

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF JOBS AND TRAINING

In the Matter of Proposed Adoption
of Rules of the State of Minnesota
THE
Governing Vocational Rehabilitation
JUDGE
Services, Minnesota Rules, Parts
3300.5000 to 3300.5060.

REPORT OF
ADMINISTRATIVE LAW

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on November 30, 1993, at 9:00 a.m. in Room 503, IRS Training Center, Galtier Plaza, 175 East Fifth Street, 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 Jobs and Training (the 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 Department after initial publication are impermissible substantial changes.

The Department was represented by Donald E. Notvik, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130. The Department's hearing panel consisted of Ncrena Hale, Assistant Commissioner; Kim Rezek, Director of Vocational Rehabilitation; Kathy Carlson, Manager of Program Planning and Development; Roberta Pisa, Rehabilitation Specialist; Myk McArdle, Rehabilitation Specialist; Tom Stephanie, Rehabilitation Specialist; and Lois Bendix, Clerical Executive. Approximately thirty-five persons attended the hearing. Twenty-two persons signed the hearing register. The Administrative Law Judge received nine agency exhibits and twelve public exhibits during the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until December 20, 1993, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five working days were allowed for the filing of responsive comments. At the close of business on December 28, 1993, the rulemaking record closed for all purposes.

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

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Department of actions which will correct

the defects and the Department may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected.

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

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

When the Department files the 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 November 23, 1992, the Department published a Notice of Solicitation of Outside Opinion on the proposal to adopt rules on vocational rehabilitation services at 17 State Register 1278.

2. On September 17, 1993, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules certified by the Revisor of Statutes;
- (b) the Order for Hearing;
- (c) the Notice of Hearing proposed to be issued;
- (d) the Statement of Need and Reasonableness (SONAR); and
- (e) a statement by the Department of the anticipated attendance at the hearing, if held.

3. On September 23, 1993, the Department filed the following documents with the Administrative Law Judge:

- (a) a revised Notice of Hearing and SONAR;
- (b) a statement by the Department of the anticipated

- (c) duration of the hearing, if held; and
- (c) a statement indicating that the Department intended to provide additional discretionary public notice of the hearing.

4. On October 5, 1993, the Department mailed the Notice of Hearing and a copy of the proposed rule to all persons and associations who had registered their names with the Department for the purpose of receiving such notice, all persons who requested a hearing on these rules, and all persons to whom additional discretionary notice was given by the Department.

5. On October 11, 1993, the Department published the Notice of Hearing and the proposed rules at 18 State Register 1025.

6. In response to the published notice and the mailing, the Department received over 25 requests from persons for a hearing on the proposed rules.

7. On November 17, 1993, the Department filed the following documents with the Administrative Law Judge:

- (a) a photocopy of the pages of the State Register containing the Notice of Hearing and the proposed rules;
- (b) the Notice of Hearing as mailed;
- (c) the Department's certification that its mailing list was accurate and complete as of October 5, 1993, and the Affidavit of Mailing the Notice to all persons on the Department's mailing list;
- (d) the Affidavit of Mailing the Notice to those persons to whom the Board gave discretionary notice; and
- (e) the names of Agency personnel or others solicited by it to appear.

8. On November 18, 1993, the Department filed with the Administrative Law Judge the comments it had received in response to its Notice of Solicitation of Outside Opinion published on November 23, 1992.

9. Minnesota Rules pt. 1400.0600 (1991) requires that the documents listed in Findings 7 and 8 above be filed with the Administrative Law Judge at least twenty-five days prior to the date of the hearing. These documents were in fact filed on dates that were twelve and thirteen days prior to the hearing. The Department's failure to comply strictly with the rules constituted a procedural error. In *City of Minneapolis v. Wurtele*, 291 N.W.2d

386, 391 (Minn. 1980), however, the Minnesota Supreme Court noted that "[t]echnical defects in compliance which do not reflect bad faith, undermine the purpose of the procedures, or prejudice the rights of those intended to be protected by the procedures will not suffice to overturn governmental action

See also Auerbach, Administrative Rulemaking in Minnesota, 63 Minn.

L. Rev. 151, 215 (1979) (in deciding if an error is fatal, one should consider

(1) the extent of the deviation, (2) whether the error was inadvertent or intentional, and (3) the extent to which noncompliance prevented people from

participating in the rulemaking process). Accord: Report of the Administrative Law Judge in In re Proposed Amendments to the Rules of the State Board of Animal Health, OAH Docket No. 2-0500-4574-1 (June 28, 1990); but cf. Johnson Bros. Wholesale Liquor Co. v. Novak, 295 N.W.2d 238, 241-42 (Minn. 1980) (a complete failure to comply with the Administrative Procedure Act is not an appropriate instance in which to apply the substantial compliance doctrine and results in an invalid rule).

The Legislature recently amended the Minnesota Administrative Procedure Act to include a harmless error provision. See Minn. Stat. §14.15, subd. 5 (effective April 21, 1992). Pursuant to that enactment, the Administrative Law Judge must "disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule" if the Judge determines that (1) the agency's error "did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process" or (2) "the agency has taken corrective action to cure the error or defect" so that interested parties were not deprived of meaningful participation in the rulemaking process.

None of the Department's late filings in this proceeding related only to the procedural requirements of this rulemaking proceeding and not to the substantive aspects of the proposed rules. The errors were inadvertent and were corrected after they were brought to the attention of the Department. No member of the public requested an opportunity to review the rulemaking file maintained by the Administrative Law Judge prior to the hearing. No one objected to the late filing of any of these documents or complained of any prejudice arising from the Department's failure to comply strictly with Minnesota Rules pt. 1400.0600. Numerous individuals participated in this rulemaking proceeding, and that participation was vigorous. Under these circumstances, the Administrative Law Judge finds that the agency's late filings "did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process" within the meaning of Minn. Stat. § 14.15, subd. 5 (1992) and that the procedural error thus must be disregarded as harmless in nature.

Nature of the Proposed Rules and Statutory Authority

10. The proposed rules provide definitions, implement an order of selection for receipt of vocational rehabilitation services, require consumer financial participation, require the use of comparable benefits where such benefits are available, and set forth terms and conditions under which vocational rehabilitation services will be provided. The duties of the Department include the administration of programs providing vocational rehabilitation assistance for persons with disabilities. Minn. Stat. chapter 268A (1992) governs the provision of such assistance. Minn. Stat. § 268A.03(b) directs the Commissioner to "provide vocational rehabilitation services to persons with disabilities in accordance with the state plan for vocational rehabilitation," including services incidental to the determination of eligibility, vocational counseling, physical restoration, transportation, occupational and business licenses, maintenance, training materials, placement, on-the-job skill training, time-limited postemployment services, and supplies for small business enterprises. Minn. Stat. § 268A.03(m) provides that the Commissioner of Jobs and Training shall "adopt, amend, suspend, or repeal rules necessary to implement or make specific programs that

the commissioner by sections 268A.01 to 268A.10 is empowered to administer." The Commissioner is also authorized by Minn. Stat. § 268.021 to "adopt rules . . . in accordance with chapter 14, with respect to programs the commissioner administers under this chapter and other programs for which the commissioner is responsible under federal or state law." The Judge concludes that the Department has general statutory authority to adopt these rules.

Small Business Considerations in Rulemaking

11. Minn. Stat. § 14.115, subd. 2 (1992), requires state agencies proposing rules that may affect small businesses to consider methods for reducing adverse impact on those businesses. In its Notice of Hearing, the Department indicated that, in its view, the proposed rules do not affect small businesses within the meaning of Minn. Stat. § 14.115 and invited comment from any members of the public who disagreed with this assessment. No one has suggested that the rules proposed by the Department will adversely affect small business. Indeed, to the extent that the proposed rules establish standards under which the Department's Division of Rehabilitation Services may provide goods and services for the establishment of a small business enterprise, the rules may in fact foster the development of small businesses. The Administrative Law Judge thus finds that the Department has complied with Minn. Stat. § 14.115, subd. 2.

Fiscal Notice

12. Minn. Stat. § 14.11, subd. 1, requires state agencies proposing rules that will require the expenditure of public funds in excess of \$100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two years immediately following adoption of the rules. Because there is no evidence that the proposed rules will require expenditures by local bodies of government in excess of \$100,000 in either of the two years immediately following adoption or, for that matter, any expenditures by local public bodies, the Judge finds that a fiscal notice is not required in this rulemaking.

