

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed
Adoption of Department of Human
JUDGE
Service Rules Governing Licensure
of Residential Programs for Persons
with Mental Retardation or Related
Conditions, Minnesota Rules, Parts
9525.0215 to 9525.0355

REPORT OF THE
ADMINISTRATIVE LAW

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson at 9:00 a.m. on Monday, November 14, 1988, in Room 500 North, Minnesota State Office Building, St. Paul, Minnesota. This Report is part of a rule hearing proceeding, held pursuant to Minn. Stat. §§ 14.131 - 14.20 to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable, and whether or not the rules, if modified, are substantially different from those originally proposed.

Maureen Bellis, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Minnesota Department of Human Services. The following Department employees appeared and testified in support of the proposed rules: James Loving, Licensing Division; Karen Peed, Residential Program Management; Martha O'loole, Rules Division; and Ed Skarnulis, Director of Developmental Disabilities. The hearing continued until all interested groups and persons had had an opportunity to testify concerning the adoption of the proposed rules.

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

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

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

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

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

FINDINGS OF FACT

Procedural- Requirements

1. On September 16, 1988, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) A copy of the proposed rules certified by the Revisor of Statutes.
- (b) The Order for Hearing.
- (c) The Notice of Hearing proposed to be issued.
- (d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
- (e) The Statement of Need and Reasonableness.
- (f) A Fiscal Note

2. On October 3, 1988, a Notice of Hearing and a copy of the proposed rules were published at 13 State Register pages 836-851.

3. On September 28, 1988, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. On October 7, 1988, the Department filed the following documents with the Administrative Law Judge:

- (a) The Notice of Hearing as mailed.
- (b) The Agency's certification that its mailing list was accurate and complete.
- (c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
- (d) An Affidavit of Additional Notice.
- (e) The names of Department personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
- (f) A copy of the State Register containing the proposed rules.

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

5. The period for submission of written comment and statements remained open through December 5, 1988. The hearing record closed on December 8, 1988, at the end of the third business day following the close of the comment period. Pursuant to Minn. Stat. § 14.15, subd. 2, the Chief Administrative Law Judge granted an extension for the completion of this Report through January 18, 1989.

statutory Authority

6. The statutory authority to promulgate the proposed rules is found at Minn. §§ 245A.09, subd. 1; and 252.28, subd. 2.

Fiscal Note

7. The Department states that adoption of these proposed rules will increase state and local public body spending by over \$100,000 in each of the first two years following adoption. A fiscal note was prepared pursuant to Minn. Stat. § 3.982. The Department estimates that during the 1990 and 1991 Fiscal Years the state will have additional expenditures of \$339,080. Counties will experience expenditures of \$11,824 during the same two fiscal years. This estimation of increased costs reflects new rule requirements concerning the training of residential program staff. 1988 legislation mandates that the state must assume the entire non-federal share of all medical assistance expenditures beginning January 1, 1989. The Administrative Law Judge finds that the Department has complied with the fiscal note requirements contained in the referenced statute.

B. The Association of Residential Resources in Minnesota (ARRM) strenuously argues that the fiscal note prepared by the Department is grossly inadequate. They contend that these proposed rules, if implemented, will require providers to spend nearly \$1 million in funding for training direct care staff and to meet other requirements imposed by the rules. ARRM states that, "we believe that the Department should be required to reestablish [sic] a new fiscal note after reviewing the costs

Minn. Stat. § 14.131 specifically requires that an agency prepare a fiscal note if required by section 3.982 "before the agency orders the publication of a rulemaking notice" Additionally, Minn. Stat. § 14.11 requires that an agency make a reasonable estimate of the expense to "all local public bodies" if the adoption of a rule will require the expenditure of public money. Minn. Stat. § 3.982 requires a fiscal note when state-mandated action "would force the local agency or school district to incur costs. Obviously, expenditures by providers, non-public entities, to comply with the proposed rules do not fall under any of these "fiscal note" statutes. Normally, cost concerns such as these must be addressed by an agency pursuant to Minn. Stat. § 14.115, subd. 2 which requires that certain "methods" for reducing the impact of a proposed rule on small business be considered by the agency. However, "service businesses regulated by government bodies" are specifically exempted from the application of Minn. Stat. § 14.115 pursuant to subd. 7(c) of that section. Consequently, the remaining avenue available for objection to the proposed rules based upon cost factors is the "reasonableness"

standard contained in Minn. Stat. § 14.50. As stated above, the Judge has found that the Department has complied with "fiscal note" requirements.

Modifications to the Proposed Rules-Made by the Department

9. Prior to the commencement of the hearing and at the end of the period for receipt of written comments, the Department made modifications to the proposed rules which are intended to clarify the purpose and intent of the rules and respond to issues raised by the public. These modifications are set forth below:

9525.0215 PURPOSE AND APPLICABILITY.

Subp. 2. Exclusions

A. residential programs serving - four or fewer persons unless the residential program certified as an intermediate care facility under 42 C-F.R., art 483;

9525.0225 DEFINITIONS.

Subp. 3. Advocate. "Advocate" has the meaning given it in Minnesota rules, part 9525.0015, subp., 3.

