the Department has not adequately addressed the privacy concerns related to this requirement – either for staff or, particularly, for residents. In its response to the Long-Term Care Imperative's comments on this issue, the Department simply noted that it was "unpersuaded" by an argument that the staffing schedule violates patient's rights, but did not address the valid concerns that patient information may be protected by law.[520] The Department stated that "[n]othing in the proposed rule requires or allows for facilities to post any protected resident information."

438. The Administrative Law Judge disagrees. Under Subpart 4A(1), the staffing plan must "identify the direct-care staff member's *resident assignments* or work locations."[521] The rule is silent about using resident initials or otherwise protecting resident's rights to privacy related to the care and services residents are receiving each day. Indeed, one of the Department's arguments in support of posting the schedule is to allow staff, residents, family members, and the public to know what residents are receiving what care from which staff members (i.e., which staff members are assigned or providing services to which residents).

439. The Assisted Living Bill of Rights, Minn. Stat. § 144G.91, subd. 13(c) provides that residents have a right to "respect and privacy regarding the resident[s'] service plan." In addition, consultations, examinations, and treatments are confidential.[522] Because the staffing plan identifies which staff member (including specialists) are working with which residents, it is entirely possible that private or confidential information could be contained on the staff plan (such as which residents are meeting with physical therapists, social workers, psychiatrists, or others). There is nothing in the proposed rule to protect this sensitive information from being required to be displayed.

440. The Department has failed to establish by a preponderance of the evidence that private resident information will be protected on the staffing plans that are posted and

[519] Ex. D at 80-81 (SONAR).
[520] Department Response to Long-Term Care Imperative (Response 27, Feb. 12, 2021).
[521] Emphasis added.
[522] Minn. Stat. § 144G.91. subd. 13(c).

available to the general public. This renders the rule in conflict with the Assisted Living Bill of Rights and, potentially, HIPAA. Without additional information from the Department about how residents' privacy will be protected on these staffing plans, the Administrative Law Judge must **DISAPPROVE** proposed Rule 4659.0180, subp. 4.

Part 4659.0180, Subpart 5: Direct-Care Staff Availability

441. Proposed Rule 4659.0180, subp. 5 requires the scheduling of two direct-care staff when the needs of a resident require the assistance of two staff members for scheduled and unscheduled needs. Subpart 5 reads:

> A minimum of two direct-care staff must be scheduled and available at all times whenever a resident requires the assistance of two direct-care staff for scheduled and unscheduled needs.

442. This rule expands upon the minimum staffing requirements set forth in Minn. Stat. § 144G.41, which require (among other things) sufficient staffing:

- "at all times to meet the scheduled *and reasonably foreseeable unscheduled* needs of each resident *as required by the residents' assessments and service plans* on a 24-hour per day basis";[523] and
- that ensures "*one or more persons* are available 24 hours per day, seven days per week, who are responsible for responding to the requests of resident for assistance with health or safety needs."[524]

443. Commenter Kendra Miller suggests that the provision be revised as follows:[525]

> A minimum of two direct-care staff must be present ~~scheduled~~ and available at all times ~~whenever a~~ if any resident requires the assistance of two direct-care staff for scheduled and/or unscheduled needs as reflected in the plan of care.

444. Ms. Miller's comments go to the difference between: (1) a staff member being "scheduled" and actually being "present" in the facility and able to assist; and (2) unscheduled needs (such as toileting) verses unforeseeable needs (such as an accident or emergency).[526] Ms. Miller points to the resident's care plan as the basis of determining what needs are scheduled and unscheduled and, thus, reasonably foreseeable.[527]

445. The Department did not substantively respond to this comment.

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[523] Minn. Stat. § 144G.41, subd. 1(11)(ii) (emphasis added).
[524] *Id.*, subd. 1(12) (emphasis added).
[525] Comments of Kendra Miller (Comment 1).
[526] *Id.*
[527] *Id.*

446. In the SONAR, the Department explained that on nights and weekends, facilities tend to have fewer staff, yet residents may still have needs requiring the assistance of two or more staff members.[528] This rule ensures that sufficient staff will be scheduled and available to meet those needs even during these nighttime and holiday shifts.[529]

447. Given the minimum staffing requirements set forth in the Assisted Living Act, the Department has established the need and reasonableness of this rule generally - to ensure sufficient staff is available to provide care for residents requiring more than one direct-care staff member for even unscheduled needs (such as toileting) 24 hours each day. As written, however, this rule is inconsistent with, and potentially conflicts with, the minimum staff requirements set forth in Minn. Stat. § 144G.41, subd. 1(11).

448. Minn. Stat. § 144G.41, subd. 1(11)(ii) requires that staffing be sufficient "at all times to meet the scheduled and *reasonably foreseeable* unscheduled need of each resident *as required by the residents' assessments and service plan* on a 24-hour per day basis."[530] By failing to include important modifiers ("reasonably foreseeable" and "as required by the residents' assessments and service plans"), the rule extends beyond what is reasonable for a facility to anticipate and plan to meet.

449. Because proposed Rule 46559.0180, subp. 5 is inconsistent with Minn. Stat. § 144G.41, subd. 1(11)(ii), it is **DISAPPROVED**.

