

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF JOBS AND TRAINING

In the Matter of Proposed  
Amendments to the Rules  
Relating to Rehabilitation  
REPORT OF THE  
Services for Blind and  
LAW JUDGE  
Visually Handicapped  
Persons, Minn. Rules Part  
3325.0100 - 3325.0500.

ADMINISTRATIVE

The above-entitled matter came on for hearing before Bruce D. Campbell, Administrative Law Judge, at 9:30 a.m. on December 15, 1990, in Room 5 of the State Office Building, 100 Constitution Avenue, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.01 - 14.28 (1990), to determine whether the proposed amendments to the rules of the Department of Jobs and Training relating to rehabilitation services for blind and visually handicapped persons should be adopted by the Agency.

The Agency was represented at the rulemaking hearing by Steven Liss, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101. Members of the Agency panel appearing at the hearing were Richard Hokanson, Richard Strong and William Kaze, Minnesota Department of Jobs and Training, Services for the Blind and Visually Handicapped Division, 1745 University West, St. Paul, Minnesota 55104-3690.

The hearing register was signed by eight persons. Eight members of the public provided oral testimony at the hearing. All persons desiring to testify were given an opportunity to do so. The record remained open through January 4, 1991, for the submission of initial written comments. The period for responsive

comments closed on January 9, 1991. At the hearing herein, the Agency offered SSB Exhibits A - I as jurisdictional documents. Public Exhibits I - 3 were also received. During the initial comment period, which expired on January 4, 1991, the Administrative Law Judge received the timely-filed comments which have been included in the record. As authorized by Minn. Stat. § 14.15, subd. 1 (1990), three business days were allowed for the filing of responsive comments. The only responsive comment received by the Administrative Law Judge was filed by the Agency. In addition to timely-filed comments, the Administrative Law Judge also received a late-filed comment which has been marked as late filed and included with the official record. That comment, however, was not considered in determining whether the Agency has established the need for and reasonableness of its proposed rules. On January 9, 1991, the record of this rulemaking proceeding finally closed for all purposes.

The Commissioner of the Department of Jobs and Training must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of the Department of Jobs and Training of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, he must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

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

When the Commissioner files the rule with the Secretary of State, he 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 November 8, 1990, the Agency filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.

2. On November 13, 1990, a Notice of Hearing and a copy of the proposed rules were published at 15 S.R. 1102 - 1120.

3. On November 7, 1990, the Agency mailed the Notice of Hearing to all persons and associations who had registered their names with the Agency for the purpose of receiving such notice.

4. On November 8, 1990, the Agency filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
- (d) The names of Agency personnel who would represent the Agency at the hearing, together with the names of any other witnesses solicited by the Agency to appear on its behalf.

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

5. At the request of the Administrative Law Judge, at the hearing herein, the Agency provided for the record a copy of its Notice of Solicitation of Outside Opinion, published on February 6, 1989, at 13 S.R. 1897, and a copy of the rules as published in the State Register. See, Finding 2, supra. The Agency did not receive any outside opinions or comments in response to its Notice.

The two enumerated documents received by the Administrative Law Judge at the hearing, were available for inspection at the hearing and at the Office of Administrative Hearings from the date of the hearing until the record closed on January 9, 1991.

6. The period for submission of written comments and statements remained open through January 4, 1991, the period having been extended by Order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on January 9, 1991, the third business day following the close of the comment period.

7. Minn. Stat. § 14.131 (1990), requires that the Agency have available to the public a copy of the Statement of Need and Reasonableness before it orders a publication of a notice of rulemaking in the State Register. Minn.

Stat. § 14.14, subd. 1a (1990), requires that the notice be published in the State Register at least 30 days prior to the date set for the hearing. Hence Minn. Stat. §§ 14.131 and 14.14, subd. 1a (1990), require that the Statement of Need and Reasonableness be available to the public at least 30 days prior to the hearing. The Statement of Need and Reasonableness was at least available to the public at either the Agency or the Office of Administrative Hearings beginning on November 8, 1990. That date was prior to the date of publication of the Notice of Hearing in the State Register, November 13, 1990, and was 30 days prior to the date of the hearing, December 15, 1990.

8. Minn. Rules pt. 1400.0300 (1989), requires that the Agency prefile with the Administrative Law Judge the documents stated in Finding 1. Those documents are to be filed "prior to giving notice of the hearing." Minn. Rules pt. 1400.0300, subd. 1a (1989). Although the documents were filed with the Administrative Law Judge prior to the publication of notice in the State Register, they were not filed with the Administrative Law Judge prior to the date notice of the hearing was mailed to the public. The Affidavit of Mailing the Notice of Hearing and Certificate of Mailing List show that the Agency accomplished service by mail to the public on November 7, 1990, the same date that they mailed the documents for pre-filing to the Administrative Law Judge. The documents were not received by the Administrative Law Judge until November 8, 1990, one day after the Notice of Hearing was placed in the mail to

the public. The purpose of Minn. Rules pt. 1400.0300, subp. 1a (1989) is to allow the Administrative Law Judge to review the sufficiency of the Agency's documents before public notice of the hearing is mailed. If, for example, the Notice of Hearing does not contain the required material or if the Statement of Need and Reasonableness is defective, the Administrative Law Judge can require compliance with the Minnesota Administrative Procedure Act and governing rules so that the Agency does not engage in a hearing process that includes a fatal jurisdictional defect. The public interest is also served by having the Administrative Law Judge review the sufficiency of the documents before the public receives notice of the hearing and expends money and effort in participation.

