11-1800-10238-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Department of Human Services Rules Relating to Child Protection and Foster Care for Children; Minnesota Rules, Parts 9560.0221 and 9560.0500 to 9560.0670

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on February 12, 1996, at 9:00 a.m. in the Minnesota Lottery Headquarters, 2645 Long Lake Road, Roseville, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1994), to hear public comment, determine whether the Minnesota Department of Human Services (hereinafter referred to as "DHS" or "the Department") has fulfilled all relevant substantive and procedural requirements of law or rule applicable to the adoption of the rules, evaluate whether the proposed rules are needed and reasonable, and assess whether or not modifications to the rules proposed by the Department after initial publication are substantially different from the rules as originally proposed.

Robert Sauer, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department at the hearing. The Department's hearing panel consisted of Asha Sharma, Rulemaker, DHS Appeals and Regulations Division; Denise Revels Robinson, Director, DHS Family & Children's Services Division; Robert DeNardo, Program Supervisor, DHS Family & Children's Services Division; Sue Stoterau, Social Services Program Consultant, DHS Family & Children's Services Division; and Ruth Weidell, DHS Program Consultant Twenty-seven persons attended the hearing. Thirteen persons signed the hearing register. Many of the attendees gave testimony about the proposed rules. The Administrative Law Judge received twelve agency exhibits and two public exhibits during the hearing. The hearing continued until all interested persons, groups, and associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until March 4, 1996, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1994), five working days were allowed for the filing of responsive comments. At the close of business on March 11, 1996, the rulemaking record closed for all purposes.

The Administrative Law Judge received several written comments from interested persons during the comment period. The Department submitted written comments responding to matters discussed at the hearing and comments filed during the 20-day period. In its written comments, the Department proposed further amendments to the rules.

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

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

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

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

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

FINDINGS OF FACT

Procedural Requirements

1. The Department published Notices of Solicitation of Outside Opinion in 18 State Register 853-854 (Sept. 13, 1993) regarding its proposal to adopt rules governing the removal of children from their homes and return of children to their homes and standards for relative foster care placement, conducting relative searches, and recruiting foster and adoptive families of the same racial or ethnic heritage as the child. Another Notice of Solicitation regarding the Department’s proposal to promulgate

amendments to rules relating to the administration and provision of foster care services was published by the Department in 18 State Register 1127 (Oct. 18, 1993). The Department also published Notices of Solicitation of Outside Opinion regarding its proposal to amend its foster care rules and rules governing the removal of children in need of protection in 19 State Register 2449 and 2452 (July 19, 1995),

2. On December 11, 1995, the Department filed the following documents with the Chief Administrative Law Judge:

a. a copy of the proposed rules certified by the Revisor of Statutes;

b. the Order for Hearing;

c. the Notice of Hearing proposed to be issued;

d. a Statement of Need and Reasonableness (hereinafter referred to as "SONAR") applicable to each of the two sets of proposed rules;

e. a fiscal note applicable to each of the two sets of proposed rules;

f. an estimate of the number of persons expected to attend the hearing and its expected duration; and

g. a statement that additional discretionary public notice would be given by the Department pursuant to Minn. Stat. §14.14, subd. 1a (1994).

3. On December 20, 1995, the Department mailed the Notice of Hearing and a copy of the proposed rule to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. The Department also mailed the Notice of Hearing to the 87 Minnesota County Human Services Agencies, members of the Rule Advisory Committee, and other interested persons.

4. On December 26, 1995, the Department published the Notice of Hearing and the proposed rules in 20 State Register 1725.

5. On January 12, 1996, 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 December 20, 1995, and the Affidavit of Mailing the Notice to all persons on the Department's mailing list;

d. the Affidavit of Mailing the Notice to those persons to whom the Department gave discretionary notice;

e. all materials received in response to the Notices of Solicitation of Outside Opinion published by the Department relating to these rules; and

f. the names of Agency personnel or others solicited by the Department to testify on behalf of the Department at the hearing.

Nature of the Proposed Rules and Statutory Authority

6. In this rulemaking proceeding, the Department seeks to amend two sets of rules: the rules governing protective services for children, which are currently set forth in Minn. Rules pt. 9560.0210 through 9560.0234, and the rules governing foster care for children, which are currently set forth in Minn. Rules pt. 9560.0500 through 9560.0670.

7. The Department seeks to add a new rule part to its child protection rules. The new rule part, which would be codified in Minn. Rules pt. 9560.0221, would set forth criteria for local social service agencies to consider and procedures for them to follow when seeking to remove a child from his or her home. Differing standards and procedures are established for removal of Indian children and non-Indian children, in accordance with applicable statutes.

8. The Department also seeks to amend its existing foster care rules during this rulemaking proceeding. The modifications and new rule provisions would be set forth in Minn. Rules pts. 9560.0500, .0510, .0521, .0529, .0535, .0542, .0545, .0552, .0560, .0580, .0590, .0603, .0606, .0609, .0615, .0620, .0665, and .0670. The Department seeks to amend existing rule provisions relating to the scope of the rules, the purpose of foster care services, the notification to be given to schools and other local agencies, the provision of social services to children and the waiver of such service requirements, strategies for meeting the health and dental needs of children, and the recruitment of foster care providers. The proposed rules would also add new rule provisions defining additional terms; delineating authority for a child's placement by a local agency; addressing steps that must be taken where a local agency is given legal custody by a court or places a child in foster care under a voluntary placement agreement; discussing the need to place children in licensed homes or facilities; describing the extent to which the local agency must search for relatives with whom to place a child; addressing requirements to document placement efforts and the decisions that are made; describing the extent to which the race, color, or national origin of the child or foster care provider may be considered; discussing placement plan requirements; setting forth provisions for agency and court review of placements; establishing criteria for returning children to their homes; and setting forth notice and appeal procedures.

9. Minn. Stat. § 257.071, subd. 8, provides that "the commissioner of Human Services shall adopt rules establishing criteria for removal of children from their homes

and return of children to their homes." Regarding foster care, Minn. Stat. § 257.072, subd. 9 provides:

> The commissioner of human services shall adopt rules to establish standards for conducting relative searches, and recruiting foster and adoptive families of the same racial or ethnic heritage as the child, and evaluating the role of relative status in the reconsideration of disqualifications under section 254A.04, subdivision 3b, and granting variances of licensing requirements under section 245A.04, subdivision 9, in licensing or approving an individual related to a child.

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

Impact on Agricultural Land

10. Minn. Stat. § 14.11, subd. 2 (1994), requires that agencies proposing rules that have a "direct and substantial adverse impact on agricultural land in the state" comply with the requirements set forth in Minn. Stat. §§ 17.80 to 17.84 (1994). Because the proposed rules will not have an impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1994), these provisions do not apply to this rulemaking proceeding.

Fiscal Notice

11. Minn. Stat. § 14.11, subd. 1 (1994), 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. The Department does not believe that any additional cost to local agencies will result from the amendment to the child protection rules because all of the requirements set forth in Minn. Rules pt. 9560.0221 are duplicated from state statute or federal law. In its fiscal note relating to the foster care rule changes, the Department estimates that the costs associated with the additional hours per case necessary to comply with the proposed rules would be $521,208 for Minnesota counties and $26,000 for the State in the first year, and $539,896 for the counties and $13,000 for the State in the second year.

12. In arriving at its cost estimates, the Department relied upon written survey responses of nine Minnesota counties; analysis of foster care data for 1991-93; staff projections of additional staff hours required to comply with the rule provisions relating to search for relatives, documentation of placement, and the notice and appeal procedures; and analysis of information from departmental data bases. The fiscal note sets forth a clear explanation of the Department's methodology and identifies the assumptions upon which the Department relied in arriving at its final cost estimate. The Judge finds that the Department has met the requirements of Minn. Stat. § 14.11, subd. 1 (1994).