450. To make the rule consistent with the Act, the Administrative Law Judge recommends that the Department incorporate the following changes:

> A minimum of two direct-care staff must be scheduled[531] and available <u>to assist</u> at all times whenever a resident requires the assistance of two direct-care staff for scheduled and <u>reasonably foreseeable</u> unscheduled needs<u>, as reflected in the resident's assessments and service plan.</u>

451. If the Department incorporates these changes, proposed Subpart 5 will be approved.

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[528] Ex. D at 81 (SONAR).
[529] *Id.*
[530] Minn. Stat. § 144G.41, subd. 1(11)(ii) (emphasis added).
[531] The Administrative Law Judge does not adopt Ms. Miller's recommended change of "present" because this word, in this context, is ambiguous. Minn. Stat. § 144G.41, subd. 1(12)(ii) requires that one or more staff persons are "available" 24 hours per day, seven days per week, located in the same building, in an attached building, or on a contiguous campus. Thus, "present" and "available" have different meanings under the Act. To ensure consistency with the Act, the Judge recommends maintaining the word "available" over "present."

Part 4659.0180, Subpart 6: Direct-Care Staff Availability; Night Supervision[532]

452. Proposed Rule 4659.0180, subp. 6 was one of the more controversial rules proposed. It requires that facilities have sufficient staff to respond to resident calls for assistance during nighttime hours within, at least, 10 minutes. Subpart 6 reads:

> During the hours of 10:00 p.m. and 6:00 a.m., direct-care staff shall respond to a resident's request for assistance with health or safety needs as soon as possible, but no later than ten minutes after the request is made.

453. This provision received a significant number of comments both for and against the 10-minute requirement. Comments in favor of the subpart note that studies show staffing levels are often the lowest during the overnight hours when resident needs still exist. Thus, to ensure that sufficient staff is available to care for residents, a 10-minute response time is necessary and reasonable because it sets a measurable standard for which facilities can create their staffing schedules.[533]

454. Opponents of the 10-minute rule argue that the requirement is arbitrary and imposes a strict liability on providers.[534] These commenters note that real life situations occur where a staff is assisting one resident and cannot respond to another within exactly

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[532] While AARP supports Subparts 5 and 6 (related to staffing requirements), it asserts that the rules lack enforcement mechanisms and critical (but unspecified) "references to the statutes."[532] Minn. Stat. § 144G.41 requires that facility "develop a staffing plan that includes evaluation to be conducted twice a year." AARP believes that the Department should review the staffing plans, provide enforcement of the plans, and issue "corrections" for violations.[532] Because the rules do not replace the statutory requirements, AARP's concerns are noted but are not detrimental to the rule which apply in addition to the statutory requirements.

[533] Comments of Jenny Hopkins (Comment 96); Comments of Elder Justice Center (Comment 30); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16); Comments of Elder Voice Family Advocates (Comment 72); Comments of Ron Elwood, Legal Services Advocacy Project (Comment 25); Comments of Beth McMullen, Alzheimer's Association (Comment 28, 60); Rebuttal of AARP, Alzheimer's Association, Legal Services Advocacy Project, Elder Justice Center (Jan. 12, 2021); Test. of Eilon Caspi (Hrg. Tr. Vol. II. at 177-190); Comments of Eilon Caspi (Comment 61).

[534] Comment of Ben Woit, Benedictine (Comment 92); Comments of Pam Leach (Comment 79); Comments of Brianna Olson (Comment 80); Comments of Andrea Buck (Comment 90); Delwyn Spronk (Comment 91); Comment of Arlan Swanson and Heidi Appel (Comment 106); Comment of Mindy Smith (Comment 107); Comments of Kris Backstrom and Tiffany Ziwicki (Comment 108); Comments of Valerie Skarphol (Comment 111); Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45); Comments of Anneliese Peterson (Comment 48); Comments of Shelli Bakken, Walker Methodist (Comment 58); Comments of Shauna Kapsner (Comment 53); Test. of Shauna Kapsner (Hrg. Tr. Vol. I at 82-97); Comments of Lindsey Sand, Population Health, Knute Nelson (Comment 55); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Test. of Lindsey Sand (Hrg. Tr. Vol. I at 126-137); Test. of Lores Vlaminck (Hrg. Tr. Vol. II at 190-208); Test. of Shelli Bakken, Walker Methodist (Hrg. Tr. Vol. II at 244-248); Test. of Nancy Strandlund (Hrg. Tr. Vol. II at 258-270).

10 minutes.[535] A few commenters noted that the 10-minute rule does not account for "travel time" from one area of a facility to another.[536]

455. These commenters urge that this rule reduces staff ability to prioritize their responses and is contrary to the type of person-centered regulations that the Assisted Living Act was intended to impose.[537] According to these commenters, the rule ignores the fact that many calls for assistance are not medical-related and would be difficult for the facility to differentiate between health-related calls.[538]

456. Facilities assert that the imposition of this requirement will be expensive for many smaller facilities because they will be required to hire additional staff, which are hard to find due to a current nursing shortage.[539] Often, small facilities have only one staff member on duty at night.[540] This rule would require them to hire another staff member, resulting in a cost of upwards of $50,000 per year.[541] This cost would, thus, be passed on to residents and would not be absorbed by the Medicaid Elderly Waiver program.[542]

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[535] Comment of Mary Jo Thorne (Comment 112); Comment of Pamela Klingus (Comment 39); Comment of Josh Berg, Lifesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Comments of Lore Brownson (Hrg. Tr. Vol. I at 98-103; Vol. II at 211-217); Test. of Shelli Bakken, Walker Methodist (Hrg. Tr. Vol. II at 244-248).

