

5176-1

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

in the Matter of Proposed  
Adoption of Permanent Rules  
Relating to Surveillance and  
Utilization Review of Medical  
Assistance Services, Minn. Rules,  
Pts. 9505.2160 to 9505,2242.

REPORT OF THE  
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on February 13, 1991, at 9:00 a.m. in the Space Center Building, 444 Lafayette Road, St. Paul, Minnesota.

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

Kim Buechel Mesun, special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Department at the hearing. The Department's hearing panel consisted of Debra Stenseth, Supervisor of DHS's Surveillance and Utilization Review Section (SURS), Connie Jacobs, Staff Attorney for SURS; Ron Rogers, Supervisor of the Recipient Primary Care Section and SURS; Larry Woods, Director of the Health Care Support Commission; and Eleanor Weber, Rulemaker for DHS. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the date of the St. Paul hearing, to March 5,

1991. Pursuant to Minn. Stat. § 14.15, subd. 1 (1988), three business days were allowed for the filing of responsive comments. At the close of business on March 8, 1991, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period. The Department submitted written comments responding to matters discussed at the hearings and proposing further amendments to the rule;.

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

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise DHS 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, DHS 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 DHS 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 DHS makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

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

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

#### FINDINGS OF FACT

Procedural Requirements

1. On December 11, 1990, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules certified by the Revisor of Statutes;
- (b) the Order for Hearing;
- (c) the Notice of Hearing proposed to be issued,
- (d) the Statement of Need and Reasonableness (SONAR);
- (e) a list of additional persons to receive the Notice of Hearing; and,
- (e) a fiscal note,

2. On January 9, 1991, DHS mailed the Notice of Hearing to all persons and associations who had registered their names with the Department "or the purpose of receiving such notice and the persons who appear on the list of additional persons to receive the Notice of Hearing.

3. On January 14, 1991, the Notice of Hearing and the proposed rules were published at 15 State Register 1579.

4. On January 17, 1991, DHS filed the following documents with the Administrative Law Judge:

- (a) the Notice of Hearing as mailed;
- (b) a copy of the State Register pages containing the Notice of Hearing and its proposed rules;
- (c) a copy of the Notice of Solicitation of Outside Material; and all materials received pursuant to that Notice;
- (d) the names of agency personnel and witnesses called by the Department to testify at the hearing;
- (e) the Department's certification that its mailing list was accurate and complete;
- (f) the Affidavit of Mailing the Notice to all persons on DHS's mailing list and ,
- (g) the Affidavit of Additional Mailing.

#### Nature of the Proposed Rules and Statutory Authority.

5. Medical assistance (MA) funding for medical care of low income persons is made available to the state of Minnesota under the provisions of Title XIX of the Social Security Act (42 U.S.C. 1396a, et seq.) and 42 C.F.R. 431.10. These provisions require Minnesota to designate a state agency to carry out the administration and oversight of disbursing MA funds to eligible persons or programs. DHS is the designated state agency and it is directed by Minn. Stat, § 256B.04, subd. 10 to adopt rules to investigate suspected MA fraud and abuse and establish a system to safeguard against improper use of MA services. These proposed rules establish procedures to identify, investigate, and remedy improprieties in MA services. The Administrative Law Judge concludes that DHS has general statutory authority to adopt these rules.

Small Business Considerations in Rulemaking.

6, Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. DHS considered how the proposed rules would affect small businesses. The Department concluded that the requirements of federal law and rules governing the MA program rendered lessening the impact on small businesses impractical as such action would contravene federal law. See SONAR, at 10. The Department also maintains that the proposed rules fall within the standards and costs for service businesses exemption set forth at Minn. Stat. § 14.115, subd. 7(c). The Judge agrees. Even though the exemption does apply, DHS has also met the requirement; of Minn, stat. § 14.115, subd. 2 by considering methods of reducing the impact of the rules on small businesses.

Fiscal Notice.

7. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of \$100,000 per year by local public bodies. The notice must include an estimate of the total cost to local public bodies for a two year period. The proposed rules will apply to oversight of expenditure of MA funds and may require a payback of improperly used MA money. DHS staff testified at the hearing that these rules would apply to county welfare agencies Mary Martin, representing REM, Inc. (REM) asserted that this oversight of county welfare agencies, which could require paybacks from counties, resulted in a fiscal impact on counties which was not discussed in the fiscal notice. REM maintains that this omission constitutes a defect in the proposed rulemaking. These paybacks are not the "expenditure of public funds" intended by the statute, however. Rather, they are a return of funds improperly distributed. The proposed rules will not require expenditures by local governmental units or school districts in excess of \$100,000 in either of the two years immediately following adoption, and thus no notice is statutorily required.

Impact on Agricultural Land,

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

Proposed Rule 9505.2160 - Scope and Applicability.

9. This proposed rule part identifies the various programs which are subject to these rules. DHS identified each program not receiving MA funding and documented the Department's authority to establish the SURS system of

investigation over those programs. SONAR, 11-13. Mary Rodenberg Roberts, Director of Resident Advocacy Services (RAS); REM; and Jean Searles, M.S.W., Director of RESA, Inc. (RESA) objected to the proposed rules extending to Intermediate Care Facilities for the Mentally Retarded (ICFs/MR). Mary Rodenberg-Roberts and Jean Searles maintain that the SURS procedures duplicate the ratemaking review of Minn. Rules 9553 (Rule 53) and 9510. REM asserted that SURS duplicates the activities of the Medicaid Fraud Control Unit (MFCU). These commentators contend that the proposed rule is unreasonable by virtue of this duplication.