Impact on Agricultural Land

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

Analysis of the Proposed Rules

14. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules has been established by the Department by an affirmative presentation of fact. The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the adoption of each of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for each provision. The SONAR was supplemented by the comments made by the Department at the public hearing and in its written post-hearing comments.

The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. *Broen Memorial Home v. Minnesota Department of Human Services*, 364 N.W.2d 436, 440 (Minn. Ct. App. 1985); *Blocher Outdoor Advertising Company v. Minnesota-Department of Transportation*, 347 N.W.2d 88, 91 (Minn. Ct. App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984). An agency is entitled to make choices between possible standards as long as the choice it makes is rational. If commentators suggest approaches other than that selected by the agency, it is not the proper role of the Administrative Law Judge to determine which alternative presents the "best" approach.

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

Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed. Minn. Stat.

□ 14.15, subd. 4 (1992). The standards to determine if the new language is substantially different are found in Minn. Rules pt. 1400.1100 (1991). Any language proposed by the Department which differs from the rules as published in the State Register and is not discussed in this Report is found not to constitute a substantial change.

Proposed Rule Part 3300.5000 - Purpose and Scope

15. Subpart I of part 3300.5000 specifies that the proposed rules are limited in application to the provision of vocational rehabilitation services to persons with disabilities in Minnesota. Subpart 2 indicates that the rules do not require the Department to expend money on behalf of an eligible person if funds are not made available from federal and state appropriations for vocational rehabilitation services. Subpart 3 clarifies that the rules are inapplicable to persons who are blind because such persons are governed by the rules of State Services for Blind and Visually Impaired Persons. Proposed rule part 3300.5000 has been shown to be needed and reasonable.

Proposed Rule Part 3300.5010 - Definitions

16. Proposed rule 3300.5010 establishes definitions for forty-nine terms used in the provision of vocational rehabilitation services. Only those

definitions that received significant comment or otherwise require discussion will be specifically discussed in this Report. The remaining definitions are adequately supported by the Department's SONAR and have been shown to be needed and reasonable.

Subpart 6 - Comparable Benefits

17. David H. Anderson, Financial Aid Director of Moorhead State University, objected to the definition of "comparable benefits" in subpart 6. Mr. Anderson indicated that he assumed that Aid to Families with Dependent Children ("AFDC") would also be included as a comparable benefit to pay for education costs. The Department responded that it intends to find that a comparable benefit is available only if the benefit is earmarked for the same purpose as the funding provided by the Department. The Department indicated that "a comparable benefit for tuition is a Pell Grant or similar resource" while "[a] comparable benefit for maintenance is AFDC or similar resource." Department's December 20, 1993, submission at 9. The Department thus indicated that AFDC would not be applied against tuition costs. The Department's interpretation of the rule provision is consistent with the common understanding of the word "comparable." The definition of "comparable benefits" in subpart 6 has been shown to be needed and reasonable.

Subpart 8 - Durable Medical Equipment

18. Mr. Anderson questioned why "three-wheel self-propelled devices" were included in the definition of "durable medical equipment." He pointed out that three-wheeled all-terrain vehicles ("ATVs") are not as safe as four-wheeled vehicles and questioned whether wheelchairs would qualify under the proposed definition. Proposed subpart 8 expressly lists "wheelchairs" as meeting the definition of "durable medical equipment." The three-wheeled vehicles mentioned in the subpart are scooters, not ATVs. Subpart 8 is needed and reasonable, as proposed.

Subpart 10 - Employment Goal

19. Proposed subpart 10 defines "employment goal" as "full-time or part-time gainful employment" that, inter alia, is consistent with the consumer's "strengths, resources, priorities, concerns, abilities, and

capabilities"; provides the consumer "access to an appropriate occupational field in which there is opportunity . . . to develop and be productive, consistent with the eligible consumer's abilities and informed choice"; is available in the labor market where the consumer is willing to seek employment; and is in the competitive labor market or any other vocational outcome determined to be consistent with the federal Rehabilitation Act of 1973. Several individuals and groups, including Jay Warner; Hal Augustin; Christine Kirwin; Randall Doane; Scott Wenger; Clifford Poetz of Advocating Change Together ("ACT"); Luther Granquist, Deputy Director of the Minnesota Disability Law Center ("MDLC"); Robert Brick, Executive Director of ARC Minnesota ("ARC"); and Duane Shimpach, Chair of the Governor's Planning Council on Developmental Disabilities ("the Governor's Council") objected to the proposed definition on the grounds that it failed to commit the agency to providing services that will "maximize employability" of an eligible consumer. These commentators maintained that, in order to comply with the federal law on vocational rehabilitation, the definition must acknowledge that the goal is employment that will maximize the individual's employment potential.

The federal Rehabilitation Act of 1973, as amended in 1992, is codified in 29 U.S.C. § 701, et seq. The Rehabilitation Act states that its purpose, among other things, is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C. § 701(b)(1). The Department argues that the foregoing language sets out a purpose for the Rehabilitation Act, not a controlling standard for every aspect of administering vocational rehabilitation services. In support of its argument, the Department indicates that "maximization" is not used in the substantive portions of the Rehabilitation Act. The Department further stresses that the Rehabilitation Act does not require the IWRP to address the achievement of "maximum potential" and that the Act does not refer to maximizing employability in defining the term "employment outcome."

In support of their argument, the MDLC and Mr. Warner cite *Indiana Department of Human Services v. Firth*, 590 N.E.2d 154 (1992), review denied (July 9, 1992); *Polkabila v. Commissioner for the Blind and Visually Handicapped*, 583 N.Y.S.2d 464 (App. Div. 1992); and *Buchanan v. Ives*, Civil No. 90-0321-B (D.C. Maine, November 13, 1991) (order on cross motions for judgment). In *Firth*, an individual with deafness challenged a decision by the Indiana Department of Human Services denying rehabilitation services to assist him in attending law school. On appeal, the Indiana Court of Appeals determined that he should receive such services. The Department points out that law training was a better vocational option for Mr. Firth given his inability to find employment in the field in which he had obtained a bachelor's degree (English) and asserts that this case should be limited in application to its particular facts.

In *Polkabila*, the petitioner, a woman who had been blind from birth, challenged the Commissioner's denial of her request for sponsorship to attend undergraduate college and law school. An Administrative Law Judge upheld the Commission's denial based upon a finding that the petitioner's career as a paralegal was "suitable employment" which was "consistent with her capacities or her abilities and the goal of the [vocational rehabilitation] program" even

though it may not be the highest level obtainable by her. On appeal, the court stated that the primary issue in the case was "whether the [Rehabilitation] Act mandates that respondents provide petitioner with vocational rehabilitation services designed to enable her to reach the highest achievable vocational goal, or whether it merely mandates . . . 'suitable employment' consistent with her ability." 583 N.Y.S.2d at 464-65. The court held that the Administrative Law Judge had applied an improper standard in denying the petitioner's request, pointing out that the standard should have been "whether petitioner could maximize her employability by pursuing such a goal." Id. at 465.

In Buchanan, the State of Maine denied Mr. Buchanan's request for services related to the self-employment goal set forth in his IWRP despite an administrative decision favoring the funding of his proposal. Mr. Buchanan then filed an action in U.S. District Court alleging that the state had violated the Rehabilitation Act by refusing to provide services to maximize his employability. The court denied the plaintiff's request for a permanent injunction and remanded the matter to the agency for further proceedings. The state contended in Buchanan that, by adding the reference to "maximizing" employability, Congress simply intended to urge states to place their clients

in full-time employment rather than part-time employment. The court disagreed, noting that, "[b]y adding "maximize" to § 701, Congress was clearly stating its intent to establish a program which would provide services to assist clients in achieving their highest level of achievement or a goal which is consistent with their maximum capacities and abilities." Slip op. at 7-8.

The court further determined:

"Suitable" is a relative term which cannot, by itself, provide the legal standard against which to determine the level of services which will be provided. "Suitable" must be interpreted in reference to the goal of "maximizing employability". If the services provided do not maximize employability, they cannot be "suitable."