Small Business Considerations in Rulemaking

13. Minn. Stat. § 14.115, subd. 2 (1994), requires state agencies proposing rules that may affect small businesses to consider methods for reducing adverse impact on those businesses. In the SONARs issued by the Department with respect to these two sets of proposed rules, the Department indicated that it considered the requirements of section 14.115 but believes that any impact on small business falls within the exemptions set forth in Minn. Stat. § 14.115, subd. 7(2) and (3) (1994). Those statutory provisions exempt "agency rules that do not affect small businesses directly, including, but not limited to, rules relating to county or municipal administration of state and federal programs" and "service businesses regulated by government bodies, for standards and costs, such as . . . group homes and residential care facilities . . . ."

14. The proposed rules merely relate to the administration of child protection and foster care rules by local social services agencies. They do not affect small businesses directly. Accordingly, it is found that an analysis of small business considerations under Minn. Stat. § 14.115, subd. 2, is not required for these rules.

Analysis of the Proposed Rules

15. 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 SONARs as its affirmative presentation of need and reasonableness for each set of rules. The SONARs were supplemented by the comments made by the Department at the public hearing and in its written post-hearing comments.

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

17. 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. 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. Because some sections of the proposed rules were not opposed and were adequately supported by the SONARs, 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. 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 from the rules as originally proposed.

CHILD PROTECTION RULES

Proposed Rule Part 9560.0221 - Criteria for Seeking Child's Removal from Home

Subpart 3 - Removal of Indian Child

18. Under proposed rule 9560.0221, subpart 1, if a local agency determines that the child is an Indian child, it must follow the procedures set forth in subpart 3 before seeking removal of the child from his or her home. Different standards are proposed for Indian and non-Indian children because Indian children are subject to the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1923, and the Minnesota Indian Family Preservation Act, Minn. Stat. § 257.35 through 257.3579 (1994).

Item A

19. Item A of the proposed rules provides that the local agency "may seek emergency removal of any Indian child who is temporarily or permanently located off the reservation to prevent imminent physical damage or harm to the child." (Emphasis added.) The use of the word "may" in this context suggests that local agencies may exercise discretion in this matter and that, if they determine that the child faces imminent physical damage or harm, they may choose either to seek or not to seek emergency removal of the child. This delegation of unguided discretion to the local agency is a defect in the rule. The rule must establish a reasonably clear policy or standard to control and guide administrative officers so that the rule is carried out by virtue of its own terms and not according to the whim and caprice of the officer. Anderson v. Commissioner of Highways, 126 N.W.2d 778, 780 (Minn. 1964). The defect in the rule may be corrected by replacing "may" with "must." As corrected, item A has been shown to be needed and reasonable to provide guidance to local agencies regarding when they must seek emergency removal. The modification suggested to correct the defect does not result in a rule that is substantially different from the rule as originally proposed.

Item D

20. Item D of subpart 3 of the proposed rules states that, with respect to an Indian child who is not a resident of or domiciled on a reservation, "the agency may seek removal of the child only if clear and convincing evidence can show that the child is likely to suffer

serious emotional or physical damage in the care of the parent or Indian custodian." The rule language is drawn from the ICWA. See 25 U.S.C. § 1912(e).

21. Emma Adam of the University of Minnesota Institute of Child Development asked whether item D referred to nonemergency removals, emergency removals, or both, and further asked whether "CHIPs" ("Child in Need of Protective Services") criteria apply to Indian children. In its post-hearing response, the Department indicated that the proposed rule was intended to apply only to nonemergency removals and added that clarification to the proposed rule. The Department also stated that CHIPs criteria set forth in Minn. Stat. § 260.015, subd. 2A (1994), apply to Indian children to the extent that they do not conflict with the ICWA. Although many of the CHIPs criteria meet the standard of "serious physical or emotional damage" set forth in the ICWA, some do not. Agencies will be required to ensure that removal of Indian children under the CHIPs statute is consistent with the ICWA. The addition of the word "non-emergency" to the proposed rule is reasonable and necessary for clarification of item D, and does not constitute a substantial change from the rule as originally proposed.

Item E

22. The Department added a new item E at the suggestion of Janet C. Werness, Attorney for Southern Minnesota Regional Legal Services, Inc. ("SMRLS"), and Steven Hirsh, Attorney for Anishinabe Legal Services, Inc. SMRLS and Anishinabe Legal Services suggested that the rules should emphasize the need to take active efforts to provide remedial services and rehabilitation programs designed to prevent the break-up of the Indian family and the need to show that such efforts have proven unsuccessful. Ann Stiehm Ahlstrom, Assistant Hennepin County Attorney, on behalf of the Minnesota County Attorneys Association, suggested additional modifications to the proposed language to prohibit agencies from soliciting the advice of members of the child's extended family where the parent objects. The Department declined to add verbatim the language suggested by SMRLS, noting that the suggested language mandated soliciting the advice of members of the child's extended family and thus conflicted with the statutory prohibition against contacting relatives if parents object unless a court order is obtained. Minn. Stat. § 257.072, subd. 7(1)(a) (1994). As proposed by the Department, the new item E would provide as follows:

> An agency removing an Indian child must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. Active efforts may include, but are not limited to, soliciting the advice of tribal representatives and, if the parents do not object, members of the child's extended family.

23. The "active efforts" requirement is drawn directly from the ICWA, 25 U.S.C. § 1912(d). The additional language added by the Department provides some guidance to local agencies attempting to make active efforts to provide services to Indian families and children. However, the last sentence of the item suffers from a vagueness defect because the wording of the rule is not sufficiently clear for agencies to determine

whether the identified actions will or will not be deemed to be "active efforts." See Thompson v. City of Minneapolis, 300 N.W.2d 763, 768 (Minn. 1980) (rule is void for vagueness if the language is "not sufficiently specific to provide fair warning" to those regulated by the rule). This defect in the rules may be cured by deleting the word "may." As modified and corrected, the language of item E is not substantially different from the rule as originally proposed, and has been shown to be needed and reasonable.

Items F and G

24. Original item E of subpart 3 (relettered in the final version as item F) requires testimony by a qualified expert witness as to the likelihood of harm to the Indian child from continued residence with the parent or Indian custodian before the child may be removed. As originally proposed, "qualified expert witness" was defined in item F (relettered in the final version as item G) as a tribal member recognized by the tribal community as knowledgeable in tribal customs of family organization and child rearing; a lay person with substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards and child rearing practices within the Indian child's tribe; or "a professional person having substantial education and experience in the area of the professional person's specialty." This language was derived from guidelines issued by the Bureau of Indian Affairs. See SONAR at 4.

25. Peter W. Gorman, Assistant Public Defender of the Office of the Hennepin County Public Defender; Paul T. Minehart, the ICWA Court Monitor for the Minneapolis American Indian Center; Mark D. Fiddler, Director of the Indian Child Welfare Law Center, SMRLS, and Anishinabe Legal Services objected to the third category included in the definition of "qualified expert witness" as failing to meet the requirements established in the DHS Social Services Manual, state litigation, and federal law. They suggested that additional language be included in the rule to clarify that witnesses must have social, cultural, and child-rearing knowledge directly related to the Indian community to be qualified as expert witnesses in matters involving Indian children. These commentators emphasized that the ICWA requires that placement decisions be governed by "the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." 25 U.S.C. § 1915(d). They further pointed out that the Minnesota Court of Appeals, relying upon the Department's Social Services Manual, has held that a qualified expert witness must possess "substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community." In re Welfare of B.W., 454 N.W.2d 437, 444 (Minn. App. 1990). The Court held in B.W. that the DHS manual is a "clear expression of state policy" and must be followed in qualifying expert witnesses in cases involving Indian children unless explicit findings are made showing good cause exists for deviation from the standard.

26. In its post-hearing submission, the Department pointed out that its manual merely illustrates discretionary policy and does not have the force of law and disputed SMRLS' contention that the Court of Appeals adopted the manual provision in In re Welfare of B.W. Nevertheless, the Department proposed to modify the rules to include

the suggested language because it is already a part of Departmental policy, as reflected in the manual. As a result, the Department proposed to modify item F(3) to read as follows:

> F. A "qualified expert witness" means:
>
> * * *
>
> (3) a professional person having substantial education and experience in the area of the professional person's specialty, along with substantial knowledge of prevailing social and cultural standards and child-rearing practices within the Indian community.