[536] Comments of Josh Berg, LIfesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Test. of Shelli Bakken, Walker Methodist (Hrg. Tr. Vol. II at 244-248); Test. of Nancy Strandlund (Hrg. Tr. Vol. II at 258-270).

[537] Comments of Randy Bury and Molly Carmody, Good Samaritan Society and Sanford Health (Comment 45); Comments of Long-Term Care Imperative (Jan. 15 and Feb. 17, 2021); Comment of Michelle Mohlenbrock (Comment 66); Comments of Karis Gust (Comment 76); Comments of Shelli Bakken, Walker Methodist (Comment 58); Comments of Josh Berg, Lifesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27, Rebuttal, Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

[538] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).Comments of Karis Gust (Comment 76); Comment of Mindy Smith (Comment 107); Test. of Lores Vlaminck (Hrg. Tr. Vol. II at 190-208) (requesting clarification of what is a reasonable response: is it a response that "I'll be right there"?); Comment of Michelle Mohlenbrock (Comment 66) (noting that the rule should mandate emergency alert buttons so that facilities can differentiate between emergency calls and non-emergency calls). The Administrative Law Judge finds this argument unconvincing because the proposed 10-minute rule only applies to calls related to health and safety.

[539] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 17, 2021) Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49); Comment of Michelle Mohlenbrock (Comment 66); Comments of Karis Gust (Comment 76); Comments of Andrea Buck (Comment 90); Comment of Deb Nobis (Comment 97); Comment of Crystal Holloway (Comment 98); Comments of Lores Vlaminck (Comment 99); Comment of Arlan Swanson and Heidi Appel (Comment 106); Comments of Josh Berg, LIfesprk (Comment 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243); Comment of Karis Gust (Comment 76); Comments of Kathy Manning (Comment 86); Comment of Deb Nobis (Comment 97); Comment of Arlan Swanson and Heidi Appel (Comment 106).

[540] *Id.*

[541] *Id.*

[542] Comment of Karis Gust (Comment 76); Comments of Kathy Manning (Comment 86); Comments of Andrea Buck (Comment 90); Comments of Andrea Buck (Comment 90); Comment of Deb Nobis (Comment 97); Comments of Sam Orbovich, Long-Term Care Imperative (Comments 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative, Feb. 17, 2021) Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).

457. Other commenters note that a similar 10-minute response time is not imposed on hospitals or nursing homes in Minnesota. They further maintain that it is contrary to the minimal staffing requirements of Minn. Stat. § 144G.41, subd. 1(12)(ii), which require a response "within a reasonable amount of time."[543] Still other commenters urge that the night shift should be treated just like the day shift and require a response "as soon as possible," removing the 10-minute timeframe.[544]

458. For its part, the Minnesota Board of Nursing suggests that the subpart be revised to require that direct-care staff respond at all times (not just during nighttime hours) within 10 minutes.[545] Similarly, Minnesota Elder Justice recommended that the response time during daytime hours should be reduced to five minutes.[546]

459. In the SONAR, the Department cites to the minimal staffing standards set forth in Minn. R. § 144G.41, subd. 1(12)(ii), which require that facilities "ensure one or more persons available 24 hours per day, seven days per week, who are responsible for responding to the requests of residents for assistance with health or safety needs . . . within a reasonable amount of time."[547] The Department argues that the addition of the 10-minute limit provides guidance and clarifies what "reasonable amount of time" should be.[548]

460. The Department selected the 10-minute limit based upon a 2012 published study of four U.S. hospitals that showed faster call response times prevented harm to residents and are consistent with the amount of time most residents would expect to receive assistance.[549] The Department asserts that faster response times result in greater resident satisfaction and lowers the incident of falls and injuries.[550] First, the study relied upon by the Department was of four hospitals, not assisted living facilities. Second, there

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[543] Comment of Mindy Smith (Comment 107); Comments of Anneliese Peterson (Comment 48); Comments of Shauna Kapsner (Comment 53); Test. of Shauna Kapsner (Hrg. Tr. Vol. I at 82-97); Comments of Josh Berg, Lifesprk (Comment 52, 62, 113); Test. of Josh Berg (Hrg. Tr. Vol. I at 71-81, Vol. II at 234-243).

[544] Comments of Lindsey Sand, Population Health, Knute Nelson (Comment 55); Comment of Ben Woit, Benedictine (Comment 92); Comments of Brianna Olson (Comment 80); Comments of Lores Vlaminck (Comment 99); Comment of Mindy Smith (Comment 107); Comments of Anneliese Peterson (Comment 48); Comments of Shelli Bakken, Walker Methodist (Comment 58); Test. of Lindsey Sand (Hrg. Tr. Vol. I at 126-137).

[545] Comment of Mariclair England, Board of Nursing (Comment 4); Comments of Sean Burke and Amanda Vickstrom, Elder Justice Center; Test. of Sean Burke (Hrg. Tr. Vol. I at 32-37).

