

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CHILDREN, FAMILIES & LEARNING

In the Matter of the Proposed Amendments
to Rules Relating to the Child Care
Assistance Program, Minnesota Rules
Chapter 3400.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Beverly Jones Heydinger conducted a hearing on these proposed rule amendments beginning at 10:30 a.m. on February 14, 2001, and continuing at 7:00 p.m., in Rooms 13 and 14, Department of Children, Families & Learning, 1500 Highway 36 West, Roseville, Minnesota. The hearing continued until everyone present had an opportunity to state their views on the proposed rules.

This Report is part of a rulemaking process governed by the Minnesota Administrative Procedure Act.^[1] The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency may have made after the proposed rules were initially published are not impermissible substantial changes. The rulemaking process also includes a hearing, when a sufficient number of persons request one. The hearing is intended to allow the agency and the administrative law judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

Beverly Bryant, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota St., St. Paul, Minnesota 55101-2130, appeared as the attorney for the Department of Children, Families & Learning ("Department"). Several Department employees were on a panel available to provide the public with information about the proposed rules and to answer any questions. The panel members were: Cherie Kotilnek, Acting Manager, Early Childhood and Family Support; Karen Pitts, Acting Supervisor, Early Childhood and Family Support; Elizabeth Roe, Acting Supervisor, Early Childhood and Family Support; and Jodi Pope, Child Care Assistance. Approximately twenty members of the public attended the morning hearing. Two members of the public attended the evening hearing. Twenty members of the public signed the morning hearing register and two members of the public signed the evening hearing register.

After the hearing ended, the record remained open for twenty calendar days, until March 6, 2001, to allow interested persons and the Department an opportunity to submit written comments.^[2] During this initial comment period the administrative law judge received nine written comments. Following the initial comment period, the record remained open for an additional five business days to allow interested persons and the Department the opportunity to file a written response to the comments submitted. The deadline for response to the comments

was March 13, 2001. Two responsive comments were received. The hearing record closed for all purposes on March 13, 2001.

NOTICE

The Department must make this Report available for review for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. During that time, this Report must be made available to interested persons upon request.

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

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

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who asked to 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 29, 1997, the Department published a Request for Comments on Planned Amendments to Rules at 22 State Register 1134.^[3] On October 5, 2000, the Office of Administrative Hearings approved an additional notice plan submitted by the Department for a second Request for Comments. On October 16, 2000, the Department published the second Request for Comments on Planned Amendments to Rules at 25 State Register 852-853.^[4] The Department mailed the Request for Comments to those individuals on its rulemaking mailing list.

The Department also mailed the Request for Comments to the following groups: the Advisory Committee that assisted in drafting the rules; county human services directors; county child care assistance program supervisors; county client access contacts; county administrative contacts, Child Care Resource and Referral agencies; employment and training service providers; Head Start directors; advocacy group contacts; contacts in other CFL programs; interagency contacts; tribal contacts; and legislative staff members. The Request for Comments was also posted on the Department's web page.^[5]

2. On November 29, 2000, the Department requested that a hearing be scheduled and filed the following documents with the Chief Administrative Law Judge:^[6]

- a. A copy of the proposed rules certified as to form by the Revisor of Statutes;^[7]
- b. The Statement of Need and Reasonableness (SONAR);^[8]
- c. The Dual Notice proposed to be published;^[9] and
- d. The Department's request for prior approval of its Notice Plan for giving Dual Notice.^[10]

3. Administrative Law Judge Beverly Jones Heydinger approved the Department's Notice Plan on December 1, 2000.

4. The Department mailed the Dual Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving the notice.^[11]

5. The Dual Notice of Hearing was published on December 26, 2000, at 25 State Register 1172-1174.^[12] The Dual Notice of Hearing was distributed to the entities specified in Finding 1. In addition, the Dual Notice of Hearing was mailed to workgroup members who helped draft the rule and others who had requested copies of the proposed rules. The Dual Notice was also posted on the Department's web page.^[13]

6. The Department received many comments and over twenty-five requests for a hearing on this matter.^[14]

7. On January 31, 2001, the Department mailed a notice to all persons who requested a hearing, and to all persons who commented on the proposed rules, notifying them that a hearing would be held.^[15]

8. On the day of the hearing, the Department placed the following additional documents into the record:^[16]

- a. Comments received in response to the October 16, 2000 Request for Comments;^[17]

- b. Certificate of Mailing the Statement of Need and Reasonableness to the Legislative Reference Library and a copy of the transmittal letter;^[18]
 - c. Certificate of Mailing the Dual Notice, the Certificate of Mailing List, current as of December 21, 2000, and the Certificate of Additional Notice with a copy of the lists and the notice as mailed attached;^[19]
 - d. Certificate of Sending Notice to Legislators and a copy of the transmittal letter;^[20]
 - e. Preliminary Agency response to written comments, including preliminary modifications to proposed rules;^[21]
 - f. Certificate of Mailing the Request for Comments, Certificate of Mailing List, current as of October 13, 2000, and Certificate of Additional Notice with a copy of the lists and Request for Comments as mailed attached;^[22]
 - g. Written testimony from an Adult Basic Education teacher submitted by e-mail dated February 6, 2001;^[23] and
 - h. Minnesota Department of Human Services Bulletin dated December 28, 2000.^[24]
9. The Department has met all of the procedural requirements under the applicable statutes and rules.

Background and Nature of the Proposed Rules

10. This rulemaking proceeding involves amendments to existing rules of the Minnesota Department of Children, Families & Learning governing the Child Care Assistance Program (“Program”). The Program provides money to families for child care expenses while the person receiving the funds works, attends school, or looks for employment.

Statutory Authority

11. Minnesota Statutes, section 119B.02, subd. 1 provides, in part: [t]he commissioner shall develop standards for county and human services boards to provide child care services to enable eligible families to participate in employment, training, or education programs...The commissioner shall adopt rules to govern the program in accordance with this section. The rules must establish a sliding schedule of fees for parents receiving child care services. The rules shall provide that funds received as a lump sum payment of child support arrearages shall not be counted as income to a family in the month received but shall be prorated over the 12 months following receipt and added to the family income during those months. In the rules adopted under this section, county and human services boards shall be authorized to establish policies for payment of child care spaces for absent children, when the payment is required by the child’s regular provider. The rules shall not set a

maximum number of days for which absence payments can be made, but instead shall direct the county agency to set limits and pay for absences according to the prevailing market practice in the county...

12. Minnesota Statutes, section 119B.02, subd. 3 provides that “[t]he commissioner shall adopt rules under chapter 14 that establish minimum administrative standards for the provision of child care services by county boards of commissioners.”

13. Minnesota Statutes, section 119B.04, subd. 2 provides that “[t]he commissioner may adopt rules under chapter 14 to administer the child care and development fund.”

14. Minnesota Statutes, section 119B.06, subd. 2, provides that “[t]he commissioner may adopt rules under chapter 14 to administer the child care development block program.”

15. Minnesota Statutes, section 199B.12, subd. 2, provides that “parent fees must be established in rule and must provide for graduated movement to full payment.”

16. 1999 Minnesota Laws, chapter 205, article I, section 63 states as follows:

The commissioner of children, families, and learning shall amend the parent fee schedule in Minnesota Rules, chapter 3400, to do the following: (1) parent fees for families with incomes between 101.01 percent of the federal poverty guidelines and 35 percent of the state median income must equal 2.20 percent of adjusted gross income for families at 35 percent of the state median income; (2) parent fees for families with incomes between 35.01 percent state median income and 42 percent of the state median income must equal 2.70 percent of adjusted gross income for families at 42 percent of the state median income; (3) parent fees for families with incomes between 42.01 percent state median income and 75 percent of the state median income must begin at 3.75 percent of adjusted gross income and provide for graduated movement of fee increases; and (4) parent fees for families at 75 percent of state median income must equal 20.0 percent of gross annual income.

17. The Administrative Law Judge finds that the Department has the general statutory authority to adopt the proposed rules. Instances where questions arise regarding statutory authority are addressed in the discussion of specific rule sections.

Rulemaking Legal Standards

18. Under Minnesota law,^[25] one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.^[26] The Department prepared a SONAR in support of its proposed rules. At the hearing, the Department relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Department staff

and panel members at the public hearing, and by the Department's written post-hearing comments.

19. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.^[27] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.^[28] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.^[29] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."^[30]

20. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is entitled to make choices between possible approaches so long as its choice is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.^[31]

21. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether an agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.^[32]

Impact on Farming Operations

22. Minnesota Statutes section 14.111 imposes an additional notice requirement when rules are adopted that affect farming operations. In essence, an agency must provide a copy of any such proposed rule change to the Commissioner of Agriculture at least thirty days prior to publishing the proposed rule in the State Register.

23. The proposed rules do not impose restrictions or have a direct impact on fundamental aspects of farming operations. The Administrative Law Judge finds that the proposed rule change will not affect farming operations in Minnesota, and thus finds that no additional notice is required.

Statutory Requirements for the SONAR

Cost and Alternative Assessments in the SONAR:

24. Minnesota Statutes, Section 14.131 requires an agency adopting rules to include in its SONAR:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the

costs of the proposed rule and classes that will benefit from the proposed rule;

- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule; and
- (6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

25. The SONAR includes the analysis performed by the agency to meet the requirements of the statute.^[33]

26. The proposed amendments will affect state and county program administrators who administer the Child Care Assistance Program. Child care providers and Child Care Assistance Program participants and potential participants will also be affected.

27. The Department contends that state and county program administrators will benefit from the proposed rules as the rules are intended to clarify procedures and policies applicable to the Program. The Department also contends that child care providers will benefit from the proposed rules because they give legal effect to standards that benefit the providers. By way of example, the Department indicated that the proposed rules allow for provisional payment to legal nonlicensed providers while county registration requirements are being verified. The Department indicates that the rules will also benefit providers who provide child care in more than one county because the rules create more consistent procedures for the providers. Finally, the Department asserts that families will benefit because the proposed rules give similarly-situated families equal access to benefits.^[34]

28. State and county governments will bear some of the costs of the proposed rules. The Department will develop and conduct training for program administrators, but there will be costs for the time and expenses to attend training. There will be costs associated with changing policies and forms. Providers are expected to bear some costs associated with the proposed rules including reviewing, signing and performing duties required by standardized acknowledgment forms prior to receiving payment from the child care fund. Legal nonlicensed providers are expected to bear costs associated with reregistering if they have not provided care for a child care assistance participant for over two years.^[35]

29. Some families may receive reduced child care assistance if they receive funds from the Higher Education Services Organization and other sources. The rules also reflect the increased copayment fees that took effect July 1, 1999. The proposed rules formally set forth the payment schedule utilized by the counties since that date.

30. Costs to the Department for training are expected to total approximately \$10,800. There will be additional expenses to inform counties and other interested parties about the rules, to prepare forms, to update the child care assistance policy manual, to produce training materials and an explanatory bulletin, and to copy and distribute these materials. Other state agencies such as the Departments of Human Services and Economic Security may incur costs to update forms and procedures that are applicable to the Program. The Department believes these costs will be minimal and that changes can be implemented when the materials are scheduled for a regular update. The Department has shown that the proposed rules will have a minimal effect on state revenues. Many of the current optional provisions will become mandatory, but are already being followed by most counties. Making these provisions mandatory will not increase the use of child care assistance. Further, the Department has shown that any costs associated with an increase in the use of child care assistance will be offset by cost savings produced by the proposed rules.

31. The Department has considered alternative methods for achieving the purpose of the proposed rules. For example, the Department assessed several different definitions of the terms “legal guardian” and “residency” before deciding on the definitions set forth in proposed rule parts 3400.0020, subp. 31b, and 3400.0020, subp. 38a. The Department also considered alternatives for keeping immunization records including requiring the counties to keep them. The Department ultimately rejected this method because all other providers are required to keep these records and because of the burden this requirement would place on the counties relative to the providers.

Differences between the proposed rules and federal regulations.

32. The SONAR discusses one area in which the Department believes the proposed rules differ from federal regulations. The difference pertains to immunization requirements. However, the federal regulations allow lead agencies to exempt the immunization requirements in certain instances. Because the federal provisions allow for local discretion, the Department’s decision to not exempt children who are cared for in their own homes or who are cared for by relatives does not constitute a deviation from the federal provisions.