DHS responded that Rule 53 is a rate-setting rule which provides for audits every four years. The intent of Rule 53 is to measure compliance with the reimbursement requirements set by the State, not investigate fraudulent or abusive practices relating to medical services. DHS did not respond to the comment on the MFCU. SURS has been duly established as a division of the Department. Whether another branch of the same agency has identical jurisdiction has no impact on the need or reasonableness of the proposed rule. ICFs/MR provide services for which payment is made through MA funds. The Legislature and the federal government have concluded that surveillance

and review of MA providers in necessary. Having those functions performed by two divisions of an agency is not facially unreasonable, None of the commentators asserted that MCFU is finding every instance of potential fraud and abuse in the MA system.

DHS did delete all references to specific Minn. Rules citations in the proposed rule. The Department maintained that this would prevent omissions and ensure that persons would not be confused by the citations, in the event of further revisions to those rules. The Department has shown that proposed rule part 9505.2160 is needed and reasonable to establish the scope of the remaining proposed rules. The modification proposed by DHS is made for the purpose of clarifying the rule and does not constitute a substantial change.

Due to the great number of modifications made to the rules after their publication in the State Register by DHS, the Administrative Law Judge has not duplicated all of the new language in this Report. The modifications are located in the record in three documents. These documents are: 1) Modifications Proposed at Public Hearing February 13, 1991; 2) 20-Pay Response to Comments; and 3) 3-Day Response to Comments. These documents are a part of the public record in this proceeding and have been made available at the Office of Administrative Hearings for public inspection and photocopying.

Proposed Rule 9505.2165 - Definitions.

10. Proposed rule 9505.2165 is composed of seventeen subparts setting the scope of this proposed rule part and defining other terms used throughout the proposed rules. Those definitions which require comment will be discussed. As with the remainder of the proposed rules, only those portions of the rules which require discussion or generated public comment will be discussed in this Report. All other parts of the rules are found to be needed and reasonable.

Subpart 2. Abuse.

11. Proposed rule 9505.2165, subpart 2 establishes an extensive definition of what constitutes "abuse." The specific items which constitute

abuse did not generate critical commentary. Many commentators did object to this definition, however. Donald Asp, on behalf of the Minnesota Medical Association (MMA); Care Providers of Minnesota (Care Providers); REM; Darrell R. Shreve, Ph.D, Director of Research and Regulations for the Minnesota Association of Homes for the Aging (MAHA); Marilyn Eelkema, representing the Minnesota Pharmacists Association; Paul Sherman; Victoria Lemberger, representing the Minnesota Hospital Association (MHA); Paul Onkka with the Legal Services Advocacy Project; and RAS were unanimous in their objection to the proposed definition of abuse in that it lacked the requirement that the action be part of a pattern. The commentators asserted that permitting abuse to be found in a single erroneous billing is unreasonable and a violation of due process rights

12. The Department responded to these objections by adding the element of a "pattern" to the definition of abuser DHS also added the term "repeated" to items 1 5, 10, 13, and 18 of subpart 2(A), which defines abuse by providers. Addition of these terms makes the proposed rule's language

consistent with the intent behind the abuse provision The change eliminates any possibility that a provider or recipient of MA could suffer adverse action through a single error in the affected items. The addition of "repeated" to item 13 should be examined by DHS, however, for grammatical continuity. While the grammatical confusion in this item is not a defect in the proposed rules, the Administrative Law Judge suggests that the item start with "repeatedly" and "repeated" be added between "causing" and "submission" to achieve the desired result.

13. Many of the game commentators suggested that intent be added as an element to several items. In response to those comments, DHS altered subpart 2(A)(14) which prohibits submission of a false application by adding "knowingly and willfully." DHS also altered item (17), which prohibits payment of program funds to a vendor suspended from program participation, to be a violation only if that conduct is done when "the provider knew or had reason to know" that the vendor was suspended. Those two modifications are consistent with the commentators proposals and meet their objections with respect to the prior language.

14. DHS also deleted item 6 and replaced that language with "repeated submission of claims for services that are not medically necessary." REM objected to medical necessity as a ground for abuse unless the term was defined. DHS did add a definition of "medical necessity" which is discussed at Finding 18, below. The effect of the change to item 6 is to conform the rule with Minn. Stat. § 256B.04, subd. 10, which charges DHS with establishing criteria for identification and investigation of "presentation on claims for services not medically necessary."

15. Item 15 of subpart 2(A) was deleted by DHS. The Department stated that this deletion was for the purpose of clarifying the rule- The content of item 15 made a provider's failure to abate a practice initially found to be abusive by DHS to be an independent instance of abuse if the practice was continued after the provider receives a Department warning The deletion is not a substantial change to the rules as proposed.

16. Subpart 2(B) defines abuse by recipients. DHS proposed only one grammatical change to item 11 in subpart 2(B). However, item 3 is identical to the language deleted in subpart 2(A)(15), discussed at Finding 15, and item 3 should also be deleted for the same reasons. Item 4 prohibits duplication or alteration of a recipient's medical identification card. In response to an inquiry by RAS, DHS acknowledged the MA card may be duplicated to ensure continued service in case of any loss of the original card. Since item 4 does not mean what it says, it must be changed to reflect the actual conduct prohibited. Failure to do so is a defect in the proposed rules, since the item unreasonably prohibits an accepted practice as presently written. Based on the other examples of abuse provided, DHS may word item 4 as follows:

altering or duplicating the medical identification card for the purpose of : 1) obtaining additional health services; billed to the program or 2) aiding another to obtain such services

With the suggested modification, item 4 is needed and reasonable

17. Both subparts 2(A) and (B) of proposed rule 9505.2165 are structured as definitions followed by this language: "Abuse by a provider [recipient] is characterized by, but not limited to, the presence of one of the following conditions." After that statement, items detailing specific types of abuse are listed. This language is defective in two respects. First, "characterized by" is meaningless rule terminology. Either the conduct constitutes abuse or it does not. For the purposes of rulemaking, a person must be able to determine what conduct is permitted and what is prohibited. Second, the phrase "but not limited to" fails to provide notice of what conduct is included in the definition of abuse. That point was clearly made by REM in its post-hearing comment. See, Comments of REM, Inc., at 11. These defects make subparts 2(A) and (B) unreasonable.