27. The Minnesota County Attorneys Association asserted that the inclusion of the DHS manual language in the proposed rules would place an onerous burden on a very limited pool of experts who meet the criteria and would preclude the Department from being able to change its policy easily in the future. The MCAA also contended that there had not been an honest public discussion of the proposed rule, as modified. SMRLS concurred with the DHS revision of item F(3) and urged that the modification not be viewed as a substantial change.

28. The Minnesota Court of Appeals has held that the DHS manual is a "clear expression of state policy" which must be followed in qualifying expert witnesses in cases involving Indian children unless the court makes explicit findings supporting just cause to deviate from the standard expressed in the manual. The rule incorporates DHS policy that has been in place since 1987. The rule as modified is within the scope of the subject matter set forth in the notice of hearing and does not make a major substantive change that was not raised by the original notice of hearing in such a way as to invite reaction at the hearing. Affected classes of individuals had reasonable notice that the definition of "qualified expert witness" was a subject to be considered during this rulemaking proceeding and had an opportunity to submit comments on that issue. The record demonstrates that the definition of "qualified expert witness" proposed by the Department is needed and reasonable and conforms the rule to existing practice in Minnesota. The rule, as modified, is not substantially different from the rule as originally proposed. See Minn. Rules pt. 1400.1100 (1995).

FOSTER CARE RULES

Proposed Rule 9560.0521 - Definitions

29. Proposed rule 9560.0521 contains subparts defining terms used in the proposed rules. Subpart 9 defines "foster care" for the purposes of the rules. At the hearing, DHS proposed modifying the subpart to change some of the grammar. The modifications do not result in a rule that is significantly different from the rule as originally proposed. Subpart 9 has been shown to be needed and reasonable, as modified, and does not constitute a substantial change.

30. Subpart 13, as originally proposed, defined "guardian or legal guardian" as "a person appointed by a parent's will or by the court to have the powers and responsibilities of a parent." At the hearing, the Department added the qualification "except that the guardian is not legally obligated to provide support for the ward out of the guardian's own funds." The additional language clarifies that the definition does not add to or detract from the legal responsibilities of guardians and is consistent with the definition contained in Minn. Stat. § 525.619 (1994). The subpart is needed and reasonable, as modified. The new language clarifies the rule and does not constitute a substantial change.

Proposed Rule 9560.0523 - Authority for Child's Placement by Local Agency

31. As originally proposed, part 9560.0523 sets forth three ways in which a local agency obtains authority to place a child in foster care: (A) through a voluntary placement agreement, (B) via a court order granting legal custody or, (C) where the child is in imminent danger of harm, by authority of Minn. Stat. § 260.165. The Minnesota County Attorneys Association objected to item C because it could be interpreted to require foster care during the pendency of police custody and thereby prohibit the police from exercising discretion to entrust children to relatives during the pendency of police custody. MCAA maintains that removing this discretion will create additional costs to local agencies and problems with foster care licensing requirements, and suggested modified language for inclusion in the rule. Irene Opsahl and Monica Burczek, Attorneys with the Legal Aid Society of Minneapolis, Inc., objected to the original rule and to the modification proposed by the MCAA, and suggested that part C either be eliminated from the rule or modified in a different fashion.

32. In its post-hearing comments, the Department determined that it was appropriate to delete item C because authority to place children who are removed by the police is ultimately obtained by court order. Thus, counties have only two bases for placement. The rule, as modified, has been shown by the Department to be needed and reasonable. Deleting item C does not result in a rule that is substantially different from the rule as originally proposed.

Proposed Rule 9560.0525 - Local Agency Given Legal Custody by Court

33. Proposed rule 9560.0525 sets forth requirements applicable to local agencies who have been given court-ordered legal custody of a child. As originally proposed, the rule required that the agency place the child according to the court order; transmit written reports to the court with information, evaluations, and recommendations prior to expiration of the court order; notify the court and the child's parent or guardian if the child is placed outside the court's jurisdiction; notify foster care providers of court hearings pertaining to foster children in their care; seek court permission for special treatment and care; obtain judicial consent before terminating foster care; and obtain written consent from the parent/guardian and court before initiating an out-of-state placement.

Item D

34. Irene Opsahl, Monica Burczek, and Laurie Hanson, Attorneys for the Legal Aid Society of Minneapolis, objected to the provision requiring notice to foster care parents as not being sufficiently detailed. They suggested that item D of the rule be modified to require that foster care providers be given advance written notice by mail of the date, time, location, and purpose of hearings pertaining to their foster child. They asserted that all foster parents should be encouraged to provide information regarding the child to the child protection agency or the guardian ad litem and that, where the foster parent is a relative, the relative has the right to be informed of actions affecting the child. They argued that a detailed notice is necessary to ensure that relatives and other foster care providers have the information they need to understand their options and make informed choices. MCAA opposed the suggestions made by Legal Aid of Minneapolis and argued that current rule language sufficiently protects the interests of the child. The MCAA asserted that the notification sought by Legal Aid of Minneapolis would invite foster parents to seek to intervene in every juvenile court proceeding involving a child in placement and would complicate and delay court proceedings.

35. In its post-hearing submission, the DHS agreed that foster care providers should be notified in advance of court proceedings but wanted to ensure that foster parents realized that receipt of the notice did not confer standing on them to participate in all hearings. As a result, the Department has proposed to modify item D to provide as follows:

> When a court has given legal custody of a child to a local agency, the local agency must:
>
> * * *
>
> D. inform the foster care providers of court hearings that pertain to any foster child in their care by sending advance written notice by mail to the foster care providers of the date, time, location, and purpose of any court hearing. The notice shall contain a statement that receipt of the notice does not confer standing on the foster care provider to participate at the hearing.

The new language meets the legitimate needs of foster care providers to be informed of matters affecting children in their care. The addition of the statement regarding standing serves to prevent misunderstandings by foster care providers concerning their ability to fully participate in the court proceedings. The item, as modified, is needed and reasonable to delineate the responsibilities of local agencies that are given legal custody of a child by a court. The new language does not result in a rule that is substantially different from the rule as originally proposed.

<u>Item G</u>

36. At the hearing, DHS announced that it wished to modify item G by replacing the term “facility” with “foster care.” The modification conforms the item to the Department’s intent, since the item applies to foster care placements outside of

Minnesota but not placement of children in facilities that are not involved in foster care. Item G, as modified, has been demonstrated to be needed and reasonable. The modification is not a substantial change.

Proposed Rule 9560.0527 - Local Agency Placing Child Under Voluntary Agreement

37. Proposed rule 9560.0527 sets out the responsibilities of a local agency when a child is placed in foster care under a voluntary agreement. As originally proposed, items A and B indicated when the written consent of one or both parents or legal guardian was required. Item C required the agency to obtain the agreement of the parent or guardian, preferably in writing, to notify the local agency if the parent or guardian wishes to have the child returned from placement before the date set forth in the voluntary placement agreement. Item D required the local agency to "obtain the agreement of the Indian child's parent or guardian to notify the local agency in a written and notarized statement." Item E required return of the child within 24 hours of receipt of notice, preferably in writing, unless a longer time was set forth in the placement agreement. Item E further specified that the notice had to be a written and notarized statement.

