

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of  
Amendments to the Rules of the Department  
of Human Services Governing the Awarding  
and Administration of Grants for Living  
JUDGE  
Services to Persons with Mental Retardation  
or Related Conditions (Minnesota Rules,  
parts 9525.0900 to 9525.1020)

REPORT OF THE  
ADMINISTRATIVE LAW

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on February 9, 1993, at 9:00 a.m. in Rooms I-A and 1-B of the Department of Human Services Building, 444 Lafayette Road, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1992) to hear public comment, determine whether the Minnesota Department of Human Services (hereinafter referred to as "DHS" or "the Department") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, assess whether the proposed rules are needed and reasonable, and determine whether or not modifications to the rules proposed by the Department after initial publication are substantially different from those originally proposed.

David Iverson, Special Assistant Attorney General, 52E Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Department. The Department's hearing panel consisted of Bob Meyer, Assistant Director of the Department's Division for Persons with Developmental Disabilities; Laura Plummer Zrust, Rules Coordinator with the Department's Rules Division; and Tom Fields, Grants Manager for the Department's Division for Persons with Development Disabilities.

Seventeen persons attended the hearing and signed the hearing register.

Many of the attendees gave testimony about these rules. The Department submitted changes to the proposed rules at the hearing. The Administrative Law Judge received 21 agency exhibits and two public exhibits as evidence during the hearing. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until March 1, 1993, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five working days were allowed for the filing of responsive comments. At the close of business on March 8, 1993, the rulemaking record closed for all purposes.

The Administrative Law Judge received several written comments from interested persons during the comment period. The Department submitted written comments responding to matters discussed at the hearings and comments filed during the twenty-day period. In its written comments, the Department proposed further amendments to the rules.

The agency 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 agency of actions which will correct the defects and the agency 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 agency may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the agency 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 agency 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 agency may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the agency 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 agency files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On December 7, 1992, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules certified by the Revisor of Statutes (Exhibit 3);
- (b) an estimate of persons expected to attend the hearing and an estimate of the expected duration of the hearing;
- (c) the Order for Hearing (Exhibit 8);

- (d) the Notice of Hearing proposed to be issued;
- (e) the Statement of Need and Reasonableness (hereinafter referred to as the "SONAR") (Exhibit 4);
- (f) a statement that additional discretionary public notice would be given; and,
- (g) a Fiscal Note.

2. On December 23, 1992, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. The Department also sent additional discretionary notice to the 87 Minnesota County Human Service Agencies and the members of the advisory committee which participated in the formulation of the proposed rules.

3. On December 28, 1992, a copy of the proposed rules and the Notice of Hearing were published at 17 State Register 1649.

4. On January 14, 1993, DHS filed the following documents with the Administrative Law Judge:

- (a) the Notice of Hearing as mailed (Exhibit 6);
- (b) a copy of the State Register containing the Notice of Hearing and the proposed rules (Exhibit 9);
- (c) a copy of the Notice of Solicitation of Outside Opinion published at 16 State Register 395 (1991) together with the materials received in response to that notice (Exhibits I and 2);
- (d) the Agency's certification that its mailing list was accurate and complete and the Affidavit of Mailing the Notice to all persons on the Department's mailing list and to those persons receiving discretionary notice (Exhibits 10-13); and,
- (e) the names of agency personnel and witnesses to testify for the Department at the hearing (Exhibit 16).

Statutory Authority

5. Minnesota Statutes § 252.275 (1992) governs the provision of semi-independent living services (hereinafter referred to as "SILS") for persons with mental retardation and related conditions. Under that statute, the Commissioner of Human Services is required to "establish a statewide program to provide support for persons with mental retardation or related conditions to live as independently as possible in the community." Minn. Stat. § 252.275, subd. 1. The Commissioner conducts this program by reimbursing counties for a portion of their expenditures made in providing SILS services and one-time living allowances to SILS participants. Minn. Stat. § 252.275, subds. 1 and 3. The statute further specifies that the Commissioner of Human Services "may adopt emergency and permanent rules in

accordance with chapter 14 to govern allocation, reimbursement, and compliance." Minn. Stat. § 252.275, subd. 6.

The proposed rules establish standards and procedures that will govern the provision of SILS services. The Administrative Law Judge concludes that the Department has general statutory authority to promulgate these rules.

#### Nature of the Proposed Rules

6. As the statewide SILS program now operates, persons with mental retardation or related conditions are afforded the opportunity to live in the community with assistance from licensed SILS providers. Such providers assist, counsel, and train SILS participants regarding skills and activities which are necessary to permit them to live in the community, such as money management, shopping, meal planning and preparation, personal hygiene, and other aspects of daily living. SILS providers generally enter into contracts with county boards as to what functions are to be provided and what rate of compensation will be paid for those services.

