

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
THE
Relating to Case Management Services
LAW-JUDGE
for Children with Severe Emotional
Disturbance and Adults with Serious
and Persistent Mental Illness, Rules
Relating to Mental Health Case
Management Services and Home Based
Mental Health Services Under Medical
Assistance, and of the Proposed
Amendments of Rules Related to Mental
Health Services Under Medical Assistance

REPORT OF
ADMINISTRATIVE-

The above-entitled matter came on for hearing before Administrative
Law
Judge Peter C. Erickson at 9:00 a.m. on Thursday, August 13, 1992, at the
Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota
55155.

This Report is part of a rule hearing proceeding held pursuant to Minn.
Stat.

□□ 14.131 - 14.20 to determine whether the Agency has fulfilled all
relevant
substantive and procedural requirements of law, whether the proposed
rules are
needed and reasonable, and whether or not the proposed rules, if
modified, are
substantially different from those originally proposed.

Cheryl Heilman, Special Assistant Attorney General, Suite 200, 520
Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the
Minnesota

Department of Human Services (DHS or Department). Appearing and
testifying in
support of the proposed rule amendments on behalf of the DHS were:
Eleanor

Weber, Rules Division; Dan Myhre, Mental Health Division; Richard Seurer,
Mental Health Division; Sharon Silkwood, Mental Health Division; Kathleen
Cota, Medical Assistance Division; Marcia Tippery, Medical Assistance
Division; Ron Hook, Medical Assistance Division; Jerry Storck, Mental
Health
Division; Gene Urbain, Mental Health Division; and Ed Swenson, Director
of the

Mental Health Division. Dr. Michael Patton, Independent Program Consultant, also appeared and testified on behalf of the Department. The hearing continued until all interested groups or persons had had an opportunity to testify concerning the adoption of the proposed rules herein.

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

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Department of actions which will correct the defects and the Department may not adopt the rules 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 rules 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 rules and submit it to the Revisor of Statutes for a review of the form. If the Department makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rules, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the 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

Prpcedural Requiremgnts

I. On June 26, 1992, 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 the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.
- (f) A Statement of Additional Notice.

2. On July 13, 1992, a Notice of Hearing and a copy of the proposed rules were published at 17 State Register pp. 38-61.

3. On July 8, 1992, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. On July 20, 1992, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.

- (c) The Affidavit of Mailing the Notice to all persons on the Agency's I I St.
- (d) An Affidavit of Additional Notice.
- (e) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (f) A copy of the State Register containing the proposed rules.
- (g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 16 State Register pp. 1411, 1594, 1688, 1886, and 1947 published December 2, 1991, December 30, 1991, January 13, 1992, February 10, 1992, and February 24, 1992, respectively, and a copy of the Notices.

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

5. The period for submission of written comment and statements remained open through September 2, 1992, the period having been extended by order of the Administrative Law Judge to 20 calendar days following the hearing. The record closed on September 10, 1992, the fifth business day following the close of the comment period.

Statutory Authority

6. Statutory authority to adopt the proposed rules is contained in Minn. Stat. §§ 245.484; 256B.04, subd. 2; 256B.0625, subd. 20; and 256B.0625, subd. 24. Minn. Stat. § 245.484 (1991 Supp.) specifically authorized the Commissioner to adopt emergency rules to govern the implementation of case management services for eligible children and professional home-based family treatment services for Medical Assistance eligible children by January 1, 1992 and adopt permanent rules by January 1, 1993. Such emergency rules were adopted and became effective on December 27, 1991. What is proposed herein

are permanent rules which amend and replace the emergency rules now In effect. Except as specifically noted below, the Administrative Law Judge finds that the Department has documented its statutory authority to adopt the proposed rules herein.