38. SMRLS suggested modifying item A to require that the local agency determine as a threshold matter whether the child was an Indian child and recommended that the requirements applicable to Indian children be set forth in item A. These requirements would include the need to have the parent sign a consent to placement in front of a judge at least ten days after the child's birth, the need to notify the child's tribe within seven days of placement, and the need to advise the parent that the child will be returned to the parent upon demand. SMRLS also recommended that item D be deleted and that item E be modified to simply require that the child be returned "as soon as possible and no later than 24 hours after receipt of notice, preferably in writing." SMRLS emphasized that the ICWA requires that a child in voluntary placement be returned "on demand" and objected to any requirement that Indian parents meet a higher burden than non-Indian parents as violating the ICWA. The suggested changes would, in the opinion of SMRLS, comply with the requirements of the ICWA that Indian parents be fully informed of the consequences of a placement and that any placement where the child cannot be returned on demand be treated as an involuntary placement. Anishinabe Legal Services also expressed concern about the proposed rule erecting higher barriers for Indian parents seeking return of their children than for non-Indian parents, and urged the Department to strike the requirement that Indian parents provide a notarized statement.

39. In response to these concerns, DHS modified the proposed rule by adding a new item C, modifying original item C and relettering it item D, deleting original item D, and modifying item E. As modified, the proposed rule requires that the local agency must:

C. in addition, in the case of an Indian child, advise the parent or custodian that the child is to be returned upon demand in a written and dated statement complying with the requirements of Minnesota Statutes,

section 257.351, subdivision 4, and notify the Indian child's tribe within seven working days of placement;

D. obtain the agreement of the non-Indian child's parent or guardian to notify the local agency in a written and dated statement if the parent or guardian wishes the child returned from placement before the date specified in the voluntary placement agreement; and

E. return the child to the child's parent or guardian as soon as possible and no later than 24 hours after receiving a written and dated demand for return of the child, unless a longer response time is specified in the demand for any child, or in the voluntary placement agreement for a non-Indian child; for Indian children, the demand must be a written and dated statement complying with the requirements of Minnesota Statutes, section 257.351, subdivision 4.

40. The new item C contains the written notice of the right to return upon demand and the notification of the Indian child's tribe requested by SMRLS. The requirement that the consent form be signed before a judge is not included based upon the Department's view that the ICWA may not require consent before a judge for voluntary placements. See 25 U.S.C. §§ 1903(1)(i) and 1913. The Department will discuss this matter in current negotiations on tribal agreements. Because a written and dated demand is required for all returns, the notice requirement is equivalent for Indian and non-Indian children. The statute requiring submission of a notarized form is referenced in the rule. Items C, D, and E, as modified, are consistent with the requirements of the ICWA and applicable state statutes and have been shown to be needed and reasonable. The modifications do not result in rules that are substantially different from those originally proposed.

Proposed Rule 9560.0529 - Placement in Licensed Facility

41. As originally proposed, rule part 9560.0529 required local agencies to place children in licensed residential facilities, with relatives undergoing evaluation for an emergency license, or in some other facility as permitted by statute. Legal Aid of Minneapolis suggested a change in the language of the proposed rule to clarify that a child may be placed immediately with a relative and need not wait for the licensing process to be initiated.

42. DHS agreed that the language of the rule as originally proposed may have had the unintended effect of prohibiting placement with unlicensed relatives unless the relative is already undergoing licensing. The Department modified the rule to expressly permit placement "in the home of a relative who is or who will later undergo evaluation for an emergency license, as per Minnesota Statutes, section 245A.03, subdivision 2a." That statute expressly allows for issuance of a license or approval retroactive to the date the child was placed in the relative's home or, if more than 90 days have elapsed since the placement, retroactive 90 days. The change is needed and reasonable to allow relatives to provide foster care. The Department may wish to consider replacing

the phrase “as per” with “pursuant to” or “in accordance with” in order to convey the intent of the rule more clearly. None of these modifications will result in a rule that is substantially different from the rule as originally proposed.

Proposed Rule 9560.0532 - Removal of Children

43. Proposed rule 9560.0532 states that “an agency may seek removal of a child from the child’s home pursuant to procedures specified in parts 9560.0210 to 9560.0485 and Minnesota Statutes, sections 260.015, 260.165, and 260.181.” This language suggests that local agencies may choose either to follow or not to follow the identified statutory and rule provisions. This is unbridled discretion on the part of the rules if the rules are optional, or a defect in the rules for vagueness if agencies are required to follow the listed rules and statutes.

44. Minn. Stat. § 260.165, subd. 1 (1994), provides that no child may be taken into immediate custody unless there is a court order, the child “is found in surroundings or conditions which endanger the child’s health or welfare . . . .,” or certain other enumerated situations are present. Minn. Stat. § 260.015 (1994) defines terms used in the statutes governing the Department, including the term “child in need of protection or services,” “child-placing agency,” “foster care,” “relative,” “Indian child,” and other terms. Minn. Stat. § 260.181 (1994) provides, inter alia, that “[t]he policy of the state is to ensure that the best interests of children are met by requiring due, not sole, consideration of the child’s race or ethnic heritage in foster care placements.” Similarly, Minn. Rules 9560.0212 notes that parts 9560.0210 to 9560.0234 govern the administration and provision of child protective services by local social service agencies; 9560.0214 sets forth definitions of terms such as “child,” “child protection worker,” “family unit,” “imminent danger,” “Indian child”, “investigation,” “maltreatment,” “shelter care facility,” and other terms; 9560.0216 through 9560.0222 delineate the responsibilities of local agencies in responding to and investigating reports of maltreatment and medical neglect, and contain frequent directives that local agencies “shall” take a particular action; 9560.0228 sets forth requirements for the provision of protective services, including the requirement that the local agency “shall” ensure that protective services are provided and “must” prepare a written protective services plan; 9560.0230 provides that local agencies “shall” maintain records of every report of maltreatment; 9560.0232 requires that local agencies “shall” ensure that child protective services and a shelter care facility are available on a 24-hour basis; 9560.0234 provides that local agencies “shall” have annual training plans for child protection workers and submit such plans to the Department for approval; 9560.0430 sets forth definitions of “local agency,” “licensed child-placing agency,” and “relative”; 9560.0440 requires that local agencies “shall develop social service plans for wards; 9560.0480 provides that local agencies “shall” maintain records on each child for whom they are responsible; and 9560.0485 provides that local agencies “shall” provide postguardianship services to former wards of the commissioner.

45. The contents of the statutory and rule provisions cited in the proposed rule clearly support the conclusion that local agencies must comply with them; it is apparent that local agencies do not have the option to ignore the requirements and procedures

set forth in these provisions. Accordingly, the proposed rule is defective due to vagueness. It simply does not give local agencies fair notice of what will be expected of them when they are removing a child from his or her home. This vagueness rises to the level of a defect because the wording of the rule is not clear enough for agencies to determine what conduct will comply with the rule or what standards they should follow. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) ("where, as here, there are no standards governing the exercise of discretion granted by the ordinance, the scheme permits and encourages arbitrary and discriminatory enforcement of the law").

46. To cure the defect in the proposed rule, the rule must affirmatively express the local agency's duty to follow the identified statutes and rules. Replacing "may" with "shall" accomplishes this task. If the Department seeks to acknowledge the local agency's role in determining when the child's situation warrants removal of the child, the Department may wish to consider prefacing the rule part with "Where a local agency has determined that a child is in need of protective services," together with replacing "may" with "shall." The replacement of "may" with "shall" cures the defect in the proposed rule and renders the rule needed and reasonable. Neither suggested change will result in a rule that is substantially different from the rule as originally proposed.