[546] Comments of Sean Burke and Amanda Vickstrom, Elder Justice Center (Comment 30); Test. of Sean Burke (Hrg. Tr. Vol. I at 32-37). While the proposed rules make the CNS responsible for creating the staffing plan, under the Assisted Living Act, the licensee remains ultimately responsible for the management, control, and operation of the facility. *See* Minn. Stat. §§ 144G.08, subd. 32 and 144G.10, subd. 1. The Assisted living director is responsible for administering, managing, and overseeing the assisted living facility. Minn. Stat. § 144G.08. subd. 6. The Department rejected this suggestion, reiterating the bases for the 10-minute rule. See Department Response to Elder Justice Center Comments (Response 30, Feb. 9, 2021).

[547] Ex. D at 81 (SONAR).

[548] *Id.*

[549] *Id*. at 81-82.

[550] *Id.* at 82.

is nothing in the SONAR that indicates that the studies relied upon specifically studied a 10-minute response time. Instead, the studies were cited to support the general proposition that shorter response times result in increased resident satisfaction and fewer falls and injuries.[551]

461. With respect to the 10-minute time limit, the Department writes that this time standard comes from California law that "requires a 10-minute response time for resident requests for emergency assistance in residential care facilities for the elderly."[552] The Department's summary of the California is not entirely correct.

462. The California law that the Department cites to in its SONAR is 22 California Code of Regulations, Section 87581.[553] This provision was renumbered in 2008 to Section 87415.[554] 22 C.C.R. § 87415 provides:

> (a) The following persons providing night supervision from 10:00 p.m. to 6:00 a.m. shall be familiar with the facility's planned emergency procedures, shall be trained in first aid as required in Section 87465, Incidental Medical and Dental Care Services, and shall be available as indicated below to assist in caring for residents in the event of an emergency:
>
> (1) In facilities caring for less than sixteen (16) residents, *there shall be a qualified person on call on the premises.*
>
> (2) In facilities caring for sixteen (16) to one hundred (100) residents at least *one employee shall be on duty on the premises, and awake. Another employee shall be on call, and capable of responding within ten minutes.*
>
> (3) In facilities caring for one hundred one (101) to two hundred (200) residents, *one employee shall be on call, on the premises; one employee shall be on duty on the premises and awake; and one employee shall be on call and capable of responding within 10 minutes.*
>
> (4) Every additional 100 residents, or fraction thereof, shall require an additional one (1) staff person on duty, on the premises and awake.
>
> (5) In facilities required to have a signal system, specified in Section 87303, Maintenance and Operation, at least one night staff person

[551] *Id.* at 81-82.
[552] *Id.* at 82.
[553] *Id.* at 82, FN 250.
[554] *See* https://casetext.com/regulation/california-code-of-regulations/title-22-social-security/division-6-licensing-of-community-care-facilities/chapter-8-residential-care-facilities-for-the-elderly-rcfe/article-10-food-services/section-87581-night-supervision-renumbered.

shall be located to enable immediate response to the signal system. If the signal system is visual only, that person shall be awake.

(6) The requirements of this section shall not prohibit compliance with additional supervisory requirements required by the State Fire Marshal.[555]

463. First, the California regulations differentiate between the size of the residential facility. The Department's proposed rule is applied across the board for all facilities, regardless of the number of residents. Second, the California regulation states that for facilities that require an additional staff member, that staff member must be "on call and capable of responding within 10 minutes." In contrast, the propose rule states that every request for assistance with health or safety needs must be responded to no later than 10 minutes. The California law and the proposed rule are substantially different.

464. The Long-Term Care Imperative cites to *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238 (Minn. 1984), to argue that the 10-minute limit is arbitrary and capricious and not supported by evidence in the record.[556] In *Pettersen*, the Supreme Court addressed whether the Department's proposed rule established a 0.5 parts per million (PPM) maximum formaldehyde level in new housing units was arbitrary and capricious.[557] The Court held that the standard was, in fact, arbitrary and capricious because the Department provided "no explanation of how the conflicts and ambiguities in the evidence are resolved, no explanation of an any assumptions made or suppositions underlying such assumptions, and no articulation of policy judgments."[558] The Court concluded, "We do not say 0.5 ppm is wrong; we only say we cannot tell if it is within the bounds of what is right."[559]

465. The same is true here. The 10-minute rule may not necessarily be wrong and is likely a good benchmark for facilities to determine if their staffing is sufficient at any time of day. (After all, who wants to wait more than 10 minutes when they have health and safety needs to be met?) However, the evidence that the Department relies upon does not support the selection of 10 minutes from any other standard. The studies relied upon were not directed at the specifics of the rule: one study involved four hospitals and neither specifically addressed the 10-minute rule. The studies merely support a commonsense proposition that faster response times result in better results for patients and increased resident satisfaction. As for the California statute, it is materially different. It differentiates between the size of the facility and only requires that on-call staff be available to respond in 10-minutes, if needed. It is directed at identifying on-call staff availability and does not require a 10-minute response for all residents.

