

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES AND
THE DEPARTMENT OF CORRECTIONS

In the Matter of the Proposed Amendments
to and Repeal of Rules Governing
Chemical Dependency Treatment Licensing
and Funding, Minnesota Rules, Chapters
2960 and 9530.

**REPORT OF THE ADMINISTRATIVE
LAW JUDGE**

Administrative Law Judge Kathleen D. Sheehy conducted a hearing concerning the above rules beginning at 9:30 a.m. on February 1, 2008, in Room 2370 of the Elmer L. Anderson building, 540 Cedar Street, Saint Paul, Minnesota. The hearing continued until all interested persons, groups and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are 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 of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, 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 includes a hearing when a sufficient number of persons request that a hearing be held. 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. The Administrative Law Judge is employed by the Office of Administrative Hearings, an agency independent of the Department of Human Services (DHS) and Department of Corrections (jointly referred to as the Department).

Barry R. Greller, Assistant Attorney General, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared at the rule hearing on behalf of the Department. The members of the DHS hearing panel were Robert Klukas, DHS Legal Analyst and Rule Writer; Carol Falkowski, Director of the DHS Chemical Health Division; Lee Gartner, DHS Planner, Chemical Health Division; Larry Burzinski, DHS Licensing Division Supervisor; and Julie Reger, DHS Licensing Unit Manager Mental Health/Chemical Dependency. Fifty-two members of the public signed the hearing register and 14 members of the public spoke at the hearing.

¹ Minn. Stat. §§ 14.131 through 14.20 (2008).

The Department received three written comments on the proposed rules before the hearing. After the hearing, the record remained open for 20 days, until February 21, 2008, to allow interested persons and the Department an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five working days to allow interested persons and the Department the opportunity to file a written response to the comments submitted. The OAH hearing record closed on February 28, 2008. All of the comments received were read and considered.

SUMMARY OF CONCLUSIONS

The Department has established that it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable.

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

FINDINGS OF FACT

Nature of the Proposed Rules

1. This rulemaking proceeding involves the amendment and repeal of rules governing chemical dependency treatment and funding, and licensure of programs that provide chemical dependency treatment and detoxification services, Minnesota Rules Chapters 2960 and 9530. Specifically, the Department proposes to amend and repeal parts of the following rules:

Minnesota Rules, Chapter 2960 (also known as the “Children’s Residential Facility Rule”), governing licensure of residential programs that serve children and juveniles, specifically those rule parts that regulate chemical dependency assessment and treatment;

Minnesota Rules, Parts 9530.6405 to 9530.6505 (also known as “Rule 31”), governing licensure of chemical dependency treatment programs;

Minnesota Rules, Parts 9530.6510 to 9530.6590 (also known as “Rule 32”), governing licensure for detoxification programs;

Minnesota Rules, Parts 9530.6600 to 9530.6660 (also known as “Rule 25”), governing chemical dependency care for public assistance recipients; and

Minnesota Rules, Parts 9530.6800 to 9530.7031 (also known as “Rule 24”), governing the Consolidated Chemical Dependency Treatment Fund (CCDTF).

2. The Department proposed the five rule amendments at the same time in an effort to ensure that its policies and terminology are consistent throughout the rules. In addition, the proposed rule amendments are part of the Department’s effort to shift chemical dependency treatment away from the acute care model of treatment (that regards chemical dependency as an acute illness) and toward a model that regards chemical dependency as a chronic condition. The proposed rules organize information

about a client's condition and placement criteria according to the six dimensions for assessment developed by the American Society of Addiction Medicine (ASAM). According to the Department, this manner of assessment provides a way of organizing information, risk assessments, and treatment planning decisions that is better focused on the individual client's needs while creating a common language for transmitting information about the client among professionals.

3. Initially, in 2003, the Department intended to update only Minnesota Rules, parts 9530.6600 to 9530.6655, to bring the rules in line with the then recently proposed chemical dependency treatment and detoxification facility licensing rules. The Department published a Request for Comments on October 13, 2003, reflecting this intent.²

4. The Department convened a series of meetings with people involved in chemical dependency assessment and treatment across the state during 2003 and 2004. The meetings were held in St. Paul, St. Peter, Brainerd and other places to discuss the draft assessment and treatment rules. In addition, the Department met separately with representatives of the Native American tribes, counties, and others who are involved in chemical dependency care and assessment activities. Since the beginning of the rule drafting in 2003, the Department met more than 16 times with representatives of the groups mentioned above to review and discuss early drafts of these rule amendments.

5. After publishing the Request for Comments in 2003 and conducting meetings, the Department decided to amend all chemical dependency treatment related rules to promote consistency among these five related rules. The Department published a Revised Request for Comments in the State Register on June 18, 2007, to advise the public of the larger scope of the proposed rule amendments.³

Procedural Requirements of Chapter 14

6. On October 13, 2003, the Department published a Request for Comments on Possible Amendments to Rules Governing Chemical Dependency Care for Public Assistance Recipients, Minnesota Rules, Parts 9530.6600 to 9530.6655. The Request for Comments was published at 28 S.R. 506.

7. On June 18, 2007, the Department published a Revised Request for Comments on Possible Amendments to Rules and Repeal of Rules Governing Chemical Dependency Treatment and Funding, Minnesota Rules, Chapters 9530 and 2960. The Department explained that during the course of developing the Amendments to Rules Governing Chemical Dependency Care for Public Assistance Recipients, it determined it was necessary to modify related rules governing the Consolidated Chemical Dependency Treatment Fund and rules governing the licensure of adult and juvenile chemical dependency treatment programs and detoxification programs. The Revised Request for Comments was published at 31 S.R. 1808.⁴

² 28 S.R. 506.

³ 31 S.R. 1808.

⁴ Ex. 1.

8. By letter dated November 19, 2007, the Department requested that the Office of Administrative Hearings schedule a hearing and assign an Administrative Law Judge. Along with the letter, the Department filed a proposed Notice of Hearing, a copy of the proposed rules, and a draft of the Statement of Need and Reasonableness (SONAR). The Department also requested that the Office of Administrative Hearings give prior approval of its Additional Notice Plan. Under the Plan, the Department represented that it would mail a Notice of Hearing to a broad range of individuals and public and private entities, including professional associations, involved in the delivery of chemical dependency treatment and detoxification services in Minnesota.

9. In a letter dated November 28, 2007, Administrative Law Judge Kathleen Sheehy approved the Department's Additional Notice Plan.⁵

10. On December 27 and 28, 2007, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the agency for purpose of receiving such notice and to all persons identified in the Additional Notice Plan.⁶

11. On December 27, 2007, the Department mailed a copy of the SONAR to the Legislative Reference Library.⁷

12. On December 27, 2007, the Department sent a copy of the Notice of Hearing and SONAR to the legislators specified in Minn. Stat. § 14.116.⁸

13. On December 31, 2007, the Notice of Hearing and a copy of the proposed rule were published at 32 S.R. 1198.⁹

14. On the day of the hearing the following documents were placed in the record:

- The Request for Comments and Revised Request for Comments on Possible Amendments to Rules and Repeal of Rules Governing Chemical Dependency Treatment and Funding, published June 18, 2007, at 31 SR 1808. (Ex. 1);
- A copy of the proposed rule with Revisor's approval dated October 5, 2007 (Ex. 2);
- A copy of the SONAR (Ex. 3);
- Certificate of Mailing the SONAR to the Legislative Reference Library, with cover letter dated December 27, 2007 (Ex. 4);
- A copy of the Notice of Hearing and a copy of the Notice of Hearing and Proposed Rules as published in 32 S.R. 1198 (Ex. 5).

⁵ Ex. 7.

⁶ Exs. 6 and 7.

⁷ Ex. 4.

⁸ Ex. 8.

⁹ Ex. 5.

- Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List on December 27, 2007, and Certificate of Accuracy of the Mailing List, with mailing list (Ex. 6);
- Certificate of Giving Additional Notice pursuant to the Additional Notice Plan on December 27 and 28, 2007, with mailing list, and copy of letter from Administrative Law Judge Kathleen Sheehy approving Additional Notice Plan (Ex. 7);
- Certificate of Mailing the Notice of Hearing and the SONAR to Legislators on December 27, 2007 (Ex. 8).
- Copy of the Department's Modifications to Proposed Rules (Ex. 9);
- Written comments received prior to and during the hearing (Exs. 10-19).

15. Written comments received after the hearing (Exs. 20-26) and the Department's responses (Exs. 27-28) were also marked and placed in the record.

Additional Notice

16. Minnesota Statutes §§ 14.131 and 14.23, require that the SONAR contain a description of the Department's efforts to provide additional notice to persons who may be affected by the proposed rules. The Department submitted an additional notice plan to the Office of Administrative Hearings, which reviewed and approved it by letter dated November 28, 2007. In addition to notifying those persons on the Department's rulemaking list, the Department represented that it would also provide notice to the following groups and individuals:

- All residential and non-residential chemical dependency treatment license holders;
- All detoxification program license holders;
- Minnesota Council of Child Caring Agencies;
- Association of Minnesota Counties;
- Minnesota Association of Resources for Recovery and Chemical Health;
- Minnesota Medical Association;
- Managed care organizations under contract with DHS and the Department of Corrections to provide assessment and treatment services;
- Minnesota Association of County Social Services Administrators;
- Tribal and County CCDTF coordinators;
- Providers outside of Minnesota who are paid through CCDTF;
- County Board Chairs; and
- Minnesota Association of Treatment Providers.

Statutory Authorization

17. Minn. Stat. § 241.021, subd. 2, requires that the Department of Corrections license residential programs that care for delinquent youth.

18. Minn. Stat. § 245A.03, subd. 1, requires that persons who operate residential or nonresidential treatment programs be licensed by DHS.

19. Minn. Stat. § 245A.09, requires the Commissioner of Human Services to adopt rules governing licensure of residential and nonresidential treatment programs.

20. Minn. Stat. § 254A.03, subd. 3, requires DHS to adopt rules which establish criteria used to determine appropriate chemical dependency treatment care for recipients of public assistance.

21. Minn. Stat. § 254B.03, subd. 5, requires the Commissioner of Human Services to adopt rules governing the use of money for chemical dependency treatment and the appeals process used by recipients to appeal disputed services.

22. Laws of Minnesota, 1995, chapter 226, article 3, section 60, requires DHS and the Department of Corrections to jointly adopt rules for residential treatment programs that serve children and juveniles. Minnesota Rules, Chapter 2960 was adopted in response to this legislation.

23. The Administrative Law Judge finds that DHS and the Department of Corrections have the statutory authority to adopt the proposed rules.

Regulatory Analysis in the SONAR

24. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. The first factor requires:

(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.

The Department lists the following as the classes of persons who will be primarily affected by the proposed rules:¹⁰

persons who seek chemical dependency assessment or treatment and their families;

counties, tribes and health plans that have employees and designees who provide chemical dependency assessment and treatment;

health plans and counties that pay for or provide chemical dependency assessment and treatment;

persons who pay taxes to support public services including chemical dependency care, assessment and treatment; and

¹⁰ SONAR at 5.

licensed programs that provide treatment or detoxification services.

(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.

The Department does not anticipate that the proposed rule amendments will have an effect on state revenues.

The Department also does not anticipate that the proposed rule amendments will increase its costs to implement and enforce the rules. The Department states that it has ongoing costs associated with training providers about rules, answering inquiries, and enforcing rule requirements. The proposed rules will not increase the need for training. In fact, the Department is hopeful that the proposed rule amendments will improve compliance and thereby reduce administrative costs associated with enforcement, including investigations. If that happens, the initial training costs associated with informing interested parties about the rule amendments could be offset by cost savings associated with improved rule compliance.

The Department also does not anticipate that other agencies will incur substantial costs related to the implementation and enforcement of these rules, beyond the training costs that typically accompany a new rule. The Department states that training about the new rule could be substituted for some ongoing training activity, including ongoing rule training for existing staff and newly hired staff. With respect to the three licensing rules implemented and enforced by DHS and the Department of Corrections, the Department acknowledges that agency employees who provide assessment and treatment will need training about the new rules. The Department states that it will assist with the training of these employees involved in assessment and treatment programs at no cost to other agencies.

Finally, the Department points out that there are already costs associated with training agency and program staff on existing federal and state laws and regulations relating to privacy and confidentiality issues associated with chemical dependency and treatment. Consequently, these training costs are not entirely associated with the proposed rule amendments.

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The Department believes that the more client-focused chemical dependency treatment model, adopted as part of the 2004 chemical dependency treatment program licensing rules, will be a more cost-effective way of providing treatment because it emphasizes meeting the needs of the client, rather than placing clients according to limited types of treatment licensure.

The Department also believes that there are no less costly or less intrusive viable alternative means by which to require providers to provide the most effective treatment

other than through licensure standards, standards for assessment and treatment, and standards for the Consolidated Chemical Dependency Treatment Fund.

(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.

The Department states that the legislature has mandated that it adopt rules to license residential programs and that the legislature has determined that expenditure of public money for chemical dependency treatment must follow rules adopted according to Minn. Stat. § 254B.03, subd. 5. In addition, the Department notes that the legislature also requires that recipients of public assistance who need chemical dependency treatment be given appropriate care as determined by the Commissioner of Human Services through rulemaking.

Based on these explicit rulemaking directives from the legislature, the Department maintains that it is not reasonable to consider alternative methods by which to provide licensure and program standards for chemical dependency funding, care and treatment. The Department considers these rules to be the least costly and least intrusive methods of achieving the purpose of the proposed rule amendments. It did not seriously consider alternative methods for achieving the purpose of the proposed rules.

