

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed
Permanent Rules of the Minnesota
Department of Health Relating to
Essential Community Providers,
Minnesota Rules Chapter 4688.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on December 27, 1995, at 9:00 a.m. in LL56, Metro Square Building, 121 East Seventh Place, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Department of Health (MDOH or Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the MDOH after initial publication are impermissible substantial changes.

Paul Zerby, Assistant Attorney General, 525 Park Street, St. Paul, Minnesota 55155, appeared on behalf of the MDOH. The MDOH's hearing panel consisted of Irene Goldman, Rule Writer; Dave Giese, Division Director; and Nan Schroeder.

Thirty persons attended the hearing. Twenty persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the date of the last hearing, to January 16, 1996. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five working days were allowed for the filing of responsive comments. At the close of business on January 23, 1996, the rulemaking record closed for all purposes. The Administrative Law Judge received seven written comments from interested persons during the comment period. The MDOH submitted written comments responding to matters discussed at the hearings and making changes in the proposed rules.

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

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the MDOH of actions which will correct the defects and the MDOH may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge

identifies defects which relate to the issues of need or reasonableness, the MDOH may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the MDOH does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

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

When the MDOH files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On October 13, 1995, the MDOH filed the following documents with the Chief Administrative Law Judge:

- a) a copy of the proposed rules certified by the Revisor of Statutes;
- b) an estimate of persons expected to attend the hearing,
- c) an estimate of the expected duration of the hearing;
- d) a statement that the Department expects to provide additional discretionary notice;
- e) a copy of the MDOH's Order for Hearing;
- f) the Notice of Hearing proposed to be issued; and,
- g) the Statement of Need and Reasonableness (SONAR).

2. On November 1, 1995, MDOH filed the signed Order for Hearing with the Administrative Law Judge.

3. On November 2, 1995, MDOH mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose

of receiving such notice. MDOH gave discretionary notice on that date to persons that had inquired of the Department about the proposed rules or who might otherwise have an interest in the proposed rules.

4. On November 13, 1995, a copy of the proposed rules and the Notice of Hearing were published at 20 State Register 1142.

5. On November 29, 1995, the MDOH filed the following documents with the Administrative Law Judge:

- a) The Notice of Hearing as mailed;
- b) a copy of the State Register containing the Notice of Hearing and the proposed rules;
- c) a copy of the Notice of Solicitation of Outside Opinion, published at 20 State Register 346, together with all materials received in response to that notice;
- d) The Agency's certification that its mailing list was accurate and complete as of October 30, 1995, and the Affidavit of Mailing the Notice to all persons on the MDOH's mailing list and to those persons receiving discretionary notice; and,
- e) a statement that no letters had been received requesting a rule hearing.

Statutory Authority.

6. In its SONAR, MDOH cited as its statutory authority Minn. Stat. § 62Q.19, subd. 7, which states:

By January 1, 1996, the commissioner shall adopt rules for establishing essential community providers and for governing their relationship with health plan companies. The commissioner shall also identify and address any conflict of interest issues regarding essential community provider designation for local governments. The rules shall require health plan companies to comply with all provisions of section 62Q.14 with respect to enrollee use of essential community providers.

SONAR, at 6.

7. The Commissioner is expressly authorized to adopt rules on essential community providers. The Administrative Law Judge concludes that the MDOH has the statutory authority to promulgate these rules.

Nature of the Proposed Rules.

8. The proposed rules set definitions, establish application standards, and reporting requirements for providers that seek to become or maintain the status of essential community provider (ECP). The criteria used by the Commissioner to designate ECPs are set by these rules. The relationship of ECPs to health plan networks are regulated by these rules. Specific options for support services are established by the rules. ECP designation was first established in 1994 by operation of Minn. Stat. § 62Q.19. The statute creates a means for ECPs to integrate with managed care networks to ensure that particular populations are afforded needed health care services. The effect of the designation is to provide a payment mechanism for services provided by ECPs.

Small Business Considerations in Rulemaking.

9. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. MDOH asserted that small businesses would not be affected by the proposed rules. Notice of Intent to Adopt Rules, at 3. No commentator indicated that the rules would have an impact on small businesses. MDOH has met the requirements of Minn. Stat. § 14.115, subd. 2.

Fiscal Notice.

10. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of \$100,000 per year by local public bodies. The notice must include an estimate of the total cost to local public bodies for a two-year period. MDOH estimates the proposed rules will not require any expenditures by local governmental units over the next two years. SONAR, at 6-7. The Department has met the fiscal notice requirements of Minn. Stat. § 14.11, subd. 1.

Impact on Agricultural Land.

11. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in this state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

Proposed Rule 4688.0005 - Incorporation by Reference.

12. Proposed rule part 4688.0005 incorporates by reference the Physician's Current Procedural Technology codes from 1994 (CPT 95). The language of the rule part meets the requirements for incorporation by reference in Minn. Stat. § 14.07, subd. 4. MDOH uses CPT 95 codes to determine in a uniform fashion what medical services are provided to persons by ECPs. SONAR, at 12. The rule part is needed and reasonable to incorporate a uniform coding system into the rules.

Proposed Rule 4688.0010 - Definitions.

13. Eight terms used in the rules are defined in proposed rule part 4688.0010. Only the terms generating comments will be discussed.

14. Mary C. Hipp, Counsel for Medica Government Programs (Medica/Allina), suggested that the definition of “culturally sensitive and competent services” in subpart 3, be changed to focus on services over the “ability to provide services.” MDOH considered the comment and consulted with its Office of Minority Health, before deciding to decline to change the rule language. MDOH stated that “Medica’s proposed modification would result in a definition that is too narrow and does not require any responsible health professionals who provide direct services.” MDOH Reply, at 6. Either the proposed subpart or the suggested change accomplish the goals sought by MDOH. The definition is needed and reasonable as proposed.

15. Beverly Turner, Senior Government Affairs Counsel for the Insurance Federation (Insurance Federation) urged MDOH to add definitions for “health plan company” and “indemnity carrier.” The Insurance Federation maintains that these definitions are necessary to eliminate any possibility that indemnity carriers would be required to contract with ECPs. MDOH responded that indemnity carriers are required to pay for services appropriately provided, regardless of the source, and the rules do not impose any new requirement on indemnity carriers. MDOH Reply, at 3-4. The Insurance Federation has not shown that the rules are defective for failing to include the requested definitions.

Proposed Rule 4688.0020 - Application.

16. To obtain the ECP designation, a provider must apply to MDOH. Proposed rule part 4688.0020 establishes the requirements for such an application. Item B requires that the applicant must be either a local government unit, an Indian tribal government, an Indian health service unit, or a community health board; or a nonprofit organization with a sliding fee schedule and the ability to demonstrate that access to services is not limited by financial limitations of the client. These classes of applicant are consistent with Minn. Stat. § 62Q. Alfred R. Pemberton, Chairman of the Leach Lake Reservation (Leach Lake), suggested that “Indian Health Service, Service Unit” should be used instead of “Indian health service unit.” MDOH agreed, and changed the rule accordingly. Item B is needed and reasonable, as modified. The new language is not a substantial change.

17. Item C requires each applicant to list the CPT 95 codes of all services provided. MDOH indicates that such reporting is needed to allow the Department to determine which services will be designated as ECP provider services. SONAR, at 12. Minn. Stat. § 62Q.19, subd. 1 allows ECP designation for some or all services of a provider. Item C is needed and reasonable to allow MDOH to carry out its statutory responsibility in a uniform manner.

18. A list of qualifying populations served by the applicant is required under item E. In addition, the annual number of such clients served and the percentage that those clients constitute among the entire client population served by the applicant must be submitted. This information is used by the Commissioner to determine whether the applicant should be approved for ECP status. Item E is needed and reasonable, as proposed.

19. An applicant must list, under item F, the supportive and stabilizing services available to the applicant's clients. Such services include transportation, child care, linguistic services, and culturally sensitive and competent services. The applicant must also indicate how the need for such services is determined, how the services are provided, and how useful the service has been to clients. The provision of such services is an element in the granting of ECP status under Minn. Stat. § 62Q.19, subd. 1(1). MDOH intends for applicants to explain why any services not provided are not needed, in addition to demonstrating those services that are needed. SONAR, at 16. This information is needed to allow MDOH to grant ECP designation to appropriate providers without unduly restricting that status.

20. Item G asks the applicant to provide "other information related to the qualification of the applicant for ECP designation as is reasonably necessary to enable the commissioner to carry out the duties under this chapter and Minnesota Statutes, section 62Q.19." MDOH explains that, in the course of the application process, questions may arise that require supplemental information from the applicant. SONAR, at 17. The wording of the item is vague, since it appears to require that the applicant provide information that is not identified. Further, the language "to carry out the duties under this chapter" is vague. This vagueness rises to the level of a defect in the proposed item. This defect can be cured by changing the language to read as follows:

Any other information, requested by the commissioner,
reasonably necessary to determine whether the application
should be granted or denied.