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[555] Emphasis added.
[556] Comments of Sam Orbovich, Long-Term Care Imperative (Comment 27); Rebuttal of Sam Orbovich, Long-Term Care Imperative (Feb. 17, 2021); Test. of Sam Orbovich (Hrg. Tr. Vol. I at 40-49).
[557] *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 246 (Minn. 1984).
[558] *Id.*
[559] *Id.*

Because the Department has failed to establish by an affirmative presentation of facts that the 10-minute response time is needed and reasonable for all facilities across the board, including small facilities who will be required to hire additional staff, proposed Rule 4659.0180, subp. 6 is **DISAPPROVED**.

PART 4659.0190: TRAINING REQUIREMENTS

466. Proposed Rule 4659.0190 addresses the training requirements for staff in conjunction with the training and competency laws set forth in Minn. Stat. §§ 144G.61, .62, 63, .64, and .83.

467. A handful of commenters made suggestions about additional items that would like to see included in the training requirements of the proposed rule. Commenter Nancy Haugen urged the Department to include a statement making it clear that an RN must only delegate duties to licensed staff (not unlicensed staff) who have demonstrated competency to that RN; and give more guidance as to staff retraining.[560] Commenter JacLynn Herron suggested the Department impose a requirement of dementia training for all staff in all assisted living facilities due to the complexity of the illness and its likelihood of "creeping" in on elderly individuals.[561] Suzanne Scheller of Elder Voice Family Advocates suggested a rule ensuring temporary workers are given orientation to the site and resident care plans.[562] She also recommended that the rules require skills testing.[563] The Alzheimer's Association suggested that training include specific training on the Missing Resident Plan.[564] And AARP asked that the Department give "more robust attention to cultural linguistic competence" in the training requirements.[565] AARP, however, offered no specific language to include in the rule.[566]

468. The Department declined to make changes to proposed Rule 4659.0190 based upon these suggestions.

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[560] Comments of Nancy Haugen (Comments 5 and 82); Test. of Nancy Haugen (Hrg. Tr. Vol. II at 249-255). Minn. Stat. § 144G.61, subd. 1(2) requires that training and competency evaluations of unlicensed personnel be conducted by RNs or another instructor in conjunction with an RN.

[561] Comment of JacLynn Herron (Comment 6). Minn. Stat. §144G.63 and .64 have specific requirements for dementia care training for direct-care staff and supervisors in all assisted living facilities, not just those serving residents with dementia.

[562] Test. of Suzanne Scheller, Elder Voice Family Advocates (Hrg. Tr. Vol. I at 50-63). Elder Voice Family Advocates made a number of suggestions for changes to the training requirements, but did not identify any defects in the proposed rule. This groups urges the Department to require training on the emergency preparedness plan (already required in the proposed rule); infection control (dictated by statute); mental health; grievance procedures; transportation and transfers; food handling; diabetes; wound monitoring; pain assessment; fall prevention; physical restraint; modified diets; elopement and monitoring; CPR and first aid (including the Heimlich maneuver); and developmental disabilities. *See* Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10).

[563] *Id.*

[564] Comments of Beth McMullen, Alzheimer's Association (Comment 28, 60).

[565] Comments of Art Serotoff, AARP Chapter 5203 (Comment 15).

[566] *Id.*

469. The Department explained that the training requirements in proposed Rule 4659.0190 are needed to implement the comprehensive list of training topics identified in the Assisted Living Act. The rules bring clarity and cohesion to the eight sections of the Assisted Living Act that address training and competence. Subpart 1 requires facilities to establish, implement, and keep current policies and procedures for staff orientation, training, and competency and performance evaluations. Subpart 2 identifies specific orientation requirements. Subpart 3 requires additional training for direct care staff in facilities serving residents with dementia. Subpart 4 addresses staff retraining and competence. Subpart 5 addresses the portability of training from one facility to another. Each of these subparts fill in or provide clarity to the training statutes.

470. While the suggestions made by commenters were helpful, the Department has established the need and reasonableness of Subparts 1-5, without the additions suggested by commenters.

471. The Department has, however, modified the last sentence in Subpart 3B to correct a drafting error. This change is as follows:[567]

> The commissioner must publish and update as needed a list of acceptable skills competency or knowledge tests on the department's website that are based on current best practice standards in the field of dementia care and meet the requirements of Minnesota Statutes, section 144G.83, subdivision 3, clause ~~(3)~~(2).

472. These changes correct drafting errors and do not result in a substantially different rule. Accordingly, proposed Rule 4659.0190, subps. 1 through 5 are **APPROVED**, as written.

Part 4659.0190, Subpart 6: Training Records and Certificates[568]

473. Proposed Rule 4659.0190, subp. 6 identifies the documentation facilities need to maintain to evidence staff has completed the training and competency evaluations required by rule and law.

474. Commenter EduCare questioned whether the training "certificates" referenced in subpart 6 need to be maintained as a paper document.[569] The Department responded noting that "any documentation of training that meets the requirements of [the] proposed rule part will be accepted as proof of compliance, whether [or not]

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[567] Ex. L.

[568] Elder Voice Family Advocates also suggests that training should be verified by an RN, that training manuals; that policies and procedures be available and accessible in the facility; and that qualifications of instructors be available to the Commissioner for review. *See* Comments of Suzanne Scheller, Elder Voice Family Advocates (Comment 10).