9. The Agency has not strictly complied with Minn. Rules pt. 1400.0300, subp. 1a (1989), in that they mailed the Notice of Hearing to the public on the same day they mailed the documents to be prefiled to the Administrative Law Judge. The Agency, however, has complied literally with the notice requirements of Minn. Stat. § 14.131 (1990), and § 14.14, subd. 1a (1990). The public has received the required 30-day notice of the rulemaking proceeding and has had the statutory period to review a sufficient Statement of Need and Reasonableness. At most, the Agency deprived itself of its ability to have the Administrative Law Judge review the jurisdictional documents in advance. Since the jurisdictional documents were in all respects appropriate, the failure by the Agency to comply strictly with Minn. Rules pt. 1400.0300, subp. 1a (1989), is, at most, a harmless procedural error which did not prejudice the rights of the public to participate fully in this rulemaking proceeding. The Administrative Law Judge, therefore, finds that the Agency has substantially complied with Minn. Rules pt. 1400.0300, subp. 1a (1989). Its mailing of a Notice of Hearing to persons on its mailing list on the same day it mailed the documents to be prefiled to the Administrative Law Judge does not result in a jurisdictional defect.

10. The Agency also failed to comply literally with Minn. Rules pt. 1400.0600 (1989). It did not prefile a copy of the State Register in which the Notice of Hearing and proposed rule amendments were published or its Notice of Intent to Solicit Outside Opinion. Minn. Rules 1400.0600 (1989), requires that those documents be filed with the Administrative Law Judge at least 25 days prior to the hearing. The appropriate publications were, however, made in the State Register. see, SSB Ex. H and SSB Ex. A. Moreover, at the request of the Administrative Law Judge, copies of those publications were provided at the hearing. No member of the public asked to review those documents prior to the hearing. If such a request had been made, they could have been obtained from the Agency prior to the hearing. The Administrative Law Judge finds that the failure of the Agency to prefile the copies of the two publications in the State Register at least 25 days prior to the hearing is not such a procedural error as would be jurisdictional.

11. As consequence of Findings 9 and 10, supra, the Administrative Law Judge finds that the Agency has substantially complied with all relevant jurisdictional requirements, necessary to a valid rulemaking proceeding. The procedural irregularities stated in Findings 8 and 10, supra, are harmless errors which do not affect the validity of this rulemaking proceeding or deprive the Administrative Law Judge of jurisdiction.

Notary of-Proposed Amendments

12. The proposed amendments modify Minn. Rules pt. 3325.0100 - 3325.0500 which relate to the provision of rehabilitative services for blind and visually handicapped persons. Some of the changes are technical amendments which only affect readability, other amendments were necessitated by changes to federal regulations which govern two of the Agency's programs and other amendments reflect policy changes the Agency wishes to adopt.

Special Notice

13. These rules do not affect local government expenditures, agricultural lands, small businesses or state fees. Hence, no special notice or additional substantive requirements for the adoption of rules are imposed upon the Agency by statute or rule.

Statutory Authority

14. Minn. Stat. § 248.07, subd. 14a (1990), in relevant part, provides:

The commissioner shall adopt rules to set standards for the provision of rehabilitative services to blind and visually handicapped persons. The rules shall, at a minimum, contain program definitions and set standards for basic eligibility, including financial need eligibility and definitions of legal blindness.

The rules shall provide for the development of formal rehabilitation plans for eligible clients and shall govern the provision of direct rehabilitative services to clients, including placement and training programs, and providing tools and equipment. In addition, the rules shall set standards for appeals filed under subdivision 15 and include specific requirements for timely responses by the agency.

Minn. Stat. § 248.07, subd. 14a (1990), authorizes the rules proposed in this proceeding and, unless specifically otherwise stated in this Report, the rules proposed by the Agency are within the authority of the Commissioner under the statute.

## IntrQduction and-Definitions

15. The Agency administers four specific programs for the blind and visually handicapped. These programs include the Vocational Rehabilitation Program, the Independent Living Rehabilitation Program, the Self-Care Rehabilitation Program and the Child Rehabilitation Program. Rules relating to the Vocational Rehabilitation Program and Independent Living Rehabilitation Program must be coordinated with governing federal regulations under which federal funds for these two programs are made available to the State pursuant to the Federal Rehabilitation Act. A discussion of the federal regulations, as applicable, are contained in the Statement of Need and Reasonableness (SONAR,

SSB Ex. F) and the Reply Comments of the Department of Jobs and Training, January 9, 1991. The governing federal regulations were substantially amended in 1988. Hence, a need arose to conform the substance and language of the Minnesota Rules to the requirements of the amended federal regulations, as a condition to the continued receipt of federal funding, at least as respects the two federally funded programs. The proposed rules first modify the definitional sections which pertain to all four programs and to the rules regarding the general administration of the programs. They then make virtually identical changes in the separate rules governing each of the four programs previously identified. Finally, amendments are made to the administration sections which are generally applicable to the administration of all four programs.