Fiscal-Notes

7. The Department prepared fiscal notes which estimate the anticipated cost to local and state government in the next two years if the case management rules (9520) and medical assistance rules (9505) are adopted and implemented. With respect to the case management rules, the Department contends that the rules do not expand either the population of eligible clients or the required services now mandated by statute. Consequently, the Department has concluded that any changes required by the proposed rules can be accomplished within the current legislative appropriation. However, the Department does concede that the caseload limit now contained in the rules may have a fiscal impact on counties. The rules do provide, however, that counties may continue to exceed the limits to the extent that increased revenue is insufficient to hire the additional case managers needed to reach the limits. With respect to the Medical Assistance rules, the Department contends that the rules will provide counties a funding source, Medical

Assistance, to pay for services which are currently mandated by the Minnesota Comprehensive Mental Health Act and subsequent amendments. Consequently, the Department concludes that there will be no cost to counties or other local governments as a result of the Medical Assistance rules. The Department does estimate that state Medical Assistance payments for mental health case management services will be \$5,032,000 in fiscal year 1993, \$5,500,000 in fiscal year 1994, and \$6,330,000 in fiscal year 1995. Medical assistance payments for home-based services are estimated at \$2,117,497 for fiscal year 1993, \$3,722,131 in fiscal year 1994, and \$5,128,492 in fiscal year 1995. However, because the Department is just now beginning to pay for home-based mental health services under emergency rules, the cost projections are tentative. The above-cost projections were, however, presented to the Legislature and incorporated into the state budget assuming those projections. Consequently, the Department contends that the proposed permanent rules will not require increases in state spending beyond what is already in the current state budget.

Nature of the Proposed Permanent Rules

8. These proposed rules consist of two "packages", the 9520 package which is the case management service rules that set program standards (old Rule 79) and the 9505 package which are the medical assistance rules that set medical assistance requirements for case management services and for home-based mental health services (old Rule 47). The proposed case management rules (9520) establish uniform program standards for case management services to children with severe emotional disturbance and adults with serious and persistent mental illness without regard to the clients' eligibility for medical assistance or other funding sources. The case management rules take an outcome-based approach rather than prescribe objective standards and services. The rules afford the service providers the discretion to determine

the method of attaining the desired outcome that is most appropriate for the client and feasible for the providers. The proposed medical assistance rules (9505) establish eligibility requirements for providers to receive medical assistance reimbursement for case management services and for home-based mental health services. These eligibility standards limit the amount, duration and scope of services as required under state and federal law.

9. Some of the proposed rule provisions received no negative public comment and were adequately supported by the Statement of Need and Reasonableness (SONAR). The Judge will not specifically address those provisions in the discussion below and finds that the need for and reasonableness of those proposed rules has been demonstrated. Some of the

In order for an agency to meet the burden of reasonableness, it must demonstrate by a presentation of facts that the rule is rationally related to the end sought to be achieved. *Broen Memorial Home v. Minnesota Department of Human Services*, 364 N.W.2d 436, 440 (Minn. App. 1985). Those facts may either be adjudicative facts or legislative facts. *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984). The agency must show that a reasoned determination has been made. *Manufactured-Housing Institute* at 246.

public comments raised issues beyond the scope of the proposed rules or were legislative-type suggestions designed to improve the rules. As set forth below, some of the concerns raised by the public have been addressed by rule modifications made by the Department at the time of and subsequent to the hearing. The discussion which follows the modifications will only address substantive issues of need, reasonableness or statutory authority which the modifications below do not resolve.

Modifications to the Proposed Rules Made by the Department

10. At the commencement of the hearing, the Department proposed several modifications to the rules as published as follows:

9505.0322, subp. 14.

A. Recipients who are receiving case management services through the Veterans Administration are not eligible for case management services under parts 9520.0900 to 9520.0926 and this part while they are receiving case management services through the Veterans Administration that are substantially similar to the requirements of parts 9520.Q200 to 9520.0926.

9520.0903, subp. 3.

D. "Additional case-managers means an increase in the case management staff in comparison to staff employed in December 1992. If a county can demonstrate that case management staff were hired with county funds before December 1992 in anticipation of increased-revenue as defined item A, -the commissioner shall consider those case management staff as additional case managers."

9520.0903, subp. 3.

A. Delete "1990" at the end of the paragraph and insert 1992.

9520.0914, subp. 2.