The determination of a client's maximum employability requires a highly individualized analysis, that should take into account the client's goals as determined by the IWRP and, within reason, the client's highest possible level of achievement. The IWRP may then be analyzed to determine whether that program is viable for that individual given his unique circumstances and the realities of the competitive labor market.

Id. at 8. The court went on to note that an employment objective that is "clearly below the individual's capabilities is not 'consistent' with that person's capabilities, nor could it be considered 'suitable' employment." Id. at 10. The court cautioned, however, that "the Act should not be interpreted to require that in every case the client's optimum level be reached. The client's own values and goals, the economy and the potential market for the client's skills should all be considered in determining the level of services to be provided." Id.

It is evident that the maximization of employability has been used by the courts in the cases cited above as a guiding principle in determining whether

the purposes of the Act were being met in particular cases. However, the Department correctly asserts that the Rehabilitation Act does not refer to maximization of employability in its provisions setting forth the methods to be used. In its expression of purpose, the Rehabilitation Act focuses on the ultimate outcome sought for an individual with disabilities, not the methodology to be used. The concept is not referenced in the provisions of the Act which do discuss methodology, such as the provisions governing IWRPs and defining the term "employment outcome." Under these circumstances, the rule is not rendered unreasonable by its failure to reference the ultimate goal of "maximizing employability." While the Department, in order to comply with the goals of the Rehabilitation Act, must ensure that its services facilitate a consumer's achievement of maximum potential, the Department is not required to incorporate that concept into the definitions relating to its methodology.

Hal Augustin, Randall Doane, ACT and ARC objected to the Department "closing the book" on consumers once they obtain employment. The Governor's Council urged the Department to establish a simplified process for an individual to use if he or she wishes to pursue a different job. The Department indicated that it was not its intent to define "employment goal" to exclude persons with current employment from getting assistance from the

agency to maximize their employability. Hearing Transcript at 92. Nothing in the proposed rules requires the Department to view individuals as "closed cases" once they obtain employment. If a consumer believes that additional services should be rendered, he or she may take the appropriate steps to request and, if necessary, require such services to be provided. As a subject for future rulemaking, the Department may wish to consider establishing a specific procedure for handling requests for assistance in obtaining enhanced employment. The proposed rules are not, however, defective due to their failure to specify such a procedure, nor are they defective for failing to refer to the purpose of the Rehabilitation Act to maximize employability.

The definition of "employment goal" in the proposed rules is consistent with the Rehabilitation Act. Subpart 10 has been shown to be needed and reasonable as proposed.

Subpart 13 - Functional Areas

20. Several commentators, including Valerie Brown, Project Coordinator with the Client Assistance Project, Mr. Warner, ACT, the MDLC, ARC, the Governor's Council, and the Minnesota Commission Serving Deaf and Hard of Hearing People ("the Minnesota Commission"), urged that "functional area" be more specifically defined in the proposed rule. As originally proposed, subpart 13 defined "functional area" to mean "mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills," without further explanation. Several of the commentators noted that handbooks or manuals are used by the Department to determine whether a specific individual has an impairment in a particular functional area. The Governor's Council expressed concern that the standards might not be evenly applied if they are not specified in the rule.

In response to comments received pertaining to this subpart, the Department expanded the proposed rule to include specific definitions of the

seven functional areas listed in the subpart. Department's December 16, 1993, submission at 4-5. As modified, subpart 13 would add the following new items A through G:

A. Mobility means the physical and psychological ability to move about from place to place inside and outside the home including travel to and from usual destinations in the community for activities of daily living, training, or work.

B. Self-direction means the ability to plan, initiate, organize, or carry out goal-directed activities or solve problems related to self care, socialization, recreation, and working independently.

C. Self-care means the ability to manage self or living environment (i.e. eating, toileting, grooming, dressing, money management, and management of special health or safety needs, including medication management), as they affect an individual's ability to participate in training or work-related activities.

D. Interpersonal skills means the ability to establish and maintain personal, family and community relationships as it affects (or is likely to affect) job performance and security.

F. Communication means the ability to effectively give and receive information through spoken words or concepts (writing, speaking, listening, sign language, or other adaptive methods).

F. Work tolerance means the capacity to effectively and efficiently perform jobs requiring various levels of physical and/or psychological demand.

G. Work skills means:

(1) the ability to do specific tasks required to carry out job functions, and

(2) the capacity to benefit from training in how to perform tasks required to carry out job functions.

Each of the items added reflect the common understanding of the meanings of these terms. The modification clarifies the proposed rule and was made in response to public comment. It does not result in a rule that is substantially different than the rule as originally proposed. Subpart 13, as modified, has been shown to be needed and reasonable.

Subpart 17 - Individual with a Most Severe Disability

21. The Department has defined "individual with a most severe disability" to mean an eligible consumer (A) who has a severe physical or mental impairment that results in a serious functional limitation in employment in three or more functional areas; (B) whose vocational rehabilitation can be expected to require multiple services over an extended period of time; and (C) who has one or more physical or mental disabilities resulting from conditions specified in the rule or another disability or combination of disabilities determined to cause comparable serious functional limitation. Dr. Donald W. Clark, the parent of a cerebral-palsied child, a former board member of United Cerebral Palsy of Minnesota, and an instructor of rehabilitation counselors, objected to the first element of the definition which requires that an individual have serious employment-related functional

limitations in three or more functional areas. Dr. Clark argued that the proposed rule is inconsistent with the federal Rehabilitation Act, which defines an "individual with a severe disability" as someone who has one or more functional impairments.

The Department responded that the 1992 amendments to the Rehabilitation Act require each state to establish an order of selection that would first serve "individuals with the most severe disabilities in accordance with criteria determined by the state." Department's December 16, 1993, submission at 5, citing the Rehabilitation Act, § 101(a)(5)(a)(ii). The Department also

points out that the reports of the Conference Committee and the relevant House and Senate committees further indicated that each state was to establish an order of selection and establish criteria for determining who would be treated as individuals with the most severe disabilities, after seeking substantial input from consumers and advocates. Id. at 5-6, citing House of Representatives Reports 102-822 and 102-973 and Senate Report 102-357).

The term, "individual with a most severe disability," is not defined in the Rehabilitation Act; the determination of appropriate criteria was left to the states. The proposed definition was developed by the Department's Focusing Services work group. SONAR at 12. Input from consumers and advocates for the disabled was gathered prior to the rulemaking hearing, SONAR at 2-3, as well as during this rulemaking process. The Department has shown that it is needed and reasonable to require an individual to have functional limitations in three or more areas in order to qualify as an "individual with a most severe disability."

Subpart 23 - Job Placement

22. Scott Wenger objected that the definition of "job placement" in subpart 23 contained criteria that were unduly vague and not related to the Department's proper responsibilities. Randall Doane suggested that item D be revised to refer specifically to the removal of communication barriers to accommodate eligible consumers.

In response to these comments, the Department deleted items A through L as originally proposed and added new items A through I. The language of the new items is drawn from the rule as originally proposed and otherwise is adapted from the Standards Manual for Organizations Serving People with Disabilities issued by the Commission on Accreditation of Rehabilitation Facilities. In two instances, the Department retained the language of the rule as originally proposed. As modified, the subpart would include the following services in the definition of "job placement":

- A. contacting employers to develop and/or identify job opportunities and assisting eligible consumers in securing employment;

B. assessing the characteristics and tasks of an eligible consumer's job choice to determine the skills, knowledge, and abilities needed to perform the tasks involved in the job;

C. counseling and/or training of individuals and/or groups regarding the techniques for obtaining and maintaining employment, including assisting eligible consumers in preparing resumes and job applications and in developing job interviewing skills;

E. enhancing disability awareness through educating eligible consumers and employers about various disabilities and resulting vocational implications, rehabilitation technology, job accommodations, services provided by the division, incentives to the employer, and current disability related legislation;

F. providing onsite job analysis, consultation and recommendations for worksite and job modification, when appropriate;

G, maintaining contact for a reasonable period of time to promote adequate job adjustment and retention;

H. assisting employers to identify, modify and/or eliminate architectural, procedural, instructional, communication or attitudinal barriers to the employment and advancement of persons with disabilities; and

I. maintaining communication and coordination with other community agencies and resources concerning job openings, coordination of services to assist eligible consumers to obtain and retain employment, and joint efforts to increase employment opportunities for people with disabilities.