16. To the extent that an individual provision of the proposed rules has not been the subject of public comment and it is not beyond the statutory authority of the Agency, or otherwise legally inappropriate, the need for and reasonableness of those provisions have been established in the hearing record, particularly the SONAR. All such provisions are hereby found to be both needed and reasonable for the reasons stated in the SONAR. Moreover, the adoption of such provisions by the Agency are within the statutory authority of the Commissioner under Minn. Stat. § 248.07, subd. 14a (1990). Likewise, changes to the proposed rules advanced by the Agency not specifically discussed herein were shown to be authorized and not to involve prohibited substantial changes. The remainder of this Report will consider those provisions of the proposed rules which received some public comment at the hearing or in later written submissions.

17. Part 3325.0110, subp. 23E defines "sheltered employment". The National Federation of the Blind of Minnesota, Inc. states that the Agency should require in the definition of "sheltered employment" that any facility engaged in sheltered employment must not be physically housed with any facility that provides rehabilitative services. The Federation desires to achieve

physical separation between adjustment-to-blindness training programs and sheltered workshops. While such a substantive provision in a rule may be appropriate, the only amendment the Agency makes to subpart 23E, defining sheltered employment, is a technical, nonsubstantive change in language. As such, the Agency need not rejustify the need for and reasonableness of the entire provision, but only its change. Minn. Rules part 1400.0500, subp. 1 (1989). The change made to subpart 23E is needed and reasonable as being consistent with a stylistic change in the manner of referring to clients throughout the rules. Hence, the Administrative Law Judge finds that the Agency's amendment to subpart 23E is both needed and reasonable. The suggestion of the National Federation of the Blind of Minnesota, Inc. for a physical separation between places of sheltered employment and facilities providing adjustment-to-blindness training is a matter which the Agency can consider in a separate rulemaking proceeding, if it so chooses.

18. Part 3325.0110, subpart 23F is a new definition of "supported employment". The definition is taken verbatim from the governing federal regulation, 34 C.F.R. § 361.1(c)(2). The Administrative Law Judge finds that the definition is needed and reasonable as being consistent with the definition contained in the applicable federal regulation. Legal Advocacy for Persons with Developmental Disabilities argues that the definition used for supported employment should not be the federal definition but a definition of that term found in Minn. Stat. § 268A.01, subd. 13 (1990). That definition of the term is the definition used by the Minnesota Division of Rehabilitation Services and

the Minnesota Department of Human Services. The definition contained in Minn. Stat. § 268A.01, subd. 13 (1990), is less restrictive than the federal definition. Adoption of a less restrictive definition of supported employment than that in the federal regulation, however, could jeopardize the ability of the Agency to obtain federal funds for its Vocational Rehabilitation and Independent Living Programs. The Agency currently receives federal funds under Title VI-C of the Federal Rehabilitation Act to provide supported employment services. It also uses federal money under section 110 of Title I of the Act to assist clients in achieving the gainful employment outcome of supported employment. The Agency must report its use of funds to the federal government as a condition of receiving federal funds. Use by the State of a more liberal definition than the federal funding source would be inconsistent with the federal funding requirements and could jeopardize the State's ability to obtain funds for supported employment activities. Reply-Comments of the agency January 9, 1991, p. 1. Although Legal Advocacy for Persons with Developmental Disabilities argues that the federal definition may be liberalized, until that occurs, if at all, the Administrative Law Judge agrees with the Agency that the use of a more liberal definition could jeopardize the State's ability to obtain federal funding for supported employment services. If the federal definition changes in the future, it would be appropriate for the Agency to amend its rules to reflect the revised federal position.

19. Part 3325.0110, subp. 28A defines an "individual with severe disability" as follows:

"Individual with severe disability" means a disability that causes a person to be an individual with severe handicaps as defined in subpart 28B.

This definition is both needed and reasonable as being consistent with the applicable federal regulations. The National Federation of the Blind of Minnesota, Inc. suggests that the definition be rewritten to clarify whether the subject of the definition is a severe disability or an individual with a severe disability. As currently drafted, the provision defines a severe

disability and not a person with a severe disability. While not affecting need and reasonableness, the Administrative Law Judge strongly suggests to the Agency that it clarify this section, in accordance with the wording of subpart 28B as follows:

Subp. 28A. Individual with severe disability.  
"Individual with severe disability" means an individual with a disability that causes that person to be an individual with severe handicaps as defined in subpart 28B.