Proposed Rule Part 9560.0535 - Local Agency Search for Relatives

Subpart 1 - Search for Relatives Required

Subpart 2 - Parental Objection to Relative Search

47. Proposed rule 9560.0535 requires, in subpart 1, that "[t]he local agency must search for relatives with whom to place a child, unless the child's parent specifically objects." Subpart 2 of the proposed rule sets out the process to be followed where the parent objects to notifying or searching for relatives. Pursuant to the proposed rule, the local agency must "evaluate and address" the parent's concerns without contacting relatives. In conducting this evaluation, the agency must consider (A) the child's and parent's or guardian's preferences about relatives and the reasons for those preferences, (B) whether there are other relatives who may be contacted, (C) whether any relatives have offered to take care of the child, (D) whether placement with relatives would interfere with the parent's ability to follow a placement plan, and (E) where an Indian child is involved, the tribe's position on contacting the relatives. The subpart goes on to state that, "[i]f a parent still objects to the relative search," the agency must then notify the juvenile court of the parent's reasons for objecting and may not contact the child's relatives unless the court orders it to do so. As a initial matter, the Administrative Law Judge notes that the Department may wish to begin this sentence by stating, "After discussing the foregoing considerations with the parent, if the parent still objects to the relative search. . . ." The suggested language is not required to cure a defect but would clarify that the obligation to "evaluate and address" includes consulting with the parent about the identified factors. Finally, the proposed rule as

originally proposed specifies that, in the case of an Indian child, the agency must seek a relative placement unless the court has determined that there is good cause under the ICWA not to do so, and requires that the preference of the Indian child, parent, or guardian be considered in accordance with the ICWA.

48. The proposed rule was supported by Tarryl Clark, Senior Program Associate for the Children's Defense Fund, who expressed the view that counties are not currently making it a priority to place children with relatives. Muriel Hinich, who is Director of Grandparents Preserving Families and was a member of the advisory committee that drafted these rules, asserted that it is irrational to allow a parent who cannot care for a child and may be acting impulsively due to anger or bitterness to object to a relative search. Ms. Hinich contended that the parent's request that relatives not be contacted should trigger an investigation as to why the parent objects. Ms. Hinich also suggested that the rule be clarified to require that local agencies conduct a "diligent" search for relatives. Louise Bruce, an attorney in private practice who also participated in the rules advisory committee, and Emma Adam of the Institute of Child Learning suggested that the burden be placed on the objecting parent to demonstrate why relatives should not be contacted. Under this proposal, the rule would allow agencies to contact relatives unless the court ordered that there not be such contact.

49. The Department declined to modify the proposed rules in response to these comments. The Department pointed out that Minn. Stat. § 257.072, subd. 1 (1994), requires agencies to make "special efforts" to search for relatives. Subpart 4 of the proposed rules delineates what steps the local agency must take to satisfy the "special efforts" requirement. Because the statute does not mandate "diligent" efforts, the Department declined to use that term in the rules. Regardless of whether the phrase "special efforts" or "diligent efforts" is used, it is apparent that the statute requires agencies to conduct a thorough search. The Department further emphasized that Minn. Stat. § 257.072, subd. 7(1)(a) (1994), expressly prohibits a local agency from contacting relatives unless ordered to do so by the juvenile court where a parent has made an explicit request that the relative preference not be followed. As reflected in the statute, the Legislature has determined that parental wishes are to be respected unless overruled by the court. DHS has no authority to change the procedure established by statute.

50. Paula K. Richey, a member of the rule advisory committee, objected to the language in subpart 2 requiring agencies to "tell parents of the notification to the court" where the agency has notified the juvenile court that the parent objects to a relative search. Ms. Richey asserted that due process requires each parent to receive prior notice and an opportunity to be heard on the issue of the relative search. In response, DHS modified the language of subpart 2 to provide that "[t]he agency must send each parent a copy of the notification to the court." The modification is needed and reasonable to ensure that each parent receives written notice that the court has been contacted regarding the relative search issue. The Department also modified the last sentence of subpart 2 to refer to "custodian" rather than "guardian."

51. Subparts 1 and 2 have been shown to be needed and reasonable, as modified. Neither of the modifications made by the Department in subpart 2 are substantial changes.

Subpart 3 - Initiation of Search for Relatives

52. As originally proposed, subpart 3 required a local agency to conduct a relative search for at least six months and specified that the agency "may continue the search thereafter as necessary or if the court orders it to do so." Linda Anderson, Director of the St. Louis County Social Service Department, urged deletion of the requirement that local agencies continue searching even if the first placement is with a relative and also recommended eliminating the language permitting agencies to continue searching after six months. Patricia Ray, Ombudsperson for Spanish-speaking Families, suggested that local agencies be required to search for relatives outside the country if there is a likelihood that the child has relatives in other countries. Ms. Ray further suggested that the rules require searches to continue for more than six months when it is likely that there are relatives outside the country.

53. In response, the Department pointed out that the statute does not require agencies to search for all relatives or to conduct international searches, and contends that it would be burdensome and impractical to do so. The Department expressed its view that placement of children with relatives in foreign countries would be inconsistent with the State's policy to encourage parental visitation and family reunification and noted that local agencies would have no authority to license foster care providers in foreign countries. Moreover, the Department emphasized that the governing statute expressly provides that the "special efforts" requirement is satisfied if the agency has made "appropriate efforts" for six months following the child's placement in a residential facility and the court approves the agency's efforts pursuant to Minn. Stat. § 260.191, subd. 3a. Minn. Stat. § 257.072, subd. 1 (1994). Thus, the statute recognizes that the court may order the search to continue beyond six months. The Department and the advisory committee agreed that agencies that wished to pursue a search beyond six months should be permitted, but not required, to do so. Although the statute does not clearly require that the local agency continue to search for relatives after a relative is found, the advisory committee recommended that the search continue even if a relative was found because it was deemed to be proper for the agency to have more than one appropriate relative available to care for the child in the event that the first placement was unsuccessful.

54. In response to these comments, the Department modified the first portion of subpart 3 to provide as follows:

> For six months following the child's first placement, the agency must search for the child's relatives, even if the first placement is with a relative. The agency may continue the search thereafter if it determines it to be in the best interest of the child of if the court orders it to do so.

Deletion of the "at least six months" language is needed and reasonable. Six months is the statutorily required term to determine if relatives suitable for placement can be found. However, the use of "may" in the second sentence suggests that the local agency has the discretion to choose to discontinue its search even when it determines that continuing to search is in the best interest of the child or a court has ordered the local agency to continue to search. Discretionary power may be delegated to administrative officers "[i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers." Lee v. Delmont, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949); accord Anderson v. Commissioner of Highways, 126 N.W.2d 778, 780 (Minn. 1964).. The proposed rule, as modified, does not furnish "a reasonably clear policy or standard of action" within the meaning of the Lee decision. This is a defect in the rule. In order to ensure that the rule will be applied in a consistent manner, more specific language avoiding the delegation of unbridled discretion to local agencies is necessary.

55. To cure this defect, the Department must clearly state when it is necessary for local agencies to conduct relative searches and what standard will be used to control and guide local agencies in exercising discretion in deciding to continue searching. The Judge suggests the following language:

> The agency must search for the child's relatives for six months following the child's first placement, even if that placement is with a relative. The agency shall continue to search so long as the agency determines continued searching is in the best interest of the child or so long as the court orders the agency to do so.

56. Subpart 3, as modified, has been shown to be needed and reasonable. The modifications suggested to cure the defect identified above do not result in a rule that is substantially different from the rule as originally proposed.

Proposed Rule Part 9560.0542 - Consideration of the Child's Heritage

57. Part 9560.0542, as originally proposed, provided that the race, color, or national origin of the child or foster care provider could be considered in making a placement "only when a narrowly tailored, individualized determination has been made that the facts and circumstances require consideration of race, color, or national origin to advance the best interests of the child." This language was drawn from federal guidelines issued under the Multi-Ethnic Placement Act ("MEPA"). At the hearing, the Department replaced this language with language taken directly from MEPA itself.

58. The purpose of MEPA is "to promote the best interests of children by . . . preventing discrimination in the placement of children based on race, color, or national origin; and . . . facilitating the identification and recruitment of foster and adoptive families that can meet children's needs." P.L. 103-382, Title V, Part E, Subpart 1, § 552 (1994). The Act, which is codified in 42 U.S.C. § 5115a, prohibits agencies or entities

that receive federal assistance and are involved in adoption or foster care placements from "categorically deny[ing] to any person the opportunity to become an adoptive or a foster parent, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved" or "delay[ing] or deny[ing] the placement of a child for adoption or into foster care, or otherwise discriminat[ing] in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved." 42 U.S.C. § 5115a(a)(1). The MEPA further provides, however, that such agencies "may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interests of a child." 42 U.S.C. § 5115a(a)(1) (emphasis added).