The Judge appreciates the Department's desire to build examples into the proposed rules. Indeed, many of the commentators sought changes in the rules to minutely detail what conduct is prohibited as abuse- To cure the defects in subparts 2(A) and (B), DHS should use the following language:

The following practices are deemed to be abuse by a provider [one "recipient" in subpart 2(B)]:

By deeming certain specific examples to be abuse, DHS does not detract from the overall applicability of the definition which precedes the examples. Alternatively, the Department may cure the defect in subparts 2(A) and (B) by deleting the examples and relying on the definitions to enforce the rules.

By making either of the modifications suggested by the Administrative Law Judge, proposed rule 9505.2165, subpart 2 would be needed and reasonable. None of the modifications made or suggested would alter the nature of the rules and they do not constitute substantial changes.

Subpart 6A Medically Necessary or Medical Necessity

18. In response to comments by REM and others, the Department added a definition of "medically necessary" or "medical necessity." The addition, codified as subpart 6A, references Minn. Rule 9505.0175, subp. 25. The referenced subpart defines those same terms for the purposes of making MA

payments. The reference is needed and reasonable to ensure that the grounds for payment of a claimed health service is identical to the grounds for review of that payment. The definition is included at the suggestion of a commentator, and does not constitute a substantial change.

Subpart 6B - Pattern.

19. In addition to adding "pattern" to the abuse definition, the Department has added a new subpart defining "pattern." Subpart 6B defines "pattern" as "an identifiable series of more than one event or activity." The definition is taken almost verbatim from Minn. Rule 9505.1750, subp. 9. The new subpart is included since "pattern" has been reintroduced into the proposed rules. The definition is needed and reasonable to aid in interpreting the definition of abuse. The new subpart incorporates language which would otherwise be repealed, and does not constitute a substantial change.

Subpart

9 - Provider

20. The definition of provider references Minn- Rule 9505-0175, subp@ 38, That definition, in part, refers to Minn. Stat. sec. 256B.02, subd. 7 REM objected to this definition as being "clumsy" owing to these multiple references. Since the rule applies only to a limited class of persons who must enter into an agreement for payment and who are aware of the overall restrictions which are set upon providers, the multiple references do not constitute a defect. The definition is needed and reasonable to specifically identify a particular class of persons subject to these rules- The Department did make modifications in the subpart, but these are only stylistic. The new language in the subpart does not constitute a substantial change.

Subpart 11 - Restriction.

21 This subpart is mentioned only due to the Department's change in the last sentence to delete "skilled or intermediate care nursing services," and replace it with "long-term care facilities." The change was made to conform the rule language with the most current terminology in the area. REM questioned whether ICFs/MR were considered long-term care facilities, The Administrative Law Judge takes the Department's comments concerning the change to mean that if ICFs/MR were considered intermediate care nursing services under the proposed rule, they are long-term care facilities under the proposed rule, as amended, The subpart is needed and reasonable. The change does not alter the scope of this subpart. However, if the Department has changed the applicability of this provision with its amendment, DHS has not shown that excluding ICFs/MR is either needed or reasonable.

Proposed Rule 9505.2170 - Bulletins, Manuals, and Forms Related to Program.

22. Proposed rule 9505.2170 allowed DHS to issue bulletins, manuals, and forms which the providers must comply with. The penalty for noncompliance was not stated. Care Providers of Minnesota and REM objected to this rule part as

constituting illegal rulemaking. DHS subsequently deleted this rule part from its proposed rules. The deletion is not a substantial change.

Proposed Rule 9505.2175 - Health Service Records.

23. Proposed rule 9505.2175 is composed of six subparts and conditions payment for program services upon proper documentation of the services. Care Providers questioned the term "occurrence" as it is used in subpart 1. The term refers to any event which qualifies for payment under the MA program. DHS added language to subpart I which references subparts 3 through 6. The new language is needed to give meaning to those subparts. REM objected to the health service record requirements, citing concern that the rule might conflict with other recordkeeping rules. No specific conflicts were identified. The only conflict which could pose a problem is where a record is prohibited from being kept by statute or rule. Because no such rule or statute has been cited, the Judge finds that subpart I has been shown to be needed and reasonable and the new language is not a Substantial change.

Subpart 2 - Required Standards for Health Service Records.

24. Subpart 2 lists, in items A through 1, the specific requirements which must be met for a health service record. The only item which drew substantial comment was item A, requiring the record to be legible to the person providing care. This item affords some deference to the customs of health care professionals who place handwritten notations in the record. As Paul Onkka pointed out, these notations are often difficult for anyone other than the author to read. Requiring the record to be legible to any person providing care is an elementary precaution to ensure proper medical treatment. DHS has modified item A to show that the legibility standard is a minimum, not a maximum standard. The modification clarifies the intent of the item and does not constitute a substantial change. Item A is needed and reasonable to recognize current standards in the healthcare professions-

Subpart 6 - Rehabilitative and Therapeutic Service Records.

25. DHS added subpart 6 at the hearing to set the documentation standards for rehabilitative and therapeutic services. The subpart incorporates the standards net for payment of such services. As discussed in Finding 18, above, this approach conforms the standards for receiving payments and for auditing for those payments. Subpart 6 is needed and reasonable, and does not constitute a substantial change.

Proposed Rule 9505.2180 - Financial Records.

26. Similar to the health service record requirements, proposed rule 9505,2180 sets requirements for financial documentation relating to payment for services received by program participants. REM objected to subpart 1(A) for containing the modifier "such as" when describing particular accounting records. REM asserted that this language is just as vague as the phrase "including but not limited to" which has been identified as a defect in many rulemaking proceedings. This assertion is correct. "Such as" is unreasonable insofar as it does not specify what items are required to be kept to comply with the proposed rule. The Department may cure the defect by deleting "such

as" or by reordering the things listed so that the end of item A reads "bank deposit slips and any other accounting records prepared for the provider."