(5) The probable costs of complying with the proposed rules.

The Department states that the proposed rule amendments include no new general responsibilities for counties, tribes and health plans because providing assessment and treatment is already their responsibility. Although the amendments alter the way in which assessment and treatment responsibilities are met, the Department maintains that the new rules should not increase the costs of assessment and treatment.

In a written comment, Daniel Papin, Director of Washington County Community Services, stated that county agencies that do chemical dependency assessments will incur more costs as a result of the proposed rules. Specifically, Mr. Papin stated that the new timelines and more comprehensive assessments will require more staff time. Mr. Papin recommended that the counties be allowed to pay for assessment staff through the CCDTF. Mr. Papin maintains that without some financial assistance for the counties, the proposed amendments will result in an unfunded mandate.¹¹ Similarly, Mike Schiks, Chief Executive Officer of Project Turnabout Addiction Recovery Center, expressed concern that the new timelines mandated by the proposed rules will require assessors to work harder and faster without any funding for additional staff.¹² These comments are addressed below in the discussion of part 9530.6615, subp. 5.

¹¹ Ex. 23.

¹² Ex. 22.

(6) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The Department states that a failure to adopt the proposed rule amendments will not result in a specific cost to the state or other entities. However, the Department maintains that the proposed rule amendments present an opportunity to realize potential savings. According to the Department, the proposed rule changes should reduce costly repeat placements in chemical dependency treatment. The Department states that the average cost per placement of all types of chemical dependency treatment is \$2,735 for treatment provided through public funds. The cost of treatment provided through other funding sources may be higher.

Based on the Drug and Alcohol Normative Evaluation System (a system to collect information from all licensed treatment programs regarding clients admitted to those programs), the percent of clients in State Fiscal Year 2006 who had previous treatment admissions were as follows:

- 73.4% at least one previous admission
- 46.6% at least two previous admissions
- 29% at least three previous admissions
- 18.1% at least four previous admissions
- 12.5% at least five previous admissions
- 8.5% at least six previous admissions

These rates have remained essentially the same over time.

Based on its own treatment outcome study,¹³ the Department maintains that the more successful the client is in the initial treatment, the less likely it is that the client will need repeated treatment. While it is not possible to predict the actual number of clients whose outcomes will improve, the Department contends that it is reasonable to assume that the approaches suggested by the proposed rule amendments will reduce repeat placements and will reduce the costs associated with repeated treatment.

The Department states that adoption of the proposed rule amendments is not expected to significantly change the overall proportion of assessment and treatment costs paid for by either the public or by private parties. However, the Department maintains that failing to adopt the proposed rule amendments will result in a missed opportunity to bring all the rules closely related to chemical dependency assessment and treatment into conformity, as well as a missed opportunity to use currently accepted best practice standards to reduce repeated treatment placements. The Department hopes that clear and consistent rules that promote the most effective treatment and minimize repeated chemical dependency treatment placement will reduce the costs of all parties that pay for treatment.

¹³ "The Challenges and Benefits of Chemical Dependency Treatment," an outcome study released by the Department in 2000.

(7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

The Department states that three of the rules it proposes to amend govern the licensure of treatment and detoxification programs, which are not subject to federal regulation.¹⁴ Likewise, federal regulations do not govern the operation of the CCDTF, a program created by the Minnesota legislature. The Department states that rules governing the operation of CCDTF at parts 9530.6800 to 9530.7031, do not conflict with federal regulations regarding the use of federal funds. According to the Department, the proposed amendments are in keeping with and support federal laws and regulations about funding chemical dependency assessment and treatment.

Finally, the Department states that federal laws and regulations do not differ with the proposed amendments to rules governing assessment and chemical dependency care for public assistance recipients, parts 9530.6600 to 9530.6660. According to the Department, these parts incorporate and support federal laws and regulations and are intended to be consistent with federal laws and regulations in areas that overlap.

Performance Based Rules

25. The Administrative Procedure Act¹⁵ also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.¹⁶

26. The Department states that the proposed rule amendments will eliminate old rule standards that were not focused on performance and will implement rules that are more oriented to improving the performance of chemical dependency assessment and treatment activities in this state. According to the Department, the old rules emphasized categories of licensure and were less focused on requiring the assessment and treatment services that the client needs to successfully complete treatment. The Department states that the proposed rule amendments encourage license holders to identify the needs of individual clients and to design treatment programs to meet those needs.

27. The Department also states that the proposed rule amendments complete the transition from a system based upon facility licensure categories and payment based on licensure categories, to a system that focuses on providing appropriate services to the client to yield a better treatment outcome. The Department believes that the proposed rule amendments encourage improved performance by the entities that provide assessment and treatment services and promote a better outcome for clients at an overall reduced cost.

¹⁴ Chapter 2960 and Parts 9530.6405 to 9530.6505 govern treatment program licensure, and parts 9530.6510 to 9530.6590 govern detoxification program licensure.

¹⁵ Minn. Stat. § 14.131.

¹⁶ Minn. Stat. § 14.002.

Consultation with the Commissioner of Finance

28. Under Minn. Stat. § 14.131, the Agency is also required to “consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

29. The Department consulted with the Department of Finance, and in a response dated December 17, 2007, the Department of Finance concluded that “the fiscal impact to local governments from the proposed rule change is minimal.”¹⁷

30. The Administrative Law Judge finds 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.

Analysis Under Minn. Stat. § 14.127

31. Effective July 1, 2005, under Minn. Stat. § 14.127, the Department must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”¹⁸ The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.¹⁹

32. The Department has determined that the cost of complying with the proposed rule in the first year after it takes effect will not exceed \$25,000 for any one small business or small city.²⁰ To the best of the Department’s knowledge, no city operates a licensed treatment program, nor are cities directly affected in a tangible way by the proposed rule. The Department does not expect that its proposed rule changes will require small businesses that provide assessment or treatment services to spend more than \$25,000 in the first year after the rules take effect. Two of the three affected licensing rules are only three years old. The proposed licensing rule amendments standardize the use of certain terms such as “substance use disorder,” and clarify the provider requirements established in the 2004 rulemaking. According to the Department, the licensing rule changes should require very little license holder training and no changes to the buildings where treatment is provided.

33. The Department states that the amendments to Minnesota Rules, parts 9530.6600 to 9530.6660, and Minnesota Rules, parts 9530.6800 to 9530.7031, will require training a program’s director and the person performing the program’s billing function on billing practices. According to the Department, the costs of training should not exceed \$25,000 for any given program. The Department believes that no new equipment, remodeling, or other facility changes are required by the rule amendments.

¹⁷ SONAR at 12. The Department cited this letter but did not include it in the record.

¹⁸ Minn. Stat. § 14.127, subd. 1 (2005).

¹⁹ Minn. Stat. § 14.127, subd. 2 (2005).

²⁰ SONAR at 9.

34. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127 and approves that determination.

Rulemaking Legal Standards

35. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule 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.²¹ The Department prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rule. The SONAR was supplemented by comments made by Department representatives at the public hearing and in written post-hearing submissions.

36. 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.²² Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.²³ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.²⁴

37. 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."²⁵ An agency is entitled to make choices between possible approaches as long as the choice made 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.²⁶

38. 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 the Department 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.²⁷

²¹ *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

²² *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

²³ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

²⁴ *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

²⁵ *Manufactured Housing Institute*, 347 N.W.2d at 244.

²⁶ *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

²⁷ Minn. R. 1400.2100.

39. In this matter, the Department has proposed some revisions to the proposed rule language after the proposed rules were published in the *State Register*. Thus, the Administrative Law Judge must also determine if the new language is substantially different from that which was originally proposed.²⁸

40. The standards to determine if new language is substantially different are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if “the differences are within the scope of the matter announced ... in the notice of hearing and are in character with the issues raised in that notice,” the differences “are a logical outgrowth of the contents of the ... notice of hearing and the comments submitted in response to the notice,” and the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”

41. Any substantive language that differs from the rule as published in the *State Register* has been assessed to determine whether the language is substantially different. Because some of the changes are not weighty or controversial, they are not separately set forth below. Any change that is not separately discussed below is found to be not substantially different from the rule as published in the *State Register*.

Analysis of the Proposed Rules

General

42. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise need to be examined. When rules are adequately supported by the SONAR or the Department’s oral or written comments, a detailed discussion of the proposed rules is unnecessary. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

Discussion of Proposed Rule

Minnesota Rules, Chapter 2960--Licensure of Residential Programs that Serve Children and Juveniles.

2960.0020 Definitions

43. **Subpart 70a. Substance use disorder.** This subpart defines “substance use disorder” to mean:

a pattern of substance use as defined in the most current edition of the Diagnostic and Statistical Manual of Mental Disorders-IV-TR (DSM), et seq. The DSM-IV-TR, et seq. is incorporated by reference. The DSM-IV-TR was published by the American Psychiatric Association in 1994, in Washington, D.C., and is not subject to frequent change. The DSM-IV-TR is available through the Minitex interlibrary loan system.

²⁸ Minn. Stat. § 14.15, subd. 3 (2006).

44. In its SONAR, the Department explains that it has substituted the term “substance use disorder” for the terms “chemical abuse” and “chemical dependency” throughout chapters 2960 and 9530 because “substance use disorder” is the current terminology used by the American Psychiatric Association (APA). The Department states that use of the term “substance use disorder” does not change the substantive requirements of the rules, but serves to align the rule with the APA terminology consistently throughout the rule. The Department further states that it is necessary to define “substance use disorder” because the presence or absence of a substance use disorder is essential to determining whether or not a client needs treatment services. The Department asserts that it is reasonable to rely on the definition of this term in the most current edition of the DSM, because the manual is the most widely recognized reference for standardizing the definitions of mental and behavioral disorders. The Department states that its adoption of the DSM definition will ensure that the Department will use the same definition used by many other states and by insurers and researchers.

45. Although the Department has attempted to implement consistently this change in terminology, there still appear to be some consistency issues in the proposed rules. For example, the Department proposes to repeal the existing definitions of “chemical abuse” and “chemical dependency,” while retaining in subpart 14 the definition of “chemical dependency treatment services,” which is defined in part as services provided to alter the resident’s “pattern of harmful chemical use.” To be fully consistent, it would seem that the definition of “chemical dependency treatment services” should be changed to “services provided to a resident who has a substance use disorder.” In addition, a revision proposed for 2960.0670, subp. 2, would change “chemical abuse treatment” to “substance abuse treatment,” a term that is not specifically defined. To be fully consistent, it would seem the reference in 2960.0670, subp. 2, should be changed from “chemical abuse treatment” to “chemical dependency treatment.” The Administrative Law Judge encourages the Department to continue the process of reviewing the rule for consistency, and to modify its proposed language as necessary with that goal in mind. Modifications of this nature would be needed and reasonable, and would not likely be a substantial change in the rule.

46. Furthermore, the SONAR does not provide any reason why it is necessary to incorporate the entire 900-page DSM-IV-TR into the definition of “substance use disorder,” as opposed to the specific section of the DSM-IV-TR concerning substance-related disorders. As the Administrative Law Judge pointed out at the hearing, even the section on substance-related disorders in the manual is arguably overbroad, as it includes disorders concerning caffeine and tobacco. In response to this comment, the Department proposed a modification to 9530.6605, which would add a subpart defining “substance” as a “chemical,” which in turn is defined in 9530.6605, subpart 5, as “alcohol, solvents, and other mood-altering substances, including controlled substances as defined in Minnesota Statutes, chapter 152.” This revision would limit the definition of “substance use disorder” to those chemicals specifically identified under Minnesota law for which the state will provide and license chemical dependency treatment. The Department has indicated that its failure to make a similar change in chapter 2960 was an oversight that will be corrected.

47. In furtherance of this goal, the Administrative Law Judge recommends that the Department create a new subpart 70a, which will define “substance” as a “chemical,” as defined in 2960.0020, subp. 11. The proposed definition of “substance use disorder” would then become subpart 70b. This proposed definition would be needed and reasonable, and the modification would not constitute a substantial change in the rule.

2960.0440 Applicability

48. Items A and B of this rule part identify the residential programs that must be certified under parts 2960.0430 to 2960.0490. For consistency, the Administrative Law Judge recommends that the phrase “chemical use problems” in items A and B be replaced with the phrase “substance use disorder.” This suggested modification would clarify and not substantially change the proposed rule.

2960.0450 Chemical Dependency Treatment Services

49. **Subpart 3. Additional chemical dependency treatment services.** This subpart lists services, such as health monitoring, stress management and living skills development, that a license holder may provide to residents, in addition to the mandatory services in subpart 2.

50. In a letter received after the hearing, Jeff Glover, LADC, of Anthony Louis Center and On-Belay House, recommended that continuing outpatient services be added to the list of services that may be provided to clients after completion of their residential stay. Mr. Glover states that some residents continue to benefit from counseling services even when they no longer need residential care.²⁹

51. The Department responded that it does not have the statutory authority to include provisions for outpatient services in the licensing rules governing Children’s Residential Facilities. The statutory authority is limited to adopting rules for “secure and nonsecure *residential* treatment facilities.”³⁰

52. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and agrees with the Department that it lacks the statutory authority to include in this rule part the provision of outpatient services to clients who no longer are receiving residential care.

53. **Subpart 4. Counselors to provide chemical dependency treatment services.** As published, this subpart requires that therapeutic recreation (a required service under subpart 2) be provided by recreation therapists or licensed alcohol and drug counselors.