Item A, new subitem (5); insert:

(5) arrange for a standardized assessment by a physician chosen by the child's parent or legal representative or if appropriate the child of side effects related to the administration of the child's psychotropic medication

Renumber subitems (5) to (10) as subitems (6) to (11).

Item B, new subitem (5); insert:

(5) arrange for a standardized assessment by a physician of the adult's choice of side effects related to the administration of the adult's psychotropic medications.

Renumber subitems (5) to (8) as subitems (6) to (9).

The above-modifications were made in response to public comment and to further clarify the intent and purpose of the proposed rules. Except as specifically

set forth below, the Judge finds that the need for and reasonableness of the above-modifications has been demonstrated by the Department. None constitute a substantial change to the rules as initially proposed.

11. Subsequent to the hearing and after a review of all of the written submissions, the Department further modified the proposed rules as follows:

9505.0322, subp. 5.

A. Change "every 18 months" to "every 12 months".

9505.0322, subp. 10.

A. . . . no more than six ten hours item F. (Strike remainder of sentence.) . . . or other interested persons is limited to no more than two Three hours per recipient per month.

B. deleted in its entirety.

Items C. to H. are relettered B. to G. and "H" in subd. 10 is replaced by G.

9505.0323, subp. 4, I.

Current subitem (5) is modified by adding the following language:

consider the recipient's need for referral part 9530.6615. if- the recipient has never-had a psychiatric consultation or medication valuation, the mental health professional must refer the recipient to a psychiatrist or other physician for an evaluation of biological factors which may be contributing to the recipient's mental ill or emotional disturbance. .The mental health professional may complete the diagnostic assessment, initiate treatment, and bill medical assistance is for the mental health services before the physician consultation is completed If. upon review of the report of the psychiatrist or physician, the mental health Professional - believes the diagnostic assessment needs to be updated to include the recommendations of

the psychiatrist or physician -the updating of the diagnostic assessment will be eligible for medical assistance payment. If a psychiatrist or physician subsequently recommends-the recipient's treatment with either an antipsychotic medication or an antidepressant medication prescribed-for the purpose of treating the recipient Iness. me(tance payment or Ongoing medication management. evaluation, and monitoring in-limited to a psychiatrist or a registered nurse Ind who works under the clinical supervision of a psychiatrist.

Subitem (6) is modified by striking the proposed rule amendments and retaining the provision in its current form as follows: refer the recipient for medically necessary services that are outside the scope of practice of the mental health professional.

9505.0323, subp. 29, B.

When the client is a child antidepressant medication for treatment depressive-illness. In the case of a child with severe emotional disturbance. When a child with severe emotional disturbance is receiving an

antidepressant medication prescribed for treating a condition other than a depressive mental condition requiring but the child's response to the antidepressant-medication must be monitored by a behavioral pediatrician or neurologist. I-

9505.0324, subp. 6 , F.

The initial on-site observation has been changed to one during the first six twelve hours

9505.0324, subp. 6 , 1. (2).

The following language is inserted after..... receiving home-based mental health services.:

For purposes of the child's transition to outpatient psychotherapy, the child may receive two additional psychotherapy sessions per six-month episode of home-based mental health services if the mental health professional providing the home-based health services requests authorization, -And observe

9505.0324, subp. 6, J.

J. home-based mental health services provided to a child with severe emotional disturbance who is not living in the child's residence who is

However, up to 35 hours of home-based mental health services provided within a six-month period to a child with severe emotional disturbance who is residing in a hospital, a group home as defined in part 9560.0520, subpart 4, a residential treatment facility licensed under parts 9545.0900 to 9545.1090, a regional treatment center, or other institutional group setting or who is participating in a program of hospitalization are eligible for medical assistance payment [remainder without change].

9505.0324, subp. 8.

Travel by a mental health professional . . . for medical assistance payment. Delete "until June 30 -1993..... (through]

9520.0900, subp. 2.

The county board shall make..... all adults with serious and persistent mental illness who are residents of the child who request or consent to the services under and all other commonly available state and federal funding sources. section 256E.07 and all other available state and federal sources.