#### Substantive Provisions

20. Part 3325.0140, subp. 2, part 3325.0220, subp. 2, part 3325.0290, subp. 2 and part 3325.0360, subp. 2 make eligibility for each of the four assistance programs contingent upon satisfying stated conditions. One of the items of information that must be presented for the determination is an "assessment of the applicant's overall general health". This assessment substitutes for a written report of a general medical examination by a

physician required by the existing rule. Under the four separate amendments, the assessment of overall health could be made by a rehabilitation counselor, a nurse, a physician, or a physician's assistant. The final eligibility determination is made by the rehabilitation counselor, and not medical personnel under the Agency's rules and federal regulations. If, however, it is appropriate to have an accurate assessment of the applicant's overall general health, it may be questioned whether a rehabilitation counselor necessarily possesses the expertise to make that evaluation. The National Federation of the Blind of Minnesota, Inc. argues that a rehabilitation counselor does not necessarily have the expertise to Judge the applicant's general health or the state of his or her disabilities other than blindness. The Agency argues that this change is needed and reasonable and notes in the SONAR that the final eligibility determination is to be made by the counselor and not a medical professional. Moreover, there is no direction in the federal regulations as to who should make the overall health assessment. It is asserted that there will be enough information available in the applicant's file, including the ophthalmological examination by a health care professional to allow the rehabilitation counselor to make an informed judgment. The Agency concludes "reports from those professionals, in conjunction with existing medical information, is usually sufficiently detailed for the counselor to make a determination of general health." statement of Need and Reasonableness p. 7. The Agency also concludes that eliminating the requirement of a physician's general health examination will also speed the eligibility process. It is asserted that the requirement for a general physical examination by a physician has deprived some clients of timely access to rehabilitative services. The Agency also asserts that, many times, the rehabilitation counselor can determine the applicant's overall general health by reviewing the medical records provided and questioning the applicant.

A rehabilitation counselor, however, is not necessarily skilled in the health sciences. The rule as written would always allow a rehabilitation

counselor, without medical training or expertise, to perform an assessment of the applicant's overall general health, without consulting a health care professional. The Administrative Law Judge finds, therefore, that the rule which allows a rehabilitation counselor, under all circumstances, to make an overall general health assessment of the applicant is unreasonable, as not being within the necessary expertise of the rehabilitation counselor.

21. To correct the defect stated in Finding 20, supra, the Agency must revise the four sections previously noted to read, substantially, as follows:

B. An assessment of the applicant's overall general health conducted by a physician, or a physician's assistant, or a nurse. An assessment of the applicant's overall general health may be conducted by a rehabilitation counselor if the medical records of the applicant provided to the rehabilitation counselor include an assessment of the applicant's overall general health conducted by a physician, physician's assistant or nurse within the previous 12 months.

The Administrative Law Judge has selected a period of 12 months as establishing that the prior assessment was reasonably contemporaneous with the eligibility determination. The Agency, however, may specify a different length of time as long as the period selected ensures that the counselor will be reviewing

records that reasonably reflect the applicant's current condition. If the Agency corrects the defect as noted above, the change would not result in a prohibited substantial change. Minn. Rules pt. 1400.1100, subp. 2 (1989).

22. Part 3325.0170, subp. 5, part 3325.0240, subp. 5, part 3325.0310, subp. 5 and part 3325.0380, subp. 5 each provides, in substantially similar language, for changes in the written program plan which may be initiated by the Agency or the client's rehabilitation counselor without the approval and signature of the client. Each provides for an amendment without the signature of the client when a closure amendment is made. Each of those closure decisions initiated by the Agency, however, must also be accompanied by a statement of the client's rights to formal and informal administrative review. Part 3325.0170, subp. 6, which relates to the vocational rehabilitation program, also provides for written notice of appeal rights when the Agency proposes any change in a client's written plan. The amendments to the sections noted which authorize a change in the written plan without the client's signature when closure is concerned or, under the vocational rehabilitation program, when the Agency proposes a change in the written plan, are both needed and reasonable. In many cases, the client will not agree to closure. In any event, the client will be specifically advised of his or her rights to both formal and informal review under the rules. Under such circumstances, the client is protected against arbitrary action by the review provisions of the rules. This portion of the proposed amendment will allow the Agency to deal more efficiently with a client and plan more expeditiously and practically when the client does not consent to the termination of services. The interests of the client are adequately protected against arbitrary action by the review rights available under the rules.

23. Each of the sections stated in Finding 22, supra, also amends each section noted by placing the word "substantial" before the word "changes" so as to eliminate the requirement for consent of the client when the Agency or a

rehabilitation counselor deviates from the written plan, regarding the client's service needs, financial situation, health, intermediate rehabilitation objective, or rehabilitation goal, when the administrator or counselor determines that the change is not "substantial". None of the four parts noted require any notification to the client of the change or the decision by the administrator or counselor that a deviation is not deemed "substantial". The review provisions of the rules, however, appear to give the client rights to both informal and formal review of any decision of a rehabilitation counselor or the Agency which relates to the provision or denial of rehabilitation services. Presumably, these review rights would relate, even, to decisions of the administrator or counselor that a change or deviation is not a substantial change or deviation from the written plan. Under the sections as drafted, the Agency or a counselor could decide that a decision regarding the provision of services is not substantial and not obtain the signature of the client to the adjustment or deviation or even notify the client of the determination. In the meantime, the client, ignorant of the decision, would not seek either formal or informal review of the determination. Although the time for perfecting an appeal appears to run from the date of actual notice of the decision to the client, in the absence of a formal notification, that date may be impossible to prove. Moreover, the rule is not clear as to the time for requesting a formal review of decisions under nonfederally funded programs if no informal review is sought prior to the request for a formal review. An administrative agency that makes decisions affecting the rights of an individual must, under due process, provide that individual with notice of its determination and the grounds for