Subpart 1(A) is needed and reasonable with the proposed modification. The modification is in direct response to a post-hearing comment and does not constitute a substantial change.

27. Subpart 1(E) requires retention of "patient appointment books and supervision schedules." RAS objected to this item as not accurately describing the material to be retained. DHS acknowledged that the books and schedules are the providers, maintained on behalf of the patient and amended the item accordingly. Subpart 1(E) is needed and reasonable to require documentation of services provided. The modification to the item clarifies the rule and does not constitute a substantial change

28. Providers must maintain employee records under subpart 1(H). REM questioned whether the privacy concerns of employees were being considered in the scope of this record requirement. DHS responded to this concern by altering the requirement to include only data which, when kept on public employees, is public data- REM disputed only the reasonableness of the

"current home address" requirement. REM noted that providers could be required to update former employee files for five years, based on current data practices. Such a requirement, if intended by the Department, has not been shown to be needed and reasonable. If the Department wants to apply the employee record requirement to former employees of the provider, the following language must be appended to subpart 1(H):

or the last known address of any former employee

The suggested language clarifies the rule to differentiate between current and former employees and will ensure that the most recent address available to the employer will be available to DHS. If DHS intends to apply subpart 1(H) only to present employees, the rule is needed and reasonable with the Department's amendment. If the rule is to apply to former employee records, the rule is defective because there is no showing that the rule is needed and reasonable. With the language suggested by the Administrative Law Judge, subpart 1(H) is needed and reasonable. Neither modification constitutes a substantial change.

Proposed Rule 9505.2185 - Access to Records.

Subpart I - Recipient's Consent to Access.

29. Nick Johnston, Ph.D., Executive Director of Central Minnesota Mental Health Center and RAS strongly objected to the provisions of proposed rule 9505.2185, subpart 1. This subpart "deems" a recipient to have consented in writing to the release of any of the recipient's health service records related to program services. RAS maintains that such a sweeping disclosure requirement is unsettling to recipients and questioned the Department's authority to compel such a disclosure. Paul Onkka of the Legal Services Advocacy Project identified two problems with the proposed rule part. First, financial records are included in the rule, but not in the statute cited by DHS as its authority for the provision. DHS responded to this comment by deleting all reference to financial records in subpart 1,

The second problem identified by Paul Onkka is caused by the use of the

phrase "records related to services under a program." He maintains that this language is broader than the statute authorizing that consent to access by DHS to medical records be deemed given. Minn. Stat. 256B.27, subd. 3 requires that written consent be filed with the local agency before recipient medical records may be inspected by DHS. Subdivision 4 of that statute states:

A person determined to be eligible for medical assistance shall be deemed to have authorized the commissioner of human services in writing to examine, for the investigative purposes identified in subdivision 3, all personal medical records developed while receiving medical assistance.

Minn. Stat. § 256B.27, subd. 4,

Close comparison of the statute with the Department's proposed rule reveals two discrepancies- The first, pointed out by Paul Onkka, is that subpart 1 would authorize inspection of records not developed while receiving

medical assistance. The statute limits the "deemed authorization" to records developed while receiving public assistance. This expansion of the records available to DHS is an intrusion on the privacy rights of individuals and not authorized by statute. Should a recipient volunteer that information, DHS may use it as provided for in subdivision 3. Absent the written consent however, the Department's ability to deem consent is limited. The second discrepancy is less clear. A person must be determined to be eligible to fall under subdivision 4, subpart I could be read to cover a person who had applied for, rather than be eligible for, MA participation. However, this is not a defect, as long as DHS restricts the rule to apply only to eligible persons.

To cure the defect identified in this Finding and clarify which parts of the rule apply to which type of consent, DHS should replace the first sentence of subpart I and the beginning of the second sentence with the following language:

If a recipient has not executed and filed a written consent authorizing release of the recipient's health service records, such consent shall be deemed to have been given in accordance with Minn. Stat. § 256B.27, subd. 4. Any consent given in writing for the release and review

The proposed language would clearly distinguish between the two types of consents, written and deemed. The proposed language would keep the rule within the Department's statutory authority. DHS would be responsible for keeping its record searches within the scope set by Minn. Stat. § 256B.27, subs. 3 and 4, As modified above, the rule is both needed and reasonable. The modification suggested does not constitute a substantial change.

Subpart 2 - Department Access to Provider Records.

30- The only aspect of proposed rule 9505 @2185, subp 2 which drew criticism was the requirement that the records be made available for inspection with no less than 24 hours notice. The corollary to this provision

is that, in some instances, the provider would receive only 24 hours notice. REM and Victoria Lemberger, on behalf of the MMA, objected to this limitation as being too restrictive, harmful to the provider's business, and punitive in nature. Care Providers suggested that the notice only be effective if given to responsible employees of the provider, not "whomever answers the phone." Statement of Care Providers of Minnesota, at 6. William Asp suggested 72 hours is a more appropriate time frame from notice to access.

DHS maintained that expanding the notice period would increase the opportunity for record tampering. The Department asserted that its investigators always attempt to give notice to the person in charge of a facility for obtaining access to records. DHS also stated that its investigators have rescheduled inspections where unforeseen circumstances create problems for the provider in releasing adequate staff to aid in obtaining records. The variety of persons who are appropriate for notifying is cited by the Department as the reason it cannot specify the person to receive notice in the proposed rule consistent with the exigencies of an investigation. The time limit, while restrictive, has been shown to be needed and reasonable to carry out the investigations required under state and federal law.

Proposed Rule 9505.2190 Retention of Records.

31. Proposed rule 9505.2190 is composed of four subparts. only subpart I was questioned by commentators. subpart I requires retention of records for five years after the date of billing. REM suggested that the date the service was provided start the retention period. DHS declined to make that change but did add "initial" to "date of billing" to clarify the start of the five year period. Proposed rule 9505.2190 has been shown to be both needed and reasonable as modified. The modification specifies the point in the billing process from which the five year retention period runs. The modification is not a substantial change.