9520.0902, subp. 6, A.

For a child..... requested by the child's parent or legal representative or, as appropriate by the child to participate

9520.0902, subd. 26.

. . . section 525.619, a guardian or custodian pursuant to Minnesota Statutes section 260.242, subdivision 2 or 260.015 subdivision 14 or an or an Indian

9520.0903, subp. 3, A,

. . . to 9520.0926 during calendar year 1992 1993 or the . . .

9520.0904, F.

compliance with and information to..... chapter 13,
and information about the
Patients

9520.0905, G.

compliance with chapter 13, and information about the Patients
. . . .

9520.0904, C.

information provided . . . family community support services,
potential cost
of the services to the child and the child's parent, and the services
. . . .

9520.0905, D.

. . . community support services, potential services
to the adult,
and the full array

9520.0907.

Except under the circumstances specified in this part, when case
management
services are requested for a child or the child is referred for case
management services, the child's parent or legal representative,
if any, has
the right to receive the notices specified under parts 9520.0900 to
9520.0926
and to make

and the decision about-whether
to accept
case management services for the child. If one of the
circumstances in item A
applies, the child shall receive the required notices and make
decisions the
decision about whether to accept case management services. and-authoriae-
a

If the circumstances in item B applies, the
person to
to receive notices is the guardian ad litem appointed
by the
court.

A. The parent or legal representative is hindering or impeding
the child's

access to mental health services or the child: (1) has been married or has borne a child as specified in Minnesota Statutes, section 144.342; (2) is living separate and apart from the child's parents or legal guardian and is managing the child's own financial affairs as specified in Minnesota Statutes, section 144.341 ; (3) is at least 16, but under 18 years old, and has consented to treatment as specified in Minnesota Statutes, section 253B.03, subdivision 6, paragraph (d); or (4) is at least 16, but under 18 years old and for whom a county board has authorized independent living pursuant to a court order as specified in Minnesota Statutes, section 260.191 , subdivision I , paragraph (a), clause (4).

B. If a A petition has been filed under Minnesota Statutes, chapter 260 or a court order has been issued under Minnesota Statutes, section 260.133 or 260.135 and a guardian ad litem has been appointed and if consent for case management services has not been otherwise obtained from parent or legal

representative. or, as appropriate. the child. I
request-a
court order Pursuant to Minnesota Chapter 260 to
authorize-case
management services for the-child.

9520.0910, subp. 2.

. . . for case management services unless_case_management
services have
already initiated for the child Dr the adult.

9520.0914, subp. 2, A.

(8)..... regional treatment center, correctional facility or
any other
resident placement. or inpatient

The same language is also added to B.(7).

9520.0914, subp. 2, B.

(5) attempt to meet with the adult at least once every 90 30 calendar
days;
or at least once within a longer interval of between 30 a
as specified in the a unity support plan.

(6) be available to meet with the adult at the request of the adult more
frequently at-the-request-of-the-adult than specified in subitem (5); or-
as

9520.0916, subp. 3.

Recommendations of the case management team about mental health services
for
the child shall be

246,4888 noted in the child's record in accordance with Minnesota
Statutes
section 245.4881. subdivision 3. paragraph (b).

9520.0917

The case management services-of functions of a case manager for an adult
with
serious and persistent mental illness may be provided by a team that
includes
the adult, the adult's case manager, and other persons who meet at least
the

qualifications established in part 9502.0912, subpart 2.
r tiesf
the adult with serious and persistent mental illness. the case management
team
shall involve other persons as specifi esota Stat
245.4711. subdivisioa-4 in all phases of development and
implementation
n vi 1 ni I"a . Members of the team
. . . to
provide case management services. One member of the team shall be
designated
as the team leader subject to the local-Agency.
(remainder
unchanged.)