the decision. Anderson-v. Moberg Rodlund Sheet Metal Co. 316 N. W. 2d 286 (Minn. 1982) ; In re Emmanuel Nursing Home 411 N. W. 2d 511 (Minn. App. 1987) Central-Care-Center v.-Wynia, 448 N.W.2d 880 (Minn. App. 1989). The failure of the rule to require specific notice of appeal rights also raises serious due process considerations when legally unsophisticated persons are the subject of the government action. See, Wilson v. Health & Hospital Corp of Marion County, 620 F.2d 1201 (7th Cir. 1980); Memphis Light Gas and Water Division v. Craft, 436 U.S. 1 (1978). The rule, as proposed, does not provide for notice to the client of the deviation and appeal rights, as required by due process. Minn. Stat. § 14.50 (1990) requires the Agency in proposing rules to fulfill "all relevant substantive . . . requirements of law or rule . . . ." A notice provision is such a requirement. Moreover, it is clear from the hearing record that this omission by the Agency was the product of not considering the issue, rather than a reasoned determination that the legal requirement would be satisfied apart from the proposed rule. The failure to include a notice provision relating to a decision that a deviation from the written plan is deemed not substantial violates Minn. Stat. § 14.50 (1990).

24. To correct the defect stated in Finding 23, supra, the Agency or counselor must notify the client in writing of deviations from the written plan, even with respect to matters not considered substantial. That notice must include a summary of the deviation the Agency or counselor will initiate, the reason for that deviation and a citation to the appeal rights of the client. Appropriate language accomplishing that result can be found in part 3325.0170, subp. 6. Written notification to the client would not need to be sent by certified mail, as long as the appropriate evidence was included in the client's file that the notice had been sent by a named individual on a stated date. If the Agency amends the sections noted in accordance with this Finding, that change would only reflect existing law relating to the right to notice and

would not constitute a prohibited substantial change within the meaning of Minn. Rules pt. 1400.1100 (1989).

2 5 . Part 3325.0420, subp. 14 amends the general program administration provisions as they relate to vocational training services. Under the existing rule, an individual could not receive Agency assistance for training at a private or non-Minnesota institution of higher learning in an amount greater than the amount charged by Minnesota public colleges, universities or technical institutes, unless such training was not available at a public Minnesota institution. Moreover, since the university system makes higher education available to the blind and visually handicapped without charge, a blind or visually impaired person could not receive any public assistance through the Agency for attending a private college or university or any non-Minnesota institution of higher learning, unless the specific, necessary training was not available at a public Minnesota institution. This provision reversed an earlier approach taken by the Agency. Under the rule operative during the 1970s, an individual could receive public funds for post-secondary training at private or non-Minnesota colleges or universities. The proposed rule amends the section by enumerating criteria A - C, which, if satisfied, would allow public support for a blind or visually impaired student attending a Minnesota private college or university or a non-Minnesota institution of higher learning. By volume, this subpart received the most comment of all proposed amendments. A number of individuals opposed the rule amendment. Some stated that the expenditures would be improvident and deprive the program of necessary funds for non-college training. Some persons noted that 80 percent of the clients of the Agency are over the age of 55 and would not likely benefit from

the liberalized tuition support policy. Several persons commented that subpart 14C(2), as originally proposed, was inappropriate. That subpart only required that the private or non-Minnesota institution be "closer geographically to the client's home address". Witnesses testified about the options that would be available to a student living, for example, in St. Paul. A number of private colleges could be a few miles closer to the client's home address than the University of Minnesota. Other locations, such as Northfield, could also provide a number of private colleges several miles closer to an individual's home address than would the State university. It was argued that this is a poor reason to expend additional public funds. The persons who testified in support of the change stated that blind and visually handicapped people have a 70 percent unemployment rate. Under such circumstances, it is appropriate that blind and visually impaired students receive the best education possible to best fit them for later employment. Under appropriate circumstances, attending private institutions of higher learning or non-Minnesota colleges or universities could, in the long run, benefit taxpayers by giving the affected students a substantially increased earning power.

26. At the hearing and in its reply comments, the Agency proposed to amend this subpart of the rules by deleting subpart 14C(2) and adding another criteria, D, to read as follows:

D. The non-Minnesota institution is geographically closer to the client's home address.

In its reply comments, the Agency responded to the individuals who asserted that the effect of the provision will be to deprive other clients of assistance in favor of more expensive private or non-Minnesota post-secondary schools. As stated by the Agency, funds are available to serve adequately older persons via the Independent Living Program, the Self-Care Program and the Vocational Rehabilitation Program. In the recent past, the Agency has been successful in expanding the scope of those programs and providing necessary services.