The suggested language clarifies that the Commissioner must ask for the information and that the information is to be used in the application process. The new language is needed and reasonable and does not constitute a substantial change.

Proposed Rule 4688.0030 - Application Fee.

21. An application fee of \$46.00 is required of each application by proposed rule part 4688.0030. No commentator objected to the amount of the fee, although one commentator urged that the fee go no higher. There is no evidence in the record that suggests MDOH will be changing this amount in the near future. In the event the amount is to be changed, the statutory process for changing a fee set by rule must be followed. Proposed rule 4688.0030 is needed and reasonable.

Proposed Rule 4688.0040 - Criteria for ECP Designation by Commissioner.

22. Upon receipt of the application, the Commissioner is to determine whether to grant or deny ECP status based on the criteria in proposed rule 4688.0040. These criteria are set out in subparts 2 through 8. Subpart 2 requires the applicant to provide "medical care to uninsured persons, high risk and special needs populations, and underserved and other special needs populations" Judith Walker, Counsel for Policy Development for BlueCross BlueShield of Minnesota (BCBSM); Ghita Worchester, speaking on behalf of Ucare, Medica/Allina, and several other managed care organizations, suggested that a threshold of 75 percent be established that requires an applicant or ECP to provide that portion of its services to eligible clients to be eligible for designation as an ECP. Without such a threshold, the commentators maintain, the statutory intent that only "essential" providers receive the designation will be undermined. Ucare suggested that the ECP designation would be misused by requiring

that any willing provider would be able to contract with managed care plans that would not otherwise enter into a provider contract. Pamela Page, Interim Executive Director of the Neighborhood Health Care Network (NHCN) opposed any percentage criterion as a barrier to health care for high risk and special needs client populations. Rhonda L. Degelau, Executive Director of the Minnesota Primary Care Association (MPCA), objected to any threshold requirement as being beyond the statutory authority of the MDOH. MPCA also suggested that establishing of any particular percentage as a criterion would be arbitrary. MPCA asserted that rural providers would be at a disadvantage in meeting the suggested threshold.

23. MDOH responded that it had considered a threshold in the percentage of clients receiving ECP services in the drafting of this rule, but no suitable percentage could be arrived at that would include all providers properly considered ECP's. MDOH Reply, at 9. The possibility that ECP designation would be misused is conceded by MDOH, but such misuse is not considered likely. *Id.* MDOH has stated that it would pursue a legislative change if misuse occurs in a significant degree. As to the proposed threshold of 75%, MDOH noted that most applicants would be prevented from obtaining ECP designation at that level. There is a sufficient barrier to misuse in the application process itself to warrant approval of the rule without some objective statistical criterion for applicants to meet. Subpart 2 is needed and reasonable without adding a threshold percentage to determine eligibility for ECP designation.

24. Leech Lake urged that community norms be defined in the manner of adding the specific standards of "sufficient personnel and facilities to provide timely medical care ... [with] (1) reasonable appointment scheduling; and (2) reasonable waiting times." Pemberton Letter, December 12, 1995, at 1. The commentator also suggested that appointment scheduling and waiting times be monitored by the provider. Kathy Parson, Director of Managed Care for St. Cloud Hospital, urged that MDOH recognize in the rules the differences between rural and metro-area providers, especially in terms of community transportation services and child care services. MDOH responded that the proposed language offers applicants a number of options to meet each of the service criteria and the option to show that the service is unnecessary for the provider's clientele. MDOH Reply, at 6. The norms to be emphasized are, in MDOH's opinion, community-based norms. *Id.*, at 7. The language for the standards proposed by Leech Lake are substantially present in subpart 2. MDOH has declined to add more specific criteria to allow more flexibility on the part of providers. *Id.* The chosen standard is needed and reasonable to require of providers applying for ECP designation.

25. Subpart 3 requires information on the support services provided or coordinated by the applicant. Transportation, child care, linguistic services, and culturally sensitive services must be accounted for by examples on one of the listed categories in the subpart. If none of the listed categories are provided, the applicant must either explain what is offered in its place, or explain why such service is not required. The options are needed and reasonable to meet the standards for ECP providers. MDOH recognized the need to clarify the rule on child care to ensure that coordination with unlicensed day care providers was limited to only those providers exempt from licensure under State law. MDOH Reply, at 8. The new language is needed and reasonable and does not constitute a substantial change.