Proposed Rule 9505.2195 - Copying Records.

32. Care Providers, MMA, MHA, and MAHA expressed concern that proposed rule 9505.2195 was shifting the burden of photocopying costs onto providers. DHS explained that the provision was intended to place the cost of photocopies on the Department, unless the provider prevents DHS from using the Department's own equipment to produce those copies. Only in that event would the cost shift to the provider to produce the copies needed for the investigation, To clarify the Department's intent, DHS added "at its own expense" to the first sentence of the rule. DHS has left the last sentence intact, since the Department intends that providers pay for photocopies when the opportunity to make copies is denied to the investigators. Proposed rule 9505.2195 is needed and reasonable to offer an incentive for provider cooperation in the investigator's photocopying. The modification clarifies the intent of the rules and does not constitute a substantial change.

Proposed Rule 9505.2200 - Identification and Investigation of Suspected Fraud and Abuse.

Subpart I - Department Investigation.

33. Subpart I of proposed rule 9505.2200 states that "the department may investigate providers or recipients to monitor compliance with program requirements The use of the word "may" in this subpart gives the

Department discretion as to whether or not it will conduct investigations.

This provision conflicts with the intent of Minn. Stat. § 256B.04, which requires DHS to supervise and investigate the MA program. Including discretion concerning whether to investigate is in conflict with the statutory responsibility of the Department and constitutes a defect in the proposed rules.

The authority for, and scope of, investigations is established by statute. Minn. Stat. sec. 256B.04, subds. 1, 10, and 15. If the Department is clarifying that not every provider or recipient need be investigated, the following language will meet that need and cure the defect identified in this Finding :

The department shall investigate providers and recipients to , monitor compliance with program requirements for the purpose of identifying fraud, theft, or abuse in the administration of the program,

This Finding is not intended to suggest that the Department does not have discretion concerning which providers or recipients to investigate. The suggested modification restates that discretion without suggesting that DHS may ignore its statutory responsibilities. The suggested language is needed and reasonable to reflect the Department's investigatory discretion without exceeding its statutory authority. The modification incorporates most of the rule as published in the State Register and does not constitute a substantial change.

#### Subpart 2 Contacts to Obtain Information.

34. Subpart 2 is written to reflect the investigatory discretion referred to in the previous Finding. This subpart sets out a list of examples of persons or entities which may be contacted for investigative purposes. The language of the subpart does not clearly establish a definition which sets forth the scope of the contacts DHS "may" make to conduct investigations. Following that unclear definition with "Examples are" and a list only creates a vague rule which has not been shown to be reasonable. This language constitutes a violation of substantive law and a defect under Minn. stat. 14.14, subd. C.

To cure the defect, the Department should adopt the following language:

The department may contact any person, agency, organization or Other entity that is necessary to an investigation under subpart 1. Among those who may be contacted are:

The list of items (A through 1) would follow the colon. The proposed language clarifies the rule and sets a criterion of "necessary to an investigation." The modification is not a substantial change and cures the defect noted above.

#### subpart 3 - Activities Included in Department's Investigation.

35. REM objected to the use of "includes, but is not limited to" preceding the list of activities which the Department may engage in when

conducting an investigation. This language constitutes a defect in the proposed rule because it is unreasonably vague. For DHS to adopt this rule, it must either use the specific list of items as the extent of its investigations, or DHS must define the activities it will engage in when investigating. The following language will achieve this purpose:

The department's authority to investigate extends to the examination of any person, document, or thing which is likely to lead to information relevant to the expenditure of funds, provision of services, or purchase of items identified in 9505.2160, subpart 1, provided that the information sought is not privileged against such an investigation by operation of any state or federal law. Among the activities which the Department's investigation may include are as follows

After the colon, items A through G would be listed. This proposed language permits the broad scope an investigator needs to discover evidence of improper conduct, while not leaving anyone subject to these rules guessing as to what other activities might be included. By applying the scope portion within the

suggested language, the outer boundaries of the investigation can be predicted. The suggested language cures the defect in proposed subpart 3, renders the rule needed and reasonable, and does not constitute a Substantial change.

Subpart 4 Determination of Investigation.  
Subpart 5 Postinvestigation Action.

36 The Department proposed to modify this rule part at the hearing, but it was not clear whether the modification was to occur in subpart 4 or subpart 5. Although the change is apparently intended for subpart 4, it is more cogent if made at subpart 5. DHS also modified subpart 4(B) to clarify that one possible determination is that insufficient evidence of fraud, theft, or abuse exists to warrant further action. The two subparts, as modified, are needed and reasonable and neither modification constitutes a substantial change.

Proposed Rule 9505.2205 - Commissioner to Decide Imposition of Sanction.

37. Just as the use of "may" was a defect in subpart I of proposed rule 9505.2200 (see, Finding 33, above), granting the Commissioner discretion whether or not to consider the recipient's personal preferences for a primary care case manager in proposed rule 9505.2205 is also a defect. The rule unreasonably fails to limit the Commissioner's discretion. To cure this defect, "may" must be replaced with "shall." This modification will eliminate the defect by removing discretion concerning whether the recipient's preference will be considered in arriving at the Commissioner's decision, DHS replaced the word "obey" in the rule with "comply with." Additionally, item F refers to "local trade area." That term was replaced in proposed rule 9505.2240, subp. 1(B). The Department may wish to replace the term in item E also. None of these modifications constitute a substantial change. As modified in this Finding, the Judge finds that the rule is both needed and reasonable.

Proposed Rule 9505.2210 - Imposition of Administrative Sanctions.