Further, during fiscal year 1990, only 80 individuals received assistance from the Agency in post-secondary institutions of higher education. This includes persons only taking several courses and some short-term refresher courses. Hence, the financial impact of the subpart will not be substantial or adversely affect other clients. By eliminating geographic considerations for Minnesota institutions, the Agency has avoided a significant defect in its proposal as originally presented. The student who wishes to attend a private institution of higher learning or a non-Minnesota college or university must meet the remaining criteria under subpart 14A-C.

27. The Administrative Law Judge finds that the amendments to part 3325.0420, subp. 14, as altered by the Agency in its post-hearing responsive comments dated January 9, 1991, are both needed and reasonable in balancing appropriately the employment concerns of blind and visually handicapped college students with fiscal constraints. Since the changes to this section were responsive to public comments, do not result in a rule that is fundamentally different, or adversely affect public participation in the hearing process, the amendments to this subpart proposed by the Agency in its responsive comments are not prohibited substantial changes.

28. Part 3325.0440, which relates to financial participation by clients, requires that the degree of financial participation a client must provide must

be determined "on the relationship of the client's annualized average monthly income over the preceding six months less any income received for dependent children to the most recent estimate of the Minnesota median income levels as adjusted for a family size of one . . . ." Part 3325.0440, subp. 3. The effect of the various amendments to part 3325.0440 is to exclude a consideration of the client's nuclear family resources from consideration when a financial participation decision is made. All of the public comment relating to this section supported this change in the rule. The universal public comment was that blind individuals would be a financial burdens to their families and would not have an incentive to obtain necessary training if the resources of the nuclear family were considered in determining financial participation. Many persons testified that parents would not fund rehabilitative treatment for their children. The change in the rule would also relieve the Agency of the burden of dealing with family financial data. Families would be freed of the stigma of government review of their personal affairs. The changes in subpart 3 have received the unanimous support of the financial task force, the Minnesota Council for the Blind, and agreement from the Agency. SONAR, p. 15. The Administrative Law Judge finds that the amendments to part 3325.0440 are needed and reasonable.

29. Minn. Rules pt. 3325.0460 changes the circumstances under which the Agency will make available to a client a piece of equipment necessary for employment which costs more than \$300.00. Under the rule as amended, title to the equipment and responsibility for the cost of its maintenance passes to the client if two years have elapsed since services were terminated to the rehabilitated client and the client continues to use the equipment in a manner consistent with the plan under which the equipment was provided. Prior to the transfer of title, the equipment is subject to lease. Under the lease the

client must continue to use the equipment in a manner consistent with his or her written rehabilitation plan. During the lease period, maintenance responsibility rests with the Agency. One goal of rehabilitation is to make the client self-sufficient. To continue the Agency's title in the specialized equipment and its maintenance responsibility after rehabilitation has occurred would foster dependence by the rehabilitated client on the Agency. One mark of rehabilitation and self-sufficiency is an ability to bear the normal costs of daily living, including equipment maintenance. The provision for transferring title and maintenance responsibility to a rehabilitated client after a sufficient period of time has been endorsed in substance by the Financial Task Force, by the Council for the Blind, by the Agency and by a number of private individuals in written comments. No member of the public has opposed this provision of the rule. The Administrative Law Judge finds that the amendments to part 3325.0460 are needed and reasonable.

30. Part 3325.0480 amends the provision relating to administrative review. It substitutes the word "informal" before the word "review" in this section and states the federal requirement that a request for informal review may not be used to delay a more formal hearing for vocational rehabilitation and independent living program applicants or clients before an impartial hearing officer, unless the parties jointly agree to a delay. The changes to both the heading and the internal portions of the rule, by adding the word "informal" before the word "review" are technical changes of language made only to differentiate the informal review process from the formal review process. The amendment to subpart 5 of part 3325.0480 is necessary and reasonable to clarify the relationship between the informal review process and formal review decisions. This subpart is also consistent with, and required by, 34 C.F.R.



□ 361 . 48. Legal Advocacy for Persons with Developmental Disabilities commented negatively on these amendments to part 3325.0480, since the part retains the requirement that the director receive a request for informal review no more than 30 days after the applicant or client is notified of the action which is to be subject to informal review. That provision, however, was included in the rule currently in effect. Since the Agency has not attempted to amend or change the 30-day requirement, they need not establish the need for and reasonableness of that portion of the rule which they do not seek to amend. Minn. Rules part 1400.0500, subp. 1 (1989). The Administrative Law Judge finds that the proposed amendments to Minn. Rule pt. 3325.0480 are both needed and reasonable.

31. Part 3325.0500 sets out a formal review process applicable to the two federally funded programs -- the Vocational Rehabilitation Program and the Independent Living Program. Under the rules, an informal review may be had by any participant in one of the four programs previously enumerated. Formal review under the contested case procedures of Minn. Stat. §§ 14.48 - 14.62 (1989), is available to the two nonfederally funded programs, the Child Rehabilitation Program and the Self-Care Program. In the part relating to the formal review process applicable to the federally funded programs, reference is made to an impartial hearing officer. There is no requirement that the impartial hearing officer have legal training or any particular expertise. There is no statement of who may serve the function of impartial hearing officer and there is no specific statement of a requirement to preserve testimony at the impartial hearing. Under stated criteria, the director of the division may review and reverse a decision of the informal hearing officer. The final decision of the director is subject to judicial review, presumably as a final action of an administrative agency. This part contains no reference to the contested case provisions of the Minnesota APA.