[569] Comments of Jennifer Anderson, EduCare (Comment 87). Commenter Joe Cuoco also noted the Department's reliance on "paper" copies of training records in an increasingly electronic world. *See* Comment of Joe Cuoco (Comment 70). *See also* Comments of Doug Beardsley, Care Providers of Minnesota (Comment 23) (recommending removal of the word "certificate").

documentation is expressly labeled as a certificate."[570] To that end, EduCare's suggested the following revision to Subpart 6, consistent with the Department's intended actions:

> **Subp. 6. Training records and ~~certificate~~ documentation**.
>
> A. The facility must maintain a record of staff training and competency required under this part and Minnesota Statutes, chapter 144G, that documents the following information for each competency evaluation, training, retraining, and orientation topic:
>
> ***
>
> (5) name and title of the staff person completing the training, and the staff person's signature with a statement attesting that the staff person successfully completed the training as described on ~~the certificate~~ in the training documentation.
>
> B. ~~A copy of the certificate of~~ Documentation of the completed competency evaluation, training, retraining, or orientation must be provided to the employee at the time the evaluation or training is completed.

475. EduCare's proposed changes appear to be consistent with the Department's direction regarding training records. Accordingly, any modifications incorporating these changes would be approved if submitted with other Department modifications. If these changes are made, the Department should also remove the word "certificates" from the title of the subpart.

476. With or without EduCare's recommended changes, the Department has established the need and reasonableness of proposed Rule 4659.0190. Should the Department choose to adopt the changes proposed by EduCare, such changes would not result in a substantially different rule. Proposed Rule 4659.0190, subp. 6 is **APPROVED**, as written.

PART 4659.0200: NONRENEWAL OF HOUSING, REDUCTION IN SERVICES; REQUIRED NOTICES

477. LeadingAge Minnesota alerts the Department to a typo in proposed Rule 4659.0200, subp. 1 (Line 43.2).[571] The proposed rule, Subpart 1 references part 4659.0130, subps. 6 to 9, but should actually reference part 4659.0120, subps. 6-9 (addressing relocation evaluation, relocation plan, information to receiving facility, and discharge summary). To that end, the Administrative Law Judge recommends that the Department amend proposed Rule 4659.0200, subp. 1 as follows:

> A facility that decides not to renew a resident's housing under Minnesota Statutes, section 144G.53, paragraph (a), clause (1), or that reduces a resident's services to the extent that the resident is required to move under

[570] Department Response to Comment 87.
[571] Comments of Kari Thurlow, LeadingAge Minnesota (Comment 29).

Minnesota Statutes, section 144G.55, subdivision 1, paragraph (a), must comply with part 4659.0123~~3~~0, subparts 6 to 9.

478. This recommended change is necessary to fix a typographical error and does not result in a substantially different rule.

479. Subject to this recommended change, proposed Rule 4659.0200 is **APPROVED**.

PART 4659.0210: TERMINATION APPEALS; PROCEDURE AND TIMELINES FOR APPEALS

Part 4659.0210, Subpart 2: Contact Commissioner to Start Appeal

480. The Department proposes to modify proposed Rule 4659.0210, subp. 2, as follows:[572]

> Within the timelines stated in subpart 1, the resident or an ~~representative~~ individual acting on the resident's behalf shall contact the department in writing to request an appeal of the termination. ~~The request shall be made in writing and submitted by mail to the department.~~ The failure of a resident to request a hearing within the provided timelines constitutes a waiver of the right to a hearing.

481. This modification is consistent with Minn. Stat. § 144G.54, subd. 3(d) and Minn. R. 1400.5800 (2019). This modification does not result in a substantially different rule. Proposed Rule 4659.0210, subp. 2 is, therefore, **APPROVED**, as modified.

Part 4659.0210, Subpart 3: Hearing Process

482. Proposed Rule 4659.0200, subp. 3A provides that appeal hearings provided for under Minn. Stat. § 144G.54, subd. 3 shall be held according to the rules of the Minnesota Revenue Recapture Act, unless the chief administrative law judge determines that a formal contested case proceeding should be held.

483. The Assisted Living Act, Minn. Stat. § 144G.54, subd. 3, addresses how termination appeals shall be conducted. Subdivision 3(a) provides:

> The Office of Administrative Hearings must conduct an expedited hearing as soon as practicable under this section, but in no event later than 14 calendar days after the office receives the request, unless the parties agree otherwise or the chief administrative law judge deems the timing to be unreasonable, given the complexity of the issues presented.

[572] Ex. L.

484. Subdivision 3(c) of the statute further provides that: "[t]he hearing is not a formal contested case proceeding, except where determined necessary by the chief administrative law judge."[573]

485. The Assisted Living Act does not make clear what procedural rules apply to expedited termination appeals if the chief administrative law judge does not deem it necessary to have a formal contested case proceeding. The statute does not reference the Minnesota Revenue Recapture Act or the administrative rules related to those types of hearings (Minn. R. 1400.8505 - .8612).

486. Proposed Rule 4659.0200, subp. 3 attempts to fill this gap in the statute by requiring that termination appeals be heard according to the Revenue Recapture Act rules (Minn. R. 1400.8505 - .8612), unless the chief administrative law judge determines that the standard contested case hearing rules apply. The problem with this approach is that the Department does not have authority to require the use of the Revenue Recapture Act rules without a statutory directive.