Department's December 16, 1993, submission at 8-9. In its post-hearing comment, the Department stated that it made the modification to clarify the language of the proposed rule and indicated that the new language "is based on accepted standards in the wider rehabilitation community." Id. at 8.

The new language sets forth several activities aimed at assisting individuals with disabilities in securing and retaining employment. It includes providing assistance to employers to identify, modify and/or eliminate communication barriers, in accordance with Mr. Doane's suggestion. The subpart, as modified, is needed and reasonable to define the Department's job placement responsibilities. The new language does not constitute a substantial change.

Subpart 36 - Rehabilitation Counselor

23. The Department proposed defining "rehabilitation counselor" as a person classified as such by the Minnesota Department of Employee Relations ("DOER") and employed by the Department's Division of Rehabilitation Services to assess eligibility for and coordinate the provision of vocational rehabilitation services. Dr. Clark emphasized that the federal Rehabilitation Act requires states to ensure that qualified personnel are used and objected that the proposed rule did not specify qualifications.

In response, the Department acknowledged that the Rehabilitation Act requires that the State Plan outline policies and procedures relating to the

establishment and maintenance of standards to ensure that personnel are appropriately trained. The Department pointed out that the Rehabilitation Act does not establish a uniform professional standard and that Minnesota does not have a licensing law for rehabilitation counselors. DOER is authorized by Minn. Stat. §§ 43A.04 through 43A.05 to set the standards for positions in the classified service. The Department has worked with DOER to set hiring standards for persons hired as rehabilitation counselors. The Department indicated that, in order to qualify for the written exam, applicants must have a master's degree in rehabilitation counseling or rehabilitation teaching, a

master's degree in another area with completed graduate coursework in at least four specified rehabilitation areas, or a bachelor's degree with completed rehabilitation-related coursework in at least four specified areas. The rehabilitation areas required were taken from criteria of the Commission on Rehabilitation Counselor Certification and the Commission on Rehabilitation Education. The Department further indicated that it lacks the authority to establish its own hiring criteria or standards and that it believes that the DOER requirements meet the federal requirement to hire qualified personnel. Department's December 20, 1993, submission at 4.

It appears that the Department has the statutory authority to set standards for qualifications of personnel, at least with respect to rehabilitation facilities and programs (see Minn. Stat. § 268A.09, subd. 5(c) (1992)), and it is possible that the Department's general rulemaking authority could be construed to encompass prescribing the qualifications of persons it employs as rehabilitation counselors. The Department has not, however, chosen to exercise this authority. DOER is the state agency empowered to classify state employees, administer examinations, and compile lists of eligible candidates. The Department has consulted with the DOER in establishing qualifications which must be satisfied by those seeking rehabilitation counselor positions. Subpart 36 of the proposed rules is not rendered unreasonable by its failure to specify certain qualifications for such positions.

Subpart 37 - Rehabilitation Technologies

24. At the hearing, the MDLC objected that the definition of "rehabilitation technologies" stopped short of the definition in federal law with respect to the inclusion of assistive devices and services. T. 105-06. In its post-hearing comments, the MDLC withdrew this objection and noted that the definition of "rehabilitation technologies" did, in fact, adequately incorporate the federal definition of assistive technology devices and services. The Department's post-hearing comments included a side-by-side comparison of the proposed rule with the federal definitions and confirmed that the language of the proposed rule adequately incorporates the definitions of assistive technology device, assistive technology service, and

rehabilitation engineering. Department's December 20, 1993, submission at 10-12. The definition in subpart 37 has been shown to be needed and reasonable, as proposed.

Subpart 40 - Serious Functional Limitation

25. ARC and the Governor's Council objected to the wording of subpart 40, defining "serious functional limitation," as possibly excluding persons who were born with disabilities. Hearing Transcript at 66-67. The language to which these commentators objected indicated that a "reduction" in functional capacity was required. The Department indicated in its post-hearing comments that it had not intended to exclude from services individuals whose severe limitations were not "reductions" from a previous level of functioning. The Department thus proposed to modify the language used in the definition to address this concern and to replace the term "typically" with "routinely." As modified, the proposed rule would provide as follows:

"Serious functional limitation" means that, due to a severe physical or mental impairment, one or more of an individual's functional capacities, including mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, or work skills is restricted to the degree that the individual requires services or accommodations not routinely made for other individuals in order to prepare for, enter, engage in, or retain employment.

Department's December 16, 1993, submission at 6.

Several commentators, including ACT and ARC, suggested that the Department include further information in the rule setting forth criteria the Department will consider in determining whether an individual has a serious functional limitation. The Department declined to modify the rule as suggested, based upon its view that it would be "unnecessary and inappropriate to include in rules the guidance and training materials it has prepared to assist rehabilitation counselors in making professional, individualized assessments of the limitation experienced by applicants for vocational rehabilitation services. Department's December 22, 1993, submission at 1. The inclusion of criteria to be used by counselors in making the determination of whether a particular individual has a "serious functional limitation" would not, in the view of the Administrative Law Judge, be inappropriate, and the Department may wish to further consider whether to modify the rule as suggested. However, the Judge finds that the rule as currently proposed contains information adequate to describe the standard to be used by the Department (particularly since the Department has now provided definitions of the seven functional areas) and that the current definition is not rendered unreasonable by its failure to include further explanatory information.

The Department has demonstrated that subpart 40, as modified, is needed and reasonable. The changes proposed to the language of the rule following the hearing are responsive to public comments and do not constitute a substantial change from the rule as originally proposed.

Subpart 43 - Transportation Services

26. The Governor's Council and ACT urged the Department to train

consumers in the use of mass transit or paratransit services. Subpart 43 defines "transportation services" as payments for transportation including fares for mass transit or paratransit. The training sought by the commentators would appear to fall under the definition of "personal assistance services" in subpart 28, since use of transportation services is a daily living activity. Proposed subpart 43 is needed and reasonable to define "transportation services."

Subpart 44 - Tuition Caps

27. Subpart 44 of the proposed rule sets a tuition cap for postsecondary training programs leading to a bachelor's or higher degree in an amount equal to the average annual cost of tuition and mandatory fees needed for a student to complete 45 credits in three quarters at the University of

Minnesota, Morris (currently \$3,645), and establishes a tuition cap for all other undergraduate programs in an amount equal to the average annual cost of tuition and mandatory fees needed for a student to complete 45 credits in three quarters at a state community college. Mr. Clark asserted that the Department's proposed rule is arbitrary and capricious and inconsistent with federal law. In addition, the MDLC objected to the proposed tuition caps as "a deliberate effort to exclude maximizing of employment and economic self-sufficiency from the scope of services provided eligible consumers." MDLC Comment at 6. The tuition and fees at the University of Minnesota Law School (\$7,000 per year) and Medical School (\$10,659 per year) were cited as examples where the tuition cap for postsecondary education would cause the funds available for graduate school to fall far short of the tuition and fees charged. Id. at 7.

In its SONAR, the Department explained the reasons for its decision to select the average annual cost of tuition and fees for a year at the University of Minnesota-Morris as a standard for the cap applicable to postsecondary training programs leading to bachelor's or higher degrees:

The University of Minnesota-Morris is the public institution that most closely resembles private 4- year postsecondary institutions in Minnesota in size, academic offerings and student body profile. Tuition and mandatory fees at the University of Minnesota- Morris are higher than at any other public university in Minnesota; therefore, the use of the cap as provided in part 3300.5060, subpart 13 will allow DRS to make full payment of undergraduate tuition and mandatory fees at any four-year public Minnesota postsecondary institution, in the rare instances where grants, scholarships and consumer financial participation are unavailable to pay all or part of the costs It is reasonable to use tuition and mandatory fees at the University of Minnesota-Morris as the tuition cap for training beyond the bachelor's degree level. This provision assures the rehabilitation funds for tuition and fees for graduate school training will not exceed the amount that would be spent for tuition and fees in a bachelor's degree program.

SONAR at 19-20. In addition, the Department chose to use the University of

Minnesota-Morris as a standard since the Higher Education Coordinating Board uses that school as the comparison school to award grants for students at private institutions. Agency Exhibit M, p. 6-2 (DRS/VR Policy and Procedures Training Manual).