32. The Agency asserts that this part is necessary and reasonable because it is consistent with 34 C.F.R. § 361.48. Except for subpart 5, part 3325.0500 is taken almost verbatim from the applicable federal regulation. That regulation, 34 C.F.R. § 361.48, does not detail the basis on which the Agency can review the decision of the impartial hearing officer. The regulation does, however, require the Agency to formulate and adopt criteria under which that review will take place. There is no stated requirement in the regulation that the agency hearing be a contested case within an individual state's administrative procedure act.

33. At the hearing, the Administrative Law Judge questioned the Agency panel about the provision. The Agency did not clearly specify whether they intended the director's review to be the type of review that would be made of a recommendation by an Administrative Law Judge in a normal contested case, or whether the review was meant to more closely parallel the judicial review that a court would make of a final decision of an administrative agency under Minn. Stat. § 14.69 (1990). An administrative agency usually need not adopt the recommendation of an Administrative Law Judge or other impartial hearing officer. It may not, however, simply ignore his or her determination. It must, to an extent, explain deviations from the decision of the impartial hearing officer. *City of Moorhead v. Minnesota Public Utilities Commission*, 343 N.W.2d 843, 847 (Minn. 1984); *Hymanson v. City of St. Paul*, 329 N.W.2d 324, 326-27 (Minn. 1983); *Beaty v. Minnesota Board of Teaching*, 354 N.W.2d 466 (Minn. Ct. App. 1984); *Beck, Bakken, Muck*, Minnesota Administrative Procedure 241-42 (Butterworth 1987). Given the criteria for the director's review

contained in part 3325.0500, subp. 5C, the Agency is apparently attempting to formulate a middle ground in its criteria under which the director could review and reverse a determination of the impartial hearing officer for the reasons stated in Minn. Stat. § 14.69 (1990), and for described instances in which the impartial hearing officer has not given "appropriate and adequate" attention to stated factors. The decision of the impartial hearing officer will be a final decision unless reviewed by the director and that review can only occur under the stated criteria.

34. Part 3325.0500 does not specify whether the formal hearing available under this subpart is a contested case within the definition contained in Minn. Stat. § 14.02, subp. 3 (1990). In the rule governing formal hearings for the nonfederally assisted state programs, Minn. Rule pt. 3325.0490, the Agency has clearly determined that hearing is a contested case under the Minnesota Administrative Procedure Act.

35. The Administrative Law Judge finds that the hearing provided for in part 3325.0500 is a contested case hearing within the definition contained in Minn. Stat. § 14.02, subd. 3 (1990), and that, therefore, the contested case provisions of the Administrative Procedure Act are applicable to such hearings, except as the requirements of the APA are modified by the governing federal regulation, 34 C.F.R. § 361.48 (1988). Minn. Stat. § 14.57 makes the APA generally applicable to hearings conducted by a state administrative agency unless otherwise required by law. Minn. Stat. § 14.02, subd. 3 (1990), defines a contested case as:

a proceeding before an agency in which the legal rights, duties or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

Minn. Stat. § 14.02, subd. 2 (1990), defines an agency as:

any state office, board, commission, bureau, division, department, or tribunal, other than a judicial branch

court and the tax court, having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases.

The right to a hearing, in this case before the Agency with final decisionmaking authority vested in the director, arises by virtue of 34 C.F.R. § 361.48 (1988). It cannot be denied that the Agency has statewide authority and statewide jurisdiction to adjudicate contested cases. The APA will be applicable to the hearings mandated by 34 C.F.R. § 361.48 (1988), then, if the word "law" contained in Minn. Stat. § 14.02, subd. 3 (1990), includes federal statutes and regulations.

The ordinary usage of the term "law" in a statute is broad enough, unless the context clearly indicates otherwise, to include federal statutes. A law is merely a rule of action or conduct duly prescribed by the controlling legislative authority. 52A C.J.S., LAW; Board of Supervisor of Elections of Anne Arundel County v. Attorney General , 246 Md. 417, 229 A.2d 388, 394 (1967). There is no statement in Minn. Stat. § 14.02, subd. 3 (1990), which would limit the application of the word "law" to a state statute or regulation. It is clear that regulations are laws, as that term is understood. In re-Deyo's-Estate,

180 Misc. 32, 42 N.Y.S.2d 379, 386 (1943); Irving Trust Co. v. Nationwide Leisure Corp. 93 F.R.D. 102, 111 (S.D.N.Y. 1981). Although the Minnesota court has never ruled directly on the meaning of the word "law" in Minn. Stat.

□ 14.02, subd. 3 (1990), it has held that the phrase "constitutional right" in the statute extends to a federal constitutional right. LK\_v. Gregg, 380 N.W.2d

1 45, 1 50-52 (Minn. App. 1 986) Matter of Implementation of Engery Conservation

368 N.W.2d 308, 312 (Minn. App. 1985); Cable Communications Board v, Norwest

Cable, 356 N.W.2d 658, 666 (Minn. 1984); MT-Properties -Inc.\_v.