487. As explained above with respect to proposed Rule 4659.0080, subp. 8 (variance appeals), the Revenue Recapture Act rules, Parts 1400.8505-.8612, govern hearings arising out of: (1) the Revenue Recapture Act (Minn. Stat. §§ 270A.01-.12); (2) certain statutes specifically identified in the rule, including Minn. Stat. § 114C.23 (environmental performance standards), § 115.076 (water pollution permit applications), § 116.072, subd. 6 (MPCA administrative penalties), and § 144.991 (Department of Health administrative penalties); and (3) "*other hearings as directed by statute*" or by party agreement.[574]

488. The Assisted Living Act does not specifically authorize the Department to conduct termination appeals using the procedures set forth in the Revenue Recapture Act rules. The Assisted Living Act only states that the hearings shall be conducted by the Office of Administrative Hearing in an expedited fashion. Therefore, the Department is without legal authority to require that the termination hearings be conducted under the Revenue Recapture Act rules. Accordingly, proposed Rule 4659.0210, subp. 3A is **DISAPPROVED**.

489. The Department can remedy this issue by having the legislature specifically authorize the use of the Revenue Recapture Act rules in the statute. Otherwise, the rule and statute are ambiguous as to which administrative procedural rules should apply to these "expedited hearings" (unless the chief administrative law judge declares that the contested case rules apply). This matter should be remedied before the Assisted Living Act and rules become effective.

[573] Minn. Stat. § 144G.54, subd. 3(c).
[574] Minn. R. 1400.8505 (emphasis added).

490. The Department has also modified Subpart 3C in response to comments from the Legal Services Advocacy Project and AARP.[575] The Department proposes to modify Subpart 3C as follows:[576]

> If the resident is unable to provide self-representation at the hearing or wishes to have an ~~representative~~ individual present on the resident's behalf, an ~~representative~~ individual of the resident's choosing may present the resident's appeal to the administrative law judge on the resident's behalf.

491. According to the Department, the purpose of these changes is to "correct drafting errors."[577] The changes allow residents to be assisted by a wider range of individuals than just their legal and designated representative. The Administrative Law Judge finds that the proposed modification is needed and reasonable, and consistent with Minn. Stat. § 144G. 54, subd. 3(d) and Minn. R. 1400.5800. This modification does not result in a substantially different rule. Proposed Rule 4659.0210, subp. 3C is, therefore, **APPROVED**.

492. Because the Assisted Living Act and proposed rules requires an expedited hearing for termination appeals, the Legal Services Advocacy Project recommended that the Department require the facility, 10 days prior to hearing, to submit to the Administrative Law Judge and resident: a copy of the assisted living contract; a copy of the termination notice, and an affidavit confirming that the facility has complied with the pretermination meeting requirements.[578]

493. The Department declined to make these additions to the subpart, asserting that the additions would conflict with the Administrative Procedure Act and the administrative procedure rules applicable to the appeal hearings.[579] According to the Department, these statutes and rules already allow such documents to be admitted into evidence.[580]

494. The Department's response misses the point. The purpose of Legal Services Advocacy Project's recommendation is to ensure these material documents are made a part of the record without additional discovery being required. This is consistent with Minn. Stat. § 144G.54, which anticipates an expedited hearing procedure and proposed Rule 4659.0210, subp. 3D, which directs the Administrative Law Judge to "take appropriate steps" to develop the hearing record.

495. When revising proposed Subpart 3, the Department may wish to consider the Legal Services Advocacy's Project's recommendation to accomplish the type of stream-line appeal process without discovery that the Department seeks to impose.

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[575] Comments of Ron Elwood, Legal Services Advocacy Project (Comment 25); Comments of Art Serotoff, AARP Chapter 5203 (Comment 15); Comments of Mary Jo George, AARP Minnesota (Comment 16).
[576] Ex. L.
[577] *Id.*
[578] Comments of Ron Elwood, Legal Services Advocacy Project (Comment 25).
[579] Department's Response to Legal Services Advocacy Project (Response 25, Feb. 5, 2021).
[580] *Id.*

Because Subpart 3A is **DISAPPROVED**, this issue can be revisited by the Department upon resubmission.

Part 4659.0210, Subpart 4: Order of Commissioner

496. Finally, the Department has modified proposed Rule 4659.0210, subp. 4, related to the time the Commissioner has to issue a final order in a termination appeal. The proposed modification reads:[581]

> If a hearing has been held, the commissioner may issue a final order within 14 calendar days after receipt of the recommendation of the administrative law judge. The parties may, within the first 7 of those 14 calendar days, submit additional written argument to the commissioner on the recommendation and the commissioner will consider the written arguments. . . .

497. The purpose for the change is to establish some time limit for submitting additional written argument or exceptions to the administrative law judge's recommendation.[582] The Department explained that allowing parties to submit written comment during the entire 14 days that the Commissioner is considering the case could result in argument not being fully considered before the Commissioner must render her decision.[583]

498. The modification to the subpart is well-reasoned and helpful to ensure parties are fully heard in a timely fashion before a final decision is reached. The change does not render the subpart substantially different from the originally proposed rule. Accordingly, proposed Rule 4659.0210, subp. 4 is **APPROVED**, as modified.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has authority and jurisdiction to review these rules under Minn. Stat. § 14.14, .15, .50 (2020), and Minn. R. 1400.2100 (2019).