Subp. 4. Applicant

Subp. 5. Baseline measurement

Subp. 6. Case manager

Subp. 7. Child

Subp. 8. Commissioner

Subp. 9. County of financial responsibility

Subp. 10. Department

Subp. 11. Direct service staff

1ARRM argues further that the Administrative Law Judge should require that the Department adopt a plan to assure that the costs related to these proposed rules will be eligible for reimbursement. However, reimbursement standards are contained in other rules and would surely constitute a substantial change if now incorporated herein.

- Subp. 12. Family
- Subp. 13. Host county
- Subp. 14. Incident. "Incident" means any injury, or accident no-, seizure requiring physician's attention; an error in drug administration; a person's unauthorized absence from the residence; circumstances that involve a law enforcement agency; reports-of-abuse or neglect or a person's death.
- Subp. 15. Individual habilitation plan or IHP
- Subp. 16. Individual service plan or ISP
- Subp. 17. Interdisciplinary team
- Subp. 18. Intermediate care facility for persons with mental retardation or related conditions or ICF/MR
- Subp. 19. Legal representative
- Subp. 20. License
- Subp. 21. License holder
- Subp. 22. Living unit
- Subp. 23. Objective. "Objective" means a short-term expectation and its accompanying measurable behavioral criteria specified in the individual habilitation plan and provider implementation plan. Objectives are designed to result in achievement of the annual goals in a person's individual service plan.
- Subp. 24. Outcome. "Outcome" means the measure of change from the baseline measurement or the degree of attainment of specified goals and objectives that is achieved as a result of provision of service.
- Subp. 25. Person. "Person" means a person with mental retardation as defined in 9525.001 sub 2.0 or a related condition as defined in parts 9525.0180 to 9525.0190 who is receiving services in a residential program licensed under parts 9525.0215 to 9525.0355.
- Subp. 26. Professional support staff
- Subp. 27. Provider implementation plan or PIP

Subp. .28. Residential program

Subp. 29. Variance

subp. 30. Volunteer. "Volunteer" means an individual who under the direction of the license holder provides services without pay to persons or to-the residential program.

9525.0235 LICENSURE.

Subp. 4. Background study. Before a license is issued, a background study -an- mer4eted -by-t inn &s at a-i to totes . @t4ow 245AX. 04 - t4bd?v4s i4p -3T must be completed of the app Tic ant r- the-uppi4eent's- and a II emp loyees , contractors and unsupervised volunteers who-w ??I -4a*e -4i Fact- c4atact-w it 4- persoR*-;s mandated by Minnesota Statutes. sect-ion 245A.04. subdivision 3.

Subp. 6. Disqualification standards

A. The individual has a conviction of, has admitted to, has been charged with, is awaiting trial for, or there is substantial evidence that the individual has committed:

(1) an act of physical abuse or sexual abuse as defined in Minnesota Statutes, section 626.556;-eves-it The act ocouof&i - 4e*ore-?4o e+f@@v.e Aa+@f-t-4at- @a-ttft-e;

(2) an act of abuse as defined in Minnesota Statutes, section 626.557, subdivision 2, paragraph (d) , clauses (I) +a and (3) j- e.- vefi 44 -t@-ac@ +bat-statute;

B. The individual has a conviction of, has admitted to, has an adjudication of, delinquency for, has been charged with, is awaiting trial for, or a preponderance of the evidence indicates the individual has committed:

(1) neglect as defined in Minnesota Statutes, section 626.556 or 626.557 or abuse that is nontherapeutic conduct or illegal use of person or property as defined in Minnesota Statutes. section 626.557, subdivision 2. paragraph (d), clauses (2) and (4)

Subp. 7. Reevaluation of disqualification

C. In determining whether or not to set aside the-a disqualification based on subpart 6. item_B, the commissioner shall consider the risk of harm to persons, including the consequences of the event that led to the finding; the vulnerability of the victim of the event; the time elapsed without a repeat of the same or similar event; and documentation of successful completion of training or rehabilitation pertinent to the event.

D. Notice by commissioner of reevaluation decision. Within 30 days After the commissioner has received all information necessary to reevaluate a _disqualification the commissioner shall inform the applicant or license.

holder-and the individual involved in writing whether the disqualification has been set a-side or affirmed and the reasons for this decision.

4,E. The commissioner's disposition of a request for reevaluation of agency action. -id inistrative a disqualification under this part is the final

Subp. 11. Change in license terms. The license holder must apply to the commissioner and a new license must be issued before the license holder:

B. changes, sales, or transfers ownership or responsibility for the operation of the residential program;

Subp. 12. Commissioner's rights of access. The commissioner must be given access to the residential program, including grounds, residence, documents, residents, and staff in accordance with Minnesota Statutes, section 245A.04, subdivision 4 .

0925.0243. NEGATIVE LICENSING ACTIONS.

A. Under Minnesota- statutes. sections 245A.01 to 245A.16. failure to comply with the parts 9 5 2 5 - .021 - 5 - to --- 9525.0435 or -- the - terms of - I - licensure may, be cause for a negative licensing action. Negative licens@ actions shall be

taken in accordance with Minnesota Statutes, sections 245A.03 to 245A.09.