9520.0922

As requested..... sections 245.462 to 245.4888 and if the case
managaer is
under contract to or employed by the c rovide other
mental health
services. In the se manager r vi r m
I h , rv

se-manAger
shall not be considered as among the ft e
manager an(

manag(pent on case management functions shall be prorated in
c a I cu I ati ber of
the-reauirements Qf partr 955 a- u r

9520.0924 D. and E.

D. Except for a child . . . 90 consecutive days because the child has
filed
to keep an appointment_or refused to meet with the case-manager.

E. Except for an adult . . . 180 consecutive days because the adult
has
failed to keep an appointment or refused with the- ca5e
manager

9520.0924, A.

Add to A.:

Upon receipt of the mental health pro pinion that the
client no longer needs case management services. the client's case
manager
must inform the client of the client to appeal the decision
according to Dart 9520.0926.

9520.0926, subp. 1. A client who applies for requests or

9520.0926, subp. 2.

D. that the adult delaying; At the request Qf the adult -at& in
the
case of a child, the child and the child's pare
representative, the
child or adult shall continue to receive case manag ces
Pending-the
resolution of the apaea;

9520.0924, A.

A. A mental health professional who has provided mental health services
to
the client furnishes a written opinion that the client no longer ReedS-
CaSe
management-services meets the eligibility in Minnesota Statutes.
section 245.4871 . subdivisi d or- 245.462.
subdivision 20. for ca-adult.

The above-modifications were made in response to public comment and
testimony
contained in the record of this proceedings Except as may be
specifically

modified below, the Administrative Law Judge finds that the need for and reasonableness of the modifications above have been demonstrated by the Department. None constitute a substantial change to the rules as initially proposed.

Discussion of the

12. Minn. Rule subp. 28 -- This proposed rule defines the term "mental health professional" for purposes of medical assistance reimbursement synonymously with that term as it is defined in Minn. Stat.

□ 245.462, subd. 18, clauses (1) to (4). During the 1992 legislative session, a new clause (5) was added to the statutory definition of "mental health professional" to include marriage and family therapists. The proposed rule does not include marriage and family therapists within the definition of

"mental health professional". The Minnesota Board of Marriage and Family Therapy along with several practicing therapists objected to the non-inclusion of marriage and family therapists in the definition of mental health professional contained in the referenced proposed rule.

The Department responded to this objection by stating that Minn. Stat.

148B.32, subd. 1 clearly provides that, "Marriage and family therapy practice is not medical care nor any other type of remedial care that may be reimbursed under medical assistance, chapter 256B, except to the extent such care is reimbursed under section 256B.0625, subd. 5." The last referenced statute is specifically limited to medical assistance reimbursement for services provided by a community mental health center. The rule governing medical assistance reimbursement for mental health services provided in community mental health centers, Minn. Rule 9505.0260, specifically includes persons "licensed in marriage and family therapy under Minnesota Statutes, sections 148B.29 to 148B.39 and employed by a provider of community mental health center services." Subpart 1.C. Consequently, the Department does not feel it is appropriate to include marriage and family therapists in the general definition contained in Minn. Rule 9505.0175, subp. 28. The Judge agrees. The referenced statutes restrict medical assistance reimbursement for services provided by marriage and family therapists to only the services provided in a community mental health center. The proposed rule complies with that statutory directive.

13. Minn. Rule 9505.0324. subp. 3 -- This proposed rule sets forth eligibility requirements for a child with "severe emotional disturbance" to receive home-based mental health services. Subpart I.D. equates the term "home-based mental health services" and "Professional home-based family treatment" as defined in Minn. Stat. § 245.4871, subd. 31. That statute requires that services be provided to children who are at risk of out-of-home placement; who are in out-of-home placement; or who are returning from out-of-home placement because of an emotional disturbance. Louise Brown, Director of Public Policy, Family and Children's Service, objects to the proposed rule because it requires that the eligible child have a "severe" emotional disturbance contrary to the statutory standard of "emotional disturbance".

The Department points to Minn. Stat. § 245.4884, subd. 3, which specifically provides for professional home-based family treatment services. That statute requires that counties meet the needs of children "with severe emotional disturbance". In addition, Minn. Stat. § 245.4871, subd. 6 specifically defines the term "child with severe emotional disturbance" for the purpose of determining "eligibility for case management and family community support services". The Judge finds that the proposed rule is not contrary to law as suggested by Ms. Brown.