MDLC is correct that the tuition cap is below the maximum amount of tuition and fees at some schools. This does not render the rule defective in and of itself, however. See *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989). As the Department points out, the existence of the cap does not eliminate a consumer's right to choose a career goal, but does limit the extent to which the Department is required to support that choice. The Department has articulated a reasonable basis for its selection of a limit for tuition assistance. Subpart 44 has been shown to be needed and reasonable, as proposed.

Subpart 45 - Vehicle Adaptations

28. As originally proposed, subpart 45 of the proposed rules defined "vehicle adaptations" to mean "changes made to the structure or control devices of a motor vehicle for a person with a disability to operate the vehicle safely and legally." Latter provisions of the proposed rules indicate that only adaptations to the vehicle are costs eligible to be paid by the Department. Valerie Brown of the Client Assistance Project pointed out that the definition could be construed to exclude the provision of wheelchair lifts and suggested that language be added to the rule referring to changes made to a vehicle to enable the consumer to enter and exit the vehicle. The Department indicated in its post-hearing response that it had not intended to exclude lifts from vehicle adaptations and agreed to clarify the subpart. As modified, the proposed rule would define "vehicle adaptations" as "changes made to the structure of control devices of a motor vehicle for a person with a disability to enter, exit or operate the vehicle safely and legally." Subpart 45 has been shown to be needed and reasonable, as modified. The alteration does not constitute a substantial change.

Proposed Rule Part 3300.5020 - Conditions for Implementing an Order of Selection

Proposed Rule Part 3300.5030 - Priority Categories for Order of Selection

29. The federal Rehabilitation Act requires states to implement an "order of selection" if they cannot serve all eligible consumers. The Act provides that states must "show and provide the justification for the order to be followed in selecting individuals to whom vocational rehabilitation services will be provided" 29 U.S.C. § 101 (a) (5) (A) (i). In its SONAR, the Department indicates that, while the demand for vocational rehabilitation services is increasing, it is unlikely that federal and state funding for the program will increase significantly. SONAR at 22. The Department also indicated that its current average caseload of 138 is too large for the timely

and appropriate delivery of services and that it plans to limit caseload size to 90 to 100. Id. at 22-23. Because the Department anticipates that it will not be able to serve everyone who is eligible and applies, the Department proposes to adopt rule parts 3300.5020 and 3300.5030.

Part 3300.5030 establishes priority categories for the order of selection, affording individuals with a most severe disability the first priority, individuals with a severe disability that results in serious functional limitations in two functional areas second priority, individuals with a severe disability that results in a serious functional limitation in one functional area third priority, and all other eligible consumers fourth priority. As originally proposed, subpart I of part 3300.5020 required the Commissioner to determine the need for an order of selection at least annually based upon the anticipated need of individuals and the anticipated available resources and after consultation with the State Rehabilitation Advisory Council; directed the Commissioner to open as many priority categories as it is projected the Department can serve, starting with the first priority category listed in the rule; and provided that, while the Department would retain the discretion to open and close established priority categories based on an assessment of need and resources, the order of the categories established by the rule could not be changed as part of the process. Subpart 2 of the rule as originally proposed required the Division of Rehabilitation Services to discontinue an order of selection when it determined that it could provide services to all eligible individuals.

ACT supported the use of an order of selection and affording priority to those with more severe disabilities, but expressed concern that people with less severe disabilities would be denied services. ACT also urged that advance notice be given when a priority category is to be closed. The MDLC urged the Department to adopt standards and criteria to determine if it is adequately serving all persons in need of services. Several individuals and groups, including the MDLC, ARC, and Mr. Warner, supported requiring advance notice or formal rule amendments before making before opening or closing the priority categories in order to give consumers and advocacy organizations an opportunity to express their opinions and views. The Governor's Council also objected to the proposed rule permitting changes after consulting with the Advisory Council and suggested that the Department ensure that current and potential users of service are notified of the order of selection. Dr. Clark maintained that the Department had no rational basis to choose the priority categories because there are no up-to-date studies regarding the incidence of disabilities in Minnesota. Gerald Rath asserted that more short-term successful rehabilitation closures would be achieved if the Department continues to provide services to those with the least severe disabilities and urged the Department to seek all comparable benefits for those who do not meet the order of selection criteria,

Based upon the comments received, the Department modified subparts I and 2 of rule part 3300.5020. As modified, subpart I of the rule would provide as follows:

The commissioner shall determine the need for an order of selection annually. The commissioner's determination shall be made after consulting with and obtaining advice from the State Rehabilitation Advisory Council. The commissioner's determination shall be based on the anticipated number of individuals eligible for services from the vocational rehabilitation program and the resources anticipated to be available to the vocational rehabilitation program. The commissioner shall open as many priority categories as it is projected that the division can serve, starting with the first priority

category listed in part 3300.5030. The division retains the discretion to open and close established priority categories based on an assessment of need and resources, but the division must not change the established order of categories. The open priority categories for Order of Selection must be identified in the division's state plan for vocational rehabilitation submitted annually to the federal Rehabilitation Services Administration. The division must conduct public meetings on the plan prior to its adoption, as provided by Code of Federal Regulations, Title 34, section 361.18, paragraph (a)(1).

The Department also proposes to delete subpart 2 of the rule as originally proposed because it is unnecessary.

The concern that the proposed order of selection could reduce services to persons with less severe disabilities is legitimate. The federal

Rehabilitation Act requires, however, that states establishing an order of priority first serve individuals with the most severe disabilities. The Department's approach is consistent with the federal requirement.

The proposed rule, as modified, meets some of the commentators' concerns. The reference in the rule to the requirement that public meetings be held regarding the State Plan and the closing or opening of the order of selection categories described therein will make members of the public aware that they will have the opportunity to comment on these matters. The Department has demonstrated that proposed rule parts 3300.5020 and 3300.5030 are needed and reasonable. The modifications made to part 3300.5020 do not constitute a prohibited substantial change.

Proposed Rule Part 3300.5040 - Consumer Financial Participation in Cost of Vocational Rehabilitation Services

30. Proposed rule part 3300.5040 consists of nine subparts. Subpart I requires that eligible consumers whose gross family income exceed the state median income must pay for vocational rehabilitation services an amount equal to the percentage by which the person's gross family income exceeds the state median income for a family of the same size. Subpart 2 clarifies the rule by providing that no consumer financial participation ("CFP") is required if a person's gross family income is equal to or less than the state median as adjusted for family size. The subpart further provides that, regardless of CFP requirements, all eligible consumers are required to participate in the search for and utilization of "comparable benefits" (defined to include services or financial assistance available from sources other than the DRS, such as Medicare, Medicaid, insurance benefits, other agency benefits, and public and private grants and scholarships).

Subparts 3, 7, and 8 set forth the steps and methodology to be used in calculating CFP. Subpart 4 exempts consumers who have been determined to be eligible for medical assistance and recipients of AFDC, general assistance, or Supplemental Security Income from paying any portion of the vocational

rehabilitation service cost. The Department explained that an exemption is reasonable because such individuals have already had their financial status assessed and have been determined to have incomes that are well below the state median income level adjusted for family size and it would be an unwarranted duplication of effort for the Department to again calculate their income. SONAR, at 27-28.

Subpart 5 indicates that consumers may be required to participate in paying the cost of all vocational rehabilitation services not expressly exempted from CFP in subpart 6. As originally proposed, subpart 6 identified fourteen items as services that were to be exempted from CFP. To determine if a good or service should be exempt, the Department considered public comments and whether a specific federal exemption applied. SONAR at 29-30. The Department also proposed, for ease of administration, that nonrecurring purchases of less than \$300 be exempted from the CFP requirement. Finally, subpart 9 of the proposed rule sets forth a procedure under which consumers who cannot pay for services to the extent required may apply for a variance in the determination of financial need.

31. The MDLC and Mr. Wenger argued that the Department lacks statutory authority to implement CFP. They asserted that this change in DRS policy must be accompanied by specific statutory authority. MDLC cites seven other Minnesota statutes under which some form of CFP is required for programs administered by other agencies and argues that the statutes governing these programs expressly provide the authority for such participation that is lacking in the present instance. MDLC Comment, pp. 2-4.