B. Within ten working days after the license holder receives notice that the license is made void, ignored or revoked. the license holder shall send a copy of the commissioner's action to their legal representative and each person's case manager.

9525.0245 PROGRAM REQUIREMENTS FOR LICENSURE.

Subp. 2. Service outcomes.

E. increase each person's opportunities to develop decision-making skills and to make informed choices in all aspects of daily living, including but not limited to choosing roommates and friends, purchasing personal possessions including clothing, and participating in program planning; and

Subp. 3. Least restrictive environment. Each person's participation, movement, communication, and personal choices must not be restricted only as necessary to protect the person and others, and as specified in the person's

ISP and IHP. Supervision and assistance must be provided only when necessary for the person to complete a task, to participate in an activity, or to protect the person or others.

Subp. 4. Level of participation. The license holder must document measures, as required by each person's +54-1 -HP, to increase the level of participation by the person in environments, activities, routines, and skills in which the person is unable to function independently. Measures include staff assistance or supervision, training methodologies, and adaptation to equipment or environments.

Subp. 5. Staff conduct. The license holder shall ensure that staff treat persons with respect, 4Q not-u-c,-e--4@ua@ t4at-emphosiney-a-genno4in-Ek@b4@t@, @4- protect the personal privacy needs of persons, and do not use -language that.-emphas-izes a Person's disability.

Subp. 8. Leaving the residence. As specified in each person's ISP or I-HP, each person must leave the residence to participate in daily education, employment, or community activities. The license holder shall ensure that the residential program is prepared to care for persons who are @o-i@ 4o-@t-t-e@ the resid -duriyq_the day_because of illness, work schedules,_gt@her-reas-ns.

9525.0255 PHYSICAL ENVIRONMENT.

Subpart 1. Living unit

C. The number of persons residing in a living unit must not exceed

G. Residential programs initially licensed after the effective date gf__@t@ 9525.,0215 to 9525.0355 must have a kitchen and dining_area in-each -lIVING_ynit.

Subp. 4. Locked doors. The residential program must -- not use
+locked
doors must-4ot-be use4-to restrict a person's movement or as a
substitute for
staff interaction with persons. Reors -mu *+ nemel R- u*A ant e4 +e
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Exterior doors may be locked to ensure the safetv_yf 2er,pas,

9525.0265 PROVIDER IMPLEMENTATION PLAN.

Subpart 1. Plan development. The license holder must develop a
p-ovider
implementation plan for each person. A person's IHP or portions of the
IHP
that meet-thi- itaqi-reme n t s o f _l h i s- p a r t- -m a v -b e -s u b s t-
i t u t e,d.- -f -o r -a l l qT_p o r l i o n s
of the_prpyidgr Implementation plan.

A. The plan must be developed by a team that includes the living unit supervisor, direct service staff designated by the license holder, and any other service providers individually designated by the person or the person's legal representative, the case manager, and the living unit supervisor. It is the policy of the Department of Health Services, and the Department of Social and Behavioral Health Services, to ensure that the plan is developed by a team that includes the living unit supervisor, direct service staff designated by the license holder, and any other service providers individually designated by the person or the person's legal representative, the case manager, and the living unit supervisor.

E. The license holder must provide the person or the person's legal representative and the case manager with a copy of the plan within 31-5-working days after the plan is developed or revised.

Subp. 2. Evaluation

A. Within 30 days after a person's admission the license holder shall conduct any additional evaluations needed to supplement the assessments conducted before admission, including evaluation of:

Subp. 3. Contents of provider implementation plan. The provider implementation plan must include:

A. written, measurable, behavioral objectives, including measurable criteria for mastery, that are designed to result in achievement of the residential service outcomes specified in the persons' current ISP and IHP and signed to the license holder,

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-e7 B. a baseline measurement of the person's skill level in each behavioral objective;

InC. the specific methods that will be used for each objective including information about techniques, social environments, and materials required to implement the objective;

P. the projected starting date and completion date for achievement

of each objeglive;

H. a description of how
port4&jpate-4n-4m,4emeR+ial-tbe-p4eR-iTklementation -of _the an involves
family anq_friends.

Subp. 5 Monthly eva4uation-review

C. sign and date the monthly ena4uat!tR--r,evi-ew.

Subp. 6. Quarterly evaluations. The license holder must provide the person or thp_pyrlqp@s legal -representative-and the person's case manager with a quarterly report containing a summary of data, an analysis of the data, and an evaluation of services actually provided, sufficient to determine the extent to which services have resulted in achievement of the goals and objectives of the person's ISP - and IHP and whether services are being provided in accordance with the ISP and IHP. The report must also state whether any changes are needed in the ISP or IHP.

Subp. 8. Coordination with case manager

A. A-*6taf f memb&e w ---- ve worked-with--the-person. shall participate in the interdisciplinary team meeting that develops an IHP for each person.