14. Minn. Rule-9505.0324, subp 6.E. -- This proposed rule mandates that home-based psychotherapy must be provided by a licensed mental health professional in order to be reimbursable by medical assistance. Several individuals objected to this restriction, especially in rural Minnesota, because: (1) it is appropriate to permit persons with masters' degrees who are supervised by a licensed professional and in the process of attaining licensure to provide home-based mental health services; and (2) there is a lack of mental health professionals in rural Minnesota so it will be difficult to provide the necessary level of in-home services. The commenters requested

that a waiver for rural health care providers be permitted to allow for these kinds of "unlicensed" services.

In its Statement of Need and Reasonableness (SONAR), the Department points to Minn. Stat. § 256B.0625, subd. 24, which requires licensure under state law in order for the services provided to be reimbursable by medical assistance. In addition, the Department points out that Minn. Stat. § 256B.04, subd. 2 requires that the medical assistance program be administered statewide, in a uniform manner. Consequently, the Department contends that the restriction imposed by the rule is required by state law. Minn. Rule 9505.0323, subp. 31 does specifically enumerate medical assistance reimbursement for services provided by unlicensed medical health practitioners. The Judge finds that the proposed rule has been shown to be both needed and reasonable and is in compliance with Minnesota Statutes.

15. Minn. Rule 9505.0324, subp. 2 -- This proposed rule imposes requirements beyond those in the current emergency rule regarding eligibility to be a provider of home-based mental health services. Consequently, some small providers now engaged in offering those services will not comply with the proposed rules and their programs will be terminated. Human Resource Associates, Inc. objected to the newly imposed standards stating that the medical assistance component of its program, which is now in operation, should not be eliminated by the proposed rule.

The Department contends that the proposed rule standards which require providers to offer services in a multidisciplinary manner will provide needed access to a continuum of mental health services for the recipient. The Department argues that this continuum of services is critical to recipients who are expected to make a transition from home-based services to outpatient psychotherapy. The Department suggests that Human Resource Associates could become eligible to provide medical assistance home-based services by meeting the standards of Minn. Rules 9520.0750 to 9520.0870. Although the Department could have taken a different approach to this issue by not imposing more

stringent standards, the Judge finds that the need for and reasonableness of the proposed rule has been demonstrated by an affirmative presentation of facts.

16. Minn.-Rule 9520.0902. subp. 6 -- This proposed rule delineates what the "case management team" is for children and adults who are receiving case management services. The rule differentiates between the "team" for a child and an adult by allowing the child or child's parent to request that persons of their choosing be included on the team. The adult does not have similar input into the makeup of his "team". Kathy Kosnoff, Staff Attorney for the Minnesota Disability Law Center (MDLC), commented that it was not reasonable to prohibit an adult with mental illness from including other persons he/she requests to be on his/her team as is allowed for a child's case management team.

The Department states that a different team concept was necessary for children than for adults. It contends that the concept for children closely parallels the team approach used in developing an individual education plan for a child who is eligible for special education services. Consequently, additional individuals of the child's choosing are included on the team. The Department further contends that no such team concept is applicable for adults. However, the Department concedes that the rule does not prohibit

other individuals from participating with official members of the adult's case management team but that only the team itself would perform the case management functions of the case manager. The Judge finds that the Department has articulated a rational basis for this rule and consequently demonstrated need and reasonableness.

17. Minn. Rule 9520.Q9Q3 subp. 2 -- This rule establishes case load maximums for case managers up until December 31, 1993, and then a lower maximum beginning January 1, 1994. Many persons commented that either the case load limits established were too high or too low, and several supported the limits set. The Judge finds that the case load limits established by the proposed rule have been shown to be both needed and reasonable by the Department. However, the proposed rule permits a county to exceed the established case load limits to the "extent that the increased revenue is insufficient to hire additional case managers needed to meet the ratio required." The MDLC objects to this "escape hatch" in the proposed rule and argues that it violates the accessibility requirement contained in Minn. Stat. § 245.467, subd. 1.