38. The Department again used the word "may" in proposed rule 9505.2210. In this instance, subpart 1 grants to the Commissioner the discretion to impose an administrative sanction where fraud, abuse, or theft is determined. As with the prior uses of that term (discussed at Findings 33 and 37) the discretion granted by that term renders the rule unreasonable. The defect can be cured by replacing "may" with "shall." The Administrative Law Judge understands that, in some instances, the Commissioner may not wish to impose an administrative penalty. One alternative that DHS may adopt is the addition of "or issue a warning letter" after "administrative sanctions." Such warning letters are not administrative sanctions, DHS 20-Day Response to Comments, at 44. In any event, "may" must be replaced by "shall" to place limits on the discretion of the Commissioner and, thereby cure the defect in subpart 1. That modification would result in a rule which is both needed and reasonable. None of the modifications would constitute a substantial change.

Proposed Rule 9505.2215 - Monetary Recovery.

39. As with Findings 33, 37 and 38, "may" is used in proposed rule 9505.2215, subp. I and that term grants unbridled discretion to the Commissioner as to whether monetary recovery will be sought from a provider or recipient if fraud, abuse, theft, or error are shown. As with those other Findings, the term "may" must be replaced with "shall." should the Department wish to retain the possibility of not seeking monetary recovery, the following language will adequately restrict discretion:

The commissioner shall seek monetary recovery, absent a showing that recovery would, in that particular case, be unreasonable or unfair:

Items A and B of subpart 1 would follow the colon. The Department should review its responsibility to collect overpayments under Minn. Stat. by 256B.0641 to ensure that any nonrecovery of MA funds is consistent with law. This modification will cure the defect in subpart I and it does not constitute a substantial change.

Discretion is also present in subpart 3 where the Department may choose to charge interest when an installment payment plan is agreed to by the provider. Unlike other parts of this rule, the discretion present in subpart 3 flows directly from Minn. stat. § 256B.064, subd. 1c, The use of the word "may" in subpart 3 does not constitute a defect in the proposed rules. DHS made three other modifications to the proposed rule part. Two of those changes, one in subpart 1 and another in subpart 2, are to improve the style of the subpart's language and correct a citation error. The third modification was to delete a duplicative provision. These modifications are not substantial changes.

Proposed Rule 9505.2220 - Use of Random Sample Extrapolation in Monetary Recovery.

40. Under proposed rule 9505.2220, the Department could choose to calculate the amount of money erroneously paid to a provider through a statistical sampling method. Subpart I authorizes the use of such samples. Subpart 2 sets the criteria on which the Department decides whether or not to

use random samples. The sampling method to be used for the calculation is set forth in subpart 3. MMA objects to this provision for its lack of an appeal process for the sample method chosen. MAHA disputed whether the Department understood how the rule would operate, citing inconsistencies in the description of the process in DHS's SONAR. MAHA asserted that items C and D of subpart 3 are in conflict with each other. Additionally, MAHA argued for reducing the confidence interval, thereby rendering the statistical result more likely to reflect the actual funding amounts. MHA maintains that random sampling should be treated as no more than a rebuttable presumption in any action under these rules.

DHS responded by altering the language of subpart A. The original language referenced "the amount which would be recovered by a full audit." since only a statistical extrapolation is being taken from the data available, there is no full audit amount with which to compare the calculation. The Department deleted that language and replaced it with "a two-sided 95 percent

confidence interval." The rule was further modified to replace a "five percent factor lower end point" with "the lower end of that confidence interval" for the amount to be recovered by DHS. Altering item D to set a two sided confidence interval renders items C and D consistent, and is needed and reasonable to meet the objection of MAHA regarding the description of the sampling process

There is no need to incorporate a separate appeal process into the random sample extrapolation process. A right to appeal already exists for any final decision by DHS regarding MA funds. See, Proposed Rule 9505.2245 Any flaw in the extrapolation can be brought out in that appeal. The Department has an incentive to use an accurate and commonly accepted methodology in its sampling procedure. Flaws in the sampling process could lead to the loss of the Department's case in an appeal. Adding a separate appeal process only duplicates the final appeal and is not required by state or federal law.

DHS has not shown that requiring the recovery of the amount calculated is reasonable, however. The commentators who objected to the random sample extrapolation identified the need to expressly state that the calculation only forms a presumption that may be rebutted by better data. As the rule is presently worded, once the calculation has been performed, "the department will recover the lower end of that confidence interval." Proposed rule 9505.2220, subp. 3(D). No reason has been presented for precluding the calculation of a more accurate figure for monetary recovery, whether through a full audit or a statistical sampling with a higher degree of accuracy. Since the present wording of subparts I and 3 do not allow for more precise calculations, they are defective as being unreasonable.

To cure this defect, DHS must add language to subpart I which clearly establishes the random sample extrapolation as a rebuttable presumption. Adding the following language to subpart I will accomplish this goal:

The department's random sample extrapolation shall constitute a rebuttable presumption regarding the calculation of monetary recovery.

If the presumption is not rebutted in the appeal process, the department shall use the extrapolation as the monetary recovery figure as provided for in subpart 3.

In addition to the foregoing language, the last sentence of subpart 3 must be modified to reflect the presumption created by the extrapolation. The following language reflects the change in subpart 1:

The department's calculated monetary recovery is the lower end of that confidence interval.

The suggested language cures the defect found in proposed rule 9505.2220, subparts 1 and 3. The modifications are a direct result of the comments received through the rulemaking proceeding and do not constitute substantial changes

Proposed Rule 9505.2225 - Suspension of Provider Convicted of Crime  
Related to  
Medicare or Medical Assistance.

41, Proposed rule 9505.2225 requires the Commissioner to suspend any provider convicted of a crime related to MA or Medicare. REM objected to this rule part on the ground that the Department's statutory authority does not extend to suspending providers from non-MA programs. DHS disagreed, asserting that it does have authority to suspend from non-MA programs under Minn. stat. §§ 256B.064 and 256D.07, subd. 7(b). The Department does have authority under these two statutes to suspend providers from non-MA programs. DHS amended the proposed rule part to cite those two statutes, and make a stylistic change in the rule part's reference to the suspension process. As modified, proposed rule 9505.2225 is needed and reasonable. The modifications do not constitute substantial changes.