Performance-Based Regulation:

33. Minnesota Statutes, section 14.131, requires that an agency include in its SONAR a description of how it “considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.” Section 14.002 states, in relevant part, that “whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.” In this case, the Department indicates that it has worked with an advisory committee and workgroups to balance the interests of affected parties and promote flexibility. In some

instances, specific directives were replaced with a statement about the goal in order to provide counties with increased flexibility to achieve the desired result. The proposed rules also promote flexibility for families. For example, families are required to substantiate certain eligibility requirements, but the rules do not require that it be documented by specific submissions. Families may present a variety of documents to demonstrate eligibility.

34. The Administrative Law Judge concludes that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

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

Rule by Rule Discussion:

3400.0020, subp. 4 – definition of “administering agency”

36. No change was recommended to this definition. The definition includes a county social services agency or a public or nonprofit agency designated by a county board to administer the child care fund.

37. The Department is encouraged to review the entire child care assistance rule to be certain that the terms “administering agency” and “county” are used appropriately. For example, Rule 3400.0040, subp. 3B (proposed) states that: The county must ask for the applicant’s social security number... Before asking for the applicant’s social security number, the county must tell the applicant [certain information]... (Emphasis added.) See also Rule 3400.0040, subp. 3C: “The county must determine an applicant’s eligibility for child care assistance ...” (Emphasis added.) By using the term “county” the rules imply that other administering agencies do not have the same authority. Yet, quoted provisions are inconsistent with the new language in Rule 3400.0035. Thus, a review of the full rule is appropriate to be sure that the terms “administering agency” and “county” are used appropriately throughout.

3400.0020, subp. 31b – definition of “legal guardian”

38. This definition is approved. It appears in Minn. R. 3400.0040, subp. 5 (proposed). It is recommended that the Department review the entire rule to determine if the

term “legal guardian” should be added where the term “parent” appears, or whether the term “parent” should be defined to include “legal guardian.”^[36] This would help clarify the rule and would not result in a rule that is substantially different than what was originally proposed.

3400.0020, subp. 18 – definition of “documentation”

39. The Department is proposing to make a technical modification to the definition of “documentation” to clarify that the term includes electronic records. The proposed modification reads as follows:

“Documentation” means a written statement or record, including an electronic record, that substantiates or validates an assertion made by a person or an action taken by an administering agency.

40. The Administrative Law Judge finds that this modification is both reasonable and necessary and does not result in a rule that is substantially different than that originally proposed.

3400.0020, subp. 38a – definition of “residence”

41. The Department considered several options before deciding to allow the applicant or participant to identify where the family lives. The Department of Human Services (DHS) Program Integrity Section argues for a more precise, less subjective definition. However, the Department’s comments point out that the participant must document residence. See Minn. R. 3400.0040, subp. 3. This assures that there is legitimate support for the declared residence. The Department has justified the need for and reasonableness of this provision.^[37]

3400.0020, subps. 5, 40a and 43 – definitions of “administrative expenses”, “temporarily absent” and “vendor payments”

42. The Department has proposed adding these definitions to the rule. The SONAR explains their purpose.^[38] However the terms do not appear at any other place in the rules. Some commenters requested greater specificity or a time limit to the term “temporarily absent”, but the Department adequately explained its rationale for not further limiting the term.

43. If these terms are not used in the rule, defining them is not necessary, and if they are not used consistent with their definitions, they are not reasonable. Thus, to correct these defects the Department must either delete the definitions, or modify other provisions of the rule appropriately.

2300.0035, subp. 1 – response to informational requests

44. The Department received a comment from SMRLS that information about special needs rates should be given to people who make initial inquiries about child care assistance. The Department agrees and is proposing to modify the rules by adding this information provided to families who ask for child care assistance. The Administrative Law Judge finds that this modification is needed and reasonable and does not result in a rule that is

substantially different than what was originally proposed. For clarification, it is recommended that the agency add the words “information about” after the word “for” in the first line of this subpart. The rule would then read, “When a family asks for information about child care assistance ...” This makes it more clear that this provision applies to people making “initial inquiries” about child care assistance rather than those who are actually applying. This modification would not result in a rule that is substantially different from what was originally proposed.

45. The Department should also consider informing persons that benefits may be affected by moving to another county. For example, education plans are approved by the counties and standards for approval may vary from county to county. Advance notice would reduce the risk to a student who may anticipate moving. See discussion of Minn. R. 3400.0060, subp. 9 (proposed), *infra*. See also, differing county policies for persons on a county waiting list, 3400.0040, subp. 17 (proposed) and 3400.0060, subp. 6 (proposed), *infra*. Such an addition would not constitute a substantial change because it would more fully inform participants of applicable program provisions but not substantively modify those requirements.

46. The proposed rule language directs the counties to “inform” the family about certain items, but does not specify the method for doing it. Both St. Louis County and SMRLS were concerned that this provision is vague. SMRLS requests written notice, accompanied by an oral explanation when possible. St. Louis County asks for guidance about the distribution of general information. The Department disagrees that greater specificity about the form of the information is required and believes that it is appropriate to allow counties to tailor the response to the inquiry. This is a reasonable exercise of the Department’s discretion. However, St. Louis County’s question implies that public display of written information would be sufficient to inform the public. Providing general public access to information may not be sufficient to assure that a family has been informed of the items listed, or been given the information required. As the Department states in its written comments, the purpose of this provision is to ensure that a family is given all the information necessary to decide whether to seek assistance.

47. The Department should consider whether St. Louis County’s interpretation is reasonable, and if additional clarifying language is needed.

3400.0035 – Limited English Proficiency

48. Comments from Kathleen Davis, Esq., Mid Minnesota Legal Assistance and SMRLS focus on the federal requirements to improve access by persons with limited English proficiency (LEP) to services receiving federal funding.^[39] They contend that these rules should guide county compliance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000, et seq.), and its implementing regulations, 45 CFR Part 80. Specifically, the commenters request that these rules be amended to:

- a. Require counties to provide information about child care assistance to persons who speak a primary language other than English;
- b. Notify applicants and participants that interpreter services are available; and
- c. Develop a multiple-language block to include on materials for and notices to applicants and participants, directing them to seek language services.

49. These requests were also supported at the public hearing by Judy Pearson, Esq., St. Cloud Area Legal Services. Her office represents low income people with legal issues, including a growing number of persons with LEP who may need child care assistance. Many such persons are unaware of the child care assistance program or of their responsibilities as participants. Fear and misunderstanding can prevent eligible persons from seeking benefits or finding providers, and participants may incur large overpayments. Many LEP persons are uncomfortable using providers with whom they have limited ability to communicate and who are not familiar with their culture. Similarly it is difficult to attract and retain providers with LEP when there is little assistance in their language.

50. The Department has not agreed to make any changes in response to these comments.^[40] It acknowledges that the laws and regulations cited by the commenters apply to the agency, regardless of whether the duty to comply is addressed in the rules. It is concerned about adding language that is either redundant or inconsistent with the federal law. Also, many DCFL programs must comply with the federal requirements. DCFL prefers to develop policy that will address the issue across the agency rather than piece-meal. It does not want to mandate specific steps for Child Care Assistance until the agency review and policy development are complete.

51. It is clearly established that recipients of Federal financial assistance such as the Department must provide meaningful opportunity to persons with LEP to participate in its programs. Testimony at the hearing and the written comments are evidence that there are barriers to participation by persons with LEP. However, the type of assistance required to overcome the barriers will depend on many factors. The Policy Guidance issued by the Department of Health and Human Services office of Civil Rights (OCR), 65 Fed. Reg. 52762, et seq. (Aug 30, 2000), lists some of the factors:

- Size of the recipient of federal funds;

- The size of eligible LEP population served;
- The nature of the program or service;
- The objectives of the program;
- The total resources available to the recipient of federal funding;

The frequency with which LEP persons come into contact with the program.

52. It concludes:

There is no 'one size fits all' solution for Title VI compliance with respect to LEP persons...OCR will focus on the end result... The steps taken by a covered entity must ensure that the LEP person is given adequate information, is able to understand the services and benefits available, and is able to receive those for which he or she is eligible. The covered entity must also ensure that the LEP person can effectively communicate the relevant circumstances of his or her situation to the service provider.^[41]

53. The Commissioner of Children, Families and Learning clearly has a duty to comply with Title VI, as a recipient of federal funds. In addition, the legislature has given the commissioner the responsibility for developing standards to implement the child care assistance program.^[42] In particular, as discussed in the statutory authority section,

[T]he commissioner shall supervise child care programs administered by the counties through standard-setting, technical assistance to the counties, approval of county child care fund plans, and distribution of public money for services.... The commissioner shall adopt rules under chapter 14 that establish minimum administrative standards for the provision of child care services by county boards of commissioners.^[43]

54. In some places in the rules, the department has included reference to state and federal statutes as well as to chapter 119B to insure that the counties are fully informed of their responsibilities.^[44]

55. Minnesota Rule part 3400.0150, subp. 1 (proposed) requires each county to submit a biennial child care plan to the commissioner. Subdivision two lists essential components of the plan, including information required by Minn. Stat. § 119B.08, subd. 3. That provision includes, inter alia:

- (1) a narrative of the total program for child care sources, including all policies and procedures that affect eligible families and are used to administer the child care funds;
- (2) the methods used by the county to inform eligible families of the availability of child care assistance and related services;...

56. The Department's SONAR at page 86 explains why it has deleted the extensive list of items that must be included in the child care plan, and replaced it with general categories. Its practice is to send a child care fund plan form to each county, requesting specific information and ensuring that counties have an actual list of required elements. Thus, the issue is whether reference to Title VI must be separately listed, as an aid to the counties, and because compliance with it is a "minimum administrative standard", or whether it is one of many legal requirements that must be met and can be addressed by the department's development of the child care fund plan form and review.

57. This is a judgment call, and subject to the Department's discretion. The Department is not required to amend the rules to incorporate the requirements of Title VI. However, given the rising numbers of LEP persons in Minnesota, the goals of reaching out to them as potential participants and providers, and the necessity for compliance with the federal law to receive federal funding, the Department should consider amending 3400.0150, subp. 2 (proposed) as follows:

The plan must describe how it serves persons with limited English proficiency, as required by title VI of the Civil Rights Act of 1964, United States Code, title 42, sections 2000 et seq.^[45]

58. This language would not inhibit the Department's ability to develop an agency-wide policy on compliance, nor would it impose new substantive requirements on the counties, but only require them to report their compliance efforts. Yet, it would meet the goals discussed in the SONAR for pulling together the multiple requirements that affect the program. It would not constitute a substantial change because the counties' responsibilities for administering the child care assistance funds are covered by the rule and it is likely that notice of the rules would elicit topics that are appropriate to include. The commenters would like very specific requirements placed on the counties for serving LEP persons, but, as the federal guidance states, different approaches may be acceptable.

3400.0035 – Setting a Reading-Level Standard

59. As drafted, the rule requires the administering agencies to provide families with information about child care assistance funds and related policies.^[46] SMRLS, Kathleen Davis, and Judy Pearson, Mid-Minnesota Legal Services, ask the Department to set a standard so that all information, forms and notices are written at an acceptable level of difficulty, for applicants, participants and providers.

60. There is a uniform application form that all counties must use.^[47] Other forms and notices will be developed in conjunction with the Department's automation of the child care assistance payment system.^[48] At the present time, and under the proposed rules, the counties develop their own forms, except the application, and the forms must be submitted for review with the county's child care fund plan.^[49] The commenters believe that readability should be an essential component of the Department's review. Nothing in the current statute or rules indicates that the Department will consider readability.

61. There are several kinds of information that the county must give an applicant, participant or provider, including information to families asking for child care assistance;^[50] application procedure;^[51] information release;^[52] notice of denial;^[53] notice of approval;^[54] selection of legal nonlicensed provider;^[55] and selection of in-home provider;^[56] notice to family of eligibility for transition year child care;^[57] notice disapproving a legal nonlicensed provider;^[58] notice requirements for termination and adverse actions;^[59] recoupment and recovery of overpayments;^[60] and right to a fair hearing.^[61]

62. Since the county must include its written forms, policies and procedures in its biennial child care fund plan, it follows that each of the items above will be included. As stated by the commenters, these must be understandable to be meaningful. As the Department states, it has no basis to set a specific readability level, type size or other requirement except that the forms, information and notices must comply with the law. Yet if the information, forms and notices do not communicate clearly, they are of no value and do not convey the required information.