B. Within 30 days after an interdisciplinary team meeting, the license holder shall review the PIP in accordance with subpart I and implement changes an 44t*s 4pproved-in-writiRl 4y-the-fave man4gon in accordance with the IHP.

9525.0275 FAMILY INVOLVEMENT.

Subpart 1. Family participation. Unless restricti-ons-are contained in a i j-- -' - --' --- persgr@s ISP or I#Y.-+The license holder sha invite each person's family to participate in providing services to the person. Ner-yi@@t@ 4a@ @ (-4+o@@ to pfaside-eu,4 Examples of family participation are transportation, leisure activities, -religious observance, personal or professional services needed by the person, @lothing, holidays and vacations, and adaptive devices or equipment.

Subp. 2. Participation in planning. If the person is a child or if a person who is an adult or that person's legal representative gives permission, the license holder shall members of the person's family to participate

in the development and annual review of the PIP. A copy of the invitation must be placed in the person's file.

Subp. 3. Visiting. The license holder shall allow family members to visit at any time unless the_persop,_if an adult,_obj @@_or the persoil's +H-P,-
-ISP contains restrictions.

9525.0285 RESOURCES.

Subpart 1. General. The license holder shall ensure that each person retains and uses personal funds, unless restrictions are required in a person's ISP or IHP.

Subp. 3. Safekeeping. If a person's ISP-or or IHP requires the residential program to assist the person with safekeeping of money or valuables, the license holder shall:

A. @@ a-*ai4at4e-prpyide, if requested by the person or the person's case manager or legal representative, a statement itemizing the person's financial transactions;

C. return money and valuables in the license holder's keeping to the person or the person's legal representative, subject to restrictions in the IHP or ISP, within 44ve-three working days after requested.

Subp. 4. Prohibition

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9525.0295 ADMISSION AND DISCHARGE.

Subp. 3. Self-initiated discharge. Discharge may be initiated at any time by a person ptthe person's_legal e@ent tive or by a person's case manager ?a coulacc?4o*-w4th-the-p&ooo4-on-t@ @s94' @ eyal-veptQseptat!44.

Subp. 4. lov@r+t-ar@ @c4+arle-qis,harqe initi ted bv the license holder

Subp. 5. Discharge planning and follow-up

C. The license holder shall ensure the-person's--case-,manager is provided copies of the following records:

fl)_Ih.e-person's m-edica,l records;

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9525.0305 RESIDENI RECORDS.

Subp. 2. Admission records

-II-

C. the name, address, and telephone number of the person's legal representative or family member designated to be contacted in case of emergency or discharge; case manager; physician and dentist; and advocate, if any

D. whether the person is subject to guardianship or conservatorship and if under conservatorship a COPY of the order; Rec of the rights of the conservator and the rights retained by the person:

E. the language spoken or other means of communication understood by the person, interpreters if any and the primary language or other means of communication used by the person's family;

Subp. 3. Post-admission record keeping

A. A plan file that includes:

(3) The evaluations and reviews required in part 9525.0265, subparts 2 and 5.

B. Health records including for persons with seizures, In developed in conjunction with the person's physician that specifies the information relating to the person's seizures that must be recorded.

of the person's vast, with family members and a representative of the person. A quarterly summary of family involvement.

G. A record of other service providers that includes the name of the provider, the contact person, phone number, services being provided, services needing coordination with the residential program and the residential staff responsible for coordination.

Subp. 4. Access to records

D. direct service staff on the person's living unit and professional service staff on-sente4- u-nl e-ss-, - th.e--i nf ormation i s not relevant to carryipg out the -ISP -and IHP.

9525.0325 WRIIIEN POLICIES.

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Subpart_j,_ Generyl__poll@ ulrgtent. The license holder shall:
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A. deveippj@d_jMj@menl__W i@tt@p_@olicies coverigl_the areas in
oqbp@_3;

B. annualjy@evieW_@p"pdate as needed the written poli,jes and
inform all personl_or thefr__Ieqa__I___representative and case manager
when-.a
policy has been revised.

5qbp._2. _Availabilily of written_To_Lj@ies. The license holder
shall make
written Rolicles_aVdilable as follows:

A. inform al I persons or theiE_Ieqal_reprpsentativgs
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in writi __I t the residential program has written policies governing
the

_@a
areas listed in suyp,_I_apg_that,thes-e Policies will be Provided upon
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9525.0315 ADMINISIRAIIVE RECORDS.

The license holder shall maintain the following administrative
records and
shall make the records available for inspection by the commissioner:

K. a written personnel file for each employee and contract
consultant that includes:

(2) written job description or consultant contract that specifies responsibilities, qualifications necessary to perform the job, degree of authority to execute job responsibilities, and standards of job Performance;

95?5.0345 STAFFING REQUIREMENTS.

Subpart 1. Direct service staff. Direct service staff must:

B. Completion--of-orientation:

11) be able to communicate in the communication mode of the persons with whom the staff member is working; examples of communication modes are sign language and communication boards; and

12) demonstrate knowledge of and competence to implement the PIP for each person with whom the staff member is working on a regular basis.