59. Anishinabe Legal Services and SMRLS objected to the proposed rule as not recognizing the primacy of the ICWA over the MEPA. In its post-hearing response, DHS agreed that it was appropriate to refer to the ICWA. The Department thus modified the first portion of the rule to state as follows:

> For an Indian child, the Indian Child Welfare Act controls the placement. In all other cases, an agency may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster care provider to meet the needs of the child as one of a number of factors used to determine the best interests of the child.

The second sentence of the proposed rule echoes the MEPA language stating that it is permissible for agencies to consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster parents to meet the needs of a child of this background as one of several factors used to determine the child's best interests.

60. The rule part, as modified, uses the word "may" and thus grants discretionary power to local agencies. Under these circumstances, however, it is not an improper delegation of authority. As noted in G. Beck, L. Bakken, & T. Muck, Minnesota Administrative Procedure, at 402 (1987), "[a] rule granting discretionary power to an administrative officers is permissible under certain circumstances. First, if the enabling statute expressly authorizes such agency discretion, then the rules adopted thereunder are not required to be more restrictive." In this instance, the MEPA itself confers discretion upon agencies involved in foster care placements to consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster parent to meet the needs of a child of this background as one factor among many used to determine the best interests of the child. The statute contemplates that a case-by-case determination will be made, necessitating the exercise of discretion by individual agency workers. The rule is consistent with that approach. Accordingly, the rule, as modified, has been shown to be needed and reasonable to ensure compliance with the MEPA and the ICWA. The modifications do not result in a rule that is substantially different from the rule as originally proposed.

Proposed Rule Part 9560.0545 - Documentation of Placement Efforts

61. The standards for documenting the local agency's placement efforts are set forth in proposed rule 9560.0545. As originally drafted, subpart 1 requires that agencies document: (A) the date the search for relatives began; (B) the efforts to place the child with relatives; (C) the effort to achieve the least restrictive or most family-like environment; (D) whether the agency has determined that race. color, or national origin must be considered to advance the best interests of the child and why; and, (E) in the case of an Indian child, what actions were taken to conduct a diligent search in compliance with the ICWA.

62. SMRLS asserted that the ICWA takes precedence over the provisions of the MEPA, and urged that item D be modified to begin with the phrase, "[e]xcept in cases governed by the Indian Child Welfare Act. . . . " In addition, SMRLS suggested that agencies be required to determine the child's tribal affiliation in every case.

63. At the hearing, and in its post-hearing response, DHS modified the language of item D to provide as follows:

The local agency must document in the child's case record:

* * *

D. all the factors used in making the placement decision, including race, color, or national origin if it has been determined under part 9560.0542 that consideration of such factors is in the best interests of the child. Under the Indian Child Welfare Act, an Indian child's heritage must always be considered;

The Department also modified item E to provide that the agency must document in the case of an Indian child "the identity of the child's tribe" as well as actions taken to conduct a diligent search. Items D and E, as modified, meet the objections of the commentator and are needed and reasonable to clarify the items that local agencies will be expected to document. The new language is not a substantial change from the rule as originally proposed.

Proposed Rule 9560.0603 - Placement Plan

64. Proposed rule 9560.0603 consolidates various statutory and rule provisions relating to the preparation of placement plans for children and the required contents of such plans. The MCAA objected to the requirement in subpart 3 that foster care providers sign the placement plan, along with the agency, the parents, and the child (if competent). The MCAA was concerned that foster care providers might thereby obtain an "inappropriate voice" in the content of the placement plan. MCAA also pointed out that Minn. Stat. § 257.071 does not include foster care providers among the list of individuals required to sign the plan. The Department declined to modify the language of the proposed rule in response to this comment. The Department noted that it is appropriate to have the foster care providers sign the plan since a portion of the plan addresses their role, and emphasized that the plan reflects a "team" approach. The rules contain a more detailed description of the contents of the placement plan than the

statute. The requirement that foster care providers sign the plan indicates their acceptance of their obligations set out in the plan, and nothing more. Subpart 3 is needed and reasonable, as proposed.

65. SMRLS suggested adding language to item B of subpart 4 of the proposed rule requiring the agency to state in the placement plan whether the child was placed with a member of his or her extended family and, if not, identify the good cause for not placing the child with a relative. The Minnesota County Attorneys Association responded by stating that courts and not local agencies determine whether there is "good cause" for not following the preferences set forth in the ICWA. The Department declined to make the suggested modification. Item B of subpart 4 already requires the agency to describe the placement options that were considered and reasons for selection of a particular foster care provider. Accordingly, the language suggested by SMRLS would be redundant. The rule is not rendered unreasonable by the Department's failure to incorporate the suggested revision.

66. Item B of subpart 4 requires that the placement plan include information about placement options that were considered for the child. DHS modified item B to delete the requirement that the plan include information on the child's racial or ethnic heritage and comments on "why the child was placed in an institutional or group home rather than in a family foster home" and add a requirement that "documentation" of the search for the child's relatives be included, instead of "comments" on that subject. The Department made these changes to clarify the proposed rules and eliminate unnecessary portions of the rules. The Department noted that racial and ethnic heritage is part of routine documentation practice and item B already requires documentation of placement options and reasons for the selection of the foster care provider. Item B, as modified, is needed and reasonable to clarify the rule provisions and eliminate redundant requirements. The new language does not constitute a substantial change.

67. As originally proposed, subpart 6 required local agencies to inform the child and the parent or guardian of the right to consult social service agencies or other persons in preparation of the placement plan. The rule also requires agencies to advise the child and parent or guardian that they each have the right to legal counsel in the preparation of the placement plan and the child has the right to appointment of a guardian ad litem. Legal Aid of Minneapolis suggested that grandparents be included in the list of persons who will receive notice of a right to consult and right to counsel. The Department accepted the suggestion in part. The Department agreed that it was appropriate to advise grandparents that they may consult any person in preparation of the case plan. The Department acknowledged that some grandparents clearly have the right to participate in foster care proceedings under Minn. Stat. § 260.155, subd. 1a, which expressly provides that a grandparent has a right to participate in the proceedings to the same extent as a parent if the child has lived with the grandparent within the two years preceding the filing of the petition. The Department noted, however, that it is not clear whether grandparents have the right to counsel in such proceedings. See Minn. Stat. § 260.155, subd. 2 (1994). The Department thus modified the first portion of the first sentence of subpart 6 to state that "[t]he local agency must advise the child, the

parent or guardian, and any grandparent with the right to participate under Minnesota Statutes, section 260.155, subdivision 1a, that they may consult any person. . . ."

68. The Administrative Law Judge agrees that the language of Minn. Stat. § 260.155, subd. 2 (1994), does not clearly provide grandparents with the right to appointment of counsel. The silence of the rule on this issue will not affect whether grandparents will, in fact, be accorded a right to counsel under the statute. Any right to counsel for grandparents will arise under Minn. Stat. § 260.155, subds. 1a and 2, and not the rule. Subpart 6, as modified, has been shown to be needed and reasonable, and the modifications do not result in a substantial change.

Proposed Rule 9560.0606 - Agency Review

69. Subpart 1 of proposed rule 9560.0606 precludes a local agency from changing a child's placement unless it determines that another placement is in the best interest of the child. SMRLS suggested additional language indicating that a change to placement with a relative is presumed to be in a child's best interests and that, in cases governed by the ICWA, any change to a higher placement preference is presumed to be in the best interests of an Indian child. DHS modified the subpart to expressly require the ICWA placement preferences for Indian children. MCAA recommended that the language in the proposed rule indicating that the local agency must "request" the court's permission before changing a court-ordered placement be changed to a statement that the local agency must "obtain" the court's permission.