63. The Department has not included the criteria for approving the child care fund plan in the rule. Absent such criteria, it can check the plan against the applicable statutes and rule, and can verify that it is complete. It has proposed no other quality checks on the content. Yet, the enabling legislation directs the commissioner to set standards and adopt rules that establish minimum administrative standards for providing child care services.^[62]

64. The Department should consider adding a provision to Minn. R. 3400.0150 that the county's child care fund plan will be reviewed to assure that information, forms and notices about child care assistance must be accurate, clearly written and understandable to the persons who receive them. Although somewhat general, this would partially address the legitimate concern raised by SMRLS and give the Department a basis for rejecting submissions that do not communicate clearly.

3400.0035, subp. 2 C – application procedure

65. This subpart as proposed allows applicants to submit their applications in any county and requires the receiving county to forward the application to the county in which the applicant resides. The Department received comments that this rule provision was confusing as written and in response, has modified the provision as follows:

A county ~~that is not financially responsible for an applicant~~ may accept an application from the an applicant who does not reside in that county but immediately must forward the application to the county that is financially responsible for where the applicant resides.^[63]

66. The Administrative Law Judge finds that deleting references to financial responsibility and clarifying that applications are to be sent to the county where the resident resides clarifies this provision. The modified rule is both reasonable and necessary and does not make the rule substantially different than what was originally proposed.

67. This subpart also provides that after receiving an application, the administering agency must mail a notice of approval or denial of assistance to the applicant within 30 calendar days. With the applicant's consent, the administering agency may extend the response by another 15 calendar days. The Department received comment that this response time is too long, however, the Department asserts that the counties need this much time to process and verify the information submitted. This is the timeframe currently established in rule and the Department believes this timeframe strikes an appropriate balance between a family's need to receive assistance quickly and the county's need to verify information submitted by the applicant.

68. The Administrative Law Judge finds that the Department has sufficiently justified the timeframe established in this subpart.

3400.0035, subp. 4 – notice of denial

69. This proposed subpart requires the administering agency to inform an applicant of the reason or reasons for a denial of an application. Critical comment was received that the use of the word "inform" is vague. In response to this comment, the Department is proposing to delete the word "inform" and replace it with the phrase "provide written notice." The Administrative Law Judge finds that this modification better ensures that the applicants receive sufficient notification of the reason(s) why their application was denied. This rule as modified is both reasonable and necessary and does not result in a substantially different rule than what was originally proposed.

3400.0035, subp. 5 – notice of approval

70. Based on comments received, the Department is seeking to modify several provisions of this subpart relating to the information contained in a notice of approval of an application. The modifications are shown as follows:

The notice of approval must specify the information in items A to G H:

* * * *

D. any change in income, residence, family size, family status, or employment, education or training status must be reported within ten calendar days from the date the change occurs;

E. except in cases involving alleged child abuse by a provider or complaint that the health and safety of a child in care is in imminent danger, any change in provider must be reported to the county and the provider at least 15 calendar days before the change occurs;

F. the overpayment implications for the family if the changes described in items D and E are not reported as required; ~~and~~

G. when child care assistance is terminated, the participant will be informed of the reason for the termination and the participant's appeal rights and the provider will be

informed that, unless the family asks to continue to receive assistance pending an appeal, child care payments will no longer be made; and

H. that child care assistance can continue if the family moves to a new county and remains eligible.

71. The Department is making these modifications for a number of reasons. First, the added provisions make the subpart consistent with the reporting requirements specified in 3400.0040, subp. 4. In addition, the Department agrees that it is appropriate that families be advised of their appeal rights in the event their child care assistance is terminated as well as the implications involved in moving to a different county. The Administrative Law Judge finds that the modifications to D, E, F and G are both reasonable and necessary and do not result in a rule that is substantially different than what was originally proposed.

72. The language proposed for subpart 5H is not approved because it is inconsistent with other rules and arguably misleading and therefore is not a “rule”. Persons who qualify to receive assistance according to the basic sliding fee scale may not get continued benefits if they move,^[64] and persons with an approved education plan in one county may find that it is disapproved when they move.^[65] Other policies could affect the family’s payments, such as payment for absent days and the county’s maximum rate.^[66] It is appropriate to give notice that a move may affect child care assistance. To correct this defect the rule should state essentially the following:

H. that child care assistance benefits may be affected by moving to a different county.

73. This change or its equivalent is necessary and reasonable to inform participants in advance that a move may jeopardize continued receipt of benefits, and to be consistent with other substantive provisions of the rule. It is not substantially different than what was originally proposed.

3400.0035, subp. 8 C – selection of legal nonlicensed provider

74. An applicant must sign an acknowledgment when selecting a legal nonlicensed child care provider. Item C requires the parent to acknowledge that the legal nonlicensed provider has reviewed health and safety information supplied by the county. In the SONAR, the Department explains its concerns that legal nonlicensed providers receive health and safety information. Rule 3400.0140, subp. 5 (proposed) requires the county to give each registered provider health and safety material supplied by the Department and refer the registered provider to the child care resources and referral agency. Apparently, the parent's acknowledgment is intended to insure that the registered provider has actually reviewed the material. Commenters questioned the reasonableness of placing this obligation on participants. The Department has explained its rationale, and this item is needed and reasonable.⁶⁷¹

3400.0035, subp. 8 D – selection of legal nonlicensed provider

75. This subpart specifies, in part, that a parent who chooses to utilize a legal nonlicensed provider must sign an acknowledgment form assuring that the parent will provide an immunization record to the provider for each child within 90 days of the date that care for the child begins. The Department has chosen, in this instance, to propose a more stringent rule than applicable federal regulations require. The federal regulations allow lead agencies to exempt children from the immunization requirements if they are cared for by relatives, cared for in their own homes, are children whose parents object to immunizations and are children who are medically unable to be immunized.⁶⁸¹ In this instance, the Department has made a policy determination not to exempt children who are cared for by relatives or in their own homes. The proposed rule also expands the immunization record-keeping requirement to legal nonlicensed providers.

76. The Department's SONAR indicates that immunization records document: (1) that a child has received or is on a schedule to receive the immunizations required by Minnesota Statutes, section 121A.15; (2) that a child is medically unable to receive an immunization; or (3) the fact that a child's parents object to immunizations and therefore have not had the child immunized.

77. The Department contends that it is reasonable and necessary to extend immunization record-keeping requirements to legal nonlicensed providers. This will afford the same protections against contagious diseases that children in licensed facilities have, and better inform parents of the need for and availability of immunizations. Increasing immunization rates benefits the health and safety of all children. The Department also contends that consistently requiring immunization records for all providers simplifies the requirements for both providers and parents.

78. The Department chose not to exempt from the immunization record-keeping requirement children cared for by relatives and children cared for in their own homes for a number of reasons. The Department has shown that the minimal administrative burden associated with this record keeping is overshadowed by the beneficial effect to the health and safety of the state's children, and the consistency of having all providers keep records.

79. The Administrative Law Judge finds that the Department has demonstrated the need for and reasonableness of applying immunization record-keeping to legal nonlicensed providers. Further, the Department has demonstrated the reasonableness and necessity of exercising its discretion, as allowed under the federal regulations, not to exempt relatives and providers who care for children in the child's home from the record-keeping requirements. However, the Administrative Law Judge notes that the reference to an "immunization record" in proposed part 3400.0035, subp. 8 D could mislead program participants. As discussed in the Department's SONAR, and as addressed in Finding 76, the immunization record may consist of a statement that an immunization is contraindicated for medical reasons or that the child's parent or guardian objects to the immunizations due to conscientiously held beliefs. These options are not outlined in the rule as they are in the statute applicable to immunization records to be maintained by schools and licensed child care facilities.^[69] The Administrative Law Judge recommends that the Department clarify the availability of these options by either defining "immunization record" in part 3400.0020, or detailing these options in part 3400.0035, subp. 8 D.

3400.0035, subp. 9 – selection of in-home provider

80. At the suggestion of the Department of Human Services, Program Integrity Section, the Department is proposing to modify this subpart to add clarity:

An applicant who selects a provider who will provide child care in the applicant's home must be informed that ~~there are~~ this choice of care may create an employer/employee relationship between the parent and the provider and must be referred to resources available for more information about these ~~implications~~ legal rights and responsibilities.

81. The Administrative Law Judge finds that the subpart as modified is reasonable and necessary and does not result in a substantially different rule from what was originally proposed.

3400.0035, subp. 1 and subp. 5 – response to informational requests and notice of approval

82. Rule 3400.0100, subp. 2b (proposed) correctly restates the statute requiring participants to pay the costs of child care that exceed the county's maximum rate as well as the family co-payment.^[70] However, there is nothing in 3400.0035, subp. 1 or subp. 5 that clearly informs applicants or participants about this. It is important for families to know about the maximum rate limit when they are searching for a provider or considering changing providers. In addition, subpart 5 could mislead families because it requires families to be informed about their copayment and the maximum rate but does not inform them that they may have to pay the amount above the maximum. The terms themselves, "maximum" and "co-payment", suggest that the two amounts are all that must be paid. Given the significance of the information and effect it may have on the selection of a provider, it is recommended that the Department modify these two subparts to more clearly reflect the family's obligation to pay amounts above the maximum rate as well as the copayment.

3400.0035, subp. 5, 6 – notice of approval; copayments

83. St. Louis County commented that these subparts require the administering agency to tell the applicant how and when to make copayments when the administering agency may not know how and when the provider wants copayments made. See subpart 5C.^[71] The Department's answer is not responsive to the county's comment. Perhaps the Department is implying that the agency's notice could direct the applicant to work out the method and timing of copayments with the provider, if that was appropriate. The Department may want to clarify this with the county. Except as otherwise set forth in these findings, the Administrative Law Judge finds that these subparts are necessary and reasonable.

3400.0040, subp. 3A (1) – documentation of eligibility information

84. This subpart requires documentation of the child's citizenship status or documentation of the child's participation in a program that makes the child exempt from this documentation requirement. The Department was asked to clarify that documentation of citizenship status is required only for children for whom child care assistance is being sought. In response to this comment, the Department has modified this section to read as follows:

An applicant for child care assistance must document the:

- (1) child's citizenship status or the child's participation in a program that makes the a child exempt from this documentation requirement for all children for whom child care assistance is being sought.

85. The Administrative Law Judge finds that this subpart as modified is reasonable and necessary and does not result in a rule that is substantially different than what was originally proposed.

3400.0040, subp. 3A (3), (4) – documentation of eligibility information

86. This subpart requires an applicant to document the age of the children in the family (item 3) and the age of the applicant if the applicant is under 21 years of age (item 4). While the Administrative Law Judge finds that the Department has demonstrated the need for and reasonableness of asking for this information, it is recommended that instead of asking for the ages, the Department require the applicants to provide dates of birth. The Department is not required to make this change, but it would be more precise and easier to verify. This change would not result in a substantially different rule than what was originally proposed.

3400.0040, subp. 3B – documentation of eligibility information

87. Questions were raised about the clarity of this provision. The county must request a participant's social security number but the participant is not required to provide it.^[72] In response to comments that the proposed language was unclear, the Department has amended the subpart. The subpart, as modified, is necessary and reasonable. It better explains the county's and participant's responsibility, and how the social security number will be used. The

modification does not result in a rule that is substantially different than what was originally proposed.

3400.0040, subp. 4A – participant reporting responsibilities

88. The Department received critical comment that the words "must report" as used in this subpart are too vague. The Department recognizes that "report" is a broad term, but was concerned that defining the term would limit the options available for the child care assistance participants to communicate changes in information. However, in response to the comment, the Department proposes modifying Rule 3400.0040, subp. 4 to read, "A participant must meet the reporting requirements in items A and B. A participant may report a change in person, by telephone, by facsimile, or by mail, including electronic mail." The Administrative Law Judge finds that the modified rule is reasonable, necessary, and does not result in a rule that is substantially different than what was originally proposed.

3400.0040, subp. 4B and 3400.0185, subp. 2 B and C – participant reporting responsibilities and notice of termination of child care assistance to providers

89. These provisions require participants and the county to notify a provider that child care assistance benefits are being terminated. The Department is proposing to make identical modifications to three separate provisions that mimic the language set forth in Finding 70 addressing the modification to 3400.0035, subp. 5E (proposed). All provisions involve an exception to the notice requirements for cases involving alleged child abuse or where the health and safety of a child is in imminent danger. The intent of the Department is to create consistency among the provisions and to clarify how danger to the child may affect the provider. The Administrative Law Judge finds that the modified rule is reasonable and necessary and does not result in a substantially different rule than what was originally proposed.