Subp. 2. Living unit supervisor. The living unit supervisor must have the following qualifications in items A or B and items C and D:

A. meet the qualifications for a Qualified Mental Retardation Professional (QMRP) as defined in R. section 483.430La) and

Old A., B. and C. are renumbered as new B., Y. and

Subp. 5. Special staffing needs. The license holder must employ specially trained staff to meet special physical, communication, or behavior needs of each person in accordance with the person's I-SP and IHP.

9525.0355 STAFF ORIENTATION AND TRAINING.

Subp. 2. Orientation subjects. Orientation must include the following subjects:

A. a review and explanation of the plan file under-part-9525.0305, subp. 3, item A, of each person with whom the individual will be regularly providing services;

Subp. 4. Volunteers. The license holder must ensure that volunteers who provide direct services to persons must complete

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@_receive
the training_and orientation necessary to accomplish the tasks assigned
by the
license holder. The-4i,onse h-&]@ -Aa@ @v44e @ff4er@"h-e--g@er-fi-i@

Subp. 7. training subjects.

D. analyzing tasks and developing steymethods of instruction
and
intervention stratyqiel to achieve objectives and behavioral changes,

EFFECTIVE DATE. Parts 9525.0215 to 9525.0355 are effective six months after their notice_of_adoption_js_published in the State Register.

The above-modifications were made by the Department to clarify the proposed rules and respond to public comments. Except as specifically set forth in later findings, the Administrative Law Judge finds that the need for and reasonableness of the above-modifications has been demonstrated and that none constitute a substantial change from the rules as initially proposed.

Nature of the Proposed Rules

10. The current rule governing the licensure of residential programs for persons with mental retardation was adopted 10 years ago. At that time, the rule reflected accepted principals for the provision of services for mentally retarded individuals. However, since that time, the standards for services have changed dramatically. Currently, persons with mental retardation and other significant disabilities are being served in community settings rather than in institutional settings. The number of persons served in a single group living situation is decreasing. Consequently, the need for a new licensure-service rule had to be addressed. Additionally, the revision of the "old" rule was required pursuant to the negotiated settlement in Welsh v. Gardebring.

In July of 1986, rules were adopted governing case management for persons with mental retardation and related conditions. Those rules require that any person with mental retardation or a related condition who requires services be assigned a county case manager. All services which are funded through medical assistance must be accessed through the county social service agency. The local agency must determine the eligibility for services, assess needs, develop individual service plans, and develop individual habilitation plans. Once these plans have been developed, the local agency, through the case manager,

must either obtain services or develop services to address the persons needs.

The proposed rules establish procedures which will coordinate the activities of county social service agencies in providing case management to persons with mental retardation and related conditions. In addition, the proposed rules reflect the current standards of accepted practice. These proposed rules must be read in conjunction with Department of Health rules which govern health and safety components and federal regulations governing ICFs/MR.

11. Many of the proposed rule provisions received no negative public comment and were adequately supported by the statement of need and reasonableness. The Judge will not specifically address those rules in the discussion below and finds that the need for and reasonableness of those provisions has been demonstrated.² However, the record in this hearing

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

was quite large and many, many comments were received concerning the proposed rules. The modifications to the proposed rules set forth above in Finding 9 reflect the Department's consideration of many of the concerns raised. The Judge cannot, however, speak to ;very concern and suggestion raised in oral testimony and written comments. Rather, the Judge will primarily discuss below specific issues concerning the need for, reasonableness of, or statutory authority for the proposed rules. Additionally, the Judge may "suggest" that the Department adopt certain modified language if it appears in the record that the Department has not fully considered the modification proposed.³

Discussion of the Proposed Rules

12. Part 9525.2010 DEFINITIONS, subp. 17. Incident - this definition was modified as set forth above in Finding 9 in response to public comments and to make the definition consistent with the definition of Incident contained in modified proposed Rules 9525.2010, subp. 17 (Rule 42). The Minnesota Disability Law Center commented that the Department's proposed modification to delete "reports of abuse or neglect" from the definition is not appropriate. The Center contends that including reports of abuse or neglect within the definition of "Incident" ensures that those reports will be maintained in the plan file and acted on appropriately. The Department states that this language has been deleted because reports of abuse or neglect are handled separately under Minn. Stat. §§ 626.556 and 626.557 and rules governing reporting of maltreatment of children and vulnerable adults. The Judge finds that the Department has demonstrated the need for and reasonableness of the proposed definition, as modified, however, he does suggest that the "reports of abuse or neglect" language be retained to highlight the importance of dealing with those situations. (This same suggestion was made in the report on proposed

Rule 42 dated January 9, 1989.)

13. Part 9525.2020 LICENSURE -- This proposed rule requires that a background study of applicants and employees be conducted pursuant to Minn. Stat. § 245A.04, subd. 3 prior to licensure. Additionally, the rule specifies "disqualification" standards which include convictions of, admissions to, being charged with, is awaiting trial for, or substantial evidence that an individual has committed any of a number of specified criminal acts. The rule further provides that the Commissioner will make a redetermination of a disqualification based on standards listed in the rule. The Department testified at the hearing that they are proposing legislation which would modify the "background check" requirement now mandated by statute. At the present time, OHS has suspended implementation of procedures to conduct background studies.