Although the Department has required consumers to seek "comparable benefits" in the past, the Department acknowledges that the CFP requirement "represents a major shift in policy" when compared to its past methods. SONAR at 25; Hearing Transcript at 109-10. The Department argues, however, that its statutory authority to "provide vocational rehabilitation services to persons with disabilities in accordance with the state plan for vocational rehabilitation," "design all state plans for vocational rehabilitation," and "adopt . . . rules necessary to implement or make specific programs that the Commissioner . . . is empowered to administer" pursuant to Minn. Stat. § 268A.03(b), (c), and (m) (1992), is sufficient to permit the Department to impose the CFP requirement. The Department also points out that Minn. Stat. § 248.07, subd. 14a (1992) specifically authorizes the Commissioner to establish rules relating to "financial need eligibility" for the provision of services to persons who are blind and visually impaired. The Department asserts that it is unlikely that the Legislature intended that visually impaired persons receiving services under the same federal act should be subjected to financial eligibility requirements but that individuals with other disabilities should not. Finally, the Department asserts that it informed the Legislature of its intent to implement the CFP requirement when it submitted its 1994-95 biennial budget document and apparently views the absence of legislation overruling its planned approach as further evidence of

statutory authority.

While the question of the Department's statutory authority presents a difficult issue, the Administrative Law Judge is persuaded that the Department in fact has adequate authority to require CFP. In Appeal of Jongquist, 460 N.W.2d 915, 916 (Minn. Ct. App. 1990), the Minnesota Court of Appeals stated that "Jongquist concedes the DRS [the Department's Division of Rehabilitation Services] has the discretion to require training program participants to obtain loans." While this "concession" made it unnecessary for the Court of Appeals directly to decide this issue, the Jongquist case strongly suggests that the Department has the general statutory authority to adopt rules requiring consumers to obtain loans. There is no significant difference between a requirement that a consumer obtain a loan to cover tuition costs and a requirement that a consumer share in some of the vocational rehabilitation service costs. Moreover, it is evident that the Legislature has delegated a great deal of discretion to the Commissioner in designing the state plan for vocational rehabilitation, limited only by the requirement that the state plan satisfy the conditions established for obtaining federal funds. Federal regulations permit states to take an individual's financial need into consideration as long as the state maintains written policies to ensure that similarly situated persons are treated fairly. 34 C.F.R. § 361.47(a)(2). The State Plan allows for CFP. Department's December 22, 1993, submission at 2. Other states receiving federal funds under the Rehabilitation Act have imposed similar CFP requirements. The Administrative Law Judge thus concludes that the Department has statutory authority to adopt rules requiring CFP.

32. The ARC objected to the absence of a specified upper limit on the amount of CFP. The Department responded that it has not set a ceiling for CFP or a ceiling on the amount of funds an eligible consumer may receive. The proposed rules are not rendered unreasonable by their failure to specify a maximum CFP.

33. Dr. Clark asserted that the proposed rule discriminated in favor of persons with developmental disabilities and minorities because they tend to use the services exempted in subpart 6. The MDLC and Dr. Clark questioned why rehabilitation technology and personal assistance services were not exempted from CFP but interpreter services, notetaker services, and reader services were.

In its post-hearing submission, the Department acknowledged that the subpart 6 exemption appeared to give special consideration to a group of people and modified the proposed rule to delete interpreters, readers, and notetakers from the list of exempt services. Department's December 20, 1993, submission at 6. In response to the objections raised at the hearing, interpreter services, notetaker services, and reader services were deleted from the exemption list. As will be discussed below, the three subparts in proposed rule 3300.5060 relating to these services were also modified to accommodate the change in exempt status for those services.

Mr. Warner objected to the exemption for goods and services costing less than \$300. He expressed a concern that individuals with greater financial resources could obtain several services each year with no CFP as long as each of the services did not exceed \$300, while individuals with lesser financial resources receiving a single, more expensive, service would be required to contribute. The Department has explained that the \$300 minimum "is necessary and reasonable because it will simplify the administration of the [CFP] rule, and will allow the provision of many services at no cost to consumers, and will not require consumers to pay small amounts for relatively inexpensive services." SONAR at 29. Furthermore, the exemption only applies

to one-time, nonrecurring purchases.

The exemptions, as modified, have been shown to be needed and reasonable. The modifications were made in response to public comment and do not constitute a substantial change.

34. Subpart 7 requires consumers whose IWRP will include vocational rehabilitation services that are not exempt from CFP to provide written verification of the client's gross family income and sources of income. MDLC pointed out that the DRS' policy and procedures manual specifies that consumers will be asked to produce a copy of the first page of their federal income tax return to satisfy this requirement and that current monthly income will be utilized to determine CFP if there has been a substantial change in the consumer's income. The MDLC urged the Department to include these standards in the rule and incorporate definitions of "substantial change" and "current" income. In response, the Department indicated that it "will use the consumer's most recent federal tax return to document their income [and that] if there has been a substantial change in the consumer's or family's income, either an increase or a decrease, to the degree that it would change their financial participation, the consumer's current, that is, present, income will be used." Department's December 20, 1993, submission at 8. The Department

declined to define the terms "substantial" and "current" in the rules because their usage is consistent with commonly accepted meanings.

As noted above, the methodology set forth in the rule will control once the rule is adopted. Any guidance issued by the Department to its staff regarding the application of the rules will not have the force and effect of law afforded to a rule adopted in accordance with the Minnesota Administrative Procedure Act. Moreover, as the Court of Appeals made clear in *Appeal of Jongquist*, 460 N.W.2d 915 (Minn. Ct. App. 1990), the Department may have no authority to apply policies that have not been properly promulgated as rules. While the proposed rule is not defective as written, the Department may wish to consider incorporating language similar to that contained in its policy manual should it wish to continue applying the approach set forth in its manual. If it chooses to do so, it would not result in a rule that is substantially different than the rule as originally proposed. It would not be necessary to define "substantial" and "current" if this approach is taken by the Department since these terms are used in accordance with their common meanings.

35. Subpart 8 of the proposed rule describes the calculation of CFP. The MDLC objected that the example included in a brochure prepared by the Department to explain the CFP process incorrectly explained the process and also expressed its view that it was inappropriate for the Department to prepare such a brochure in advance of the adoption of these rules. The Department acknowledged that its math was wrong in the brochure. The Department is obliged to keep its clients aware of potential changes in the delivery of services and potential changes in costs. While the publication of a brochure expressly indicating that a future change is planned in vocational rehabilitation services benefit payments would not be an improper action on the Department's part, the Department must promulgate rules before it can implement specific policies not found in statute. *Appeal of Jongquist*, 460 N.W.2d 915, 917 (Minn. Ct. App. 1990). Because the error made in the brochure

is not repeated in the proposed rule, the rule is not defective.

36. The Governor's Council, ARC, and MDLC asserted that the variance process set forth in subpart 9 is unduly vague and lacks adequate standards to guide the decisionmaker. Mr. Anderson suggested that the wording of the variance provision be modified to refer to the consumer's gross family income rather than his or her financial situation. In its post-hearing comments, the Department accepted Mr. Anderson's suggestion and modified item E of subpart 9 to provide that "[a]n eligible consumer who receives a variance must immediately notify the commissioner in writing if the eligible consumer's gross family income improves." The Department declined to otherwise modify the variance procedure.

Minn. Stat. § 14.05, subd. 4 (1992), authorizes agencies to grant variances to rules where such variances are not otherwise prohibited by law. Before granting a variance, however, the agency must "adopt rules setting forth procedures and standards by which a variance shall be granted or denied." Id. Discretionary power may appropriately be granted to public officials if the rule specifies a reasonably clear policy or standard which provides guidance in order that the rule "takes effect by virtue of its own terms and not according to the whim and caprice of the administrative officer." *Anderson v. Commissioner of Highways*, 126 N.W.2d 778, 780 (Minn.

1964). The Department has shown that it is needed and reasonable to include a variance provision within the proposed rules which would allow the Commissioner to waive the CFP requirements in appropriate situations. The language of the proposed rule is sufficiently specific to provide adequate guidance to the Commissioner regarding the standard that will govern the grant or denial of a variance request. The term "extraordinary costs" is commonly understood to mean costs that are beyond normal or ordinary costs, and the proposed rule makes it clear that such extraordinary costs must result from illness or disability in areas such as mobility, communication, self care, medical care, shelter, food, and clothing in order for the Commissioner to grant a variance. The Administrative Law Judge thus concludes that the proposed rule is not defective due to vagueness.

Subpart 9, as modified, has been shown to be needed and reasonable. The modification was made in response to public comment and does not constitute a substantial change.