3400.0040, subp. 5a – child support cooperation

90. Based on a comment received, the Department is proposing to modify this rule part that requires applicants and participants of the Program to cooperate with establishment of paternity and enforcement of child support, as set forth in Minn. Stat. § 256.741. SMRLS pointed out that it is important to add a reference to the statutory "good cause exemption" for failing to cooperate. The Department accepts the suggestion and is proposing to amend the last sentence of this subpart to read:

For purposes of this part, a family has met the cooperation requirement when the family complies with Minnesota Statutes, section 256.741, or there is a finding under Minnesota Statutes, section 256.741, subdivision 10, of good cause for failing to cooperate.

91. The Administrative Law Judge finds that the rule is modified is reasonable, necessary and does not result in a rule that is substantially different than what was originally proposed.

3400.0040, subp. 6a – ineligibility for failure to pay fees under the child care fund

92. The Department received critical comment that the phrases "until the family arranges for payment" and "in a manner acceptable to the provider" are too subjective and difficult to review. As a result the Department is proposing to modify this subpart without changing its meaning. Specifically the Department is proposing to replace "arranges for payment" with "reaches an agreement for payment", and delete the words "in a manner acceptable to". The Administrative Law Judge finds that these changes and the resulting rule are both reasonable and necessary and do not result in a rule substantially different than what was originally proposed.

3400.0040, subp. 8 – child care assistance during employment

93. SMRLS criticizes subpart 8 because it directs counties to average wages "earned" rather than wages "paid". As SMRLS points out, in some instances, employers do not pay employees the wages earned. The Department relies on the statutory requirement that, to be eligible, employed people must "work at least an average of 20 hours...and receive at least minimum wage for all hours worked."^[73] The Department is technically correct and therefore the rule as proposed may be adopted. However, the strict reading of this subdivision may not be the only reasonable interpretation of the statute.

94. The purpose of the statutory language is to assure that participants seek and accept jobs that pay at least the minimum wage so that child care assistance funds support employment leading to self-sufficiency. But as SMRLS points out, if the program participant does the work for which he or she was hired, the worker should not be penalized when the wages are not paid. Another clause of the same statute supports SMRLS' position. It states: "When the person works for an hourly wage and the hourly wage is equal to or greater than the applicable minimum wage, child care assistance shall be provided..."^[74] It would be reasonable for the Department to interpret subdivision 1(b) and 1(c) consistently and use the hours worked and hourly wage in its calculation. This would benefit program participants. It is true, as the Department states, that the harsh effect of counting only the wages received can be moderated to a degree by the income averaging provisions, so long as the participant earns more than the minimum wage. The Department is encouraged to reconsider its position, but it is not required to make a change.

3400.0040, subp. 8 and subp. 9 – child care assistance during employment and in support of employment

95. Child care assistance is paid to eligible participants for hours spent in employment. This basic premise of the rule appears in the very last sentence of subpart 8, at the end of a paragraph that describes income averaging for persons who are not paid an hourly wage. Its location and wording is confusing and misleading. It is a general principle that applies whether income must be averaged or not. The sentence structure is also faulty and implies that breaks and travel time are counted as hours worked and thus, count in the minimum wage and hour calculation. That would be unreasonable since persons would have to be paid substantially more than minimum wage to average minimum wage for unpaid breaks and travel as well as for their hours of work.^[75] This subpart is disapproved pursuant to Minn. R. 7400.2100 because it is confusing, inconsistent with the governing statute, and could lead to incorrect and inconsistent interpretation. As written, it is not a "rule" as defined in Minnesota statutes section 14.02,

subdivision 2 and is not reasonable. To correct the defect, the subpart should be rewritten to conform to Minnesota statutes section 119B.10, subd. 1(b), (c) and (d).

96. The lack of clarity in subpart 8 also creates confusion in subpart 9B. It appears that subpart 9B's reference to subpart 8 means that payments in support of employment (often, hours sleeping) can not exceed the child care assistance that would have been paid if child care was provided during the hours the participant was working. Subpart 8, as written, deals largely with income averaging and, thus, this reference is obscure and confusing and does not meet the definition of a "rule". To cure the defect subpart 9 must be rewritten to clarify that child care assistance in support of employment can not exceed the costs of child care that would have been paid during the participant's hours of work.

3400.0040, subp. 14B – maximum education and training under child care fund

97. This subpart details the maximum amount of time a student is eligible to receive child care assistance for education. Item B states: "A student eligible under part 3400.0080 is eligible for child care assistance for the length of time necessary to complete activities authorized in the student's employment plan according to the standards in Minnesota Statutes, chapter 256J." The Department received a comment that the words, "length of time necessary to complete activities" is without standards or control, and that it is unclear about who decides how long a student may receive assistance. The Department points out that the provision specifically references "activities authorized in the student's employment plan according to the standards in Minnesota Statutes, chapter 256J." The Department asserts that the ties to the employment plan and the standards set forth in statute provide sufficient standards by which to administer this provision. Further, the Department adds that Minn. Stat. § 119B.07 establishes the maximum time that basic sliding fee child care assistance may be used for approved education plans. For these reasons, the Department has chosen not to modify this provision. The Administrative Law Judge finds that the Department has adequately demonstrated the need for an reasonableness of this rule part.

3400.0040, subp. 10 - 15. – child care assistance during employment and education or training

98. In the current rule these various subparts contained numerous references to "education or training programs." The Department, in its proposed rules, deleted the words "or training" from each subpart. Because it appeared that training was included in the definition of "education" under Minn. Stat. § 119B.011, subd. 11, and therefore, the use of the words "or training" was redundant. However, as pointed out by SMRLS, training is included in the definition of "education" only as applicable to MFIP participants, therefore, the references to training, as a separate category, are still necessary. In response to this comment, the Department is proposing to modify the proposed rules to reinstate the words "or training" into these subparts. The Administrative Law Judge finds that these modifications and the resulting rule are reasonable, necessary and do not result in a rule that is substantially different than what was originally proposed.

3400.0040, subp. 15 – changes in education and training programs

99. This subpart requires a participant to get county approval to change his or her education or training program. It specifically prohibits the county from denying a change needed for the health or safety of the student. It does not include other criteria for approval. Absent any, one must assume that the program change will be measured against subpart 12, and the county policies included in its child care fund plan.^[76] If that is the Department's intended interpretation, the rule is approved as proposed. If any other criteria are to be applied, they should be set forth in the rule.

3400.0040, subp. 15a and 3400.0230, subp. 1, 2 – child care assistance during job search and right to fair hearing

100. Throughout the proposed rules, the Department has made a consistent effort to refer to people receiving child care assistance as "participants." These sections still utilize the words "persons" and "recipient." In order to maintain consistency, the Department is proposing to modify these subparts to utilize the word "participant." In addition, the Department realized that in part 3400.0230, subp. 1, a citation to a provision of Minnesota Statutes had been only partially repealed (the strikeout did not cross out all the numbers). The Department is making a modification to complete the repeal of this statutory reference. These changes and the resulting rule are needed and reasonable and do not result in a substantially different rule than what was originally proposed.

3400.0040, subp. 17 – temporary ineligibility

101. In its SONAR at 6-7, the Department explains that families will benefit from the proposed rules because they ensure that similarly-situated families have equal access to benefits by setting policies state-wide. As an example, it cites this subpart which governs treatment of persons on the county waiting-lists who are temporarily ineligible. The SONAR states that:

“Codifying this policy ensures that temporarily ineligible families on waiting lists are treated similarly across the state.”

But the language of this subpart does not create a uniform statewide policy for persons who have been approved for assistance but are temporarily ineligible and have not yet received assistance. The Department explains its position, but it is inconsistent with the overall goals of the rule amendments. In addition, it perpetuates a distinction between county programs and places families who move to a new county at risk of varying county policies. The subpart is approved since the Department has offered a rationale for its decision. However, the Department should consider amending Minn. R. 3400.0035, subps. 1 and 5 to notify persons who are seeking information about child care assistance and participants that moving to a new county may affect their benefits. There are several other variations among counties that are retained in the proposed rules and are addressed in other parts of this report.

3400.0060, subp. 6 – transfer of families from waiting list to basic sliding fee program

102. The second paragraph of this subpart allows applicant families that are temporarily ineligible for child care assistance to be placed on the waiting list. Persons

rising to the top of the waiting list remain at the top, by priority group, “and according to part 3400.0040, subp. 17, and [counties] serve the applicant who is next on the waiting list.”^[77] This is confusing because 3400.0040, subp. 17 gives counties the discretion whether or not to keep the applicant at the top of the waiting list. It is inconsistent to say that the county “shall leave the family at the top of the list”, and at the same time let each county decide. Although the rule has been shown to be reasonable, it would be much clearer to state:

When a family advances to the top of the county’s waiting list and is temporarily ineligible, the county shall leave the family at the top of the list according to priority group, and serve the applicant who is next on the waiting list unless a different procedure is spelled out in the county’s child care fund plan.

103. This change would improve the clarity of this provision and be more consistent with Minn. R. 3400.0040, subp. 17 (proposed).

3400.0060, subp. 9 – county child care responsibility when family moves

104. Students receiving child care assistance must have their education plan approved by the county.^[78] Subdivision nine clarifies the process for continuing assistance when a participant moves to a new county. The original county’s approved education plan will remain in effect for two months (possibly longer if portability pool funding is used), but then is subject to review and approval by the new county according to its criteria.

105. The Department’s comments at page 30 discuss at length its choice to favor consistency for participants served by one county over statewide consistency or consistency for the student. Although this choice seems to favor county administration over the interests of program participants, it is not arbitrary and is approved.^[79] However, two months is a very short time when one considers that most educational courses are scheduled and paid for by the academic term. Also, the Department states that a student will always have two months’ warning of possible changes in the approved program, but that is not certain. The participant has 30 days after the move to notify the new county and apply for continued assistance.^[80] The student may receive only 15 days notice of disapproval of the education plan.^[81] This would likely be a serious hardship to a student part-way through a several-week term.

106. The effect of the rule would be mitigated if counties were required to inform participants that moving to a new county could jeopardize approval of their education program. Rule 3400.0035, subp. 5 (proposed) lists the information that the county supplies when an application is approved, and does not include the possible effect of a move on the education plan or priority for receiving assistance.^[82] As discussed earlier in this report, the Department must amend Rule 3400.0035, subp. 5 to give notice to participants, that moving to a different county may affect their benefits.

107. The last sentence of subp. 9B is unclear. Presumably it means that the family’s place on the waiting list is determined by the date it moved, but that is difficult to discern from the rule as worded. The Department may wish to rephrase the sentence. This subpart also clarifies that a family that moves to a different county may lose its

benefits if it has not risen to the top of the new county's waiting list after six months. This is an additional rationale for notifying families that moving to a different county could affect their benefits. See discussion of Minn. R. 3400.0035, subp. 5.

3400.0080, subp. 1a – eligibility for MFIP child care program

108. This subpart addresses eligibility of a sanctioned MFIP caregiver. Under the proposed rule a sanctioned MFIP caregiver is eligible for child care assistance for the portion of their employment or job search support plans with which they are complying. In addition, pursuant to Minn. Stat. § 119B.05, subd. 1, MFIP participants are eligible for child care assistance, despite their MFIP status, if they meet the requirements applicable to the Child Care Assistance Program. The Department has modified this provision to add a reference to this statutory provision in order to more clearly set forth these eligibility provisions. The clarification will benefit child care assistance workers, families and counties. The Administrative Law Judge finds that this modification and the resulting rule is both needed and reasonable and does not result in a rule that is substantially different than what was originally proposed.

3400.0090, subp. 2B – transition year child care eligibility

109. The last sentence of this subpart states:

The provision requiring receipt of MFIP in at least three of the preceding six months does not apply to caregivers who leave the work first program for the reasons listed in Minnesota statutes, section 256K.07.

This provision is reasonable and necessary as written. However, there is only one reason given in section 256K.07: leaving the work first program as a result of increased earnings from employment. It would be clearer and easier to read if the statutory basis were restated in the rule. The Department should consider amending the rule accordingly. Such a change would not be substantial since it would clarify existing requirements.

3400.0090, subp. 2C – transition year child care, eligibility

110. This subpart sets the eligibility for family income, but it is not very clear about how the comparison to the state median income will be determined. Rule 3400.0060, subp. 5C, which applies to the basic sliding-fee program, is much clearer. It states that a family is eligible if:

the family has an annual gross income that does not exceed 75 percent of the state median income for a family of four, adjusted for family size.
[emphasis added.]