54. Both Larry Blair of Fountain Centers and Steve Schneider, Manager of Mental Health Services at New Ulm Medical Center, expressed concern about the shortage of therapeutic recreation specialists and alcohol and drug counselors, particularly in rural parts of the state. Mr. Blair suggested that programs be able to use

²⁹ Ex. 24.

³⁰ See 1995 Minn. Laws ch. 226, art. 3, § 60 (emphasis added).

a consultant to develop a recreation therapy plan that could be implemented by other (non-licensed) staff.³¹

55. In response to these comments, the Department has proposed deleting the last sentence of part 2960.0450, subpart 2, item D and replacing it with the following sentence: “Therapeutic recreation must be led by, directed by, or provided according to a plan developed by staff who are qualified according to subpart 4.” The Department also proposes to modify part 2960.0450, subpart 4 by deleting the phrase “including therapeutic recreation” from the rule. As a result, the rule will no longer require that therapeutic recreation be provided by a qualified alcohol and drug counselor or recreation therapist.

56. The Administrative Law Judge finds the rule is needed and reasonable and the proposed modifications do not make the rule substantially different from the rule as published. The change reasonably addresses the legitimate concerns raised by Mr. Blair and Mr. Schneider regarding the shortage of therapeutic recreation therapists and licensed alcohol and drug counselors.

Minnesota Rules, Parts 9530.6405 to 9530.6505 (Rule 31)--Licensure of Chemical Dependency Treatment Programs.

9530.6405 Definitions.

57. The Department proposes to repeal the existing definition of “treatment” in subpart 19, and to add in subpart 7a the following definition of “chemical dependency treatment:”

“Chemical dependency treatment” means the process of assessment of a client’s needs, development of planned interventions or services to address those needs, provision of services, facilitation of services provided by other service providers, and reassessment by a qualified professional. The goal of treatment is to assist or support the client’s efforts to alter the client’s harmful substance use disorder pattern.

This definition is not specifically linked to the existence of a substance use disorder, which the Department proposes to define in subpart 17b. In the interests of clarity and consistency, the Administrative Law Judge suggests that subpart 7a be revised as follows:

“Chemical dependency treatment” means treatment of a substance use disorder, including the process of assessment of a client’s needs, development of planned interventions or services to address those needs, provision of services, facilitation of services provided by other service providers, and reassessment by a qualified professional. The goal of treatment is to assist or support the client’s efforts to ~~alter the client’s harmful~~ recover from substance use disorder pattern.

³¹ Ex. 18 and public comment at hearing.

This modification would be needed and reasonable, and would not substantially change the rule as originally proposed.

58. As noted above, the Department has proposed the same definition of “substance use disorder” (in subpart 17b) as in the previous rule, by incorporating the DSM-IV-TR. The Department indicated that it intends to limit the breadth of this reference by defining “substance” as a “chemical,” which is similarly defined at 9530.6405, subp. 7, as “alcohol, solvents, controlled substances as defined in Minnesota Statutes, chapter 152, and other mood altering substances.” The Administrative Law Judge recommends adding a new subpart 17b to define the word “substance” to mean “chemical” as defined in subpart 7, then renumbering the definition of “substance use disorder” as subpart 17c. The Department has shown that this language is needed and reasonable, and these modifications would not substantially change the rule as originally proposed.³²

59. In subpart 18, the Department proposes to define a license holder’s “target population” as:

individuals experiencing problems with ~~chemical use~~ a substance use disorder having the specified characteristics that a license holder proposes to serve.

60. In the interests of clarity and consistency, the Administrative Law Judge recommends that the definition of “target population” be revised as follows:

individuals having ~~experiencing problems with chemical use~~ a substance use disorder of the type having the specified characteristics that a license holder proposes to serve.

61. This modification would be necessary and reasonable, and it would not be substantially different than the rule as proposed.

9530.6410 Applicability.

62. Subpart 1 as proposed describes the applicability of the licensing requirement:

Except as provided in subparts 2 and 3, no person, corporation, partnership, voluntary association, controlling individual, or other organization may provide treatment services to an individual who exhibits a pattern of substance use disorder unless licensed by the commissioner.

63. This language fails to incorporate several newly defined terms, and in the interests of clarity and consistency the Administrative Law Judge proposes that it be revised as follows:

Except as provided in subparts 2 and 3, no person, corporation, partnership, voluntary association, controlling individual, or other organization may provide chemical dependency treatment services to an

³² The Department has represented that its failure to define “substance” as “chemical” was an oversight, and it has agreed to make this change.

individual who ~~has a~~ ~~exhibits a pattern of~~ substance use disorder unless licensed by the commissioner.

64. This modification would be necessary and reasonable, and it would not be substantially different than the rule as proposed.

65. In subpart 3, the rule would exclude from the licensing requirement “substance use disorder treatment” provided by licensed hospitals, unless the hospital accepts funds for “substance use disorder treatment” under the CCDTF. As noted above, the Department added to this section of the rules a definition of “chemical dependency treatment” that should be used here, instead of “substance use disorder treatment,” which is not defined. Revision of this language to include the defined term would be needed and reasonable, and would not be substantially different than the rule as proposed.

9530.6420 Initial Services Plan.

66. The existing rule requires license holders to develop initial service plans; the proposed rule would require the license holder to complete an initial services plan during or immediately following the intake interview. The proposed amendment attempts to make the timeframe more explicit.

67. The Administrative Law Judge suggests that the Department replace the words “tell what” in the second sentence with the word “identify” and delete the word “are” at line 4 on page 16 of the proposed rule. The sentence would read as follows:

The plan must address the client’s immediate health and safety concerns, ~~tell what~~ *identify* the issues are to be addressed in the first treatment sessions, and make treatment suggestions for the client during the time between intake and completion of the treatment plan.

68. The Administrative Law Judge finds the rule as proposed to be needed and reasonable. The suggested grammatical modification would clarify and not substantially change the proposed rule.

9530.6422 Comprehensive Assessment.

69. **Subpart 1. Comprehensive assessment of client’s substance use disorder problems.** This subpart requires license holders to gather assessment information. It allows license holders to use information from outside sources if that information is not more than 30 days old. As an initial matter, the Administrative Law Judge notes that “substance use disorder” is the defined term, not “substance use disorder problems.” The heading and first sentence could be changed, for consistency, to provide as follows:

Comprehensive assessment of client’s substance use disorder problems. A comprehensive assessment of the client’s substance use disorder ~~chemical use problems~~ must be coordinated . . .

70. This suggested modification would clarify and not substantially change the rule.

71. The Department proposed requiring the use of current assessment information because it has found that many programs are using county-generated client assessments that are incomplete and out of date, resulting in treatment plans based on inadequate information. The Department has defined “current information” to be information gathered no more than 30 days before the date of admission.

72. In written comments received at the hearing, Judi Gordon, RN, LADC, Executive Director, CREATE, Inc., recommended that the treatment provider be allowed to update assessment information by phone and that the assessment information be considered current for 45 days, instead of 30 days. Ms. Gordon stated that sometimes the period between the date of assessment by the placing authority and the start of treatment is longer than 30 days.³³

73. The Department agreed with this recommendation and proposed changing the definition of current information to information gathered no more than 45 days before admission. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modification does not make the rule substantially different from the rule as originally published.

74. The Department has also proposed revising the following subitems of subpart 1, regarding the information that must be included in a client’s assessment:

D. chemical use history including amounts and types of chemicals used, frequency and duration of use, date and time of most recent use, previous experience with withdrawal and period periods of abstinence, and circumstances of relapse, if any; * * *

G. physical concerns or diagnoses that may influence the treatment plan, the severity of the concerns, and whether or not the concerns are being addressed by a health care professional; * * *

N. a determination whether a client is a vulnerable adult as defined in Minnesota Statutes, section 626.5572, subdivision 21. An individual abuse prevention plan is required for all clients who meet the definition of “vulnerable adult.” whether the client is pregnant and if so, the health of the unborn child and current involvement in prenatal care;

O whether the client recognizes problems related to substance use and is willing to follow treatment recommendations.

75. The Department received one comment on the proposed changes to 9530.6422 from Brenda Iliff, Clinical Director of Hazelden Foundation. Ms. Iliff expressed concern that the Department is requiring excessive detail. Ms. Iliff stated that while duration and date and time of most recent use is necessary information for some chemicals, it is not necessary for all chemicals used by a client. For example, if a client used cocaine six years ago and has not used it since, Ms. Iliff does not believe it

³³ Ex. 13.

is necessary to know the exact date and time of the last use. Ms. Iliff is concerned that some clinicians will go to great lengths to get exact dates and times when a general statement would be sufficient. Ms. Iliff also believes that requiring substance abuse counselors to document the severity of physical concerns or diagnoses (in item G) is outside the scope of their practice. Instead, she suggests that counselors be required only to provide “a general summary about the concerns and their impact and current treatment.”³⁴

76. The Department agreed with some of these comments and proposed the following modification to item D:

D. chemical use history including amounts and types of chemicals used, frequency and duration of use, ~~date and time of most recent use,~~ ~~previous experience with withdrawal~~ and ~~period periods~~ of abstinence, and ~~circumstances of relapse, if any.~~ *For each chemical used within the previous 30 days the information must include the date and time of most recent use and any previous experience with withdrawal;*³⁵

77. The Department states that the modification is reasonable because it reduces paperwork for the license holder without jeopardizing client services. The Department also maintains that the modification is not a substantial change because it is directly related to the proposed rule standard and the rule was modified to be more reasonable based on public comment.

78. The Department disagrees with Ms. Illif’s concern that item G requires counselors to provide medical diagnoses and practice outside of the scope of their expertise. The Department states that under item G the counselor must simply ascertain whether or not a concern or diagnosis exists and whether the severity of it requires immediate attention as part of the license holder’s obligation to provide appropriate treatment in keeping with the client’s general health.³⁶

79. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modifications do not make the rule substantially different from the rule as published. The Administrative Law Judge agrees with the Department that the requirement in item G to document in the client’s assessment the severity of a client’s physical concerns or diagnoses does not amount to requiring counselors to provide a medical diagnosis.

9530.6425 Individual Treatment Plans

80. **Subpart 3. Progress notes and plan review.** In item B (4) of this subpart, the Department has proposed requiring that the weekly treatment plan review include “a review and evaluation of the individual abuse prevention plan according to Minnesota Statutes, section 245A.65.” In its SONAR, the Department states that it is reasonable to require review of individual abuse prevention plans because Minn. Stat.

³⁴ Ex. 20.

³⁵ Ex. 28 at 6. Italic script shows additions offered after the published version of the rule. Strikethrough shows deletions offered after the published version of the rule.

³⁶ Ex. 28 at 6-7.

§ 245A.65 provides that license holders have a responsibility to review the client's abuse prevention plans. The Department maintains that license holders frequently overlook this responsibility, and it contends that it is reasonable to add this requirement to improve compliance with the statute by associating the abuse prevention plan review with other plan review requirements.

81. In comments received at the rule hearing, Steve Schneider objected to this requirement. Mr. Schneider believes that requiring substance abuse counselors to document weekly a review and evaluation of each client's individual abuse prevention plan is unnecessary and adds to the continued demands on counselors for documentation with no demonstrated value. According to Mr. Schneider, counselors and staff are continuously reassessing a client's condition, including their physical and mental health, elopement risk, engagement in treatment, relapse risk, vulnerability, etc. Based on this ongoing reassessment, the Treatment Plan is revised as necessary, and the weekly progress review reflects any significant concerns and the progress being made in treatment. Mr. Schneider believes that it is no more important to ask for specific documentation every week on whether there are changes to an individual abuse prevention plan than it would be for any other aspect of the client's care. Mr. Schneider states that he is confident that any changes in a client's individual abuse prevention plan are currently being documented, and he recommends that the Department delete item B(4) as not needed.³⁷

82. The Department states that this is not a new requirement and it is required by Minn. Stat. § 245A.65, subd. 2(b)(2), which states in part, "An individual abuse prevention plan shall be developed for each new person as part of the initial individual program plan required under the applicable licensing rule. The review and evaluation of the individual abuse prevention plan shall be done as part of the review of the program plan or service plan." The Department states that it added the requirement to the rule in order to emphasize the statutory requirement, because several license holders failed to comply with the requirement.³⁸

83. The Administrative Law Judge finds the rule to be needed and reasonable. The changes clarify the requirements and make the rule more consistent with state law.

9530.6430 Treatment Services.

84. **Subpart 1. Treatment services provided by license holder.** This subpart lists the treatment services that must be offered by a license holder. The Department has proposed adding a subitem (5) to item A, which will require license holders to offer the following treatment service unless clinically inappropriate:

(5) service coordination to help the client obtain the services and to support the client's need to establish a lifestyle free of the harmful effects of substance use disorder.

85. In its SONAR, the Department states that requiring service coordination for clients is reasonable because people in need of chemical dependency treatment

³⁷ Ex. 18.