Alexander, 433

N.W.2d 886, 891 (Minn. App. 1988); Setty v. Minnesota State College

Board , 235

N.W.2d 594, 596 (Minn. 1975). Hence, if a federal constitutional right is

within the phrase "constitutional right" contained in Minn. Stat. □

14.02,

subd. 3 (1990), a federal law or regulation must be within the term "law" contained in the same section. Moreover, the APA contains internal evidence

that the right to a hearing conferred by a federal regulation is a contested

case when the final decisional authority is a state agency, as defined in Minn.

Stat. □ 14.02, subd. 2 (1990). Minn. Stat. □ 14.03, subd. 2 (1990),

specifically exempts from the contested case provisions the unemployment insurance program and the social security disability determination program in

the Department of Jobs and Training. The social security disability regulations

are federal regulations interpreted by a state agency. If the fact that the

regulations interpreted are federal law would have prevented those hearings

from being contested cases, there would have been no need to seek a specific

exemption to the contested case procedures of the APA.

36. Part 3325.0500 does not contain a reference to the contested case

procedures of the Minnesota Administrative Procedure Act. The question then

arises as to whether the rule is defective for failing to specify that the

hearing is a contested case, subject to the APA and Office of Administrative

Hearings rules, except as specifically varied by the governing federal regulation. Minn. Stat. □ 14.02, subd. 4 (1990), defines a rule as an

"agency

statement of general applicability and future effect . . . adopted to implement

or make specific the law enforced or administered by it . . . ." Under the definition, a rule must be sufficiently specific so as to advise affected persons of the requirements of the rule and make specific the law administered.

It is necessary that part 3325.0500 adequately advise persons of their hearing rights and the method of perfecting those rights. See, *Anderson v. Moberg Rodlund-Sheet Metal Co.*, 316 N.W.2d 286 (Minn. 1982); *In-re-Emmanuel Nursing Home*, 411 N.W.2d 511 (Minn. App. 1987). By failing to include a specific reference to the APA in part 3325.0500, the Agency's rule does not make sufficiently specific the law it administers within Minn. Stat. § 14.01, subd. 4 (1990).

37. To correct the defect, the Agency must insert a specific reference to the Administrative Procedure Act in this section. The following language would accomplish that objective:

The hearing conducted under this part is a contested case hearing, governed by the Minnesota Administrative Procedure Act, except as otherwise hereinafter provided.

Since a reference to the APA is legally required, the insertion of the stated language, or a variant accomplishing the same purpose, would not be a prohibited substantial change.

38. Part 3325.0500, subp. 5 is a statement of the grounds under which the director may review a decision of the impartial hearing officer. The governing

federal regulation, 34 C. F. R. § 361.48(c)(2)(vi), requires that the criteria by which the Agency will review the decision of the impartial hearing officer be stated in advance. At the hearing, the Agency proposed to amend part 3325.0500, subp. 5. In subpart 5B, in line 3, the word "policy" is stricken and the words "law, regulation or rule" is inserted. In subpart 5C(6), the present language is stricken and the following is inserted: "the state statutes and rules as they relate to specific issues in question." Responsive Comments of the Department of Jobs and Training January 9, 1991, p. 1-2. This change was made in response to comments by Legal Advocacy for Persons with Developmental Disabilities, December 21, 1990. In those comments, the organization argued that, under Minnesota law, policy statements do not have the effect of law unless specifically adopted as rules. Appeal of Jongquist 416 N.W.2d 915 (Minn. App. 1990). The Administrative Law Judge agrees that the references to "policy" in the rule, as proposed, are inappropriate, and the decision of the Agency to withdraw those references and substitute the proposed language is legally required. Since the change proposed by the Agency is required by law and is within the comments in the rulemaking record, it is not a prohibited substantial change. Adoption of criteria under part 3325.0500, subp. 5 is needed because it is required by 34 C.F.R. § 361.48(c)(2)(vi). The criteria proposed by the Board are reasonable in that they balance the freedom of the impartial hearing officer with the duty of the Agency to administer the federal programs.

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

#### CONCLUSIONS

1. The Department of Jobs and Training gave proper notice of the hearing in this matter.
2. The Agency has fulfilled the procedural requirements of Minn. Stat.

□□ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule, except as noted at Findings 8-10, supra. The procedural irregularities noted in Findings 8-10, supra, are not defects which would deprive the Administrative Law Judge of jurisdiction or the Agency of the authority to proceed to adopt the rules. ate, Finding 11, supra.

3. The Agency has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. □□ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) (ii), except as noted at Findings 23 and 36, supra.

4. The Agency has documented the need for and reasonableness of its proposed rules with 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 Finding 20, supra.

5. The amendments and additions to the proposed rules which were suggested by the Agency 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 action to correct the defects cited in Conclusions 3 and 4, supra, as noted at Findings 21, 24 and 37, supra.

7. Due to Conclusions 3, 4 and 6, supra, this Report has been submitted 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 Agency 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 specifically otherwise noted above.

Dated this            day of February, 1991.

BRUCE D. CAMPBELL  
Administrative Law Judge

Reported: Tape Recorded.