26. One type of support service, culturally sensitive and competent services, can be met by one of two options: (1) some professional staff are from the culture of clients; or (2) preservice and inservice training is provided on those issues to all profession and

support staff. The training option is not objectionable. To the extent that the first option requires an employer to make an employment decision on the basis of the race or national origin of the person who will be providing services, this provision conflicts with Minn. Stat. § 363.03, subd. 1(2)(c) (Minnesota Human Rights Act), which expressly prohibits discrimination on those bases in employment. This issue was addressed in In the Matter of Department of Human Services Rules Governing Licensure of Residential Treatment Programs for Children with Severe Emotional Disturbance, Minnesota Rules, Parts 9545.0905 to 9545.1125, OAH Docket No. 7-1800-9457-1, at 18-19 (Report issued June 16, 1995). As in the Residential Treatment Programs rule, the defect can be cured by requiring staff be familiar with the cultural background of clients. This familiarity focuses on the experience of the person, not the person's race or national origin. Beyond the statutory conflict, the rule part is not supported with facts to show that a person "from the culture" is sensitive to issues arising within the culture. Since there is no evidence that race or national origin equates to the goal sought by MDOH, the rule has not been shown to be reasonable. Modifying the item as suggested in this Finding renders the item needed, reasonable, and does not conflict with the Minnesota Human Rights Act. The new language does not constitute a substantial change.

27. Subpart 5 requires that fees be based on a sliding scale referenced to the federal poverty guidelines and that free care is available in specific instances. Phil Norrgard and Dr. Linda Frizzell of the Fond du Lac Reservation (Fond du Lac) objected to the fee provisions as being in conflict with federal requirements that no fee be charged for services provided to tribal members. MDOH responded that the sliding scale provision applied only to applicants who seek ECP designation as a nonprofit organization under Minn. Stat. § 62Q.19, subd. 1. MDOH Reply, at 2. The rule does not make the same distinction as the statute. While the statute supersedes the rule, the Department may consider expressly limiting the request for information in subpart 5 to nonprofit entities. Such a change would not be a substantial change. Subpart 5 is needed and reasonable, with or without the change.

Proposed Rule 4688.0050 - Requirements for Contracts with Health Plan Companies.

28. Under proposed rule 4688.0050, a health plan company must offer provider contracts to all ECPs within the health plan company's approved service area. The Insurance Federation suggested adding a provision that would deem indemnity carriers to have met all the rule requirements for ECPs. Fond du Lac suggested a similar change regarding Indian Health Service and Tribal health and social service clinics. Fond du Lac suggested that the information contained in the Federal Qualified Health Center (FQHC) application meets the needs of the application process for ECP designation. MDOH declined to make either change, on the basis that the legislation establishing ECPs does not allow for such a blanket inclusion and to do so would be beyond the agency's statutory authority. MDOH Reply, at 4. MDOH suggested that any FQHC application could be submitted with a letter indicating where the required information is on the document. There are no facts in the record indicating that indemnity carriers fall uniformly within the requirements of ECPs. Absent such facts, a class cannot be deemed to be in compliance. The rule part is not defective for declining to deem indemnity carriers as being in compliance with the ECP designation process.

29. There is a history of service with Indian Health Service and Tribal health and social service clinics to the classes of clients served by ECPs. Under those circumstances, MDOH has the discretion to deem such entities as in compliance as

ECPs. MDOH indicated that it needs the information in the application and in the annual report for ECPs in order to carry out the Department's oversight function. That need is reasonably met through these rules. The rules are not defective for not deeming Indian Health Service and Tribal health and social service clinics as designated ECPs.

30. The Insurance Federation also suggested language to clarify that designation as an ECP would not require a health plan company to contract with an entity affiliated with the ECP. MDOH expressed its opinion that nothing the statute or rules would give anyone that impression, but had no objection to clearly stating that in the rule. MDOH modified part 4688.0050 to add the language suggested by the Insurance Federation. The new language is needed and reasonable and does not constitute a substantial change.

Proposed Rule 4688.0060 - Refusal to Contract.