³⁸ Ex. 27 at 5.

services frequently have other problems in their lives that may not be within the purview of chemical dependency treatment, but must be addressed. For example, the Department notes that a client may not have a safe place to live. While housing is not a chemical dependency treatment service, if a client does not find appropriate housing the stress of living in an unsafe environment may trigger the client's alcohol or drug use. According to the Department many of a client's problems may not be susceptible of chemical dependency treatment, but if left unresolved, will be barriers to recovery and will render the client's chemical dependency treatment ineffective. Therefore, the Department maintains that it is reasonable to require that license holders coordinate the services the client needs outside of the treatment program.³⁹

86. In a written comment received after the hearing, Patrick Dale, CEO of the Storefront Group (a 20-bed provider of chemical health services) stated that while he agrees with the needs and benefits of service coordination, he does not believe that the Department should mandate that such service coordination be provided by a licensed counselor. Mr. Dale asserts that licensed counselors are not required to demonstrate skills or proficiency in service coordination as part of their education or licensing. Instead, Mr. Dale proposes that subitem (5) be changed to state that service coordination "must be provided by an LADC or by a person who demonstrates competency through education and work experience to provide service coordination." According to Mr. Dale, this type of staffing option would be consistent with other parts of the rule, such as 9530.6430, subpart 3, where those who demonstrate proficiency are allowed to provide services in place of a licensed alcohol or drug counselor.⁴⁰

87. In its rebuttal, the Department states that subpart 3 of 9530.6430 permits treatment services to be provided by an individual other than a licensed alcohol and drug counselor if the individual providing the service "is specifically qualified according to the accepted standards of that profession." The Department believes subpart 3 addresses Mr. Dale's concern by offering license holders flexibility to hire qualified staff other than licensed counselors. The Department rejects Mr. Dale's proposed modification to subitem (5) as being unnecessary.⁴¹

88. The Administrative Law Judge finds the rule as proposed to be needed and reasonable. The Administrative Law Judge suggests that the Department replace the word "provided" in the heading of subpart 1 with the word "offered," to be consistent with the text of subpart 1(A), which states as amended: "A license holder must provide offer the following treatment services ..." This modification would not make the rule substantially different than as published.

9530.6445 Staffing Requirements

89. **Subpart 4. Staffing requirements.** This subpart governs the percentage of a counselor's work hours that must be allocated to indirect services, the number of members that may be in a counseling group, and the number of clients a counselor in a program treating intravenous drug abusers may supervise. After publishing the rule but

³⁹ SONAR at 29.

⁴⁰ Ex. 26.

⁴¹ Ex. 28 at 7.

prior to the hearing, the Department modified the rule by increasing the time period used to determine the average number of clients in a counseling group from seven to 14 days.

90. The Department stated that the modification was based on comments it received from chemical dependency treatment counselors after publication of the proposed rule in the *State Register*. These counselors pointed out that if a treatment group meets weekly and there are more clients than expected, there is no time in a seven day period to make adjustments to the average group size. According to the Department, fourteen days is reasonable because it allows providers to adjust staff activities to meet the group size requirement. The Department states that the proposed rule modification does not make the rule substantially different because the modification is consistent with the intent of the proposed rule and the modifications are based on comments from persons affected by the rule.⁴²

91. In written comments, Ms. Gordon stated that 14 days is still an unreasonable period of time for small providers. Ms. Gordon explained that her agency provides group counseling treatment twice a week and maintains monthly rosters of attendance. On some days 17 clients may show up for the group, and on other days less than 16 may attend. Ms. Gordon understands the state's interest in preventing agencies from having groups of 30 people, but she said the likelihood of that happening with smaller agencies is very slim. Instead, Ms. Gordon recommends that the Department allow the group size to be averaged over 30 days to accommodate the fluctuations caused by new clients and those who fail to show.⁴³

92. After reviewing Ms. Gordon's and other comments received about this provision, the Department has proposed to modify this subpart to allow the group size to be averaged over 30 days. The rule will read in part: "A counseling group shall not exceed an average of 16 clients during any seven ~~thirty~~ consecutive calendar days." The Department states that allowing the group size to be averaged over 30 days will reduce the difficulties license holders have trying to stay in compliance with the rule.

93. The Administrative Law Judge finds the rule is needed and reasonable, and the proposed changes do not make the rule substantially different from the rule as published.

9530.6450 Staff Qualifications

94. **Subpart 1. Qualifications of all staff members with direct client contact.** This subpart requires that all staff with direct client contact be free from chemical use problems. The Department has proposed adding the following sentence at the end of subpart 1:

A chemical use problem for purposes of this subpart is a problem listed by the license holder in the personnel policies and procedures according to part 9530.6460, subpart 1, item E.

⁴² Ex. 9.

⁴³ Ex. 13.

95. Part 9530.6460, subpart 1, item E requires that the license holder describe in its personnel policy and procedures the grounds for taking disciplinary action against staff members, including particular behaviors that constitute a “chemical use problem.”

96. The Department appears to be distinguishing here between a “chemical use problem,” which may be a basis for employee discipline, and a “substance use disorder,” which is the required basis for treatment. The Administrative Law Judge finds the proposed amendment to be needed and reasonable.

97. **Subpart 9. Individuals with temporary permit.** The Department has proposed adding this subpart to identify the conditions under which individuals with temporary permits may provide chemical dependency counseling. Under this subpart, persons with temporary permits may provide chemical dependency treatment services if supervised by either a licensed alcohol and drug counselor or by a clinical supervisor approved by the Board of Behavioral Health and Therapy. The supervision must be documented and must relate to clinical practices. One licensed alcohol and drug counselor may not supervise more than three individuals.

98. In its SONAR, the Department states that it is necessary to detail the conditions under which individuals with permits may provide counseling because temporary permits were not available when these rules were originally adopted. In addition, the Department states that it is reasonable to require that certain conditions be placed on individuals with temporary permits because these individuals have not yet passed the examination required for full licensure. The Department also maintains that it is reasonable to limit the number of temporary permit holders that may be supervised by a licensed alcohol and drug counselor to three (presumably three at any given time). The Department explains that based on its professional judgment, it determined that “supervising a maximum of three would ensure that each temporary permit holder receives sufficient supervision and attention, whereas this outcome would seem unlikely if the number supervised was increased to four or more.”⁴⁴

99. In a comment presented at the rule hearing, Steve Schneider requested that the limitation on the number of individuals that may be supervised by a licensed alcohol and drug counselor be deleted from the proposed rule. Mr. Schneider stated that he is unaware of any other discipline of licensed mental health practitioners that has such a limitation. In addition, Mr. Schneider pointed out that counselors with temporary permits have met all of the academic requirements necessary to achieve licensure. In most cases, according to Mr. Schneider, these counselors have obtained the temporary permits to make them employable while they wait to take the oral or written part of the licensure examination.⁴⁵

100. Patrick Dale also objected to limiting the number of individuals with temporary permits that a licensed alcohol and drug counselor may supervise. Mr. Dale contends that the limit is arbitrary and unfounded and should be eliminated. Mr. Dale states that the specific documentation requirements in the subpart ensure adequate

⁴⁴ SONAR at 34.

⁴⁵ Ex. 18.

supervision, and he asserts that the Department has provided no objective rationale for the limitation.⁴⁶

101. In its response, the Department stated that the limit in the proposed rule derives from the requirement in Minnesota Statute § 148C.01, subd. 12a, which provides that a supervisor shall supervise no more than three trainees practicing under the temporary permit requirements of Minn. Stat. § 148C.04, subd. 6. The Department proposes modifying this subpart by adding the following phrase at the end of item A: “according to Minnesota Statutes, section 148C.01, subdivision 12a.”⁴⁷

102. The Administrative Law Judge finds the proposed rule to be needed and reasonable and in compliance with the governing statute. The Administrative Law Judge recommends that the Department consider adding the phrase “*with temporary permits*” to the last sentence in subpart 9(A) for clarification and to be more consistent with the statutory language. The last sentence in item A would read: “One licensed alcohol and drug counselor may not supervise more than three individuals with temporary permits.” This suggested modification would not render the rule substantially different from the rule as proposed.

9530.6460 Personnel Policies and Procedures.

103. **Subpart 1. Policy requirements.** This subpart governs the written personnel policies that license holders must make available to staff. Proposed **item G** requires license holders to provide orientation “within 72 hours of starting” for all new staff. Proposed **item H** requires license holders to have written personnel policies “outlining the license holder’s response to staff members with mental health problems that interfere with the provision of treatment services.”

104. In its SONAR, the Department states that it is reasonable to require that license holders provide orientation to new employees within 72 hours of starting employment, because staff must know the topics in orientation in order to provide safe and appropriate treatment services to clients. The Department also states that it is necessary to require license holders to address mental health problems of staff “because it can affect the nature of chemical dependency treatment provided to clients.”⁴⁸

105. In written comments presented at the hearing, Brenda Iliff stated that the proposed requirement in item G that orientation be provided to new staff within 72 hours of hire poses problems for part-time or on-call staff who may work one day and then not again for another week. According to Ms. Iliff, a program or agency could easily be out of compliance with the rule based on staff scheduling.⁴⁹

106. In response to Ms. Iliff’s comment, the Department proposes modifying item G to read in part as follows:

“G. include orientation within 72 24 working hours of starting ...”

⁴⁶ Ex. 26.

⁴⁷ Ex. 28 at 9.

⁴⁸ SONAR at 35.

⁴⁹ Ex. 20.

107. The Department states that the modification is reasonable because it does not substantially change the meaning of the proposed rule, but it allows license holders more flexibility to schedule training for new staff who work irregular schedules.⁵⁰

108. The Administrative Law Judge finds the proposed rule and modification to be needed and reasonable, and the modification does not substantially change the rule.

109. In written comments presented at the rule hearing, Judi Gordon objected to the requirement in item H that license holders have written personnel policies outlining the response to staff members with mental health problems that interfere with the provision of treatment services. Ms. Gordon stated that licensed alcohol and drug counselors are not mental health professionals and that counselors would be acting outside the scope of practice if required to identify and address mental health problems of staff. Ms. Gordon suggests that proposed item H be changed to require license holders to have written policies outlining their response to "behavior problems" of staff members that interfere with the provision of treatment services.⁵¹

110. In his written comments, Steve Schneider stated that he felt the proposed language in item H was discriminatory in that it focuses solely on an employee's mental health issues when a multitude of medical conditions could impact an employee's ability to provide appropriate services. Mr. Schneider suggests that the language be revised to include a wider scope of conditions that may affect an employee's ability to work.⁵²

111. In a post-hearing comment, Patrick Dale also objected to the language of item H. Mr. Dale stated that requiring license holders to identify that an employee is performing poorly due specifically to a mental health issue oversteps the Department's authority and raises issues of differential treatment of employees based on their perceived mental health. Mr. Dale asserts that if an employee is not performing well for whatever reason, the license holder should have policies in place to address the poor performance. To require a policy specifically focused on employee mental health will, in Mr. Dale's opinion, require license holders to seek assistance from employment lawyers. Moreover, because the rule does not define the term "mental health problems," Mr. Dale contends that it will be open to interpretation by license holders, which will lead to inconsistent policies.⁵³

112. In response to the above comments, the Department proposes to modify item H by replacing the phrase "mental health" with the word "behavior" so that item H will read: "policies outlining the license holder's response to staff members with mental health *behavior* problems that interfere with the provision of treatment services."⁵⁴

113. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modification does not render the rule substantially different from the rule as originally proposed. Those commenting raised legitimate concerns about the propriety of focusing only on a staff member's mental health problems, when any

⁵⁰ Ex. 28 at 10. Italic script shows additions offered after the published version of the rule. Strikethrough shows deletions offered after the published version of the rule.

⁵¹ Ex. 13.

⁵² Ex. 18.

⁵³ Ex. 26.

⁵⁴ Ex. 27 at 9.

behavior problems that interfere with treatment services should be addressed. The modification is appropriate and reasonable.

9530.6475 Behavioral Emergency Procedures

114. The Department has proposed adding the word “behavioral” before the phrase “emergency procedures” throughout item B of this subpart. The Department states that the change is editorial and is meant to clarify that item B does not govern medical crises or other emergencies, such as storms or fires.

115. In written comments received prior to the rule hearing, Deb Moses, MPH, DHS Statewide Director Community Addiction Recovery Enterprise, State Operated Services, urged the Department to replace the last sentence in item B, which reads: “Behavioral emergency procedures may not include the use of seclusion or restraint,” with the following:

Behavioral emergency procedures may only include the use of seclusion or restraint for locked facilities as well as those facilities that meet the requirements to specialize in serving clients with chemical abuse or dependency and mental health disorders. 9530.6480. These facilities may use restraint and seclusion providing they develop a policy and procedures approved by the Department of Human Services Division of Licensing based on criteria established for protective procedures in detoxification centers. 9530.6535.⁵⁵

116. In its response, the Department states that it does not believe Ms. Moses’ suggested replacement language is in the best interest of the clients. The Department maintains that staff providing treatment services should be prepared to work with clients who exhibit difficult behaviors. According to the Department, seclusion and restraint are not common practice in chemical dependency treatment facilities, and they have not been shown to be effective strategies for changing behavior in the client population. Moreover, seclusion and restraint are severe restrictions on a client’s rights in violation of Minn. Stat. § 253B.03, and improper use may result in physical harm. The Department contends that it is reasonable to prohibit the use of these procedures by license holders and staff members, and to require reliance on community resources to handle emergency situations. The Department also asserts that it is not reasonable to assume that all locked units or programs that serve clients with co-occurring substance use and mental health disorders have clients whose behavior warrants such restrictive interventions. Finally, the Department notes that the Commissioner has the authority to grant variances to parts of the licensing rule where the Department can ensure that the procedures the license holder proposes are appropriate and the staff is well trained to ensure the safety of clients and staff.⁵⁶

117. The Administrative Law Judge finds the proposed rule to be needed and reasonable. The Department has the discretion to prohibit the use of seclusion or restraint by license holders and staff members.