Minn. Stat. § 245.4711, subd. 9(a)(4) requires that the Commissioner of Human Services adopt rules establishing a "reasonable case load limit for case managers". The Department contends that at the present time, there is a great disparity in some counties between the case load limit established in the rule and the existing case load. Consequently, some counties will need more time to come into compliance with the rule than others and will not be able to comply with the rule if funding sources are inadequate. The Department argues that the rule as written will encourage a continued reduction in the average case load size.

The Judge agrees with the MDLC that providing an escape hatch in the rule seems to be contrary to the statute and overall purpose of providing adequate mental health services for all eligible recipients. However, the Legislature

did not dictate either what the case load limits should be or that they had to be uniformly applied throughout the state. All the Legislature mandated was that "reasonable" case load limits be established. The Judge reads the county's ability to fund services and/or the salaries for case managers as a factor in the "reasonableness" that the Commissioner is empowered to consider. Obviously, the Legislature had fiscal considerations in mind when it enacted Minn. Stat. § 245.486, which specifically applies to the Minnesota Comprehensive Adult and Children's Mental Health Acts.² It would surely be unreasonable for the Department to promulgate a rule regarding case load limits which the counties could not comply with based on past history and budgetary constraints beyond their control. Consequently, the Judge finds that proposed subdivision 2 is not in conflict with statute and has been shown to be needed and reasonable by the Department.

18. Minn. Rule 9520.0904 and 9520.0905 -- These proposed rules require that the case manager provide services to children and adults designed to

²Minn. Stat. § 245.486 states that nothing in the Comprehensive Acts requires the Commissioner of Human Services or county boards to fund services beyond the limits of legislative appropriations.

achieve enumerated "outcomes" in the rule. These "outcomes" do not delineate the services which must be provided but rather focus on the outcome of "improved or maintained mental health and functioning". The MDLC and Legal Aid of Minneapolis object to these proposed rules arguing that the standards are too vague because Minnesota Statutes require accountability and specific "activities" prescribed in case management services.

Minn. Stat. § 245.4871, subd. 3 defines "case management services" as "activities that are coordinated with the family community support services and are designed to help . . . obtain needed mental health services. The statute goes on to specify certain types of services which are included and appropriate for case management responsibilities. The Department contends that the "outcome" approach in the rules provides the flexibility necessary for case managers to adjust and redefine measures of progress towards goals as clients' needs and counties' circumstances change. The Department points out that proposed Rule 9520.0914 specifies the "responsibilities" of a case manager, thus ensuring that accountability is inherent in the proposed outcome-based approach. The Judge finds that the Department has demonstrated the need for and reasonableness of the proposed rule.

19. Minn. Rule 9520.0904. C., et al. -- Several proposed rule provisions use the terminology "as appropriate" when input from a child or the transmittal of information to a child is discretionary for the case manager. The referenced rule requires that the case manager provide information to the "child's parent or legal representative or, as appropriate, the child about eligibility for and frequency of case management services" Proposed Rule 9520.0902, subp. 6, A., as modified above, allows a child, "if appropriate", to request that other persons participate on the case management team. Proposed Rule 9520.0906, subp. I requires that the case manager send notice to the child's parents or the child's legal representative, or "as appropriate", the child, concerning potential eligibility for case management services. Proposed Rule 9520.0907. B., as modified above, allows a child, "as

appropriate", to give consent for case management services. Additionally, proposed Rule 9520.0908 uses the terms "as appropriate" twice when allowing the case manager discretion as to what information to provide to a child. Legal Aid of Minneapolis contends that this language is vague and permits the case manager standardless discretion in making a decision as to what information the child should have or be allowed to give.

The Judge agrees that use of the words "as appropriate" is an overly broad standard which would permit case managers to make decisions concerning providing and receiving information without any guidance from the rule. Consequently, the proposed language violates a substantive provision of law due to its vagueness. In order to correct this defect, the Department must either require that children receive or have the ability to generate input or adopt a standard which will guide the case manager in making a decision on this issue. Using only the terms "as appropriate" provides no meaningful standard as to the exercise of case manager discretion.