The Judge wants to make clear that it is not his function to redraft the proposed rules based upon arguments that a better rule would result if a different conceptual approach was used. Those arguments are more appropriately made and considered during the initial drafting process. At this point, Minn. Stat. § 14.50 mandates that the Judge make determinations concerning statutory authority, compliance with procedural and substantive provisions of law, and whether the agency has demonstrated the need for and reasonableness of the proposed rules.

The Association of Residential Resources in Minnesota (ARRM) and several other commenters strenuously object to this proposed rule based on alleged violations of Minn. Stat. ch. 364, the Criminal Offender Rehabilitation Act, Title VII of the Civil Rights Act, the Fourteenth Amendment to the United States Constitution, and Minnesota employment case law and statutes.⁴

The Judge first points out that Minn. Stat. § 245A.04 requires that a background study of applicants be completed before a decision to grant or deny an application can be made. That study must include "criminal conviction data, arrest information, reports about abuse or neglect of children or adults, and investigation results available from local, state and national criminal record repositories" Minn. Stat. § 245A.04, subd. 3. Minn. Stat. § 245A.04, subd. 6 specifically requires the Commissioner of Human Services to promulgate rules to include "disqualification standards". When those standards have been promulgated "the provisions of chapter 364 do not apply to applicants or license holders" The statute further provides that in taking any action against a license, the Commissioner shall evaluate, "information about the character and qualifications of the personnel employed by the applicant or license holder." Minn. Stat. § 245A.04, subd. 6.

Very similar disqualification rules are currently being implemented and enforced by DHS with regard to family day care licenses and family foster care licenses. See, Minn. Rules pt. 9502.0335 and 9545.0090. Those rules, and the proposed rule, set forth a rational standard that one who has been involved in certain types of criminal activity poses an inappropriate risk to vulnerable individuals. This is true even if there is only a reasonable basis to support involvement in criminal activities. The Judge cannot conclude that on its face, the rule violates Title VII, the Fourteenth Amendment or Minnesota employment law. These issues will have to be raised in an appropriate tribunal where a complete record can be made to support the allegations now argued. The Judge finds that the need for and reasonableness of the proposed rules have been demonstrated (with the exception noted in the next Finding)

and that the proposed rules, on their face, are not in conflict with substantive law.

14. Part 9525.2020 LICENSURE -- As stated above in Finding 13, this proposed rule permits disqualification from employment on the ground that an individual, at any time in his/her life, has been "charged with" any of the crimes listed. See, Subp. 6, A. and B. The Department states in its Statement of Need and Reasonableness that this standard is appropriate because it is "based on the premise that the person who has committed one of the acts listed, or possesses one of the traits described, is not a person whom the state should license to serve vulnerable adults or children." SNR at pp. 10-11. The determination that the "charged with" standard is a sufficient basis, standing alone, to assume that one has committed acts or possesses criminal traits is arbitrary. A person may be mistakenly charged with a crime, or be completely exonerated after further investigation or even a trial. In those situations, the reasonableness of the rule has not been demonstrated by the Department.

The above-defect can be corrected by changing the language in the rule (Subp. 6, A. and B.) to read:

⁴These issues are discussed further in a Memorandum attached to this Report.

. . . has been charged with and is awaiting trial for

15. Part 9525.0265, subp. 3 -- This rule sets forth the required "contents" of the provider implementation plan. The Disability Law Center argues that this subpart should be completely rewritten because the language does not include standards by which the Department could enforce the requirements effectively. The Department has modified this subpart as set forth above in Finding 9 to include objective criteria. As modified, the Judge finds that the need for and reasonableness of this provision has been demonstrated by the Department.

1b. Part 9525.0265, subp. 5A. -- This proposed rule requires that the living unit supervisor monitor a person's performance in achieving PIP objectives and shall "modify the methods used to implement the plan if indicated by objective measurements of performance." The Disability Law Center contends that this provision is in conflict with Minn. Rules pt. 9525.0105, subp. 7, which requires that methodologies identified in the IHP cannot be modified unless "authorized by the case manager and agreed to by the person with mental retardation or the person's legal representative, if any." The Department states that there is no conflict between the rules; that the "issue is the level of control exercised respectively by the case manager and the residential program."

The Judge agrees with the Disability Law Center that there is a conflict between Minn. Rules pt. 9525.0105 and proposed Rule 9525.0265, subp. 5A. Obviously, modifications which may be ordered by the living unit supervisor pursuant to the proposed rule may affect the methodologies contained in the IHP. This "conflict" can be resolved by adding a new paragraph D. to read:

Subp. 5.

D. comply with the requirements of Minn. Rules pt. 9525.0105, subp. 7 if the monthly review results in a modification of the objectives or methodologies identified within the IHP.