31. In the event that a health plan company refuses to contract with an ECP, the health plan company must provide written notice stating the reason for that refusal under proposed rule 4688.0060. The proposed rule also makes available the dispute resolution methods in Minn. Stat. § 62Q.11. The proposed rule is needed and reasonable to inform ECPs when a health plan company will not contract for services and to afford a mechanism to resolve any outstanding dispute between the ECP and company over whether services should be provided.

Proposed Rule 4688.0070 - Payment.

32. Proposed rule 4688.0070 allows ECPs and health plan companies to mutually agree to a payment method, but limits capitation payment rates to the same rates afforded other health plan company providers. In the event a payment rate is believed to differ from the rate paid to nonECPs, a complaint process is established. The rule part is needed and reasonable as proposed.

Proposed Rule 4688.0080 - Information to Enrollees.

33. Health plan companies are required to inform their enrollees of the availability of ECP services under proposed rule 4688.0080. The information provided to enrollees must include the method of obtaining services from the ECP and a toll-free telephone number to the member services representative of the health plan company. The rule is needed and reasonable to ensure that persons needing ECP services have the information necessary to obtain those services and the opportunity for assistance in accessing those services.

Proposed Rule 4688.0090 - Prior Authorization.

34. Where a health plan company requires prior authorization before enrollees can access services, such prior authorization can be required for ECP services under proposed rule 4688.0090. The rule part prohibits imposing any more restrictive policy on the access to ECP services than is required of a health plan company's enrollees generally. The rule part is needed and reasonable to prevent discrimination in the provision of ECP services.

Proposed Rule 4688.0100 - Other Providers.

35. Proposed rule 4688.0100 allows, but does not require, a health plan company to make providers other than ECPs available to serve high risk and special needs populations. The rule part states explicitly that the rules do not require health plan companies to use ECPs for those populations. The last sentence of the rule part states the intent of MDOH that ECPs be among the provider resources available to high risk and special needs populations. The first two sentences of the rule part are needed and reasonable to dispel any confusion as to whether ECP services are the sole and exclusive services to be provided to those populations. The third sentence does not establish any requirements on providers or health plan companies and essentially restates in nonrule language the effective portions of the rule part. The third sentence is not needed in the rule part. There is a potential for persons reading the rule to conclude that the sentence is intended to have the effect of a rule and thereby grant some right on the part of the populations served by ECPs. Such a conclusion would be contradicted by the language earlier in the rule part, but is likely nonetheless. The third sentence constitutes a defect in the proposed rule and must be deleted. Deleting the third sentence clarifies the rule and does not constitute a substantial change.

Proposed Rule 4688.0110 - Coverage.

36. MDOH anticipates that health plan companies will cover designated services in their enrollee contracts. Proposed rule 4688.0110 is intended to clarify that designation as an ECP service does not create a requirement on a health plan company to cover that service. However, the proposed rule is worded in a fashion that suggests that payment on otherwise covered ECP services is optional on the part of the health plan company. This is not what MDOH intended. The first sentence of proposed rule 4688.0110 is unreasonable since that sentence misstates the intent of the rule. To cure this defect, the Judge suggests the following language:

Designation of a service included in the contract between the ECP and the health plan company as an ECP service does not require that a health plan company cover that service.

The suggested language clarifies the rule and does not constitute a substantial change. With a change to clarify the rule, proposed rule 4688.0100 is needed and reasonable.

Proposed Rule 4688.0120 - Conflict of Interest.

37. MDOH anticipates that some local governments will own a health plan and operate an ECP. In that event, the potential arises for a conflict of interest between the enrollee's interest in receiving ECP services and the local government's financial interest. Proposed rule 4688.0120 provides specific information must be disclosed

about the relationship and informs the enrollee of the option to file a complaint with a state agency rather than the health care plan. Leech Lake objected to this provision as an intrusion on the sovereignty of tribal governments. After further discussion with MDOH, the commentator agreed that this rule provision was not a problem at this time. MDOH has clearly stated that these rules are preempted by federal law and treaty obligations. The rule is needed and reasonable as proposed.

Proposed Rule 4688.0140 - Restrictions on Services.