111. The addition of “annual gross” to modify income in subpart 2C would clarify how the calculation is made and improve consistency. Without the change, counties may make an inappropriate comparison. Although the rule is adequate without this language, the Department should consider this modification. It would be clearer and would not be a substantial change.

3400.0110, subp. 1B and C – child care assistance payments, payment options

112. The Department should delete subpart 1B and consider moving subpart 1C to Rule 3400.0187. In some respects subpart 1B mimics portions of Rule 3400.0187 (proposed), but recoupment and recovery are better explained in that part. Furthermore, subpart 1B (1) requires the county to recover advance payments to the family if the provider was not paid, but it is unclear why that is an “overpayment”, and is inconsistent with that term’s definition. See 3400.0020, subp. 33 and Minn. Stat. § 119B.11, subd. 2a. Also, this subpart states that the county “must” recover the amount advanced, when both part 3400.0187 and the applicable statute do not require that. As written, subpart 1B is incorrect, incomplete and inconsistent with 3400.0187 and constitutes a defect as to legality. To correct the defect, subpart 1B should be deleted and Rule 3400.0187 modified to include recovery of advance payments. Subpart 1C is correct and is approved but would be more logically moved to Rule 3400.0187.

3400.0110, subp. 3 – child care assistance payments, county authorization of child care

113. This subpart addresses in part payment of child care assistance for blocks of time. The Department received comments that the provision was unclear as written. In response, the Department is proposing a modification:

~~A county must authorize child care on an hourly, half-day, full-day, or weekly basis if the provider charges on that basis. A county may authorize child care on an hourly, half-day, full-day, or weekly basis if the activities authorized for the family justify the block of time.~~ If a provider charges on a half-day, full-day, or weekly basis, a county must authorize child care using the same basis on which the provider charges. If a provider does not charge on a half-day, full-day, or weekly basis, a county may still authorize child care on a half-day, full-day, or weekly basis if the activities authorized for the family justify payment for the block of time.

114. The Administrative Law Judge finds that this modification makes the language more clear without changing the intended meaning. The rule as modified is approved as needed and reasonable and does not result in a rule that is substantially different than what was originally proposed.

3400.0110, subp. 7 - child care assistance payments, county payment policies and schedule

115. The last two sentences of this subpart are confusing. The applicable statute requires providers paid by the counties to bill the county within ten days of the end of the month of service.^[83] The last two sentences both state in different ways that the county can set a limit on when providers can submit an invoice. First, it's not clear why the ten-day limit after the month of service does not apply. Second, the first of the last two sentences allows the county to set a limit of a year, if included in its plan, and the last sentence allows the county to set a shorter limit, if included in its plan. Read together, the last two sentences state that a county may set a time limit of one year or less on the initial submission of invoices if it includes the time limit in its plan and gives notice of the time limit to providers.^[84] If there is some other difference between the last two sentences, it's not apparent. The last two sentences are not consistent with statute and are not approved. To correct the defect, the Department must clarify its intent and modify the subpart accordingly, consistent with Minnesota statutes section 119B.13, subd. 6.

3400.0110, subp. 9 – payment during child absences

116. Prior to amendment, this subpart authorized counties to establish policies for payment of child care when children were absent. On its face, the amendment is confusing because it states that the commissioner can set policies, yet none are set out, and counties retain authority to develop additional policies that do not conflict with the commissioner's policies.^[85]

117. The Department has attempted to reconcile two provisions of statute. One, enacted in 1999, directs the commissioner to evaluate market practices for payment of absences every two years and set policies that reflect those practices.^[86] The other directs the

commissioner to adopt rules allowing counties to set policies for payment of absent days.^[87] The Department expects the second provision to be repealed once it establishes a statewide policy.^[88]

118. In its Comments, the Department states that its market survey has been completed and it plans to issue its policy prior to final adoption of the rules. It is also seeking legislative repeal section 119B.02, subd. 1, the provision giving counties the authority to set the policy.

119. The Department cannot have an enforceable statewide policy on payment for absent days unless that policy is included in its rule or specifically exempted from rulemaking.^[89] It has the statutory authority to establish the policy, but no exemption from rulemaking. Thus, its impermissible for the rule to state that there are policies without specifying what they are, and then allow counties to have additional, consistent policies. It is arguable that section 119B.13, subd. 1, gives the Department exactly the authority it needs to supercede the language in section 119B.02, subd. 1 since it is a subsequent enactment and gives specific, different direction to the commissioner.^[90] But without knowing what its proposed policy is, it would be speculation to comment on whether modifying the rule to include it would constitute a substantial change from the rule as proposed. Clearly the topic of absent days was raised and discussed during the proceedings.^[91]

120. The rule amendment as proposed is disapproved since it lacks the specificity and uniformity required of a rule by the Administrative Procedures Act.^[92] To correct the defect the Department may withdraw the amendment or modify the rule to add the statewide policy.

3400.0110, subp. 10 – child care assistance payments, payment during medical leaves of absence

121. The Department is proposing to modify this section as follows:

Counties must grant child care assistance during a parent's medical leave of absence from education or employment if:

* * * *

B. the parent is expected to return to ~~the parent's current~~ employment or an approved education or training program within 90 calendar days after leaving the job, education, or training program;

122. The words "the parent's current" were omitted because the Department did not intend that the parent must return to the same place of employment to maintain eligibility for assistance. The Administrative Law Judge finds that the modifications to this subpart are needed and reasonable and do not result in a rule that is substantially different than what was originally proposed.

3400.0120, subp. 1a – provider acknowledgement

123. The Department has held discussions with county child care administrators about the provider approval process. Many counties inform providers that they are mandated reporters of child maltreatment. Since some nonlicensed providers may not be aware of this obligation, the Department proposes to add notice about it to the provider acknowledgement, as “G” to subpart 1a.

124. The ALJ finds that this addition and the rule as modified is needed and reasonable and does not result in a rule that is substantially different than what was originally proposed. The need for an acknowledgment has been explained and this provision reiterates a duty to report maltreatment of minors that is already set forth in statute.

3400.0120, subp. 1b A(2), subp. 2a, and 3400.0140, subp. 5 – eligible legal nonlicensed providers and registration of legal nonlicensed providers

125. These subparts allow counties discretion to regulate legal nonlicensed providers. Legal nonlicensed providers are specifically exempted from licensing as child care providers, but eligible to receive child care assistance funds. The group includes child care operated by schools and city recreational programs, as well as persons providing care to children from only one unrelated family.^[93]

126. Participants are required to sign a release, acknowledging that they have selected an unlicensed provider.^[94] To receive child care assistance funds, the unlicensed provider must register with the county, as set forth in Minn. R. 3400.0120, subp. 2 (proposed). It is appropriate to require registration and seek certain assurances from the provider.

127. However, the Department lacks the authority to allow each county to set its own requirements for participation by legal nonlicensed providers. The purpose of rulemaking is to set clear, uniform standards so that persons who are affected by them know the rules and can comply with them. Counties are subordinate to the state and their authority is determined by the legislature.^[95]

128. The Administrative Procedures Act is clear that the agency shall adopt rules “setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public.”^[96]

129. For the child care assistance program, the commissioner has the authority to set standards for the counties to follow, supervise the counties and adopt rules to govern the program. The statutory authority is quite explicit.^[97]

130. In some instances the governing statute specifically delegates policy-setting to the counties. For example, counties can set some limits on employment plans^[98] and set additional priority groups to receive benefits.^[99]

131. It is clear that the legislature intended that legal nonlicensed providers should be eligible child care assistance providers.^[100] In fact, it specifically stated that “a county may not restrict access to a general category of [permitted] provider.”^[101] By allowing

counties to set their own substantive registration requirements, the Department is permitting the precise restriction that the legislature prohibited.

132. One might think that the additional registration requirements were only intended to collect additional information needed by the county to process payment, but the SONAR and Department's comments on these provisions acknowledge that counties can add "minimum standards that the county believes a legal nonlicensed provider must meet to provide safe care for children."^[102]

133. One of the stated reasons for granting county discretion is to allow counties to protect themselves from liability. There is no further elaboration offered on this point, and no discussion of why county interests in limiting liability would differ. Also, in its comments, the Department states that adding requirements for all counties, such as background checks, could limit access to legal unlicensed providers in some counties.^[103] This is not a reasonable basis for differential requirements and inconsistent with prohibiting care by unsafe providers.

134. The Department and some commenters suggest that in smaller counties with less mobile populations, parents may have more information about providers. This suggests that so long as the participant and provider know something about each other, the child will be safe. If that is the assumption, it should be applied equally to all legal nonlicensed providers.

135. The potentially burdensome effect for families of the additional registration requirements is magnified because counties are not required to approve payment to nonlicensed providers who meet state requirements while verifying the additional local requirements. The counties have the discretion whether or not to make provisional payments.^[104]

136. Rule 3400.0120, subp. 1b A(2) and 1b B, Rule 3400.0140, subp. 4, line 19, beginning at "or" through June 22, ending with "requirements", and the last two sentences of Rule 3400.0140, subp. 5 are disapproved because they are inconsistent with the Department's statutory authority and improperly delegate authority to the counties.^[105] To correct the defect, the Department can withdraw the provisions, or modify 3400.0120, subp. 1b to address some of the concerns raised by the Department and those who support allowing the counties to set additional standards and withdraw the remaining provisions, or propose another alternative.

137. It would be acceptable for the rule to allow counties to perform criminal background checks on legal nonlicensed providers and others with access to the children during the hours care is given.^[106] The rule could clarify that counties can check their own records and investigate complaints to determine whether a particular child care provider is unsafe. Local building and health codes do apply to these providers. The rule could require an inspection or assurance of compliance. The rule already requires substantiated complaints about legal nonlicensed providers to be public information and maintained for three years. It is reasonable to disapprove a provider that the county knows is unsafe.

138. It may be that the counties use their authority wisely to set additional requirements. Nonetheless, the purpose of the APA is to insure that the requirements that govern participation in state programs are spelled out, that they are discussed in a public forum with opportunity for comment, that the need for and reasonableness of them is fully supported and legality shown. Allowing counties to set their own requirements violates those principles and is permissible only to the extent specified in statute.^[107]

3400.0120, subp. 1b A(3) – eligible legal nonlicensed providers

139. Hennepin County disagrees that legal nonlicensed providers who care for a child in the child's own home should be required to assure that the home complies with building and health codes. The Department responds that the federal regulations require states to assure that health and safety regulations are in place for all types of care, including in-home care, citing 45 C.F.R. § 98.15(a)(5). The cited authority does not support the Department's justification. Another provision, 45 C.F.R. § 98.15(b)(5), better supports the position because it does require the State to assure that there are state or local health and safety requirements in place, and Section 98.15(b)(6) requires procedures to insure that providers comply with those requirements. Although this arguably requires only that regulations and an enforcement mechanism are in place, rather than requiring an affirmative assurance of compliance, the Department has explained its decision to go one step further than the minimum required. It is reasonable and necessary since legal nonlicensed providers may not be subject to routine inspection.

3400.0120, subp. 1b A(4) – eligible legal nonlicensed providers

140. The Department correctly cites Minn. Stat. § 119B.09, subd. 5 for the authority that counties may deny child care assistance when the county knows that a provider is "unsafe". The proposed rule allows each county to define the term "unsafe" and include it in its child care fund plan. Its justification is that providers and parents will have access to that plan and thus to the applicable standards. See SONAR at 73. As discussed above, this type of unfettered discretion violates the Administrative Procedures Act. Standards for "unsafe care" are already in this proposed rule. For example, counties can seek assurance of compliance with local or state health and safety regulations, deny care to providers about whom there have been substantiated complaints, and check county records for information that would lead a reasonable person to conclude that the care is unsafe. It is acceptable to allow some case-by-case interpretation of the term.^[108] It is not reasonable to allow each county to set its own standards when there are no criteria for review and approval of the counties' definition of "unsafe care" in Rule 3400.0140 or Rule 3400.0150. The Department has been directed to set the applicable standards. The Legislature has been clear where that authority can be delegated to the counties.^[109]

141. Rule 3400.0120, subp. 1b A(4) is not approved because it improperly delegates the Department's powers to the counties and conflicts with the Department's statutory authority. To correct the defect the Department must withdraw subp. 1b A(4). In the alternative, the Department may amend the rules to define "unsafe care"; or set criteria for reviewing the counties' definition.