Proposed rule 9505.2230 - Notice of Agency Action.

42. This proposed rule part sets forth the requirements of the notice which DHS must give to providers when it is imposing an administrative sanction or monetary recovery. Proposed rule 9505.2230, subpart I provides that the notice is to be sent by first class mail. Nick Johnston, PHD., ACSW, Executive Director of the Central Minnesota Mental Health Center, suggested that the notice be sent by certified mail, to ensure that the notice is received. DHS declined to make that change in the proposed rules, asserting that the notices will be adequately served by first class mail which is presently used for service in ongoing lawsuits, and in less costly. No instances of inadequate service were cited by commentators. DHS stated that the appeal period runs from the mailing of the notice, but is tolled if the provider does not receive the notice. Should any provider not receive the mailed notice, its appeal rights would not be prejudiced. The use of first class mail has been shown to be both needed and reasonable for service of notices under these rules.

Proposed Rule 9505.2231 - Suspension or Withholding of Payments to Providers Before Appeal.

Subpart I - Grounds for Suspension or Withholding.

43. Proposed rule 9505.2231, subp. 1 authorizes the Commissioner to suspend or withhold payments from a provider without a hearing. Items A through D of subpart I set forth the situations in which the Commissioner may make that choice. Minn. Stat. § 256B.064, subd. 2 permits such adverse action "if in the Commissioner's opinion that action is necessary to protect the public welfare and the interests of the program." Items A, B and C describe situations which protect the interests of the program. By stopping payments to providers which are probably overpayments, stopping payments not due providers, or stopping payment to providers who will be unable to repay overpayments, the Commissioner is protecting scarce resource; and ensuring that qualified provider; are receiving the available MA funds Item D permits pre-hearing suspension or withholding if it "is necessary to comply with" Minn. Stat. sec 256B.064, subd. 2 Item P would be move explanitory if the

following language was used:

the Commissioner conclude that suspending participation or withholding payment in necessary to protect public welfare and the interests of the program,

Item D is not defective as proposed by DHS and the suggested language is not required to be adopted. DHS did modify the initial portion of subpart I to delete some excess language- Neither that modification nor the new language suggested above constitute substantial changes.

MMA and MHA asserted that suspending or withholding payment; prior to a hearing violates due process. They cited *Goldberg v. Kelly*, 397 U.S. 254 (1970) to support the proposition that a property interest exists in welfare benefits payable to providers and is constitutionally protected against termination prior to a hearing. *Goldberg*, 397 U.S. at 1017. In some instances, the property interest of the receipt of MA benefits runs to the provider of services to the recipient. *Bracco v. Lackner*, 462 F.2d 436 (N.D.Cal. 1978). In another instance, the provider has been held to have a property interest in continued participation in the MA program. *Patchogue Nursing Center v. Bowen*, 797 F.2d 1137, 1144-45 (2nd Cir. 1986). such a property interest does not require the full appeal process to adequately protect that interest, however. *Patchogue*, 797 F.2d at 1145.

The other case cited by both MMA and MHA, *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981), upholds an administrative action taken prior to a hearing against a due process challenge. The reasons for conducting a imposing a sanction before a hearing, averting immediate harm to the public and promoting the interests of the particular government program, are similar in the proposed rules to the reasons cited in *Hodel*. *Id.* at 300 02. The provision in proposed rule 9505.2230, subpart I (providing notice and an opportunity for an informal discussion of the grounds for suspension) meets the constitutional due process requirements of the MA program for providers. See, *Patchogue*, 197 f.2d at I 1 4 5 .

In addition to the informal hearing available under proposed rule 9505.2230, subpart 1(e), a full administrative hearing may be requested by any

provider whose payments are suspended or withheld. Minn. Stat. § 256B.0643.

Proposed rule 9505.2231, subp. 1 does not, on its face, violate the principles

of due process. The proposed rule part reflects the explicit statutory authorization granted to the Commissioner. MMA also argued that the prehearing termination provision violates 42 C.F.R. § 1002.205. Although MMA's argument has merit, the Judge cannot ignore the fact that this rule was

previously adopted by DHS in nearly identical form, without triggering legal

consequences. See, Minn. Rule 9505.2050. The Judge finds that the rule part

is needed and reasonable to carry out the legislative intent behind the prehearing suspension provision. Constitutional concerns over

application of

the rule or potential conflict with federal law must be heard in the appropriate forum.

#### Subpart 2 Exception to Prehearing Suspension or Withholding

44, REM objected to the proposed rule part on the ground that ICFs/MR

were not explicitly included in the exemption from prehearing adverse action that applies to nursing homes or convalescent care homes contained in subpart 2. DHS has tailored proposed rule 9505.2231, subp. 2 to comply with Minn. stat. § 256B.064, subd. 2, which sets forth the exemption from prehearing withholding. The Department can neither add to, nor subtract from, the scope of the statute governing its actions. The language of subpart P, modified to conform to the statute, is both needed and reasonable.

Proposed Rule 9505.2235 Suspension or Termination of Provider Participation.

45. Due to the interrelation between the Department, providers, and recipients of MA funds, the suspension or termination of a provider has an impact beyond the affected provider. Proposed rule 9505.2235, subp. restricts what payments may be requested by a provider under suspension and prohibits payments to suspended vendors. REM objected to this provision on the ground that no effective date of suspension or termination is included. REM also questioned if all programs were affected by the suspension or termination. DHS responded to these comments by adding language to specify that the provider agreement, under which payments are made, is void from the date of suspension or termination and that such adverse action regarding MA participation does not include other programs unless specifically stated. The modification clarifies the date of adverse impact on a provider and the scope of that impact. Subpart I is needed and reasonable to restrict continued participation of sanctioned providers and vendors. The modification to the proposed rule was made in response to a commentator's suggestion and does not constitute a substantial change.