38. Proposed rule 4688.0140 references Minn. Stat. § 62Q.14 to set standards on how services are provided by ECPs. The statute provides for the free choice of the enrollee of the provider for some types of sensitive health care services. The rule part also limits copayments for ECP services to the same extent and manner provided for copayments charges for services from nonECP providers. Fond du Lac suggested that requiring ECPs to require copayments could violate federal law. MDOH responded that the provision does not require ECPs to collect copayments, but failure to do so could reduce the overall amount received as reimbursement from a contracting health plan company. MDOH Reply, at 2. This outcome is reasonable, given the legislative intent that ECPs not get preferential treatment (or be discriminated against, for that matter) as compared to any other provider in the health plan company's network. The rule does not require any ECP to violate federal law. Proposed rule 4688.0140 is needed and reasonable.

Proposed Rule 4688.0160 - Annual Reports.

39. Upon designation as an ECP, proposed rule 4688.0160 requires an annual report from that provider to verify the provider's tax-exempt status, the sliding-fee schedule, transportation options available to clients, child care options available, linguistic service options available, culturally sensitive services available, CPT 95 codes of services provided, the number of clients served in targeted populations, and "other information relating to the continuing qualification of the entity for ECP designation as is reasonably necessary to enable the commissioner to carry out the duties under this chapter and Minnesota Statutes, section 62Q.19." All the items identified, save the last one, are needed and reasonable to assess the provider's continuing eligibility for ECP designation. The last item suffers from the same vagueness defect identified at Finding 20, supra. To cure this defect, the Judge recommends the following language:

Any other information, requested by the commissioner,
reasonably necessary to determine whether the entity continues
to qualify for ECP designation.

The modification clarifies what information is needed and the process by which that information will be required. The reporting date was proposed as March 1. Lynn Theurer, CHS Administrator of the Winona County Community Health Public Health Nursing Service, suggested moving the date to April 15. MDOH concurred and made that change. The new language does not constitute a substantial change. Winona County also suggested using the Annual Reports for Community Health Boards as a means to meet this requirement. MDOH has not restricted the manner in which the ECP provides the required information. In its reply, the MDOH proposed a modification to allow the reporting suggested by Winona County. Under the modified language, the ECP remains responsible for providing the information as a report. The rule, as

modified, is reasonably necessary to ensure that the ECP continues to remain eligible for ECP designation. The new language is not a substantial change.

Sovereignty Issues.

40. Fond du Lac questioned whether the proposed rules infringed upon the sovereignty of tribal governments. MDOH acknowledged that the rules would benefit from a clarification of the interplay (or lack thereof) between the rules and federal, state, constitutional, and treaty requirements. Language agreed upon between the commentator and MDOH is proposed as part 4688.0001. The language expressly requires the rules to be read in conjunction with existing law and treaty obligations. The last sentence reads “Nothing in these rules is intended to interfere with the sovereignty of Indian tribal governments, including, but not limited to, the manner in which they provide, pay for or charge for health care services.” The addition of the rule part is needed and reasonable. The words “but not limited to” are redundant, however. The Judge suggests deleting that phrase to ensure there is no confusion in the rule and that unnecessary language is not included. Such a change would not constitute a substantial change.

Publishing Names of Applicants and Sanctioned ECPs.

41. Medica/Allina noted that MDOH dropped an earlier draft provision that the names of applicants for ECP designation be published in the State Register. Medica/Allina suggested that this provision be reinstated and that the names of sanctioned ECPs be published as well. MDOH declined to do so, on the basis that the rules are “promulgated to govern ECP applicants and health plan companies, not the Commissioner of Health.” MDOH Reply, at 6. Such publication would be needed and reasonable, if proposed. MDOH has expressed its intent to provide notice of the information requested here. *Id.* The proposed rules are not defective for failing to include these publication provisions. MDOH has misconstrued the nature of administrative rules, however. The agency is bound by its own rules to the same extent as any applicant, ECP, health plan company, or member of the public. White Bear Lake Care Center v. Minnesota Dep’t of Public Welfare, 319 N.W.2d 7 (Minn. 1992).

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

CONCLUSIONS

1. The Minnesota Department of Health (MDOH) gave proper notice of this rulemaking hearing.
2. The MDOH has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.
3. The MDOH has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii), except as noted at Finding 26.

4. The MDOH has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Findings 20, 35, 36, and 39.

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

6. The Administrative Law Judge has suggested language to correct the defects cited in Conclusions 3 and 4, as noted at Findings 20, 26, 35, 36, and 39.

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

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

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

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

RECOMMENDATION

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

Dated this ___ day of February, 1996.

ALLEN E. GILES
Administrative Law Judge

Reported: Tape Recorded; No Transcript.