3400.0120, subp. 2D – registration of legal nonlicensed providers

142. In response to comments, the Department has proposed modifying the requirement that nonlicensed providers reregister if a certain amount of time has passed since the provider last participated in the child care assistance program. Initially, the Department proposed reregistration after a one-year hiatus. It is modifying the proposal as follows:

A registered legal nonlicensed provider who has not provided care to children receiving assistance from the child care fund for over ~~one year~~ two years must reregister under this subpart before receiving payment under the child care fund.

The Administrative Law Judge finds that his provision as modified is needed and reasonable and does not result in a rule that is substantially different than what was originally proposed. It will reduce some of the administrative burden on providers and counties, and may speed up county approval of child care.

3400.0120, subp. 5 – notice to county required when care has terminated

143. Under this subpart, providers “must” notify the county when it knows that a family intends to end care with the provider. Although the mandatory “must” is used, it is unclear what consequences, if any, the department envisioned if the provider did not give appropriate notice. This provision is approved, but the Department may wish to clarify its intent.

144. This subpart contains a typographical error in the last sentence. The corrected rules should be modified to read “more than ~~the~~ seven consecutive days”. This change is needed and reasonable and does not result in a substantially different rule.

3400.0130, subp. 1 – child care provider rate determination

145. At the public hearing, the Department was asked to include mandatory activity fees on the rate survey. The Department agrees that the purpose of the rate survey is to establish a maximum payment rate that reflects the market rate for child care. If a facility charges mandatory activity fees, those fees are part of the true cost of care and should be included in the facility’s survey information. Accordingly, the Department has modified this part to include, “the rates surveyed shall include a survey of mandatory activity fees.” The Administrative Law Judge finds that this modification and the rule is needed and reasonable and does not result in a rule that is substantially different than what was originally proposed.

146. Some commenters asked the Department to conduct an annual rate survey, rather than once every two years under the current rule, and decrease the time required to implement the survey rates. The Department has chosen not to modify this subpart. The current practice of the Department is to conduct an annual survey when its budget and child care market trends allow. In recent years the Department has had the resources to conduct this survey on an annual basis. But it is expensive, time-consuming, and requires coordination with twenty child-care resource and referral agencies. Thus, the Department is reluctant to commit to a mandated annual survey or a definite implementation schedule when it is not certain that it will have the necessary resources. Transition to new software and database will reduce the time necessary to implement future surveys. In addition, the Department believes that the current survey practice is sufficient to ensure equal access to care for eligible families. The Administrative Law Judge finds that the Department has adequately supported the amendments to this subpart, and its decision not to alter the frequency of surveys.

147. Other comments suggest that the Department raise the maximum rate that may be paid to providers. Comments were received that specifically requested an increase to the 90th or 100th percentile rate.^[110] The Department pointed out that the current rate as proposed (75th percentile) is established as the maximum rate in statute.^[111] The Department asserts, and the Administrative Law Judge agrees, that it is not able to raise this rate.

3400.0130, subp. 2a – rate bonus for provider accreditation

148. The Department failed to address this proposed subpart in its SONAR. However, the requirement that a provider be paid a ten percent bonus if they hold a current early childhood credential or accreditation approved by the Commissioner is clearly set forth in

statute.^[112] The only additional language in the proposed rule requires providers to submit their credentials before payment of the bonus or renewal is authorized. It is logical to require providers to document that they are eligible for the bonus. As a result, the Administrative Law Judge finds that the proposed subpart is reasonable and necessary to implement the statutory language and that omission from the SONAR is a harmless error.

3400.0130, subp. 3 – rate determination; children with special needs

149. The Department is proposing the following modification to clarify the procedure for county submission of a request to pay special needs rates:

A County must submit a request to pay a special needs rate to the commissioner. The request must be submitted with or as an amendment to the county child care fund plan ...

150. The Administrative Law Judge finds that this clarifying modification and the rule is both reasonable and necessary and does not result in a rule that is substantially different than what was originally proposed.

3400.0130, subp. 3a, 3b – rate determinations; children with special needs due to disability and inclusions in at-risk population

151. The Department received several comments on these subparts. One comment requested that the rules be clearer about how providers comply with the Americans with Disabilities Act (ADA). Other comments suggested that the language of 3400.0130, subp. 3a B(3) is unclear and implies that a provider cannot get a higher rate for specialized care. In addition, comments raised the concern that the language of 3400.0130, subp. 3a B(4) implied that the provider is raising the rate for everyone in the program. These same comments also apply to subpart 3b relating to the rate determination for children with special needs in an at-risk population.

152. The Department has chosen not to be more specific about how providers comply with the ADA. As more fully explained in the discussion of federal law governing service to persons with limited English proficiency,^[113] the Department has explained its rationale and is not required to add more specificity.

153. In response to the other comments, the Department is proposing modifications to Parts 3400.0130 subps. 3a and 3b. The modification to subpart 3a reads, in part, as follows:

B. Obtain the following documentation from the child care provider:

* * * *

(3) the provider's assurance that the rate being sought is the same as the rate that would be charged for similar services provided to a child with a disability in a family not receiving child care assistance for like services; and

(4) if applicable, a statement from the provider explaining that the ~~provider's rate~~ the provider charges for all children in care should be adopted as the special needs rate for the child with disabilities because the provider has chosen to spread the cost of caring for children with special needs across all families in care; and

154. Identical changes were made to Part 3400.0130, subp. 3b with the exception of tailoring the language to apply to children in an at-risk population.

155. The Administrative Law Judge finds that these modifications result in a more clearly-worded rule that is needed and reasonable. Further, the modifications do not result in a rule that is substantially different than what was originally proposed.

3400.0130, subp. 5 – child care rate, provider's county of residence

156. The Department proposes new language to clarify the appropriate payment rate when the provider “resides” outside of Minnesota or when care is provided in the child’s home. It is necessary and reasonable to amend this subpart to address these two situations. However, the Department should consider modifying the language to improve its clarity. The term “the provider’s county of residence” apparently means the county where the service is delivered.^[114] Many providers are corporations, and/or deliver child care in more than one county. “County of residence” has no obvious meaning for those providers. In addition, the Department has proposed adding a definition of residence to the rule. It defines “residence” as “the primary place where the family lives as identified by the applicant or participant.”^[115] This is inconsistent with the use of the term “residence” in this subpart. The entire subpart would be clarified if it stated: “Payments are based on the allowable rates in the county where services are delivered to the participant. When care is provided outside the state of Minnesota, the maximum rate is determined by the participant’s county of residence.” Such a modification would be clearer and does not result in a rule substantially different than what was proposed.

3400.0130, subps. 7 and 8 – payment of registration and activity fees

157. These provisions are needed and reasonable. However, information about registration fees and activity fees is important to participants. The Department is encouraged to add information about these fees to the information given to persons inquiring about the program and to participants at Minn. R. 3400.0035, subps. 1 and 5 (proposed).

3400.0140, subp. 6 – duties upon receipt of parental complaints against legal nonlicensed providers

158. This subpart describes the process for handling parental complaints against nonlicensed providers. It is essentially unchanged except for the addition of the last clause. This clause is reasonable and clarifies the subpart. However, in some instances a nonlicensed provider is a program operated by a school board or park and recreation board. If the person who is the subject of the substantiated complaint is an employee or volunteer for such a provider, or the complaint involves public health problems, it may be harsh to prohibit any

future payments to that provider, particularly since there is no time limit, nor is the prohibition limited to one site. The Department should consider clarifying that such a provider will not be paid until the health and safety problem is resolved or the individual subject of a complaint is removed from the site. The provision prohibiting payments was included in the initial notice, thus it was properly open to comment and could be narrowed without creating a substantial change.

3400.0140, subp. 10a – definition of at-risk populations

159. SMRLS questioned the Department’s statutory authority for giving counties the option to define a population as “at-risk”. In response, the Department proposes to repeal this subpart because it creates the false impression that payment of a special needs rate for some children is optional, and because other provisions more clearly and adequately govern payment of special needs rate. Thus, this subpart is redundant and unnecessary. The Administrative Law Judge finds that the repeal of this subpart is reasonable and necessary and does not result in a rule that is substantially different from that originally proposed.

3400.0140, subp. 19 – recoupment of overpayments

160. The Department is proposing to repeal this subpart and add a single sentence that reads, “[o]verpayments must be recovered or recouped as identified in part 3400.0187.” In its reorganization of these rules, the Department has proposed to create a single part dedicated solely to overpayment procedures.^{[116](#)} Currently, Minn. Stat. § 119B.11, subd. 2 provides that overpayments, “must be recovered through recoupment as identified in Minnesota Rules, part 3400.0140, subpart 19.” Until that statutory reference is changed, the Department wants to retain a provision in this subpart directing the reader to the new overpayment provisions. The Administrative Law Judge finds that the amendment is needed and reasonable.

3400.0170, subp. 1 – proof of income eligibility

161. This subpart details how to calculate a family’s income. In order to conform with the language in Minn. Stat. § 119B.09, subd. 4, the Department is proposing to modify this provision as follows:

An applicant requesting child care assistance must provide proof of income eligibility. For the purpose of determining income eligibility, annual income is the income of the family for the current month multiplied by 12, the income for the 12-month period immediately preceding the date of application, or the income ~~for the time period~~ calculated by the method that provides the most accurate assessment of annual income available to the family. Income must be verified with documentary evidence. If the applicant does not have sufficient evidence of income, verification must be obtained from the source of income.

162. SMRLS argues that the last sentence of this provision conflicts with the provisions of Minnesota’s Data Practices Act because verification cannot be obtained

from the source of the applicant's income without permission from the applicant or participant to disclose the fact that the individual is participating in the Program.

163. In response to this comment, the Department is proposing to further modify the provision as follows:

[I]ncome must be verified with documentary evidence. If the applicant does not have sufficient evidence of income, ~~verification must be obtained from the source of income~~ the administering agency must offer the applicant the opportunity to sign an informational release to permit the administering agency to verify whether the applicant qualifies for child care assistance.

164. SMRLS' Comments, the Department Comments, and Rebuttal Comments by both SMRLS and the Department discuss whether signed affidavits from participants are adequate documentation of income. Both sides have legitimate arguments and deference must be given to the Department's decision not to allow participant affidavits since it has presented a reasoned explanation for its decision not to accept SMRLS' suggestion.

165. The Administrative Law Judge finds that the proposed modifications improve the rule's clarity and sufficiently address the data privacy concerns raised during the comment period. The rules, as modified, are needed, reasonable, and do not result in a rule that is substantially different than what was originally proposed.

3400.0170 – determination of income eligibility for child care assistance

166. SMRLS recommended that payment for jury duty and mileage should be treated as a nonrecurring lump sum under subpart 13. Although the Department has discretion here, its response fails to support its position. It is not clear that payment for jury duty is income from employment under subpart 5 of this rule. Also, since jurors receive only \$30 each day that they report for duty, juror payments may not aid them in meeting the minimum wage test. There is no requirement to pay jurors the minimum wage. Since jury duty does not fit perfectly under any of the current subparts, it is recommended that the Department should specify where it fits so that the counties will treat it uniformly. It may amend subpart 5 to include payment for jury duty and mileage as earned income, add it to subpart 12 as unearned income, or follow SMRLS' suggestion and treat it as a lump sum under subpart 13. Modifying one of the subparts would not be a substantial change since the income categories were covered by the notice and one purpose of the proceeding is to consider relevant items that may be overlooked.

3400.0170, subp. 7 – income eligibility, earned income from self-employment

167. This subpart as amended is needed and reasonable and does improve the clarity. The Department should consider whether changing "self-employment business accounts" and "personal accounts" to "self-employment business records" and "personal records" would further clarify the subpart. ^[117]

3400.0183, subp. 2C – conditions under which termination of child care assistance is required

168. This provision is needed and reasonable. However, the Department should consider modifying the confusing reference to section 256.98, subd. 8(b) in this item. The specific language of section 256.98, subd. 8(b) is fully set forth in subpart 3. It would be clearer to say in subpart 2C: “when a member of the family has been disqualified from the child care assistance program,” and state the basis for disqualification in subpart 3, as it is written. Citing the statute in subpart 2C suggests a difference from subpart 3 when there is none.

3400.0185, subp. 1 and subp. 3 – notice of termination of child care assistance to participants and notice to participants of adverse actions

169. Subpart one explains the steps the county must take to terminate assistance, and subpart three explains the steps the county must take for an adverse action. Both ordinarily require 15 days notice prior to the effective date of the termination or adverse action. These provisions do not clearly address two important questions, reeligibility prior to the action’s effective date, and participants’ choice to continue benefits during an appeal.