⁵⁵ Ex. 12.

⁵⁶ Ex. 27 at 10.

Minnesota Rules, Parts 9530.6510 to 9530.6590 (Rule 32)--Licensure of Detoxification Programs.

9530.6510 Definitions

118. As in the sections concerning the Children's Residential Facility Rule and Rule 31, the Department has proposed a new subpart 13a defining "substance use disorder" with reference to the DSM-IV-TR. The Department has indicated that it intends to define "substance" as a "chemical," which is defined in subpart 3, and that its failure to make this change consistently throughout the rule was an oversight. The Administrative Law Judge recommends adding a new subpart 13a to define the word "substance" to mean "chemical" as defined in subpart 3 of 9530.6510, then renumbering the definition of "substance use disorder" as subpart 13b. This modification will limit the definition of "substance use disorder" to those chemicals specifically identified under Minnesota law for which the state will provide and license chemical dependency treatment. The modification noted above is needed and reasonable and does not substantially change the rule.

9530.6525 Admission and Discharge Policies

119. **Subpart 2. Admission criteria.** In this subpart, the Department proposed to change the reference in item F from a "chemical dependency-related crisis" to a "substance use disorder-related crisis." To improve readability, the phrase could be changed to "a crisis related to substance use disorder." This suggested modification would not substantially change the rule.

120. **Subpart 5. Establishing custody procedure.** This subpart provides that immediately upon a person's admission to a detoxification program, the license holder obtains custody of the person under a peace officer's hold and is responsible for all requirements of client services.

121. Since publishing the rule, the Department has modified this subpart by adding the clause "until the client is discharged from the facility," to the end of the sentence. The subpart now reads as follows:

Establishing custody procedure. Immediately upon a person's admission to the program according to the criteria in subpart 2, the license holder obtains custody of a person under a peace officer's hold, and is responsible for all requirements of client services *until the client is discharged from the facility.*

122. The Department explained that the modification is based on comments it received after the proposed rule was published in the *State Register*. License holders pointed out that this provision could be misconstrued as meaning that the program is responsible for all client services even after the client is discharged from the facility. For example, if the client developed a medical problem and needed to be transferred to an emergency room, the rule as originally proposed may suggest that the program was responsible for the cost of the emergency room services. The Department states that it is reasonable to add the clause "until the client is discharged from the facility" to clarify

the limits of the program's responsibility. The Department maintains that this modification is not a substantial change because it simply clarifies the rule requirement and does not establish a new requirement that is substantially different than that in the proposed rule.⁵⁷

123. The Administrative Law Judge finds the proposed rule to be needed and reasonable. The modification clarifies the rule and does not render it substantially different from the rule as originally proposed. For purposes of internal consistency and readability, the Department may want to rephrase subpart 5 as follows:

Establishing custody procedure. The license holder obtains custody of a person under a peace officer's hold immediately upon that person's admission to the program according to the criteria in subpart 2, and is responsible for all requirements of client services *until the client person is discharged from the facility.*

124. This modification would not make the rule substantially different than published.

9530.6530 Client Services

125. Subpart 1 of the proposed rule reads that a license holder must screen each client admitted to determine whether the client suffers from "substance use disorder as defined in part 9530.6605, subparts 6 and 7." The Department has added to this rule section its own definition of "substance use disorder" at 9530.6510, subp. 13b, and it is proposing to repeal 9530.6605, subparts 6 and 7. The reference phrase "as defined in part 9530.6605, subparts 6 and 7" should be deleted. This modification is needed and reasonable and does not substantially change the rule.

9530.6535 Protective Procedures

126. **Subpart 8. Use of law enforcement.** This subpart limits the use of law enforcement personnel in licensed facilities. Under subitem A, license holders may call law enforcement only for a violation of the law by a client. Under subitem B, if a law enforcement agent uses force or a protective procedure that is not specified in the protective procedure plan for use by trained staff members, the client must be discharged. The Department states that this subpart is necessary because use of law enforcement personnel has sometimes resulted in injuries to clients. In addition, the Department maintains that reliance on law enforcement to control clients with difficult behaviors sometimes leads license holders to accept clients beyond their ability to manage. The Department asserts that in detoxification programs in particular, it is inappropriate to routinely rely on law enforcement to perform essential staff functions, such as managing client behavior.

127. At the public hearing, Larry Blair stated that the proposed rule's limitation on the use of law enforcement will require Fountain Centers to discharge unruly clients from its detoxification program. Mr. Blair explained that his staff are not trained in

⁵⁷ Ex. 9.

physical holds and that they have been calling local law enforcement when such restraints are necessary. Mr. Blair expressed concern that the proposed rule's limitation will result in discharging clients who are in need of treatment and have no where else to go.

128. In response, the Department states that defining and limiting the role of law enforcement in the license holder's protective procedure plan is reasonable and necessary to protect client safety and dignity and to ensure more thoughtful planning on the part of license holders.⁵⁸

129. The Administrative Law Judge finds the proposed rule to be needed and reasonable. It is within the Department's discretion to limit the use of law enforcement as proposed.

9530.6570 Personnel Policies and Procedures

130. **Subpart 3. Staff orientation.** This subpart requires staff with direct client contact to receive orientation training within 72 hours of beginning employment.

131. Since publishing the rule, the Department has modified this subpart by adding the following sentence at the end of subpart 3:

License holders who provide more extensive training to new staff members may extend the 72 hour orientation training period if the staff members have no direct client contact until the orientation training is complete.

132. The Department based this modification on comments it received from chemical dependency treatment providers who offer extensive training to new staff members over the course of several days and would not be able to complete orientation within 72 hours. The Department states that it is reasonable to allow an extended orientation training period if there is no client contact because it furthers the purpose of appropriately training staff early in their employment. The Department maintains that the modification is not a substantial change because it is consistent with the intent of the rule, clarifies the rule requirement and does not establish a new requirement that is substantially different than the requirement in the proposed rule.⁵⁹

133. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modification does not render the rule substantially different from the rule as originally proposed.

⁵⁸ Ex. 27 at 13.

⁵⁹ Ex. 9 and Ex. 27 at 13.

Minnesota Rules, Parts 9530.6600 to 9530.6660 (Rule 25)--Chemical Dependency Care for Public Assistance Recipients.

9530.6605 Definitions

134. **Subpart 25a. Substance.** In its response, the Department proposed adding the following new definition as Subpart 25a: "Substance. "Substance" means chemical as defined in subpart 5." The reason for the change is to limit the breadth of the definition of "substance use disorder," which would be added as subpart 26.

135. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modification does not render the rule substantially different from the rule as originally proposed.

9530.6610 Compliance Provisions

136. **Subpart 1. Assessment responsibility.** This subpart requires placing authorities to provide assessment services for clients without regard to national origin, marital status, race, color, religion, creed, disability, sex or sexual orientation according to Minnesota Statutes, section 363A.11. After publishing the proposed rule and prior to the public hearing, the Department modified subpart 1B(2) as follows:⁶⁰

B. A tribal governing board that contracts with the department to provide chemical use assessments and that authorizes payment for chemical dependency treatment under Minnesota Statutes, chapter 254B, must provide a chemical use assessment for a person residing on a reservation who seeks assessment or treatment or for whom treatment is sought, as provided in part 9530.6615, if the person is:

(1) recognized as an American Indian; or

(2) a relative of a person who is recognized as an American Indian. For purposes of this subpart, a "relative" means a person who is related to a resident by blood, marriage, or adoption, or an important friend of a resident who that resides with a resident an American Indian on a reservation.

137. The Department states that the modification is necessary to make clear that the eligible person is an American Indian or a relative of an American Indian according to the definition. The Department maintains that the modification is not a substantial change because it clarifies the rule requirement and does not establish a new requirement that is substantially different than the requirement in the proposed rule.

138. For purposes of clarity, the Administrative Law Judge recommends that the last sentence of subpart 1B(2) be rephrased as follows:

⁶⁰ Ex. 9. Italic script shows additions offered after the published version and double strikethrough shows deletions offered after the published version.

For purposes of this subpart, a “relative” means a person who is related by blood, marriage, or adoption, or is an important friend who resides with a person recognized as an American Indian on a reservation.

The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modifications do not render the rule substantially different from the rule as originally proposed.

139. **Subpart 3. Placing authority designee.** This subpart identifies who the placing authority may designate to provide assessments, and it prohibits (with some exceptions) those providing assessment services from having a shared financial interest with treatment providers. The Department has moved the exceptions to the financial interest prohibition that were previously listed in subpart 4 to new items A and B of subpart 3. (Subpart 4 is repealed.)

Under this subpart, an assessor designated by the placing authority shall have no direct shared financial interest or referral relationship resulting in shared financial gain with a treatment provider “unless the county documents that either of the exceptions in item A or B exists.” Item A and B provide as follows:

A. the treatment provider is a culturally specific service provider or a service provider with a program designed to treat persons of a specific age, sex, or sexual orientation and is available in the county and the service provider employs a qualified assessor; or

B. the county does not employ a sufficient number of qualified assessors and the only qualified assessors available in the county have a direct shared financial interest or a referral relationship resulting in shared financial gain with a treatment provider.

Documentation of the exceptions in items A and B must be maintained at the county’s office and be current within the last two years. The placing authority’s assessment designee shall provide assessments and required documentation to the placing authority according to parts 9530.6600 to 9530.6660.

The placing authority is responsible for and cannot delegate making appropriate treatment planning decisions and placement authorizations.

140. In written comments received at the hearing,⁶¹ Ms. Gordon stated that in order to be in compliance with Minn. Stat. § 254A.19, subp. 3, the Department should add a third exception to the shared financial interest prohibition in subpart 3 as item C. Based on the statutory language, Ms. Gordon recommends the following addition as item C:

C. the county social service agency has an existing relationship with an assessor or service provider and elects to enter into a contract with that assessor to provide both assessment and treatment under circumstances

⁶¹ Ex. 13.

specified in the county's contract, provided the county retains responsibility for making placement decisions.

An assessor under this paragraph may not place clients in treatment. The assessor shall gather required information and provide it to the county along with any required documentation. The county shall make all placement decisions for clients assessed by assessors under this paragraph.

141. The Department agreed to incorporate this statutory exception as item C:

C. the county social service agency has an existing relationship with an assessor or service provider and elects to enter into a contract with that assessor to provide both assessment and treatment under circumstances specified in the county's contract, provided the county retains responsibility for making placement decisions.

142. In a written comment received at the hearing, Dustin Chapman, Behavioral Services Liaison, Fairview Health Services, University of Minnesota Medical Center, proposed modifying subpart 3 to allow hospital emergency rooms and evaluation departments to conduct initial Rule 25 assessments on patients who are in emergency rooms, on medical floors, or on mental health units who need an assessment for a potential referral to substance abuse treatment. Fairview Behavioral Services does not believe that having hospital staff conduct assessments creates a conflict of interest. Although Fairview and other hospitals may have substance abuse programs, Mr. Chapman states that the hospitals are not proposing that they become "placing authorities." Rather, Mr. Chapman states that Fairview and other hospitals simply want to perform initial assessments in order to prevent delay of services. Mr. Chapman explained that under the proposed rule, counties have 20 days to authorize placement. For persons hospitalized or being seen in an emergency setting, this initial delay of up to 20 days can create a crack in the system for them to fall through. According to Mr. Chapman, these patients are less likely to follow through with making an appointment for an assessment or wait several days to be seen. In Mr. Chapman's opinion, delaying services creates the chance that these individuals will continue in a downward progression that may result in more emergency room or hospital admissions, or even more severe consequences. Mr. Chapman maintains that by allowing hospitals such as Fairview to complete the initial assessment, the state will see a reduction of the time it takes for an individual to receive services and it will create an opportunity for individuals to obtain substance abuse services in a more expeditious manner.⁶²

143. In a similar comment received February 21, 2008, Tom Turner, LADC, Chemical Health Unit Supervisor, Hennepin County Human Services, Access Court Unit/Protect CHILD, suggested that hospitals be exempted from the financial conflict of interest prohibition and permitted to perform assessments even if they also operate a chemical dependency treatment program. Mr. Turner states that without such an exemption, clients at hospitals are unnecessarily delayed from obtaining services.⁶³

⁶² Ex. 17.

⁶³ Ex. 25.

144. In a written comment received at the hearing, Steve Schneider expressed concern about the financial interest prohibition as it relates to Drug Court Treatment Services. According to Mr. Schneider, one of the goals of Drug Court is to identify potential Drug Court participants as soon after the legal intervention as possible, and complete assessments so that the individuals can be considered for acceptance into Drug Court. New Ulm Medical Center has contracts with several counties to serve as the treatment provider for Drug Court participants, and the contracts stipulate that it complete the assessments for all potential Drug Court admissions. According to Mr. Schneider, the timeframe for completing the initial assessment is very tight, to ensure a quick decision by the Drug Court Team. If an individual appears to qualify for the Consolidated Fund, the assessment is provided to the county for a determination on placement. If the level of treatment needed is outpatient, the individual is referred back to Drug Court for a specific treatment program. Referrals for residential treatment may be made to New Ulm Medical Center or another provider. Mr. Schneider recommends that counties be given greater flexibility in designating agencies to complete assessments.⁶⁴

145. In its response, the Department explained that the original purpose of the conflict of interest provision was to prevent assessors from recommending placements that would include unnecessarily expensive services meant to enrich treatment providers. Prepaid health plans, however, are designed to avoid unnecessary costs, and because the payment to the prepaid health plan is capped, any unnecessary costs ensuing from their relationships do not cause additional public expense.⁶⁵

146. With respect to the request of Mr. Chapman and others that hospitals be exempt from the conflict of interest provision in order to more timely assist those clients who are in emergency rooms or incarcerated, the Department states that Minn. Stat. § 254A.19, subdivision 3, limits the exceptions to those listed, and the Department does not have the authority to expand or alter the statutory requirements.⁶⁶

147. The Administrative Law Judge found the concerns expressed by Messrs Chapman, Turner and Schneider to be persuasive. If the county remains responsible for all placement decisions, it would seem that clients would be served more efficiently if a qualified assessor employed by a hospital could conduct the assessment in a timely manner and provide it to the county for use in making the placement decision. Unless there is a contract in place between the county and the hospital, however, this is exactly what the statute prohibits. The Department is correct that it lacks the authority to create a new exception to the statute. Such a change must come from the legislature.

148. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modifications do not render the proposed rule substantially different than the one proposed. The modifications bring the rule into compliance with the statutory requirement and thereby clarify the rule.

⁶⁴ Ex. 18.

⁶⁵ Ex. 27 at 16.

⁶⁶ Ex. 27.

149. **Subpart 5. Information release.** This subpart requires the placing authority, after receiving proper releases of information, to provide a copy of the assessment to the treatment provider.

150. In its SONAR, the Department states that it is necessary to require placing authorities to provide assessments to treatment providers in order to enable the treatment provider to begin addressing the client's needs and concerns immediately upon admission. It also avoids having the client repeat the same information for the treatment provider that he or she just provided to the assessor. In addition, the Department states that it is reasonable to require a proper release of information because the assessment will contain confidential information.

151. In a written comment received after the hearing, Patrick Dale noted that there is no time requirement for compliance with this subpart. Mr. Dale states that without a specific timeline, the requirement for providing assessments becomes unenforceable and meaningless.⁶⁷

152. In response to Mr. Dale's comment, the Department proposes adding the following sentence to the end of subpart 5: "*The placing authority shall provide the assessment to the treatment provider within seven days of the date of placement determination.*" The Department states that it is reasonable to require that the transmission of information to the provider happen quickly so the provider can promptly help the client to make treatment gains. The Department states that the seven-day limit is reasonable because it allows the placing authority enough time to send the information to the provider.⁶⁸

153. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modification does not render the rule substantially different from the rule as originally proposed.

9530.6615 Chemical Use Assessments

154. **Subpart 1. Assessment mandate; timelines.** The amendments to this subpart establish timelines by which placing authorities must provide assessment interviews for clients, complete assessments, and authorize services. In general, placing authorities must provide assessment interviews for clients within 20 calendar days from the date appointments are requested, and must complete the assessment, make determinations, and authorize services within 10 calendar days after the initial assessment interview. The rule provides that the placing authority must interview clients who miss appointments within 20 days of a subsequent request for an appointment. The rule also provides that placing authorities must provide assessments to clients in jail or prison, and that if the placing authority does not assess the client, the county where the client is held must assess the client and resolve disputes. In addition, if 30 calendar days elapse between the interview and initiation of services, the placing authority must update the assessment to determine whether the risk description has changed. And if six months pass since the most recent assessment or assessment update, the placing authority must provide a new assessment.

⁶⁷ Ex. 26.

⁶⁸ Ex. 28. Italic script shows additions offered after the published version of the rule.

155. In its SONAR, the Department states that it is necessary to establish timelines to ensure that services are provided in a timely manner. The Department emphasizes the importance of providing assessments for clients as soon as possible. The Department asserts that for many clients, the point at which they seek a chemical dependency assessment is the point at which they recognize the need to make a change. According to the Department, it is critical to provide the assessment while this recognition or realization on the part of the client is at hand. The Department also maintains that the timelines are reasonable and were arrived at only after discussions with representatives of the placing authorities.⁶⁹

156. With respect to the incarcerated population, the Department cites to a 2006 evaluation report on substance abuse treatment by the Office of the Legislative Auditor, in which correction officials stated that it sometimes takes up to three months to get a referral for an offender and up to three months to get an assessment interview. While such lengthy delays may be unusual, the Department maintains that delays leave offenders without necessary services and can impede the judicial process. The Department states that it is reasonable to require assessments for clients in jail and prisons because offenders who address their chemical use problems are less likely to reoffend, and if offenders are left to get their assessments after release from jail or prison, many will not follow through. Moreover, many judges want the information and recommendations from the assessor to assist in determining an appropriate sentence for the client. The Department also states that it is necessary to establish that counties are ultimately responsible for assessments of clients in jails or prisons because some placing authorities have refused to provide this service.⁷⁰

157. In a written comment received prior to the hearing, Carol J. Cunningham, LICSW, Program Manager, Adult Behavioral Health, Olmsted County Community Services, objects to the proposed requirement in subpart 1A that persons who miss appointments be given a new appointment within 20 days of a subsequent request for assessment. Ms. Cunningham states that there are a number of individuals who repeatedly request assessments, fail to show for their appointments, and then request new appointments. Ms. Cunningham asserts that by requiring that these individuals receive new appointments within 20 days of each request, others who are serious about making and keeping appointments for assessment are made to wait and their assessments delayed. Ms. Cunningham recommends that the placing authority be given flexibility on when to schedule interviews for those who frequently fail to keep appointments.⁷¹

158. In its SONAR, the Department acknowledges that clients do frequently miss assessment appointments. However, the Department believes that by re-setting the 20 day timeline after a client fails to keep an appointment, placing authorities will not be put in the situation of having to rearrange schedules or displace other clients in order to meet the initial 20 day timeline. In response to Ms. Cunningham's comment, the Department states that a client's right to assessment and treatment is not abrogated by the client's failure to keep an appointment. The Department notes that failure to keep

⁶⁹ SONAR at 57.

⁷⁰ SONAR at 57.

⁷¹ Ex. 11.

appointments may be a symptom of the client's illness. According to the Department, the rule should not be modified to punish clients for exhibiting symptoms of their illness.⁷²

159. In a written comment received after the hearing, Tom Turner, LADC, Hennepin County Chemical Health Unit Supervisor, Access Court Unit/Project CHILD, stated that Hennepin County will be unduly burdened by this requirement to assess clients in jail or prison without increased funding for additional staff to provide assessment services for individuals in custody as well as to review evaluations provided by other counties. According to Mr. Turner, the volume of clients in the Hennepin County jail downtown alone would require additional staff not including the rest of the county. Mr. Turner maintains that it is not a fair burden when compared to the relatively small number of incarcerated clients that other counties would be forced to serve. In addition, Mr. Turner states that it is not reasonable or necessary to require that an update be performed after 30 days for incarcerated persons. Assessments are based on a person's use prior to incarceration and most are completed more than 30 days before release because the client and county need to plan post-incarceration arrangements in advance.⁷³

160. With respect to Mr. Turner's comment that an assessment update is not necessary if the client has been incarcerated with no opportunity to abuse substances between the assessment interview and the initiation of services, the Department proposes adding the following sentence to the end of item C: "The update in item D is not required if the client has been in jail or prison continuously from the time of the assessment interview until the initiation of service." The Department agrees with Mr. Turner that an update is not necessary if the client has been in jail or prison continuously between the assessment interview and the initiation of treatment services. The Department states that the rule modification is reasonable because it is consistent with the intent of item D, and it is not a substantial change because it does not create a new burden and it is based on a public comment.⁷⁴

161. In a written comment, Ms. Gordon also recommended that item D of this provision be modified to require an update of the assessment if 45 days (rather than 30 days) have elapsed between the assessment interview and initiation of treatment. Ms. Gordon commented that it sometimes takes longer than 30 days from the date of assessment by the placing authority and the start of treatment. Ms. Gordon further recommended that providers be allowed to gather updated information by telephone rather than requiring that the client return to the placing authority for a new assessment.⁷⁵

162. In its response, the Department agreed with this comment. Item D as revised will read:

If 30 45 calendar days have elapsed between the interview and initiation of services, the placing authority must update the assessment to

⁷² SONAR at 58; Ex. 27 at 18.

⁷³ Ex. 25.

⁷⁴ Ex. 28 at 17.

⁷⁵ Ex. 13.

determine whether the risk description has changed and whether the change in risk description results in a change in planned services. An update does not require a face-to-face contact and may be based on information from the client, collateral source, or treatment provider.⁷⁶

163. The Department states that it is not necessary to modify the rule to explicitly permit gathering updated information by telephone because item D already permits information to be gathered in a manner that does not require face-to-face contact.

164. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modification does not render the rule substantially different from the rule as originally proposed.

165. **Subpart 2. Staff performing assessment.** This subpart requires that chemical use assessments be conducted by staff that annually complete a minimum of eight hours of in-service training or continuing education related to providing chemical use assessments and meet other criteria. Individuals exempted from licensure under Minnesota Statutes § 148C.11 may conduct assessments if they successfully complete 30 hours of classroom instruction on chemical use assessments, 2,000 hours of work experience in chemical use assessments, and two additional years of work experience in chemical dependency assessments or treatment before July 1, 1987, or are clinically supervised by an individual who meets the requirements of this subpart.

166. In its SONAR, the Department states that the amendments to subpart 2 are necessary because the laws governing qualified professionals in the field of chemical dependency have changed considerably. The Department notes that the practice of alcohol and drug counseling is defined at Minnesota Statutes § 148C.01, subdivision 10, to include “assessing the level of alcohol or other drug use involvement.”⁷⁷

167. In a written comment received at the hearing, Steve Schneider urged eliminating or modifying this requirement. Mr. Schneider states that, in order to maintain their license, counselors already have specific requirements relating to continuing education, and facilities and agencies have various methods of evaluating their competence to perform core functions, including assessments. Mr. Schneider asserts that it is not necessary to require licensed counselors to receive 8 hours of continuing education every year on assessments, and this requirement would add to agencies’ financial costs without any benefit. According to Mr. Schneider, the basic principles of assessment do not change. As a result, a counselor with several years of experience conducting assessments will find limited value in spending 8 hours each year of their allotted continuing education time on the assessment process.⁷⁸

168. In a written comment received after the hearing, William Pinonnault, Director, Social Service and Mental Health Division, Anoka County Human Services Division, stated that while it is reasonable to require specific training, experience, and

⁷⁶ Ex. 27 at 20. Italic script shows additions offered after the published version of the rule. Strikethrough shows deletions offered after the published version of the rule.

⁷⁷ SONAR at 59.

⁷⁸ Ex. 18.

supervision in performing chemical use assessments for individuals excepted from licensure, to require that the requisite work experience occur 21 years prior to the effective date of this rule will eventually mean that no one who is exempted from licensure under Minn. Stat. § 148C.11 will be qualified to perform assessments. Mr. Pinonnault asserts that as written, this subpart will immediately impose a significant hardship on Anoka County, whose assessors are exempt from licensure and are currently qualified but did not complete the two additional years of work experience more than 20 years ago.⁷⁹

169. In a letter dated February 21, 2008,⁸⁰ to Administrative Law Judge Sheehy, the Department agreed with Mr. Pinonnault that this rule provision should more closely follow Minnesota Statutes § 148C.11. In addition, the Department stated that the “July 1, 1987” date in Subpart 2A(2) was a drafting error. Therefore, the Department has proposed to modify Subpart 2 in order to correct the drafting error and address the concerns of those submitting comments. The proposed modified subpart reads as follows:

Subpart 2. **Staff performing assessment.** Chemical use assessments must be conducted by qualified staff of the county or their designee in a manner that complies with parts 9530.6600 to 9530.6655. An individual is qualified to perform chemical use assessments if he or she the individual annually completes a minimum of eight hours of in-service training or continuing education related to providing chemical use assessments documented under part 9530.6510, subpart 2, item C, and meets The individual must meet the criteria in one of the items listed below:” item A, B, or C below:

A. The individual meets the exception in Minnesota Statutes, section 148C.11, has successfully completed 30 hours of classroom instruction on chemical use assessments, and has 2000 hours of work experience in chemical use assessments either as an intern or as an employee. An individual qualified under this item must also annually complete a minimum of eight hours of in-service training or continuing education related to providing chemical use assessments.

B. [There is no modification to item B as proposed.]

C. The individual meets the exception in Minnesota Statutes, section 148C.11, has completed 30 hours of classroom instruction on chemical use assessments and is receiving clinical supervision from an individual who meets the requirements in Items A or B.

170. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modification does not render the rule substantially different from the rule as originally proposed. It is within the Department’s discretion to require that qualified staff annually complete eight hours of continuing education related to assessments. The Department is entitled to make choices regarding possible

⁷⁹ Ex. 21.

⁸⁰ Ex. 27 at 20-21.

approaches, as long as the choice is rational, and this is a policy choice legitimately within the Department's discretion.

171. **Subpart 3. Method of assessment.** The Department has added an introductory paragraph to subpart 3, which requires assessors to gather collateral information on the client from two sources, and to record information on forms prescribed by the Commissioner. In addition, before the assessor may determine that a collateral source is not available, the assessor must make at least two attempts to contact that source, one of which must be by mail.