70. In response to these comments, DHS modified subpart 1 to substitute "obtain" for "request" and to include a statement that, "[f]or Indian children, best interests must be determined in accordance with placement preferences in the Indian Child Welfare Act." The Department declined to include the remainder of the language suggested by SMRLS. The Department acknowledged that common law and a statutory presumption support a preference for placement of children with a relative. The Department pointed out, however, that the relevant court decisions do not clearly indicate that a change to placement with a relative is in the child's best interests. Because Minn. Stat. § 257.071, subd. 1b (1994), indicates that an agency may not change a child's placement unless the change is in the child's best interests, the Department believes that the language of the proposed rule is appropriate.

71. The Department has demonstrated that subpart 1, as modified, is needed and reasonable. The new language does not result in a rule that is substantially different from the rule as originally proposed.

Proposed Rule 9560.0609 - Court Review of Voluntary Placements

72. Where a child has been in voluntary placement for 18 months due to a developmental disability or for six months due to an emotional handicap, subparts 1 and 2 of proposed rule 9560.0609 require that the local agency either return the child to the child's home or petition the court for review of the placement. For all other voluntary

placements, the proposed rule requires that the local agency return the child home, petition for court review within six months of the placement, or file a petition to terminate parental rights. Pursuant to subpart 3 of the proposed rule, the agency must petition the court for further review of the voluntary placement of a child with a developmental disability or emotional handicap within two years of the court's initial review. In all other cases, the agency is required to seek further court review of the voluntary placement six months after the court's initial review.

73. The MCAA suggested that the rule be modified to track the language of Minn. Stat. § 260.192 more closely and recommended that the word "petition" be changed to "ask." In its post-hearing comments, the Department modified the last sentence of subpart 3 to provide that, "[i]n all other voluntary placements which the court has approved, the local agency must request the court for further review six months after the initial review if the child continues in placement."

74. The Department has shown that the proposed rule is needed and reasonable to describe the obligations of local agencies with respect to court review of voluntary placements. The modifications clarify the rule and do not result in a substantial change. The Administrative Law Judge notes that subparts 2 and 3 of the rule also contain other references to a "petition" for review. The Department may wish to consider modifying this language to refer to a "request" for review to be consistent with the modification made to the last sentence in subpart 3. The language of the proposed rule also may flow better if it refers to a requirement that the agency "file a request with the court for further review." Such modifications, if made, will not result in a rule that is substantially different from that originally proposed.

75. The rule does not indicate whether only one further review by the court is required or whether multiple further reviews must be sought at the specified time intervals if the child remains in placement. The rule is impermissibly vague due to its failure to clearly indicate what will be required of local agencies. The language of a rule must be "'sufficiently specific to provide fair warning' . . . of the type of conduct which is punishable under that rule." Thompson v. City of Minneapolis, 300 N.W.2d 763, 768 (Minn. 1980), quoting Colten v. Kentucky, 407 U.S. 104, 110 (1972). To cure the defect, the Department may incorporate the following language in subpart 3 if only a single review is required:

> If the court approves the voluntary placement of a child because of either a developmental disability or emotional handicap, the local agency must file a request with the court under Minnesota Statutes, section 260.131, for one further review within two years of the initial review. In all other voluntary placements which the court has approved, the local agency must file a request with the court for one further review six months after the initial review if the child continues in placement.

If multiple further reviews are required, the Department may incorporate the following language in subpart 3:

> If the court approves the voluntary placement of a child because of either a developmental disability or emotional handicap, the local agency must file a request with the court under Minnesota Statutes, section 260.131, for one further review within two years of the initial review and for additional further review within every two years thereafter. In all other voluntary placements which the court has approved, the local agency must file a request with the court for one further review six months after the initial review and for additional further review every six months thereafter if the child continues in placement.

76. The proposed rule, with the modifications suggested by the Department and required to correct the vagueness defect, has been shown to be needed and reasonable. The modifications do not constitute a substantial change.

Proposed Rule 9560.0613 - Court Review of Court-Ordered Placements

77. Subpart 1 of proposed rule 9560.0613 contains time requirements for agencies to seek court review of court-ordered placements. At the suggestion of MCAA, the Department modified the proposed rule to refer to a "request" for review rather than a "petition." Once again, as suggested in Finding 74 above, the Department may wish to consider further modifying the rule to require agencies to "file a request with the court for review."

78. As originally proposed, subpart 2 required that the local agency ask the county attorney to file a pleading to establish the basis for a permanent placement determination no later than 11 months after a child is placed pursuant to a court order. MCAA objected to the language of this subpart and proposed a modification to the introductory language and items E and F. The suggested language requires the local agency to request that the county attorney file pleadings to establish the basis for a permanent placement that allows a court review no later than within twelve months of the court-ordered placement. MCAA recommended that the rule include language to give local agencies discretion to request a six-month delay in the permanent placement determination due to circumstances specified in Minn. Stat. § 260.191, subd. 3b(b). MCAA also urged that the rule provide that no permanency pleading need be filed and a permanent placement determination hearing will not be required if a child is returned home or if a petition for termination of parental rights is filed prior to the deadline for filing the permanent placement pleading.

79. In response to MCAA's comments, the Department modified the introductory language of subpart 2 and revised item F, and removed it from the lettered list of items to be included in the pleadings. As modified, subpart 2 provides as follows:

> The local agency must request the county attorney to file pleadings to establish the basis for a permanent placement determination in a manner that allows for court review no later than 12 months after a child is placed in a residential facility by court order. Alternatively, the agency may request filing of pleadings recommending a delay in the permanent

> placement determination because of a circumstance specified in Minnesota Statutes, section 260.191, subdivision 3b(b). Pleadings to establish a basis for permanent placement determination must contain the following information: [Items A.-E. omitted.] A permanent placement determination is not required if a child is returned home or if a termination of parental rights petition is filed before the permanency planning determination.

80. The modified subpart conforms to the statutory requirements regarding court review of court-ordered placements. The discretion of local agencies to request delay of permanent placement is adequately limited by the statutory standards cited in the rule. The subpart, as modified, is needed and reasonable and does not result in a rule that is substantially different from the rule as originally proposed.

Proposed Rule 9560.0615 - Criteria for Return of Child to Home

81. When a child is to be returned home, proposed rule 9560.0615 sets out procedures for local agencies to follow in terminating the foster care arrangements and ensuring the appropriate return of the child. MCAA suggested that the language for return of non-Indian children from nonemergency placements contained in item A(2) of subpart 1 be revised to require that the conditions that "led to the out-of-home placement have been corrected and placement is no longer in the child's best interest." The Department modified a portion of the rule language in response to this comment, but declined to accept all of the alternative language proposed by the MCAA. As modified, A(2) permits local agencies to seek a court order to end its custody and return the child if "the conditions that led to the out-of-home placement have been mitigated." DHS noted that the rule advisory committee and subcommittee recommended that a child be permitted to be returned home even if all conditions were not yet corrected. Although some problems remain uncorrected, the home situation may be sufficiently better to allow the child to return. Thus, for example, a child removed due to a parent's severe alcoholism could be returned to the parent if the parent showed improvement in controlling the alcoholism,. even if the parent could not prove that he or she was completely "cured." Item A is needed and reasonable, as modified. The new language is not a substantial change.

82. Return of a non-Indian child under a voluntary placement is governed by subpart 1, item B. The rule originally required that the child be returned within 24 hours of a request from the parent or guardian, unless the local agency has obtained a court order for continued placement due to child protection concerns. The Department changed the rule language to be consistent with the rule language of part 9560.0527, discussed in Findings 37-40 above. As modified, item B provides that "the local agency must return the child to the parent or guardian as soon as possible and no later than 24 hours after receipt of a written and dated request from the parent or guardian . . . ." Item B is needed and reasonable as modified. The new language is not a substantial change.