170. It is unclear whether the termination or adverse action is rescinded if a participant reestablishes eligibility prior to its effective date. For example, Minn. R. 3400.0040, subp. 6b (proposed) states that a family is “ineligible” for child care assistance until an overpayment is paid in full or until the family arranges to repay the overpayment. An “ineligible” participant will be terminated, pursuant to Minn. R. 3400.0183, subp. 2C (proposed). It is unclear whether the termination is rescinded if the participant repays or arranges to repay the overpayment prior to the effective date. This omission is crucial to the participant who must otherwise reapply to participate, and could be placed on a waiting list. It is therefore impermissibly vague and disapproved pursuant to Minn. R. 1400.2100. There are other bases for ineligibility or adverse action that can change and would warrant rescission, but the rule fails to address this. To correct this defect the Department must clarify when termination or adverse action is rescinded.

171. Subparts 1 A(5) and 3 B(6) address notice to participants about termination or change in benefits. They are ambiguous and misleading because they do not fully explain that there is a choice whether or not to receive assistance pending appeal. They state that child care assistance will automatically continue pending appeal of termination or adverse action.¹¹⁸ However, three other provisions correctly state that the participant has a choice whether assistance will continue pending appeal. See Minn. R. 3400.0185, subp. 2 A(4) and subp. 4(4) (proposed), notifying providers that assistance will terminate or change on the effective date unless the family asks for assistance pending an appeal. See also Minn. R. 3400.0235, subp. 3 (proposed) which states that a participant may appeal a termination and choose not to receive child care assistance pending the appeal. In light of the inconsistency, subparts 1 A(5) and 3 B(6) are disapproved because they do not meet the definition of a “rule”.

172. To correct this defect, the provisions should be modified. For example:

3400.0185, subp. 1A(5):

If the participant appeals the proposed action before the effective date of termination, the participant may choose.

(a) to receive benefits while the appeal is pending, subject to recovery if the termination is upheld; or

(b) not to receive benefits while the appeal is pending, and receive reimbursement of documented eligible child care expenditures, if the termination is reversed.

173. The comparable change must be made to Rule 3400.0185, subp. 3B(6). These changes are necessary to assure that participants are correctly informed of their choices during the appeals period and to insure the internal consistency of these rules.

3400.0185, subp. 3 A – notice to participants of adverse actions

174. The Department has proposed to modify this subpart to delete the illustrative list of adverse actions. Some commenters wanted the list of examples expanded but the Department chose to delete the list entirely.^[119] Its rationale was that an exclusive list would be very long, and a lengthy illustrative list would suggest it was exclusive. Since it seems that the rule is sufficiently clear that any adverse action affecting the participant requires written notice to the participant, the Department’s modification is reasonable. The provision as modified is needed and reasonable and does not result in a rule substantially different than what was originally proposed.

3400.0185, subp. 3B(6) – notice to participants of adverse actions

175. DHS Program Integrity Section states in its initial comments that a fraud disqualification is not an appealable adverse action. This is not entirely clear. It is true that the legal conclusions that fraud was committed must be appealed at the time it is determined in district court. But a participant is still entitled to receive notice of disqualification to assure that no mistake has been made and that the timing of the disqualification is correct since its effective date may vary.^[120] The Department’s response to the comments seems to miss the point that was raised, but it is reasonable to reject the DHS suggestion.

3400.0187 – Recoupment and Recovery of Overpayments

176. On its face this rule states that recoupment and recovery are used when the family has received an overpayment. The statute uses similar language.^[121] It does not appear to apply when the provider has received the overpayment. Yet, the SONAR implies that recoupment or recovery may be used when funds were paid “in excess of the amount for which a family was eligible.”^[122] Also, there is no provision in this part or any other part of the rule that discusses recoupment or recovery when providers have been overpaid.

177. If the Department intends recoupment and recovery to apply when the provider was overpaid, it has not included such authority in the rule or justified it in the

SONAR. There may be an important distinction between provider overpayments from which the family benefited and those from which it received no benefit.

178. Both SMRLS and Hennepin County commented that there should be some discretion to waive recovery of overpayments, particularly when the family was not responsible for causing it. The Department's response is not entirely persuasive. It gives two explanations. First, it cites to federal law requiring states to return to the federal government amounts not spent in accordance with federal law.^[123] However, if the state or county makes a mistake, it is unclear why the participant family rather than the government agency should be responsible for repaying the federal funds unless this family received the overpayment. The agencies receive federal funds to defray administrative costs and it is more reasonable to hold the agencies accountable for their own error, if the family did not actually benefit from it. Recovering from the family would be unreasonable.^[124]

179. The Department also cites to state statute for additional support: "Child care assistance paid to a participant in excess of the payment due is recoverable..."^[125] If the participant received neither money nor a direct benefit from overpayment, the statute would not justify recovering the funds from the participant. It is unreasonable to require the participant to recover funds from the provider to repay the county when the county or the provider made the error.

180. One could arguably read into the proposed rule an interpretation that the participant is responsible only for overpayments that directly benefited the participant (because the participant was actually paid too much or charged too little). But the lack of any provision in the rule addressing recovery of overpayments from providers, and the Department's response to the comments from Hennepin County and SMRLS, suggest that the family is responsible even when it is the provider that received the overpayment.^[126]

181. It is unreasonable and inconsistent with the statute to hold participants responsible for overpayments that did not benefit them. To correct the defect, the Department must amend the rule to be consistent with the statute and clarify the method for recovering overpayments to providers.

182. Rule 3400.0187 is also unclear about when an overpayment occurs. Subpart 1 states: "When a county discovers that a family or former participant family has received an overpayment for one or more months...", the overpayment must be recouped or recovered. However, the term "overpayment" is not defined. If a family has changes that it reports in a timely way, and the county informs the family of the effective date of a change in benefits or loss of eligibility, it is unclear whether the county can charge the family with an overpayment for assistance paid prior to the effective date. Under the applicable statute, the family "must repay any child care assistance for which the family was not eligible."^[127] Rule 3400.0187, subp. 4 sets out the recoupment levels and implies that to constitute an overpayment, the family must have failed to report a change. Although this can be read into the proposed rule it would be preferable to clarify that no overpayment will arise due to a change affecting the participant family so long as the change is reported as directed by Minn. R. 3400.0040, subp. 4. Failure to make this clear could result in inconsistent interpretations by the counties and adversely affect participants in the program.^[128]

183. Rule 3400.0187 does not define or explain “recoupment” or how it works. The SONAR states at 94 that the county must recoup “by reducing the amount of assistance paid to or on behalf of” the family. The rule is impermissibly vague. To correct this defect, Rule 3400.0187, subp. 4 can be amended to read:

“[T]he county must recoup the overpayment using the procedures by reducing the amount of assistance paid to or on behalf of the family at the rates in item A, B, or C ...”

184. This subpart is also unclear about how overpayments can be recouped when a participant has been disqualified. Rule 3400.0187, subp. 4C (proposed) describes the circumstances justifying the highest level of recoupment, and it tracks the same language that would disqualify a participant. Compare Minn. R. 3400.0183, subp. 3 (proposed). Yet, once the participant is disqualified, there is no assistance from which to recoup. If recoupment begins after the disqualification period has ended and eligibility has been re-established, the rule should be clear about the application of subpart 4C. Without some change, 4C is unclear, open to inconsistent application, and is a defect because it does not constitute a rule. To correct the defect the Department must clarify whether overpayments will be recouped from persons who are disqualified and, if so, the method to be used.

185. The Department’s decision to vary the rate of recovery of overpayments is reasonable. However, the Department should consider whether it is reasonable for subpart 4C to require full repayment in ten months, regardless of the total overpayment amount. Some upper limit on the monthly recovery may be appropriate since the families eligible for child care assistance have limited income.

3400.0200 – Payments to Counties

186. In this subpart, the Department discovered an incorrect reference to a rule proposed for repeal. The Department is proposing to modify this provision to refer to the applicable rule part that addresses county submission of financial and program activity reports, Part 3400.0140, subp. 14. The Administrative Law Judge finds that this modification is reasonable and necessary and does not result in a rule that is substantially different than what was originally proposed.

3400.0230, subp. 2 – right to fair hearing, optional informal conference; administering agency requirements

187. Although the purpose of this provision is clear, its wording could be improved. It states that an applicant has an option to choose an informal conference. However, use of the term “option” implies one is making a choice between alternatives. The rule attempts to clarify that one is not “choosing”, but it is the terminology that creates the ambiguity. The amendment is approved as necessary and reasonable. However, the Department should consider that it would be clearer to delete the word “optional” from the subdivision title and rule provision and reword the provision as follows:

Subp. 2. Informal conference; administering agency requirements. The administering agency must offer an informal conference to applicants or ~~recipients~~ participants adversely affected by an agency action to attempt to resolve the dispute. ~~The administering agency must also advise adversely affected applicants and recipients that requesting a conference with the agency is optional.~~ The offer of a conference must clearly state that participation is voluntary and does not delay or replace the right to a fair hearing under subpart 1.

188. The Department intended to change “recipients” to “participants” throughout the rules, but apparently overlooked it in this subpart. Modifying this subpart to be consistent is necessary and reasonable and does not result in a rule that is substantially different than what was proposed. Failure to include this in its proposed rules is a harmless error.

3400.0230, subp. 3 A – child care payments when fair hearing is requested

189. In response to comments, the Department proposes to modify this item to clarify that a termination or adverse action will not occur if the applicant or participant requests a fair hearing before the effective date of the action or within ten days after the date of mailing the notice. Although its not entirely clear, this would ordinarily be interpreted to apply the latter of the two dates. The Department may wish to clarify its intent. The proposed modification is approved as needed and reasonable and does not result in a rule that is substantially different than what was proposed.

3400.0230, subp. 3C – child care payments when fair hearing is requested

190. SMRLS requested that this provision be amended to allow participants who prevail on appeal to be reimbursed for child care expenses incurred but not actually paid. SMRLS argues that there may be situations where a participant incurs child care costs during an appeal but does not have the funds to actually make payment.

191. The purpose of this provision is to ensure that families who prevail on appeal are not penalized for deciding not to continue receiving benefits pending the outcome. The Department agrees that the requested change is consistent with the purpose of the rule and as a result, is proposing to modify the language to allow for reimbursement for expenditures incurred as well as paid.

192. The Administrative Law Judge finds that this modification is reasonable and needed to better achieve the intent and purpose of the rule. The modification does not result in a rule that is substantially different from that originally proposed.

General comments.

193. Child care assistance is not an entitlement program. Funding is not uniformly available state-wide for the sliding-fee program. The Department’s decision to give the counties wide latitude in the administration of the program reflects this. However, the discretion given to the counties complicates providers’ participation in the

program and increases costs to providers serving participants from more than one county. Also, different county standards complicate development of uniform training materials for counties and providers and uniform information, notices and forms for participants.^[129] Although the Department must balance county concerns with those of providers and participants, it is urged to review its grants of discretion to be sure they best serve the intended beneficiaries of child care assistance.

194. For example, Karen Svendsen, Children's Home Society, testified that the lack of consistency among the counties frustrates providers and participants alike. As an example, she cited the "absent day policy".^[130] Some participants using one child care provider may be covered for absent days while other participants using the same provider but living in another county are not.

Ms. Svendsen sees this as very unfair to participants and difficult for providers to administer.^[131] She suggests that such policies be uniform state-wide or set by the county where service is delivered.^[132] Similarly, billing counties is very time-consuming for the providers because each county establishes its own billing cycles and practices, and the lack of consistency hampers accuracy. The costs of billing are ultimately reflected in higher rates for child care.

195. The Administrative Law Judge concludes that the Department has adequately explained its rationale and demonstrated the need for and reasonableness of the proposed rules except as provided otherwise herein. The Department has presented evidence to support its position and its determinations have not been arbitrary.

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

CONCLUSIONS

1. The Minnesota Department of Children, Families & Learning gave proper notice in this matter.

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14, and all other procedural requirements of law or rule.

3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; and 14.50 (i) and (ii), except as noted at Findings 72, 95, 96, 112, 115, 120, 136, 141, 170, 171, 181, 183 and 184.

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.131, 14.14, subd. 2; and 14.50 (iii) except as noted at Finding 43.

5. The additions and amendments to the proposed rules which were suggested by the Department after publication of the proposed amendments in the State Register do not result in rules which are substantially different from the proposed rules within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rule amendments be adopted except as otherwise noted.

Dated this 25th day of April, 2001.