172. In its SONAR, the Department states that it is necessary to gather information to determine a client's risk, and it is reasonable to require use of a single form prescribed by the Commissioner to ensure that each placing authority considers all the essential information when making determinations. With respect to the collateral sources requirement, the Department points out that the requirement is not new. Contact with collateral sources was originally required under item B of this subpart. However, the Department has proposed deleting those portions of item B and amending the provision to add item C in order to state more specifically the number, type and limits on collateral source contacts.⁸¹

173. In a written comment received after the hearing, Patrick Dale recommends that the Department permit the assessor to complete the assessment without the second collateral source information if the other information gathered is adequate.⁸²

174. Similarly, in a written comment received after the hearing, Tom Turner objected to the requirement that assessments include information from two collateral source contacts. Mr. Turner states that this requirement will unnecessarily delay many client placements. Mr. Turner suggests that the only required collateral source contact be the individual or agency referring the client and that any other collateral source contacts be optional based on the need for additional information.⁸³

175. In a written comment received after the hearing, Daniel Papin, Director, Washington County Community Services, stated that Washington County is supportive of the proposed rule but is concerned that the new timelines and the requirement for two collateral sources will take more time to complete and increase workload pressure on staff. Mr. Papin recommends that counties be allowed to pay for assessment staff through the Consolidated Chemical Dependency Treatment Fund (CCDTF). With this option, the cost of assessments would be shared between the counties and state, making the new proposal not only good practice, but fair and equitable.⁸⁴

176. Ms. Gordon commented at the hearing that a second collateral contact is frequently unnecessary and recommended that the provision be changed to require one collateral contact unless insufficient information was gained from the first collateral and the client. Ms. Gordon stated that requiring an additional collateral and a mailing to

⁸¹ SONAR at 60-62.

⁸² Ex. 26.

⁸³ Ex. 25.

⁸⁴ Ex. 23.

unreachable collaterals will not increase access to treatment and will only increase the time involved in completing the assessment.⁸⁵

177. In response to the comments, the Department concedes that a second collateral contact may act as an unnecessary barrier to timely placement if it simply reiterates what the assessor has already learned. Therefore, the Department proposes adding a subitem (5) to subpart 3, item C, reading as follows:

(5) if the assessor has gathered sufficient information from the referral source and the client to apply the criteria in parts 9530.6620 and 9530.6622, it is not necessary to complete the second collateral contact.⁸⁶

178. With respect to Mr. Papin's comment, the Department concedes that initially it may require some effort on the part of placing authorities to catch up on the assessment requirements for each client, but once caught up, the Department maintains the placing authority will be able to continue to meet the timelines.⁸⁷

179. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modification does not render the rule substantially different from the rule as originally proposed. Mr. Papin's recommendation that counties be allowed to pay for additional staff through the CCDTF is beyond the scope of this rulemaking proceeding. Only the cost of certain defined "chemical dependency services" under Minn. Stat. § 254B.01, subd. 3, are covered by the fund, and assessment is not one of the defined services. The Department is without authority to expand the statutory limitations placed on this fund.⁸⁸

180. **Subpart 5. Information provided.** This subpart states that "the information gathered and assessment summary must be provided to the authorized treatment program."

181. In its SONAR, the Department states that it is necessary to require placing authorities to provide information to treatment providers because having the information allows the treatment provider to begin addressing the client's needs and concerns immediately upon admission. The Department asserts that this subpart also avoids having the client repeat the same information for the treatment provider he or she just provided to the assessor.⁸⁹

182. In a written comment, Patrick Dale recommended that this subpart be amended to require that the placement authority deliver the assessment summary to the authorized treatment provider prior to the client being admitted for treatment. According to Mr. Dale, without such a requirement, clients will be required to repeat information in order for the treatment provider to complete the chemical use assessment within the mandated deadlines.⁹⁰

⁸⁵ Ex. 13.

⁸⁶ Ex. 27 at 22.

⁸⁷ Ex. 28 at 16.

⁸⁸ See Minn. Rule part 9530.7012.

⁸⁹ SONAR at 63.

⁹⁰ Ex. 26.

183. The Department states that this provision is substantially the same as part 9530.6610, subpart 5 and that the proposed modification to that subpart should address this issue.⁹¹

184. The Administrative Law Judge finds the proposed rule to be needed and reasonable.

9530.6620 Placement Information

185. **Subpart 1. ~~Level of care~~ Placing Authority determination of appropriate services.** This subpart lists the information that the placing authority must gather during an assessment to determine a client's appropriate placement for treatment. In the existing rules, the placement criteria were based on the levels of care available at that time the rules were written. In this rule, the Department has proposed using the six dimensions created by the American Society of Addiction Medicine (ASAM) as a way of organizing assessment information, risk assessments, and treatment planning decisions.

186. In its SONAR, the Department states that establishing categories for organizing information and criteria is necessary to render the large amount of information about an individual client more manageable, and to use a common language for transmitting information about the client among professionals. The Department asserts that it is reasonable to use the six dimensions developed by ASAM because they were developed specifically for the purpose of organizing and transmitting information about choosing treatment services. Use of this format ensures the assessment of the client's life is comprehensive and requires consideration of a broad set of factors influencing treatment and recovery. According to the Department, the ASAM dimensions are used by most states, the United States military, and many insurers. The Department states that it is reasonable to use the methods most widely used by others to address the need for a method of organizing information. The Department maintains that the six dimensions are needed and reasonable because they provide the most efficient and effective means of assessing a client and planning services that will give the client needed treatment services.⁹²

187. As proposed, this rule directs placing authorities to gather information about the client's "age, sex, race, ethnicity, culture, sexual orientation, disability, current pregnancy status, and home address." In a written comment received prior to the public hearing, Richard Scherber, Executive Director of Minnesota Teen Challenge, a faith-based residential drug and alcohol recovery program, urged the Department to include "religious preference" among the items of information that the placing authority should consider about a client. Mr. Scherber states that for many people, religion and spirituality are a significant part of self-identity. In addition, Mr. Scherber states that studies by national substance abuse organizations have found that religion and spirituality are key factors in the prevention and treatment of chemical addiction. Mr. Scherber also believes that dimensions 4, 5 and 6 may all be affected by a client's

⁹¹ Ex. 28.

⁹² SONAR at 64.

religious beliefs and practices, and therefore any assessment that does not take religious preference into account is incomplete and not fully effective.⁹³

188. In response to this comment, the Department has proposed adding the words “religious preference” to the items on this list. The Department states that allowing clients to choose to participate in a treatment program based on the client’s religious preference may improve the client’s willingness to participate in treatment and ultimately may improve the client’s likelihood of success.⁹⁴

189. The Administrative Law Judge finds the rule to be needed and reasonable, and the modifications do not render the rule substantially different from the rule as originally proposed.

190. **Subpart 9. Client choice.** This subpart allows the client to choose to receive treatment from a “special populations provider” appropriate to the client’s age, gender, race, sexual orientation or disability, and allows the placing authority to deviate from the placement criteria in 9530.6622 to provide the client that experience.

191. In its SONAR, the Department states that clients are more likely to be alcohol and drug free six months after discharge if they receive their treatment in a culturally specific or special population program. According to the Department, clients who identify with a group are more likely to benefit from participating in treatment groups where they feel they have similar experiences with and are supported by members of that group. The Department states that it is necessary to mandate the use of special programs chosen by the client because some placing authorities have categorically denied such requests, effectively denying some clients opportunities for success. The Department asserts, however, that it would be unreasonable to let the client choose the actual facility since in some cases clients will choose programs that are far away or very expensive over adequate programs in their area.⁹⁵

192. After publishing the proposed rule and prior to the public hearing, the Department proposed a modification to change an incorrect statutory citation. The rule as published stated that the provider must meet the criteria in Minnesota Statutes, section 245B.05. The correct citation is 254B.05.

193. The Administrative Law Judge finds that the modification is not a substantial change because it clarifies the rule and does not establish a new requirement that is substantially different than the requirement in the proposed rule.

194. In a comment similar to the one regarding subpart 1 of this rule part, Mr. Scherber of Minnesota Teen Challenge requests that the Department include “religious preference” among the characteristics that must be considered by the placing authority. In addition, Mr. Scherber recommends that the client be given the right to choose the specific provider from a list of qualified alternatives. Because Mr. Scherber believes it is essential for clients to “buy in” to a particular program in order to succeed, it is counter-productive to leave the final placement decision to the placement authority. In addition, Mr. Scherber maintains that as written, the rule may create a potential conflict of interest

⁹³ Ex. 16.

⁹⁴ Ex. 27 at 22.

⁹⁵ SONAR at 71-72.

whereby placing authorities funnel clients to particular treatment programs. Mr. Scherber states that based on anecdotal evidence from prospective clients of Minnesota Teen Challenge, a small number of placing authorities will not place clients in faith-based programs because of their own personal biases.⁹⁶

195. In a comment received on February 21, 2008, Tom Turner of Hennepin County Human Services' Access Court Unit, suggested that after a client has had two or more culturally specific placements, the placing authority be given the discretion to select whatever program they believe can best address the client's needs and not allow the client to dictate the program choice. Mr. Turner states that while Hennepin County has always used culturally specific programs whenever available, some programs may not have the specific type of programming or services to best treat a particular client. Mr. Turner also recommends that the Department allow an exception to this subpart for specialty courts (i.e., drug court, DWI court, family dependency courts) so that they may be allowed to refer clients to the programs or vendors selected to work with the court to provide a coordinated effort to enhance treatment outcomes.⁹⁷

196. As it did with regard to subpart 1, the Department proposes adding the words "religious preference" after the word "culture" in subpart 9.⁹⁸

197. In further response to the comments from Mr. Scherber, the Department has proposed a new subpart 14 in part 9530.6620 to address the client's request for a specific provider. This new subpart requires the placing authority to consider a client's request for a specific provider and, if the placing authority does not place the client according to the client's preference, to document the reasons for the deviation.

198. With respect to Mr. Turner's comment, the Department states that it has proposed a client right to a special populations program. However, the Department notes that if the only available special populations program does not provide the array of services the client needs, the placing authority has the responsibility to arrange for additional services in compliance with 9530.6620, subpart 8. The Department also declines to make an exception for specialty courts. The Department contends that these courts are in a position to select treatment providers that address the needs of the special population clients who are seen in that court.⁹⁹

199. The Administrative Law Judge finds the rule to be needed and reasonable, and the modifications do not render the rule substantially different from the rule as originally proposed.

200. **Subpart 11. Faith-based provider referral.** Under this subpart, if the placing authority recommends services from a faith-based provider, the client must be allowed to object to the placement on the basis of the client's religious choice. If the client objects, the client must be given an alternative referral.

201. In its SONAR, the Department explains that Federal Charitable Choice regulations promote the use of faith-based organizations to provide services paid for

⁹⁶ Ex. 16.

⁹⁷ Ex. 25.

⁹⁸ Ex. 27 at 24.

⁹⁹ Ex. 28 at 22.

with federal funds. Because federal funds are used to pay for chemical dependency treatment through the Consolidated Chemical Dependency Fund, it is necessary to convey applicable requirements in the rules governing placement. The Department states that the specific language in this subpart is reasonable because it conveys the requirements of 42 C.F.R. § 54.8.¹⁰⁰

202. The Administrative Law Judge finds the rule as proposed to be needed and reasonable.

203. **Subpart 12. Adolescent exceptions.** This subpart directs assessors to provide adolescents with services that include room and board under specific circumstances, regardless of the criteria in part 9530.6622.

204. In a written comment received after the hearing, Mr. Dale proposed that these exceptions apply to all clients, not just adolescent clients.¹⁰¹

205. In its response, the Department stated that the exceptions are meant to address the specific needs of adolescents, particularly with respect to their underdeveloped impulse control. The Department asserts that if an adolescent has participated in nonresidential treatment and it was insufficient, it is reasonable to assume the adolescent requires more guidance and supervision. The Department maintains that this is particularly true for adolescents diagnosed with co-occurring mental health and substance abuse issues. When coupled with a lack of impulse control, these adolescent may feel compelled to engage in dangerous and/or suicidal behaviors. The Department also notes that the rule permits room and board to be considered in a more individualized manner for adult clients. For these reasons, the Department declined Mr. Dale's suggested modification to the rule.¹⁰²

206. The Administrative Law Judge finds the rule to be needed and reasonable. The Department is entitled to make choices between possible approaches as long as the choice is rational.

207. **Subpart 14. Client request for a provider.** This is a new subpart that the Department proposed in response to a written comment received from Richard Scherber of Minnesota Teen Challenge.¹⁰³ Mr. Scherber expressed concern about potential problems or legal challenges that may result from government entities authorizing public money to be allocated to a provider with a specific religious affiliation. Mr. Scherber recommended that a provision be added to allow clients to choose the specific provider.

To address this concern, the Department has proposed adding the following new subpart:

Subpart 14. Client request for a provider. *The placing authority must consider a client's request for a specific provider. If the placing authority does not place the client according to the client's preference, the placing authority must provide written documentation that delineates the reason*

¹⁰⁰ SONAR at 72-73.

¹⁰¹ Ex. 26.

¹⁰² Ex. 28 at 23.

¹⁰³ Ex. 16.

*for the deviation from the client's preference, including, but not limited to treatment cost, provider location, or the absence of client services that were identified as needed by the client according to part 9530.6622.*¹⁰⁴

208. The Department states that adding this new subpart 14 is not a substantial change because the modification is based upon public comment, and the modification does not alter placement criteria in part 9530.6622.

209. The Administrative Law Judge finds the proposed rule to be needed and reasonable.

9530.6622 Placement Criteria.

210. **Subpart 3. Dimension 3: emotional, behavioral, and cognitive conditions and complications.** This subpart requires placing authorities to make placement decisions with reference to Dimension 3, the client's emotional, behavioral, and cognitive conditions and complications. For clients with a risk level of 3 who have co-occurring mental health and substance abuse disorders as described under this subpart, the placing authority is required to "authorize integrated chemical and mental health treatment services provided by a provider licensed under part 9530.6495 and 24-hour supervision."