20. Minn. Rule 9520.0914 subp. 2. A. (e1 -- This proposed rule provision sets forth the case manager's responsibilities with respect to participation in discharge planning for a child who is released from a residential treatment facility, regional treatment center, or inpatient hospital to his own home or a foster home. The language in the rule requires that the case manager participate in the discharge planning "to the extent

possible". William Conley from the Mental Health Association of Minnesota and the MDLC object to this vague standard. The Department contends that this standard is appropriate because the discharging facility may not notify the case manager or even want the participation of the case manager when a discharge occurs. Consequently, the Department does not feel it has the authority to compel a discharging facility to act in conjunction with a case manager. Thus, the standard of "to the extent possible" is proposed so as to not place an impossible burden on a case manager if participation in a discharge cannot be accomplished. The Judge finds that, although the standard is unclear, it is appropriate in these circumstances. The need for and reasonableness of the proposed rule has been demonstrated by the Department.

21. Minn. Rule 9520.0914, subp. 2. B. (8) -- William Conley pointed out during the hearing on this matter that the reference to Minn. Stat. § 245.4887 contained in the proposed rule should really be Minn. Stat. § 245.477. The Judge notes that the statute set forth in the proposed rule applies to appeals by children or the family of a child. Minn. Stat. § 245.477 speaks to appeals by an adult and seems to be the applicable statutory reference herein. The Judge suggests that the Department check this provision for the correct statutory reference.

22. Minn. Rule 9520.0926 -- This proposed rule sets forth the appeal rights of a client receiving services if the county terminates, denies, or suspends those services or does not act within five days upon the request or referral for services. The rule further provides that, "A county of financial responsibility has an absolute defense to an appeal under this part if it proves by a preponderance of the evidence that it has no more resources available with which to avoid a denial, reduction, suspension, or termination of case management services and that it has met the requirements of Minn. Stat. § 256E.081." The MDLC argues that this language is inconsistent with statute and beyond the authority of the Commissioner to promulgate. The

Department contends that Minn. Stat. § 245.486 which does not require the "Commissioner or county boards to fund services beyond the limits of legislative appropriations" and the standards contained in Minn. Stat. § 256E.081 referenced in the rule authorize the proposed language.

Subdivision I of Minn. Stat. § 256E.081 provides an escape hatch for a county to not provide social services "beyond the services required in federal law or state statute or included in the county's amended community social services plan" if it has met the requirements of subdivisions 2, 3 and 4 of the statute. Subdivisions 2, 3 and 4 require the county to make good faith efforts to comply with all state social service requirements and to make an affirmative showing that there are no further monetary resources to pay for additional services. Although Minn. Stat. § 256E.081 appears to apply only to services mandated by rule, Minn. Stat. § 245.486 is much broader and applies to the funding of all services if legislative appropriations are lacking. The wording in the proposed rule, that the county has no more "resources available", is unclear, however. The language then ties that unclear standard to the requirements of Minn. Stat. § 256E.081. The Judge finds that this rule provision is so unclear that it violates a substantive provision of law and is, consequently, defective. In order to correct this defect, the Department should strike the entire last sentence of subdivision I and replace it with: "Fiscal limitations as set forth in Minn. Stat. § 245.486 and Minn. Stat. § 256E.081 shall constitute a basis for the county of financial responsibility to refuse to provide or fund the services at issue in the appeal."

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

CONCLUSIONS

1. That the Department of Human Services gave proper notice of the hearing in this matter.

2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. That 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) (ii), except as noted at Findings 19 and 22.

4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That the amendments and additions to the proposed rules which were 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, and Minn. Rule 1400.1000, subp. I and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusion 3 as noted at Findings 19 and 22.

7. That due to Conclusion 3, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

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

9. That 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 specifically otherwise noted above.

Dated this 9 day of October, 1992.

PETER C.ERICKSON
Administrative Law Judge