BEVERLY JONES HEYDINGER
Administrative Law Judge

^[1] Minn. Stat. §§ 14.131 through 14.20 (2000). (Unless otherwise stated, all further references to Minnesota Statutes are to the 2000 edition.)

^[2] Minn. Stat. § 14.15, subd. 1.

^[3] Ex. 1; Minn. Stat. § 14.101.

^[4] Ex. 2. The October 16, 2000 Request for Comments erroneously indicated that the first Request for Comments was published on December 26, 1997. The actual publication date was December 29, 1997. The Administrative Law Judge does not find this to be a material error.

^[5] Ex. 14.

^[6] Minn. Stat. § 14.225; Minn. Rules pt. 1400.2080, subp. 5.

^[7] Ex. 4.

^[8] Ex. 5.

^[9] Ex. 7; Ex. 8.

^[10] Minn. R. part 1400.2060.

^[11] Ex. 9.

^[12] Ex. 7.

^[13] Ex. 9.

^[14] Ex. 10; Minn. Stat. § 14.25, subd. 1.

^[15] Ex. 12; Minn. Stat. § 14.25. The Notice of Hearing contained an inaccurate reference to the page numbers of the State Register in which the Dual Notice was published. The Administrative Law Judge does not find this to be a material error.

^[16] Minn. Stat. § 14.14, subd. 2a.

^[17] Ex. 3.

^[18] Ex. 6.

- [19] Ex. 9.
- [20] Ex. 11; Minn. Stat. § 14.116.
- [21] Ex. 13.
- [22] Ex. 14.
- [23] Ex. 15.
- [24] Ex. 16.
- [25] Minn. Stat. § 14.14, subd. 2; Minn. R. part 1400.2100.
- [26] Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989); Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).
- [27] In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).
- [28] Greenhill v. Bailey, 519 F.2d 5, 19 (8th Cir. 1975).
- [29] Mammenga, 442 N.W.2d at 789-90; Broen Mem'l Home v. Minnesota Dep't of Human Services, 364 N.W.2d 436, 444 (Minn. App. 1985).
- [30] Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d at 244.
- [31] Federal Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218, 233 (1943).
- [32] Minn. R. part 1400.2100.
- [33] Ex. 5, pp. 4-12.
- [34] Ex. 5, pp. 4-7.
- [35] See Minn. R. 3400.0120, subp. 2D (as modified).
- [36] See, e.g. 3400.0040, subp. 6a (proposed); 3400.0110, subp. 7 (proposed); 3400.0120, subps. 1, 1a (proposed).
- [37] See also the discussion of "residence" in Rule 3400.0130, subp. 5, infra.
- [38] SONAR at 28.
- [39] See also written comments of Nancy Eden, Adult Basic Education Teacher, St. Cloud Area School District #742, January 29, 2001, and Ann Willaert, Community Assistance for Refugees, Inc., January 25, 2001.
- [40] Department Comments, March 6, 2001, at 4-5; Rebuttal Comments, March 13, 2001, at 2.
- [41] 65 Fed. Reg. At 52765.
- [42] Minn. Stat. § 119B.02, subd. 1.
- [43] Id., subd. 3.
- [44] See, e.g. 3400.0235, subp. 2 (proposed) (referring to the maintenance of effort requirements of 42 USC §§ 9858 to 9858q.)
- [45] This general directive would be similar to the requirement that counties review providers' compliance with the American with Disabilities Act. See Minn. R. 3400.0130, subp. 3a B(2) (proposed), discussed infra.
- [46] Minn. R. 3400.0035, subp. 1 (proposed).
- [47] Minn. Stat. § 119B.011, subd. 3.
- [48] Department Comments at 5.
- [49] Minn. R. 3400.0150, subp. 2 (proposed).
- [50] Minn. R. 3400.0035, subp. 1 (proposed).
- [51] Minn. R. 3400.0035, subp. 2 (proposed).
- [52] Minn. R. 3400.0035, subp. 3 (proposed).
- [53] Minn. R. 3400.0035, subp. 4 (proposed).
- [54] Minn. R. 3400.0035, subp. 5 (proposed).
- [55] Minn. R. 3400.0035, subp. 8 (proposed).
- [56] Minn. R. 3400.0035, subp. 9 (proposed).
- [57] Minn. R. 3400.0090, subp. 1 (proposed).
- [58] Minn. R. 3400.0110, subp. 2a (proposed).
- [59] Minn. R. 3400.0185 (proposed).
- [60] Minn. R. 3400.0187 (proposed).
- [61] Minn. R. 3400.0230 (proposed).
- [62] Minn. Stat. § 119B.02, subd. 3.
- [63] Department Comments at 11.
- [64] Minn. R. 3400.0060, subp. 9B (proposed).
- [65] Id.; subp. 9D (proposed).
- [66] See e.g. Minn. R. 3400.0110, subp. 9 (proposed) and 3400.0130, subp. 1a (proposed).

[67] Hennepin County commented that the Department should develop the required health and safety information. The Department would not commit to do this in its Comments, page 17, but the language of 3400.0140, subp. 5 states that the Department will supply that information to the counties.

[68] 45 C.F.R. § 98.41 (a) (1) (i); 45 C.F.R. § 98.41 (a) (1) (ii) (A), (B).

[69] See, Minn. Stat. § 121A.15, subd. 3 (c), (d).

[70] Minn. Stat. § 119B.13, subd. 1.

[71] It's unclear how this comment relates to subpart 6.

[72] See SONAR at 37; Department Comments at 20.

[73] Minn. Stat. § 119B.10, subd. 1(b).

[74] Minn. Stat. § 119B.10, subd. 1(c) (emphasis added).

[75] Compare the first sentence: "...and receive at least the minimum wage for all hours worked," and the last sentence: "...Child care assistance during employment shall be granted for the number of hours worked including break and meal time and up to two hours per day for travel time." In fact the last sentence has no application to the calculation addressed in the paragraph where it appears.

[76] Minn. Stat. § 119B.07; Minn. R. 3400.0040, subp. 14A (proposed).

[77] Minn. R. 3400.0060, subp. 6 (proposed).

[78] Minn. R. 3400.0040, subp. 10 and subp. 12 (proposed).

[79] See also Minn. Stat §§ 256J.55, subd. 3 (MFIP families subject to similar limitations); 256G.07.

[80] Minn. R. 3400.0060, subp. 9 (proposed).

[81] Minn. R. 3400.0185, subp. 3A (proposed).

[82] Note also, Minn. R. 3400.0035, subp. 5 (proposed) states that participants must notify the administering agency of a change in residence within 10 days; Rule 3400.0060, subp. 9 (proposed) requires notice to the new county within 30 days of the move.

[83] Minn. Stat. § 119B. 13, subd. 6.

[84] The Department's comments and rebuttal comments suggest that it is "restoring" a one-year limit. But as written, the county can set a one-year limit, but if it does not, there is no limit. If the Department intends to impose a one-year limit it should state: A county shall set a time limit of one-year or less on the initial submission of the invoices, include it in its plan and give notice of the time limit to providers.

[85] In the SONAR, the Department states that its proposed rules will benefit families by setting statewide policies. It lists child absences as an example. See SONAR at 6-7.

[86] Minn. Stat. § 119B.13, subd. 1.

[87] Minn. Stat. § 119B.02, subd. 1.

[88] SONAR at 69.

[89] Minn. Stat. §§ 14.03, subd. 3 and 14.389.

[90] See Minn. Stat. § 645.26.

[91] In its comments, New Horizon suggests that counties may not be surveying the market in establishing absent day policies. Presumably, the Department assesses the adequacy of the survey when reviewing the counties' child care fund plans.

[92] "Rule" means every agency statement of general applicability and future effect, including amendments, suspensions and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure." Minn. Stat. § 14.02, subd. 4. See also Minn. Stat. § 14.06(a).

[93] Minn. Stat. § 245A.03, subd. 2; Minn. Stat. § 119B.011, subd. 19.

[94] Minn. Stat. § 119B.09, subd. 5.

[95] Kasch v. Clearwater Cty., 289 N.W. 2d 148 (Minn. 1980); Mid-City Hotel Assoc. v. Hennepin Cty. Bd. of Comm'rs, 516 N.W. 2d 574 (Minn. App. 1994) rev. denied.

[96] Minn. Stat. § 14.06(a) (emphasis added).

[97] Minn. Stat. § 119B.02, subs. 1 and 3.

[98] Minn. Stat. § 119B.07.

[99] Minn. Stat. § 119B.09, subd. 3.

[100] Minn. Stat. § 119B.011, subd. 19.

[101] Minn. Stat. § 119B.09, subd. 5.

[102] SONAR 73; See also, Department Comments at 2-4 and 3400.0140, subp. 5a (proposed).

[103] Department Comments at 4.

[104] Minn. R. 3400.0140, subp. 5a (proposed) ("After a legal nonlicensed provider meets the registration requirements in part 3400.0120, subp. 2, a county may issue provisional authorization and payment...

during the time necessary to verify the legal nonlicensed provider as compliance with the additional registration requirements” Emphasis added.) See also, 3400.0120, subp. 1b B, (proposed).

^[105] Minn. R. 1400.2100, D and F.

^[106] Giving the counties discretion to conduct criminal background checks is supported by the SONAR and Department Comments. However, if a County does the checks for some nonlicensed providers, it must do them for all nonlicensed providers. Comments from St. Louis County suggest its process may not be uniform.

^[107] The Department also quotes the following portion of federal law as support. It defines an “eligible child care provider” as a provider “licensed regulated, or registered under applicable State or local law” This does not modify the APA requirements that rules governing effective participation in state programs must be properly promulgated, nor is the requirement to register being disapproved.

^[108] See Bunge Corp. v. Comm’r. of Revenue, 305 N.W. 2d 779 (Minn. 1980); In re Petitions of D&A Truck Line, Inc. et al. 524 N.W. 2d 1, 6 (Minn. App. 1994).

^[109] Compare Minn. Stat. § 119B.02, subd. 3 with subd. 1.

^[110] See, e.g. Comments from Laurie Possin, Director of Family and Community Support, Greater Minneapolis Day Care Ass’n., January 25, 2001.

^[111] Minn. Stat. § 119B.13, subd. 1.

^[112] *Id.*, subd. 2.

^[113] See discussion of Minn. R. 3400.0035 – limited English proficiency, *supra*.

^[114] The SONAR at 80 supports this interpretation. It states that the amendment “ensures that all rates for care provided in Minnesota are based on the location where the care is provided.”

^[115] Minn. Stat. § 3400.0020, subp. 38a (proposed) (emphasis added).

^[116] Minn. R. 3400.0187 (proposed).

^[117] In the Department’s Comments at 55, the last sentence prior to the proposed modification refers to part 3400.1070, subp. 6. Presumably the correct reference is to part 3400.0170, subp. 7.

^[118] See, e.g. Minn. R. 3400.0185 subp. 3B(6) (proposed) (“that if the participant appeals the adverse action before the effective date of the action, the action shall not be taken until the appeals process has ended and that benefits paid during the appeals process will be subject to recovery if the termination (sic) is upheld”. Note also that the reference to “termination” in this item is incorrect.

^[119] See Department’s Comments at 57.

^[120] Minn. Rules 3400.0183, subps. 3-5 (proposed).

^[121] “An amount of child care assistance paid to a recipient in excess of the payment due is recoverable by a county agency.” Minn. Stat. § 119B.11, subd. 2a (emphasis added).

^[122] SONAR at 38.

^[123] See 45 C.F.R. § 98.65 (d).

^[124] This unfairness is greater if families are held responsible for overpayments to providers.

^[125] Minn. Stat. § 119B.11, subd. 2a.

^[126] For example nothing in Minn. R. 3400.0120 (proposed) requires counties to hold providers responsible for overpayments or explains how overpayment will be recovered.

^[127] Minn. Stat. § 119B.11, subd. 2(a).

^[128] As an example, a participant may get a job or pay increase on the 25th day of month one. It is reported on the 3rd day of month two. The county recalculates the family’s assistance and gives notice of the change, effective on the first day of month three. The rule should be clear that the family did not receive an “overpayment” in month two. Also, the rule is unclear about the notice to be given when an agency error caused the overpayment.

^[129] See e.g. comments from New Horizon concerning advance payments.

^[130] Minn. R. 3400.0110, subp. 9 (proposed).

^[131] Also, at the Public Hearing, Chad Dunkley, New Horizon child care urged more consistency among counties.

^[132] For further discussion of the absent day policy, see discussion of Minn. R. 3400.0110, subp. 9, *supra*.