83. Under item C of subpart 1, a local agency is authorized to seek a court order to end its custody of a child so that the child can be released into the care of a relative if the child can be safely maintained in the relative's home without formal legal authority and the relative is willing to care for the child without formal legal authority. The Children's Defense Fund suggested that this language be changed so that caregivers can end their relationship with the county if they are judged to be able to safely maintain the child in their homes, and expressed concern that counties will seek to end their custody of children and place them in the custody of relatives as a cost-cutting measure, regardless of the best interests of the child. Louise Bruce also objected to this item due to a concern that counties may coerce indigent relatives into taking legal custody of children instead of receiving foster care payments. DHS responded that this rule is consistent with the national policy of encouraging the least restrictive placement of a child and the state's policy of keeping children within the extended family, and will only be used in situations in which the parents and relative agree that a relative can take care of the child but the relative does not wish to be a formal foster parent. The rule does not authorize counties to initiate a transfer of legal custody to relatives. The Department indicated that the concerns of Ms. Bruce and the Children's Defense Fund are addressed by the additional language contained in item C, as revised, which requires that the local agency give the relative information orally and in writing about the rights and responsibilities of a relative and child in various formal and informal relationships, as well as by the language in part 9560.0665 requiring detailed notices to foster care providers and relatives caring for children. The Department has shown that item C, as modified, is needed and reasonable. The requirement that both written and oral notification of rights and responsibilities be given to the relative is not a substantial change in the rule.

84. Subpart 2 sets out requirements for return of Indian children. MCAA expressed the view that the rule applies the statutory standard for return of Indian children who are residents or domiciliaries of a reservation and that this standard is inappropriate for other Indian children. MCAA suggested that the rule be revised to provide that an Indian child who was removed by the court because of an emergency must be returned if there was no testimony by a qualified Indian expert that continued custody of the child by the parent or custodian would likely result in serious emotional or physical harm to the child. DHS responded that it can be difficult to identify the domicile of an Indian child in an emergency and stated that the Department has interpreted the statute to permit emergency removals of all Indian children when required to prevent imminent physical harm. The Department pointed out that the Minnesota Court of Appeals recognized in Matter of Welfare of J.A.S., 488 N.W.2d 332, 335 (Minn. App. 1992), that it is implicit in the statute that emergency removal authority extends to non-reservation Indian children. DHS objected to the language suggested by SMRLS as unnecessary, since all removals of Indian children must be supported by testimony by a qualified expert witness, as set forth in rule part 9560.0221.

85. SMRLS suggested that subpart 2(B) and (C) refer to Indian "custodian" rather than "guardian" and that the language contained in subpart 2(C) of the proposed rule requiring that parents provide a written, notarized statement for the return of Indian children be deleted. In response, the Department replaced "guardian" with the term

"custodian" in the proposed rules and added language to item C specifying that the return be accomplished "as soon as possible and no later than 24 hours after the agency receives a written and dated statement complying with the requirements of Minnesota Statutes, section 257.351, subdivision 4." The new language renders the rule consistent with part 9560.0527, discussed in Findings 37-40 above. Subpart 2, as modified, is needed, reasonable, and not a substantial change.

Proposed Rule 9560.0665 - Notice and Appeal Procedures

86. Proposed rule 9560.0665 sets forth various procedures for providing notices to relatives and foster care providers. The required notices are designed to explain the basis for agency decisions regarding such matters as the amount of the foster care payment, the difficulty-of-care rating assigned by the local agency, reductions in the number of days for which payment is provided, and the termination of foster care payments. The notices prescribed by the proposed rule also describe the provider's rights to request reassessment or a hearing under the DHS "fair hearing" process in the event of disagreements between the providers and the local agency. The "fair hearing" process involves hearings before DHS referees. Louise Bruce suggested that relative caretakers and foster care providers be permitted by the rules to request a contested case hearing before Administrative Law Judges employed by the Office of Administrative Hearings due to a perception that the fair hearing process moved slowly and DHS referees favored the Department. In response, the Department indicated that Minn. Stat. § 256.045 specifies that Department referees shall hear appeals relating to benefits administered by the Department. The Department indicated that the general practice in most cases is to hold a hearing three weeks after the Department receives the appeal and issue a decision 30 to 45 days after the hearing. Because there is no statutory authority for permitting hearings involving foster care disputes to be heard by Administrative Law Judges, the Department properly did not modify the proposed rules.

87. Linda Anderson, Director of the St. Louis County Social Service Department, objected to the proposed rules on the grounds that they impose time-consuming and onerous notice requirements, and suggested that the current rule provisions provide adequate protections for foster parents while not overburdening social workers. Carter Pettersen, Director of the Itasca County Human Services Department, also expressed concern about the number of notices required by the proposed rules. Legal Aid of Minneapolis supported the provisions of the proposed rule and stated that the proposed rule provides helpful clarification of notice and hearing procedures mandated by federal law. In its post-hearing response, the Department pointed out that the notices in this rule part are required by federal law and indicated that the Department is drafting forms that will help agencies more easily comply with the notice provisions. Some information, such as the beginning and ending dates of placement, may not be known to relative caretakers in the absence of formal notification by the Department. The Department explained that it distributed a bulletin regarding the notice and appeal procedures prior to promulgating this rule because federal law required compliance with these procedures.

88. Marian Eisner, Foster Care Supervisor for Dakota County, recommended that subpart 7, relating to notice of termination, be removed from the rule. Ms. Eisner urged that foster care payments be made based on the actual number of days in care, rather than the timing of the notice provided by the agency to the provider or the pendency of the provider's appeal. She suggested that, under the proposed rules, a child taken into custody under a 72-hour police hold and discharged from custody at the end of three days could trigger 120 days of payments. Minneapolis Legal Aid supported retaining the rule, with a modification to require that providers who believe their payments were improperly terminated can only get continuing payments if they request continuation within ten days of the date of notice and if they state in writing that the child remained in their care. The MCAA suggested that the word "appeals" be replaced with the phrase "submits a written request for a hearing" in order to make the rule consistent with Minn. Stat. § 256.045. The Department agreed to modify the rule as suggested by the MCAA. DHS replied that Ms. Eisner's concern was valid, but stated that the federal law clearly did not intend for payments to continue where the child was no longer present in the foster parent's home. To clarify the rule, DHS modified subpart 7, item G, to require that the written notice include:

> a statement that (1) a foster care provider who requests a hearing within ten days of the date of the notice may request that the foster care payments on the child's behalf continue pending fair hearing review if the request indicates in writing that the child remains in the foster care provider's care; (2) payments will continue only so long as the child remains in the foster care provider's care; and (3) if the county's action to terminate the benefits is sustained upon review, the agency may recover from the foster care provider any amounts paid pending review; . . .

89. The modifications meet the needs identified by the commentators. The proposed rule is needed and reasonable, as modified. The new language does not result in a rule that is substantially different from the rule as originally proposed.

<u>Proposed Rule 9560.0670 - Recruitment of Foster Care Providers</u>

90. Ms. Anderson suggested that this portion of the proposed rules would be more appropriately added to the foster care licensing rules. The Department agreed that these provisions might be more logically placed in the licensing rule, but pointed out that a number of them already are in the current rule. The Department indicated that it will consider moving the recruitment provisions of the rule into the foster care licensing rule when that rule is next amended.

91. Lisa Pollack of Fond du Lac Human Services recommended that the word "tribe" be added to the list of organizations with which the local agency may contract in developing a recruitment plan and to the list of organizations with which agency must work in recruiting families of various ethnic groups. The Department agreed and modified the rule accordingly. The rule has been shown to be needed and reasonable, as modified, and the modifications are not a substantial change.

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

CONCLUSIONS

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

2. The Department has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, la and 14.14, subd. 2 (1994), 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) (1994), except as noted in Findings 19, 23, 45, 54, and 75.

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) (1994).

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 (1994), and Minn. Rules pts. 1400.1000, subp. I and 1400.1100 (1995).

6. The Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3, in noted at Findings 19, 23, 46, 55, and 75.

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 (1994).

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

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

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

RECOMMENDATION

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

Dated this 10th day of April, 1996.

s/ Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape-recorded (three cassettes; no transcript prepared)