46. Subpart 3 specifies what vendor submissions can be paid by providers where the vendor is suspended or terminated from participation. MAHA and Care Providers questioned whether recovering payments and imposing administrative sanctions against a provider is reasonable if the provider only had "reason to know" that the vendor was suspended or terminated. DHS responded that the

standard of knowledge imposed by this proposed rule part is consistent with the procedures to protect program integrity set out in in 42 C.F.R. 455.2. □

The Department argued that requiring knowledge of the suspension or termination is too high a standard to ensure compliance with the rule.

The Judge agrees with DHS that actual knowledge is too high a standard to meet in proving a provider has dealt with a restricted vendor. Given the approach taken to generally notifying persons of the restriction (see, Finding 47, below), however, the Department may wish to prove that a provider had "reason to know" by regularly publishing a list of restricted vendors and making that list available to providers. That approach, suggested by Care Providers, eliminates the problems of proof which will occur when trying to show that a provider actually knew of a restriction or saw an advertisement, on a particular day, in a particular newspaper of general circulation. While a bulletin listing restricted providers might be too expensive as a method of notifying the general public, it should be within the means of the Department to notify providers. The judge finds that subpart 3 is needed and reasonable to protect the integrity of the MA system

Proposed Rule 9505.2240 . Notice to Third Parties About Department Actions Following Investigation.

47. When a provider suffers adverse action from the Department and the provider's appeal right has been exhausted, proposed rule 9505.2240 requires

DHS to notify any appropriate professional society, federal and state agencies, and the general public of the result MMA objected to the notification of the general public of adverse actions under these rules. MMA argued that, since the Board of Medical Examiners publishes the results of adverse licensing actions, the notification of the general public was duplicative of the Board's actions and unfair to physicians.

The rules proposed in this rulemaking are only marginally related to any action taken against a professional license. The purpose behind the notification requirement is to make persons involved in the MA system aware that further dealings with the restricted provider may violate the laws and rules governing the system. Whether any professional licensing body takes adverse action against the license of the provider is irrelevant to the need to advise the public that the provider is no longer eligible to offer services. DHS modified the rule to replace "local trade area" with language which clearly described the area to publish the general notice. This modification clarifies the rule and does not constitute a substantial change. As modified, the rule is needed and reasonable to advise the public, professional societies, and units of government when adverse action is taken against a provider-

Proposed Rule 9505.2245 - Appeal of Department Action.

48. Minn. Stat. § 256B.0643 lists the items which a request for appeal must specify. Proposed rule 9505.2245 follows that list very carefully, including Subpart 1, item A(5) which requires the provider to specify "other information required by the commissioner." REM objected to this item, on the ground that whatever DHS wants included in the "other information" category must be specified in this rule.

Failure to specify what other information is necessary in a request for appeal is a defect in the proposed rules, since the rule provides no notice of what information will be required of a provider in an appeal request. It was obviously the intent of the Legislature to allow the Commissioner, by rule, to list additional specific items which must be contained in an appeal, rather

than just list "other information." See, Minn. Stat. § 14.02, subd. 4. At this stage of the rulemaking proceeding, the only way to cure this defect is to delete item A(5). DHS also modified subpart I to add two rule citations referencing when a provider may request an appeal. This modification is needed to accurately reflect the actions which trigger the right to request an appeal. Neither this modification nor the required deletion constitute substantial changes. The Judge finds that the rule is needed and reasonable as modified herein.

Choice of Provider.

49, RAS asserted that the effect of many of the proposed rules is to deny recipients their federally guaranteed right to choose the provider of their health care, The proposed rule; restrict the right to choose in two ways. First, a recipient may be restricted if fraud, theft or abuse is found. The effect of the restriction is to limit the recipient to a specific provider. While this impinges on the recipient's right to choose, if in done

in a manner established by federal regulations. 42 C.F.R. 0 431.54(a) and

(e). Similarly, removing a provider for abuse, while it may affect a recipient's choice of provider, is an acknowledged course of action not violative of a recipient's federal rights. 42 C.F.R. □ 431.54(a) and (f).

The Judge finds that the proposed rules are both needed and reasonable and not in conflict with federal law.

Patient Advocate.

50. RAS proposed that an advocate, independent of DHS, be appointed to protect the rights of developmentally disabled recipients when dealing with Department investigations. DHS may, if it chooses, appoint such an advocate. However, no provision of federal or state law requires establishing such a position. RAS did not cite any instances where the tights of any recipients were not respected, or necessary services not provided. The proposed rules are not unreasonable for failing to appoint recipient advocates.

Rule 9505.0180 - Surveillance and Utilization Review Program.

51. As a result of the wholesale replacement of the existing SURS rules concerning MA services, several citations in existing rule 9505.0180 will be incorrect. At the hearing on this matter, DHS submitted a modification proposing to delete those citations and the definition of a term not used in the proposed rules. The rule part affected by these modifications was not originally published or referenced in the State Register. No commentators objected to the modifications and they have no substantive effect. The Judge finds that these modifications are appropriate.

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

#### CONCLUSIONS

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

2. DHS has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. DHS 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 (it), except as noted at Findings 29 and 33.

4. DHS has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as indicated at Findings 16, 17, 26, 28, 34, 35, 37, 38, 39, 40, and 48

5. The additions and amendments to the proposed rules which were suggested by DHS 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. 5stat. 14.15, subd. 3, and Minn. Rule 1400.1000, subp. I and 1400.1100.

6. The Administrative Law Judge has suggested action to correct the defects cited at Conclusions 3 and 4 as noted at Findings 16, 17, 26, 28, 29, 33, 34, 35, 37, 38, 39, 40, and 48.

7. Due to Conclusions 3, 4 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. 5stat, 14.15, subd. 3.

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

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

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

#### RECOMMENDATION

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

Dated this            day of April, 1991.

PETER C. ERICKSON  
Administrative Law Judge

Reported: Jennifer A. Scharf, Kirby A. Kennedy & Associates  
One volume