211. In its SONAR, the Department explains that it developed the risk descriptions and corresponding treatment planning decisions over the course of several years in consultation with a workgroup of chemical dependency professionals and a nationally known consultant. The Department maintains that the specific provisions of part 9530.6622 are needed and reasonable because they are the product of national expertise and the concerted efforts of many experienced chemical dependency professionals.¹⁰⁵

212. In a written comment received at the hearing, Steve Schneider suggests changing the language in subpart 3 to allow for referrals to programs that may not be licensed as a specialty program under part 9530.6495. Mr. Schneider commented that in rural areas there are few providers that are licensed under part 9530.6495, but there are treatment programs without this specialized license. He recommends changing this provision to allow programs that meet the general licensing requirements to accept clients with mental health disorders and substance abuse disorders. Mr. Schneider asserts that it would be contrary to a client's best interests to require that he or she go to a specialized program, which in rural areas may be a considerable distance from their home.¹⁰⁶

213. The Department maintains that license holders who meet the requirements of 9530.6495 and provide integrated chemical and mental health treatment are equipped to meet the needs and challenges of this specialized clientele. According to the Department, there is no other method of assuring that the license holder is qualified to treat persons with co-occurring disorders other than to require

¹⁰⁴ Ex. 28 at 23. Italic script shows additions offered after the rule was published.

¹⁰⁵ SONAR at 73-75.

¹⁰⁶ Ex. 18.

compliance with the licensing rule. Therefore, the Department declines to change subpart 3 as requested by Mr. Schneider.¹⁰⁷

214. The Administrative Law Judge finds the proposed rule to be needed and reasonable.

215. **Subpart 4. Dimension 4: readiness for change.** This subpart requires placing authorities to make placement decisions with reference to Dimension 4, a client's readiness for change. For a client with a risk level of 4 who is "noncompliant with treatment and has no awareness of addiction or mental disorder and does not want or is unwilling to explore change or is in total denial of the client's illness and its implications," the placing authority must authorize treatment services that include "service coordination and specific engagement or motivational capability."

216. In a written comment received before the hearing, Dannette Coleman, Vice President of Public Policy & Government Relations for Medica, recommended that, instead of requiring treatment services when the client is noncompliant and unwilling to change, the rule should provide for the possibility that such clients may not be ready to enter treatment or that after a period of time with no change, might not be appropriate for continued treatment. Ms. Coleman states that the rule should allow for other options than simply more of the same for those clients who have had many, many courses of treatment with limited or no change in their illness. Ms. Coleman also suggests that the rule provide for a change in placement or end of treatment if the client is not making progress or has stopped making progress. In Medica's opinion, the rules should allow for other alternatives when treatment is not effective or no longer effective.¹⁰⁸

217. In response to Ms. Coleman's comment, the Department states that subpart 4 allows placing authorities to have flexibility in determining the appropriate configuration and intensity of services. For those clients who are noncompliant or unwilling to change, low intensity and individualized treatment may be more appropriate than the typical highly intensive treatment experience.¹⁰⁹

218. The Administrative Law Judge finds the rule as proposed to be needed and reasonable.

219. **Subpart 5. Dimension 5: relapse, continued use, and continued problem potential.** This subpart requires placing authorities to make placement decisions with reference to Dimension 5, a client's relapse, continued use, and continued problem potential. After publishing the proposed rule and prior to the hearing, the Department proposed to modify Risk Description 2(B) to correct a typographical error. The Department has proposed replacing the word "consistently" with the word "inconsistently" so that Risk Description 2(B) will read: "The client has some coping skills *inconsistently* applied."

220. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modification simply corrects a typographical error and does not result in a rule that is substantially different from the rule as originally proposed.

¹⁰⁷ Ex. 27 at 26.

¹⁰⁸ Ex. 10.

¹⁰⁹ Ex. 27 at 27.

221. **Subpart 5. Treatment Planning Decision 3.** This subpart requires the placing authority, for a client with a risk description of 3, to authorize treatment services that include counseling services to help the client develop insight and recovery skills. After publishing the rule and before the hearing, the Department proposed modifying this provision by adding the phrase “*and may include room and board.*” The modified provision reads as follows:

The placing authority must authorize treatment services for the client that include counseling services to help the client develop insight and build recovery skills *and may include room and board.*

222. **Subpart 6. Treatment Planning Decision 3.** This subpart requires the placing authority, for a client with a risk description of 3, to authorize certain supportive treatment services and service coordination, and help in finding an appropriate living arrangement. After publishing the rule and before the hearing, the Department proposed modifying this provision by adding the phrase: “*and may include room and board.*” The modified provision reads as follows:

The placing authority must authorize the treatment planning decision described in 2 and service coordination, and help find an appropriate living arrangement *and may include room and board.*

223. The Department states that the modifications to subparts 5 and 6 are reasonable because clients may have problems with their recovery skills or in their living situations that are not as severe as the attributes described by Risk Description 4 in both dimensions 5 and 6. According to the Department, those problems might warrant removing the client from the client’s living situation or giving the client an opportunity to practice recovery skills in a protective setting. Because identifying which client will need to practice recovery skills in a protective setting is too fact-specific to define in rule, the Department states that it is reasonable to leave the determination up to the discretion of the assessor, who is the professional most qualified to make the decision. The Department contends that the modifications are reasonable because they allow a qualified assessor to make an appropriate decision about room and board for a client on a case by case basis. The Department further maintains that the modifications are not substantial changes because they correct an oversight in drafting and are consistent with the structure and tenor of the placement criteria in that they enhance the logical progression of treatment planning decisions from less to more intensive responses to client.¹¹⁰

224. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and it addresses concerns expressed by some commenting that the rule unduly limits eligibility for residential placement. This provision will give the assessor the discretion to decide whether to place a client in a program with room and board.

¹¹⁰ Ex. 9.

9530.6655 Appeals

225. **Subpart 2. Client's right to appeal.** The Department has amended this rule part because proposed provisions have created new rights for clients. Under this subpart, clients have the right to a hearing if they are denied assessments or placement within the timelines of the rule provisions.

226. In its SONAR, the Department states that it is necessary and reasonable to provide clients with appeal rights when the timelines are not met, because otherwise they would have no recourse and the timelines would not be enforceable.¹¹¹

227. In a written comment received February 20, 2008, Jeff Glover, LADC, Anthony Louis Center/On-Belay House (an adolescent treatment center), recommended that there be an appeal procedure for treatment centers as well. Mr. Glover explained that extended residential treatment centers are often at odds with counties that do not want to fund extended residential treatment or want to inappropriately shorten the length of stay for budgetary reasons. According to Mr. Glover, some counties seem to have an unwritten policy against placing clients in residential treatment even when clients clearly meet the criteria when assessed. Mr. Glover also suggests that the county or placing authority be required to respond to appeals by treatment centers in 3-5 business days, and Mr. Glover recommends that the hearings not be handled by DHS but instead by an independent agency.¹¹²

228. In its rebuttal to comments, the Department states that the rule provides an appeal process pursuant to Minnesota Statutes § 256.045, and this process establishes timelines including a timeframe by which counties must respond to appeals. The Department also states that the appeal is not decided by the same entity that made the initial decision. Rather, the appeal is heard by a state human service judge (a department employee) and decided by the Commissioner of Human Services.

The Department declines to adopt Mr. Glover's proposal to create an appeal process for providers to challenge county decisions. The Department notes that the powers of the placing authority are granted by statute, and giving the providers a right of appeal would limit the statutory right of the placing authority to make placement decisions. The Department maintains that issues relating to the contractual relationship of the parties should be addressed by the parties to the contract and not by the Department.¹¹³

229. The Administrative Law Judge notes that there appears to be a typographical error in 9530.6655, subpart 2, item B. The reference in item B to "9530.6615, subpart 1" should be changed to "9530.6655, subpart 1."

230. The Administrative Law Judge finds the proposed rule to be needed and reasonable. The modification to correct the citation in item B does not result in a substantial change to the rule as proposed.

¹¹¹ SONAR at 77.

¹¹² Ex. 24.

¹¹³ Ex. 28 at 26.

231. **Subpart 4. Considerations in granting or denying additional services.** This subpart identifies the factors that the placing authority must take into consideration in determining whether to grant or deny additional services. The Department has proposed deleting the existing requirement in item A that the placing authority consider “the usual and customary length of placement,” and adding a proposed item D, which requires the placing authority to consider “whether the client’s risk description in the dimensions being addressed by the service provider is 2 or greater according to part 9530.6622, subpart 4, 5, or 6.”

232. In its SONAR, the Department states that the proposed changes exemplify the move from “program focus” to “client focus.” According to the Department, it is reasonable to stop focusing on a program’s usual length of time and instead focus on whether or not the client has a continuing need for service.¹¹⁴

233. In a written comment, Jeff Glover objected to proposed item D because of the tendency he sees among some placing authorities to disapprove residential treatment. Mr. Glover recommends that item D not be approved and that instead extended residential treatment sites be initially authorized for 90 days, especially for adolescent clients.¹¹⁵

234. In its rebuttal to the comments, the Department declined to withdraw subpart 4 and stated that this provision is focused on the clients and relies on the clients’ risk descriptions to determine the specific need for additional services.¹¹⁶

235. The Administrative Law Judge finds the proposed rule to be needed and reasonable.

Minnesota Rules, Parts 9530.6800 to 9530.7031 (Rule 24)--The Consolidated Chemical Dependency Treatment Fund (CCDTF).

9530.7000 Definitions

236. **Subpart 5. Chemical dependency treatment services.** To improve readability, the Administrative Law Judge recommends that this subpart be revised as follows:

“Chemical dependency treatment services” means services provided by chemical dependency treatment programs licensed according to parts 9530.6405 to 9530.6505 or certified according to parts 2960.0450 to 2960.0490.

237. This revision would be needed and reasonable, and it would not substantially change the rule.

¹¹⁴ SONAR at 78.

¹¹⁵ Ex. 24.

¹¹⁶ Ex. 28 at 27.

9530.7015 Client Eligibility under the CCDTF.

238. **Subpart 5. Eligibility of clients disenrolled from prepaid health plans.** This subpart addresses payment for treatment if the client was on a prepaid health plan at the beginning of treatment, but becomes “disenrolled” during the course of treatment.

239. The Department proposed the following modification at the hearing:

Subp. 5. Eligibility of clients disenrolled from prepaid health plans.

A client who is disenrolled from a state prepaid health plan during a treatment episode is eligible for continued treatment service that is paid for by the Consolidated Chemical Dependency Treatment Funds (CCDTF) until the treatment episode is completed or the client is re-enrolled in a state prepaid health plan if the client meets the criteria in items A and or B. The client must:

- A. ~~be eligible according to subparts 1 and 2a; and continue to be enrolled in MinnesotaCare, medical assistance, or general assistance medical care; or~~
- B. be eligible according to subparts 1 and 2a; and B be determined eligible by a local agency under part 9530.7020.¹¹⁷

240. The Department states that the modification is necessary to clarify this subpart. According to the Department, the concept of disenrollment is used in two ways. It may mean that a person is disenrolled from a prepaid health plan but continues to be eligible for a health care program and is entitled to the benefits of the health care program. In such a case, the person remains eligible to have treatment paid for, and Minnesota uses the CCDTF as the payment mechanism. Or, it may mean that a person is disenrolled from a prepaid health plan but is ineligible for a health care program. In that instance, the person must meet the specific eligibility requirements of the CCDTF. The Department states that this modification will ensure that the rule applies to both circumstances. The Department asserts that this modification is not a substantial change because it clarifies the eligibility criteria and does not establish a new requirement that is substantially different than the requirement in the proposed rule.¹¹⁸

241. The Administrative Law Judge finds the proposed rule to be needed and reasonable, and the modification clarifies the rule without rendering it substantially different from the rule as originally proposed.

242. After reading and considering all of the comments, the Administrative Law Judge finds that the Department has demonstrated that the proposed rule is needed and reasonable. As stated above, an agency is entitled to make choices between possible approaches as long as the choice made is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the “best” approach, since doing so would invade the agency’s policy-making discretion. The

¹¹⁷ Ex. 27 at 29. Italic script shows additions offered after published version of the proposed rule. Strikethrough shows deletions offered after the published version of proposed rule.

¹¹⁸ Ex. 27 at 29.

question for the Administrative Law Judge is rather whether the choice made by the agency is one that a rational person could have made.¹¹⁹

243. The Department has shown that there is a need for the proposed rules and that the proposed rules are rationally related to the end sought to be achieved. Because the Department has the statutory authority to adopt the rule and has complied with the rule adoption procedure, and because the rule is not illegal or unconstitutional, the Administrative Law Judge concludes that the Department has demonstrated the need for and reasonableness of the proposed rules.

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

CONCLUSIONS

1. The Department gave proper notice of the hearing 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 rule and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii).
4. The Department has documented the need for and reasonableness of its proposed rule with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii).
5. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rule be adopted.

Dated: April 7, 2008.

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

¹¹⁹ *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

NOTICE

The Department must make this Report available for review by anyone who wishes to review it 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. If the Department makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

When the rule is filed with the Secretary of State by the Office of Administrative Hearings, the Department must give notice to all persons who requested that they be informed of the filing.