17. Part 9525.0295 ADMISSION AND DISCHARGE -- This proposed rule requires

that license holders have written policies which govern the discharge of persons from the residential program. If the discharge is initiated by the license holder, the licensee must determine that the residential program is unable to meet the person's needs. Notice must be given to the person at least 30 days before the planned date of discharge. The proposed rule does not, however, provide for any kind of a review process to validate or invalidate the determination that the program is "unable to meet the person's needs . "

The Disability Law Center strenuously argues that pursuant to the Department's rulemaking authority, it should modify this proposed rule to include an appeal process for a person whose services are proposed to be terminated. Because the affected "persons" are totally dependent upon the services provided in order to remain in the community, the Center argues that an appeal process is critical to ensure that indiscriminate termination of services at the whim of the provider does not occur.

The Department argues that: (1) there is no statutory authority for the Commissioner to adopt rules which provide a hearing process for a person whose services are proposed to be terminated; (2) the hearing process now provided in statute pursuant to Minn. Stat. § 256.045 does not apply to "private" service providers; and (3) even if there was authority to promulgate a "hearing process" rule, such a modification would be a substantial change to the rules as initially proposed. Additionally, the Department states that it is now preparing legislation to have this issue resolved during the 1989 session.

The Disability Law Center submitted two district court decisions and several orders of the Commissioner which state that the Commissioner has authority to stay demissions from service providers. The Department contends that these district court decisions are not controlling and that the Commissioner has since repudiated the position that she has authority to order a hearing procedure to require validation of a demission by a private service provider.⁵

The Judge has concluded that Minn. Stat. § 245A.09, which provides that the Commissioner "shall adopt rules under chapter 14 to govern the operation, maintenance, and licensure of programs . . .", would authorize the promulgation of rules mandating a "hearing process" if a proposed demission were contested by the recipient of services. Obviously, the recipients of services are very vulnerable individuals who may otherwise be institutionalized if the services were not being provided. "Maintenance" of the services is critical to the "person's" existence in a community-based setting. Statutory authority contained in Minn. Stat. § 245A.09, subd. I must be read to effectuate the intent of the waived service program and to preserve its integrity. The Commissioner could propose a rule which requires a hearing using the procedures set forth in Minn. Stat. § 256.045. However, the Judge agrees with the Department that modification of these proposed rules at this point to include a "new" hearing procedure which is mandated for all contested

demissions would be a substantial change to the rules as initially proposed. This new requirement would surely invite comment from many service providers who, pursuant to the proposed rules, have discretion on the issue of demission. lee, Minn. Rules pt. 1400.1100. Consequently, no hearing rule may be promulgated at this time.

18. Part 9525.0295, subp. 4 - Several commenters, including the Disability Law Center, argued that the 30-day notice requirement should be changed to 180 days because of the difficulty in finding "substitute" service providers. They contend that 30 days is insufficient time to make alternative service arrangements which may determine a "person's" ability to remain in a community-based setting. The Judge finds that absent an appeal provision, the Department has not demonstrated that a 30-day notice is reasonable. However, the record does not show that 180 days is the minimum necessary to find alternate services. In order to correct this defect, the rule must be modified to provide at least a 60-day notice for the termination of services.

5The Statement of Need and Reasonableness states that the requirement for written discharge policies is reasonable in case a "person questions a discharge decision." SNR at 33.

If so modified, the proposed rule has been shown to be both needed and reasonable.6

19. Part 9525.0305, subp. 2G. - This provision requires that "upon admission" the license holder shall develop a record for a person which contains, in part, a copy of the person's IHP. However, pursuant to Minn. Rules pt. 9525.0105, the IHP is not developed until 30 calendar days after services have been authorized by the county. The ISP is developed as soon as a person applies for services. Consequently, the Disability Law Center contends that the term "IHP" should be stricken from the proposed rule and substituted with "ISP". The Department does not sufficiently explain why the IHP, and not ISP, is contained in this rule. The Judge finds that the reasonableness of this provision has not been demonstrated. To correct this defect, paragraph G. could be amended to read:

Copies of the person's ISP, IHP if developed, and supplemental reports

As modified, the need for and reasonableness of the proposed rule has been demonstrated.

20. Part 9525.0305, subp. 4 Access to records -- This proposed rule specifies that certain "people" have access to a person's records. The rule does not, however, include the ombudsman for mental health and mental retardation as someone who is specified to have access to a person's records. The Association for Retarded Citizens (ARC) recommended that the ombudsman be included in this rule. The Department stated that such an inclusion would require a change in the Government Data Practices Act.

The Judge points out that recent amendments to Minn. Stat. § 245.94, subd. I(e) state clearly that, "the ombudsman is not required to obtain consent for access to private data on clients with mental retardation or a related condition." Consequently, the ombudsman for mental health and mental retardation should be added to this rule as one who is permitted access to a person's records. This Finding is only a suggestion, however, and should not be read as a defect in the proposed rule.