2. The Department gave all required notice to interested persons in this matter pursuant to Minn. Stat. §§ 14.101, .111, .116, .131, .14, .22, .23, .25, .37, 115.44 (2020) and Minn. R. 1400.2060, .2070, .2080, .2230 (2019), including all additional notice requirements of rule and law.

[581] Department Additional Modifications (Feb. 16, 2021).
[582] *Id.*
[583] *Id.*

3. The Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.101, .111, .116, .131, .14, .20, .22, .23, .24, .25, 115.44, and Minn. R. .2060, .2070, .2080, .2090, .2210, .2220, .2230, and all other applicable rules and laws.

4. The Agency has demonstrated its statutory authority to adopt the proposed rules pursuant to Minn. Stat. §§ 14.05, subd. 1 (2020).

5. The Agency has fulfilled all substantive requirements of Minn. Stat. §§ 14.002, .127, .128, .131, .14, .23, .24, .50, and Minn. R. 1400.2070, .2080, and all other applicable rules and laws.

6. The Additional Notice Plan, Notice of Hearing, proposed rules, and the SONAR complied with Minn. Stat. §§ 14.131, .22, .23 and Minn. R. 1400.2060, .2070, .2080.

7. 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 and 14.50, with the exception of the following proposed rules which were **DISAPPROVED**:

4659.0020, subp. 14
4659.0040, subp. 1
4659.0110, subp. 1
4659.0120, subp. 1B
4659.0140, subp. 1B
4659.0140, subp. 4
4659.0180, subp. 4
4659.0180, subp. 5
4659.0180, subp. 6
4659.0210, subp. 3A

8. The Administrative Law Judge has **APPROVED** the following proposed rules subject to changes recommended by the Judge:

4659.0080, subp. 1
4659.0080, subp. 8
4659.0120, subp. 1D
4659.0120, subp. 7A
4659.0120, subp. 10, as modified by the Department
4659.0130, subp. 6A
4659.0150, subp. 1
4659.0160, subp. 5
4659.0200, subp. 1

9. The Administrative Law Judge has **APPROVED** the following proposed rules with recommended changes:

4659.0030
4659.0120, subp. 1C
4659.0120, subp. 4
4659.0150, subp. 2 (as modified by the Department)
4659.0190, subp. 6

10. The Administrative Law Judge further recommends that the Department revise the following proposed rules to make consistent use of the defined term "representatives." The word "representative" should be changed to "representatives" in the following proposed Rules:

4659.0120, subp. 2B (line 17.14)
4659.0120, subp. 5C (line 18.25)
4659.0120, subp. 7A (line 19.19)
4659.0130, subp. 2G(6) (line 24.13)
4659.0130, subp. 6A (line 26.8)
4659.0130, subp. 7 (line 26.21)
4659.0160, subp. 3 (line 35.22)
46459.0200, subp. 2B(4) (line 43.12)

11. The modification to Rules 4659.0040, subp. 2B; .0040, subp. 3B; .0060; .0070; .0120, subp. 9D; .0120, subp. 10; .0130, subp. 1A; .0130, subp. 1C; .0130, subp. 4; .0140, subp. 7; .0150, subp. 2C; .0170; .0190, subp. 3B; .0210, subp. 2; .0210, subp. 3C; and .0210, subp. 4. are **APPROVED**. While these modifications were proposed by the Department after publication of the rules in the *State Register,* they do not render those rules "substantially different" within the meaning of Minn. Stat. §§ 14.05, subd. 2. Such modifications are needed and reasonable, and should be adopted by the Department.

12. Due to the disapproval of certain rules, this Report has been submitted to the Chief Administrative Law Judge for her consideration pursuant to Minn. Stat. § 14.15 and Minn. R. 1400.2240, subp. 4.

13. Any Finding of Fact that might properly be termed a Conclusion of Law, and any Conclusion of Law that might properly be termed a Finding of Fact, are hereby adopted as such.

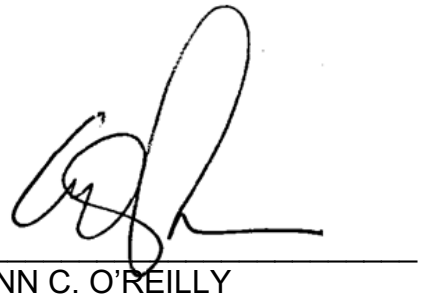
14. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude, and should not discourage, the Department from further modification of the proposed rules, provided that the rule finally adopted is based upon facts appearing in this rule hearing record and the Department complies with the requirements of Minn. R. 1400.2110, if the modification results in a substantially different rule.

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

RECOMMENDATION

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

Dated: March 29, 2021



ANN C. O'REILLY
Administrative Law Judge

NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Department of actions that 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, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Department may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. If the Department makes a submission to the Commission, it may not adopt the rules until it has received and considered the advice of the Commission. However, the Department is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Department's submission.

If the Department elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Department makes changes in the rules other than those suggested by the Administrative

Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Department must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Department, and the Department will notify those persons who requested to be informed of their filing.