37. Mr. Wenger argued that CFP was unnecessary and/or unreasonable. He questioned the agency panel at the hearing regarding its funding and expenditures and maintained that the Department's administrative costs are excessive. The scope of this rulemaking proceeding is to determine if the Department has supported its rules with an affirmative presentation of fact, if the rules are statutorily authorized, if proper procedure has been followed, and if the rules are not in conflict with other laws. The jurisdiction of the Administrative Law Judge in this matter does not extend to the organization or budget of the Department. Objections to the operation of the Department are more properly raised with the Commissioner of Jobs and Training or the Legislature. The rules are not rendered defective due to the level of the Department's administrative costs.

Proposed Rule 3300.5050 - Comparable Benefits and Services

38. Subpart I of proposed rule 3300.5500 requires eligible consumers to use comparable benefits, where available, to obtain all vocational

rehabilitation services identified in the IWRP, with certain exceptions. Subpart 2 provides more specific direction regarding the consumer's responsibility to search for comparable benefits. The subpart expressly provides that the Department must not purchase a service for a consumer if he or she refuses to apply for or refuses to accept a comparable benefit.

Item B of subpart 2 precludes the Department from purchasing postsecondary training services for the consumer if he or she cannot receive a grant or scholarship due to a prior loan default where responsible repayment efforts have not been made. Under the rule as originally proposed, such a determination must be made by the rehabilitation counselor in consultation

with the eligible consumer and the lending institution, after considering such factors as the financial resources available to the eligible consumer and the attempts that have been made to work out a satisfactory repayment agreement with the lending institution."

39. Mr. Anderson commented that the lending institution typically has no further interest in a student loan after the loan is in default and suggested that the rule instead require consultation with the holder of the loan. The Department agreed with the comment and altered item B of subpart 2 to change the term "lending institution " to " holder of the loan."

40. The MDLC pointed out that the DRS policy manual indicates that the Department considers "reasonable repayment" to be six consecutive payments. The MDLC objected that no standard is specified in the rule and suggested that a three-payment standard would be preferable. The MDLC and the Governor's Council also suggested that the language of the rule be revised to refer to the need to show that a responsible repayment effort "has begun." In response, the Department indicated that the standard of six consecutive payments set forth in its policy manual was derived from 20 U.S.C. 1078-3 Sec. 420(b). The Department indicated that it did not feel that it was appropriate to include in the rule a specific number of payments that must be made because "there may be circumstances of hardship where the individual can not [sic] work out a satisfactory agreement with the lender, but may still make a responsible effort to do so." Department's December 22, 1993, submission at 3.

The Department has shown that the language of subpart 2 (B) is needed and reasonable as proposed. The Department must recognize, however, that it cannot rely upon the six-payment standard to conclusively determine whether reasonable repayment efforts have been made since that standard is not proposed as a rule and is merely placed in a manual. The criteria set forth in the rule must govern the Department's consideration. Thus, the policy manual standard cannot replace the need for the rehabilitation counselor to make a determination and cannot preclude a finding that fewer payments meet the "reasonable repayment" factor. If the Department wishes to adhere to the six-payment standard, the Administrative Law Judge suggests that the rule be revised as follows:

B. If grants or scholarships are not available to the eligible consumer because the eligible consumer is in default on repayment of a student loan, the division must not participate financially in the purchase of postsecondary training services until the division determines that a responsible repayment effort has been made. This determination shall be made by the rehabilitation counselor in consultation with the eligible consumer and the holder of the loan, after considering such factors as the financial resources available to the eligible consumer and the attempts that have been made to

work out a satisfactory repayment agreement with the holder of the loan. The requirement of a responsible repayment effort will be deemed to be satisfied if the consumer has made six consecutive payments.

The suggested language would serve to clarify the proposed rule. Where fewer than six consecutive payments have been made, that information would be required to be considered by the rehabilitation counselor along with the consumer's financial resources in reaching a decision regarding whether the consumer has made a responsible repayment effort. The subpart is needed and reasonable with or without the suggested language, but the Department may only adhere to a "six-payment" standard if that standard is in fact incorporated into the rule. The modification in language, if adopted by the Department, is not a substantial change.

41, The Governor's Council and ARC suggested that the proposed rules state that, if comparable benefits cannot be secured within sixty days, the consumer will be eligible for DRS services. The Department declined to make the recommended change. The commentators did not make any showing regarding the basis for their recommendation of a sixty-day time line. The proposed rules are not rendered unreasonable by their failure to incorporate such a time limitation.

Proposed Rule Part 3300.5060 - Terms and Conditions for Provision of Vocational Rehabilitation Services

42. Subpart I of proposed rule 3300.5060 establishes general conditions under which services may be provided by the Department in carrying out the vocational rehabilitation program. Subpart 2 provides that the Department may only provide child care where an emergency exists such that the consumer's IWRP would be interrupted if child care were not provided. The maximum amount of child care available from the Department is three months in any twelve-month period.

The MDLC objected to subpart 2 as being inconsistent with the Rehabilitation Act. It asserted that 29 U.S.C. § 723(a)(3) requires the provision of services to families, including child care, without requiring application of comparable benefits. Similarly, MDLC maintained that limiting the duration of child care services is inconsistent with the Rehabilitation Act. MDLC Comment at 9. The Department responded that child care is not encompassed within 29 U.S.C. § 723(a)(3), but rather is generally included under 29 U.S.C. § 723(a). Department's December 20, 1993, submission at 14. The relevant provision of the Rehabilitation Act is important because 29 U.S.C. § 721(a)(8) requires the services listed in § 723(a) to be provided without a search for comparable benefits, while any other services under that section must have a comparable benefit search.

The specific language of 29 U.S.C. § 723(a) states:

- (a) Vocational rehabilitation services provided under this Act are any goods or services necessary to render an

individual with a disability employable, including, but not limited to, the following:

- (3) vocational and other training services for individuals with disabilities, which shall include personal and vocational adjustment, books, or other training materials, and such services to the families of such individuals as are necessary to the adjustment or rehabilitation of such individuals: except that no training services in institutions of higher education shall be paid for with funds under this title unless maximum efforts have been made to secure grant assistance, in whole or in part, from other sources to pay for such training.

While the wording of the Rehabilitation Act may, in many instances, be susceptible to different interpretations, it appears that the Department's interpretation of the Rehabilitation Act is correct. Child care does not appropriately fall under "adjustment or rehabilitation services," but rather under "goods and services necessary to render an individual employable." Child care thus is encompassed within the general language of 29 U.S.C. § 723(a) and, by operation of 29 U.S.C. § 721(a)(8), comparable benefits must be sought.

The Governor's Council and MDLC suggested that the term "emergency" be defined in the proposed rule. The Department concluded that the subpart would be clearer if the term was deleted. As finally proposed, subpart 2 would provide that "[t]he division must not provide child care unless an eligible consumer's individualized written rehabilitation program would be interrupted if child care is not provided. The durational limit (no more than three months in any twelve-month period) is consistent with the Department's intent that child care only be provided to avoid interruption of the client's IWRP, and not constitute an ongoing benefit offered by the Department. Subpart 2, as modified, has been shown to be needed and reasonable. The modification serves to clarify the rule and does not constitute a substantial change.

43. Subpart 3 sets out the conditions under which the Department will purchase computer hardware, software, or modems, printers, and other peripherals for eligible consumers. The MDLC objected to the Department's approach toward computers, peripherals, and software where these items are used to support the vocational rehabilitation and training of persons with disabilities and asserted that the \$3,000 limitation set forth in item F is inconsistent with the Rehabilitation Act.

The definition of "rehabilitation technology" was discussed in Finding 24 above. The Department's interpretation was found to be needed, reasonable,

and consistent with the Rehabilitation Act. The \$3,000 limitation on costs is expressly not applicable to hardware or software required to adapt the computer to meet a client's disability. The Department has demonstrated that the conditions placed upon the purchase of purchasing computers, software, and peripherals are needed and reasonable. There is no conflict with the Rehabilitation Act or state law.

44. Subpart 4 sets forth conditions under which the Department will provide interpreter services for postsecondary training. Since (as discussed above) those services were removed from the list of services exempt from CFP, the Department modified subpart 4 to add a requirement that the CFP be determined before the Department purchases interpreter services. Department's December 20, 1993, submission at 7. Similar changes were made to subpart 6 for notetaker services and subpart 8 for reader services for postsecondary training. The modifications to these three subparts have been shown to be needed and reasonable and do not constitute substantial changes.