21. Part 9525.0345 STAFFING REQUIREMENTS -- This proposed rule sets forth

the number of staff necessary to provide services and qualifications for those staff. The proposed rule requires that all "direct service staff" must be at least 18 years of age. The Department states that this age requirement is reasonable because it will mean that all staff are "legally adults and responsible as adults in providing services to the persons in the residential program." Several commenters contend that presently, direct service to persons is being provided very satisfactorily by staff who are under 18 years old. They argue that either the age restriction should be stricken or that a grandfather clause should be inserted for current employees. The Disability Law Center argues that the age restriction should be lowered from 18 to 16 and

6Several commenters questioned the failure of the rule to provide for an "emergency discharge" procedure. In response, the Department stated that if emergency-type situations should arise, a person would most likely be hospitalized, and a decision concerning discharge would be made later.

that other laws (child labor laws) should control the employment of staff under 18 years of age.

The Judge finds that the Department has not demonstrated the reasonableness of the 18-year-old age restriction. It is only an arbitrary determination of "responsibility" with no regard to the qualifications or abilities of the potential staff. In order to correct this defect, the age requirement should either be stricken or at least lowered to age 16. Competency and qualifications are what is required, not the number of birthdays a person has endured.

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

CONCLUSIONS

1. That the Department gave proper notice of the hearing in this matter.
2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.
3. That the Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) (ii), except as noted at Finding 16.
4. That the Department has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Findings 14, 18, 19 and 21.
5. That the amendments and additions to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of

Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4 as noted at Findings 14, 16, 18, 19 and 21.

7. That due to Conclusions 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. 14.15, subd. 3.

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

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

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

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated this day of January, 1989.

PETER C. ERICKSON

Administrative Law Judge

MEMORANDUM

ARRM initially contends that the proposed rule (disqualification standards) is in conflict with Minn. Stat. ch. 364, the Criminal Offenders Rehabilitation Act. Minn. Stat. § 364.03, subd. 1, states clearly that "notwithstanding any other provision of law to the contrary, no person shall be disqualified . . . from pursuing, practicing or engaging in any occupation for which a license is required solely or in part because of a prior conviction of a crime or crimes" However, Minn. Stat. § 245A.04, subd. 6 states that "the provisions of chapter 364 do not apply to applicants or license holders governed by sections 245A.01 to 245A.1b" The specific exception contained in Minn. Stat. § 245A was enacted subsequent to the general provision contained in Minn. Stat. ch. 364 and is controlling. See, Pillsbury Flour Mills Co. v. Great Northern Railway Co., 25 F.2d 66, 69 (8th Cir. 1928). Thus, ARRM's contention that the proposed disqualification standards conflict with Minn. Stat. ch. 364 has no merit.

ARRM next argues that implementation of the disqualification provisions will pose a burden to employers and have the potential to result in employee

litigation based upon unlawful termination or defamation. ARRM also contends that a "disqualification" ordered by the Commissioner may conflict with an employer's responsibilities pursuant to Minn. Stat. ch. 181.933. That statutory provision mandates that an employer must inform a terminated employee in writing of the truthful reason for the termination. However, subdivision 2 of that provision specifically prohibits an action for libel, slander or defamation by the employee against the employer. ARRM cites two cases, Frankson v. Design Space International, 394 N.W.2d 140 (Minn. 1986) and Lewis v. Equitable Life Assurance Company of the United States, 389 N.W.2d 876 (Minn. 1986) to support its position. However, neither of these cases is on point. The rule at issue would permit the Commissioner to disqualify a provider's employee from providing service to "persons", subject to the opportunity for reevaluation of the disqualification. Because it is the Commissioner's decision that the provider-employer must enforce, the Judge does not see any employer liability issues arising from this rule.

ARRM contends that implementation of the disqualification rule is in violation of the Federal Civil Rights Act because arrest records may be used

by the Commissioner to make a determination of disqualification. ARRM cites Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) and Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (D.C. Cal. 1970), as support for its position. In both Carter and Litton, the court prohibited the employer from inquiring into a job applicant's arrest record because the factor of arrest had no relationship to the job sought. In Griggs v. Duke Power Company, 91 S. Ct. 849, 853 (1971), the United States Supreme Court stated clearly that employment practices which operate to exclude members of protected classes must be grounded in business necessity.

Initially, it must be pointed out that the proposed rule does not include "arrests" as a ground for disqualification. As modified above in Finding 14, there must be a conviction, an admission, a charge with trial pending, or substantial (preponderance) evidence showing that the individual has committed a criminal act. Minn. Stat. § 245A.04, subd. 3 specifically permits the Commissioner to use "arrest information" as one factor in determining whether an individual is qualified to provide direct services to "persons". Subdivision 6 of that section goes on to state that "the Commissioner's evaluation shall consider facts, conditions or circumstances concerning . . . the well-being of persons served by the program . . . and information about the character and qualifications of the personnel employed by the applicant or license holder." The Judge has already found that the proposed rule has a rational relationship to the purposes set forth in the statute. The Judge specifically does not find that the proposed rule, on its face, is in violation of the Federal Civil Rights Act.

ARRM additionally states that the proposed disqualification rule is a violation of the due process clause contained in the Fourteenth Amendment to the United States Constitution. However, ARRM has not elaborated on this argument or provided cases to support its position. Consequently, the Judge will not address this constitutional argument any further.

P.C.E.