45. Subpart 12 specifies conditions under which the Department will provide transportation services. Item D provides that the DRS "must not purchase vehicles for applicants or eligible consumers." The Department will, under appropriate circumstances, pay for adaptations to the vehicle. In its SONAR, the Department indicated that this portion of the proposed rule "is

reasonable because the purchase of a vehicle is an individual's own decision and responsibility." Valerie Brown, Christine Kirwin, and Jay Warner objected to the proposed rule on the grounds that it would have a severe adverse effect on many individuals who cannot otherwise afford to purchase vehicles. Mr. Warner suggested that the rule allow vehicle purchases in well-defined circumstances in order to avoid a result under which only consumers who are sufficiently well-off to afford a car or van will be able to obtain adaptations, but did not propose specific language.

The proposed rule undoubtedly will have a harsh effect on many individuals who cannot otherwise afford to buy a vehicle. The costs of a van with modifications for a person with paraplegia may run as high as \$30,000. Public Ex. 3. While the Department will pay for adaptations to the vehicle, even the basic price of a converted cargo van approaches \$22,000. There is, however, no state or federal law requiring the Department to purchase vehicles for consumers. Although public transportation and van services may not always be feasible for a particular individual, they remain an option for many. The proposed rules are not defective due to their failure to permit the Department to purchase vehicles for consumers.

46. Supart 13 of the proposed rule sets forth conditions under which the Department will provide tuition, fees, books, supplies, and tools and equipment for postsecondary training. David Anderson, Director of Financial Aid at Moorhead State University, asserted that the proposed rule was unreasonable and would lead to undesirable results. Many students, including Joyce Helmin, Willie Common, Mark Schlemmer, Sherion Hillner, William Bryan Tracy II, Karilyn Leedahl, and Gwen Gareir, objected to reductions in funding and expressed concern about whether they would be able to continue attending college. Susan Rostvedt, Assistant Director of Financial Aid at Moorhead State University, who appeared at the hearing on behalf of the Minnesota Association of Financial Aid Administrators ("MAFAA"), indicated that the proposed rules would have a severe impact on students with low incomes. In

her view, the approach taken by the Department could significantly increase student debt load and affect students' ability to complete their educations. She urged the Department to return to its previous approach under which living expenses and costs directly related to school were combined before the agency made a funding decision.

In its post-hearing response, the Department indicated that the approach taken in the proposed rules would better allow the agency to delineate between direct and indirect costs. The Department indicated that it was appropriate to require that Pell Grants be considered as another source to pay for education and apply such grants towards school costs before the Department provides funds, in order to ensure that the direct school costs of tuition, fees, books, supplies, tools, and equipment are fully funded up to the level of the tuition cap. The Department further noted that students receiving SSI/SSDI benefits would still be able to use such benefits to pay for their basic living expenses. The Department acknowledged that individual students would be affected by the proposed rules and that some would see an increase in funding while others experienced a decrease. The Department indicated, however, that the rule will result in a consistent and equitable way to make funding decisions and explained that its more liberal definition of when a student may be deemed to be a dependent will increase access to training services rather than restrict it. The Administrative Law Judge concludes that the Department has demonstrated that the rule is needed and reasonable as proposed.

Retroactive Effect

47. The effective date proposed for the rules requiring CFP and certain provisions of part 3300.5060 pertaining to terms and conditions for vocational rehabilitation services is April 1, 1994. The remaining rules are proposed to have an effective date of October 1, 1993. The Governor's Council, MDLC, and Mr. Wenger objected to the Department's proposal to give the rules retroactive application. At the hearing, the Department indicated that it believed a retroactive effective date was appropriate for the rules that contain the requirements set forth in the Department's State Plan, which was effective on October 1, 1993, and also stated that retroactive effectiveness was proper for the rules which continue preexisting policies of the Department or reflect long-standing federal requirements. The Department also maintained that Minnesota Rules 7002.0005 to 7002.0095 (Air Emission Permit Fee Rule) had been adopted with a retroactive effective date to comply with federal standards.

The Minnesota Administrative Procedure Act provides that a rule becomes effective after it has been subjected to all of the requirements described in the Act (e.g., in the case of a "controversial" rule, a public hearing and the applicable post-hearing process) and five working days have elapsed after the agency publishes its notice of adoption in the State Register "unless a later date is required by law or specified in the rule." Minn. Stat. § 14.18 (1992) (emphasis added). Here, the Department has specified an earlier date in the rule. The Act further defines "rule" to mean "every agency statement of general applicability and future effect" Minn. Stat. § 14.02, subd. 4 (1992). In addition, the Legislature has indicated that no law or rule "shall be construed as retroactive unless clearly and manifestly so intended by the legislature." Minn. Stat. §§ 645.001 and 645.21 (1992); G. Beck, L. Bakken, & T. Muck, Minnesota Administrative Procedure § 24.6 (1987).

The Air Emission Permit Fee Rule was not adopted pursuant to a public hearing. The notice of intent to adopt the rule without a hearing was published prior to the effective date specified in the proposed rules and, if every aspect of the rule adoption had gone perfectly, it would have been possible to publish the final rule prior to the specified effective date. The failure to require the alteration of the effective date prior to the final publication of the rule appears to have been an oversight. The adoption of the Air Emission Permit Fee Rule does not constitute precedent allowing the retroactive adoption of rules.

The retroactive application of these rules is not adequately supported by the fact that the agency has long adhered to these approaches or issued informal policies to the same effect previously. While the Department asserts that federal standards required adoption of part of these rules effective October 1, 1993, no specific statutory provision or rule has been cited to support this claim. Even if the Rehabilitation Act required rules to be adopted, that would not authorize the Department to adopt a rule with an effective date which violates applicable state statutes. While the Department has been granted broad rulemaking authority, the authority to adopt rules with a retroactive effect must be expressly granted by the Legislature. Accord *Bowen v. Georgetown University Hospital*, 488 U.S. 209 (1988) ("a statutory grant of legislative rulemaking power will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms"). Where such explicit

authority is lacking, the Department must follow the existing provisions of the Administrative Procedure Act. It would be particularly unreasonable to allow the retroactive adoption of rules where, as here, the Notice of Hearing was not published prior to the specified effective date of the rules.

48. To cure this defect in the proposed rules, the reference to an effective date of October 1, 1993, must be deleted. The Department may replace the deleted effective date with the statement that the rule will be effective as soon as the requirements of Minn. Stat. § 14.18 are met. The effective date of the other rules, April 1, 1994, has been shown to be needed and reasonable, so long as the Department does not delay in getting these rules adopted. If the effective date under Minn. Stat. § 14.18 will be after April 1, 1994, the Department will then have to delete all references to a specific effective date. The Department can make that decision as it approaches the final publication date in the State Register.

Department Policy Toward Hard of Hearing Persons

49. Curt Micka, Director of the Minnesota Commission Serving Deaf & Hard of Hearing People (MCSDHHP), and Bonham Cross of Self Help for Hard of Hearing Persons (SHHH) expressed concern about the Department's treatment of persons who are deaf or hard of hearing and suggested that any denials of services by the DRS be reviewed by the State Coordinator for Services for Deaf and Hard of Hearing People. The Department reassured both MCSDHHP and SHHH that the needs of hard of hearing persons are being addressed, consistent with the Department's obligation to help all persons in need of vocational rehabilitation services. As discussed above, the Department adopted an expanded definition of "communication" under the definition of "functional area" set out in proposed rule 3300.5010, subpart 13(E) in response to their comments. The proposed rules are not rendered unreasonable by their failure to require separate review of benefit denials of persons with hearing impairment.

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

CONCLUSIONS

1. The Minnesota Department of Jobs and Training ("the Department") gave proper notice of this rulemaking hearing.

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

3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii) (1992), except as noted at Finding 47.

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

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

6. The Administrative Law Judge has suggested action to correct the defect cited in Conclusion 3, as noted at Finding 48.

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

8. Any Findings which might properly be termed Conclusions 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 Department from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

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

Dated this day of January, 1994.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Transcript prepared by Lori A. Case
Court Reporter
Janet Shaddix & Associates
one volume