During the 1991 legislative session, substantial amendments were enacted to the statute that governs the provision of SILS services, Minn. Stat. § 252.275 (1992). Among other things, the statutory amendments revised the definition of SILS; authorized payment of a \$1,500 one-time living allowance to SILS participants for the purpose of securing and furnishing a home; established a 70 percent reimbursement rate for county expenditures; prohibited the reimbursement of costs in excess of the 85th percentile of hourly service costs for the biennium ending June 30, 1993; established formulas, limitations, and guaranteed floors with respect to the allocation of funds to counties; provided for the quarterly review of county program expenditures by the Commissioner of Human Services and reallocation of funds; and granted the Commissioner authority to recover, suspend, or withhold payments if a county board or a SILS provider fails to comply with the statute or DHS rules.

These statutory amendments necessitated changes in the existing DHS rules relating to SILS. The proposed rules revise various definitions contained in the existing rules and the statement of the rules' purpose and applicability.

The proposed rules also amend the provisions of the existing rules relating to criteria for participant eligibility, qualifications of SILS providers, residential location standards, contract requirements, reimbursement standards, county allocations, state reimbursement and payment standards, reporting requirements, variances, demonstration projects, repayment of funds, and penalties for noncompliance with applicable laws and rules.

#### Small Business Considerations in Rulemaking

7. Minn. Stat. § 14.115, subd. 2 (1992), requires state agencies proposing rules that may affect small businesses to consider methods for reducing adverse impact on those businesses. In its Notice of Hearing and SONAR, the Department indicated that it had considered the small business requirements in drafting the proposed rules. The Department asserted that these rules merely implement the statutory requirements of Minn. Stat. § 252.275 and that it would be contrary to the statutory objectives of the SILS program to adopt less stringent requirements for small businesses.

Notice of Hearing at 2; SONAR at 32. In addition, the Department maintains that SILS rules are exempt from the small business requirements pursuant to Minn. Stat. § 14.115, subd. 7(2). Id. That provision exempts from the small business consideration requirements "agency rules that do not affect small business directly, including, but not limited to, rules relating to county or municipal administration of state and federal programs

As mentioned above, the Minnesota Legislature established the SILS program as a statewide program to provide support for persons with mental retardation or related conditions to live as independently as possible in the community. While the Commissioner of Human Services has ultimate oversight of this program, county boards are responsible for the provision of SILS services licensed by the Commissioner. Minn. Stat. § 252.275 (1992). Because the proposed rules relate to county administration of the statewide SILS program, the exemption set forth in Minn. Stat. § 14.115, subd. 7(2) is properly applied in this case. The small business requirements of Minn. Stat. § 14.115, subd. 2 (1992) thus do not apply to these rules.

#### Fiscal Note

8. Minn. Stat. § 14.11, subd. 1 (1992), requires agencies proposing rules that will require the expenditure of public funds in excess of \$100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two-year period immediately following adoption of the rules. In its fiscal note, the Department stated that the proposed rule amendments are fiscally neutral and will not affect either state or local spending in the two fiscal years following their promulgation. DHS Exhibit 5 at 3.

The Department indicated in its fiscal note that one provider has predicted that fiscal impact will result from the proposed rule provision that SILS providers may bill only for direct contact hours, with collateral expenses such as travel and paperwork being built into the hourly rate. This provider contends that SILS providers currently perform collateral activities

related to the goals of SILS participants for which they are not compensated and that the hourly rate will more than double if all collateral activity is built into the hourly rate. Id. Upon review of these claims, the Department determined that the provider's prediction of significant fiscal impact was unlikely to occur. The Department emphasized that providers who are providing services for which they are not being compensated can currently seek redress through negotiations with the county contract manager. These avenues of redress are not affected by the proposed rule changes. The Department further determined that the inclusion of the costs of collateral activities into the hourly rate should not result in an increase in the overall costs of service for providers who are currently billing for collateral activities as separate units.

Although the proposed rules will affect the amount of money going to counties for reimbursement of expenses incurred in providing SILS services, the rules merely seek to implement funding requirements mandated by statute. The rules themselves do not require the expenditure of monies by counties. The provider who estimated fiscal impact did not provide further support for its position or show that the estimated impact would be in excess of \$100,000 per year. The Administrative Law Judge concludes that the Department has met the fiscal notice requirements of Minn. Stat. § 14.11, subd. 1 (1992).

## Impact on Agricultural Land

9. Minn. Stat. § 14.11, subd. 2 (1992), requires that agencies proposing rules that have a "direct and substantial adverse impact on agricultural land in the state" comply with the requirements set forth in Minn. Stat. §§ 17.80 to 17.84 (1992). Because the proposed rules will not have an impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1992), these provisions do not apply to this rulemaking proceeding.

## Outside Information Solicited

10. In formulating these proposed rules, the Department published a notice soliciting outside information in 16 State Register 395 (Aug. 19, 1991) and received responsive comments. In addition, an Advisory Committee which included Departmental representatives, SILS providers, SILS participants, advocates for persons with disabilities, and county social service agencies was formed to assist in the development of the proposed rules. The Advisory Committee met on three occasions to discuss the proposed rules prior to their publication in the State Register.

## Analysis of the Proposed Rules

11. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules has been established by the Department by an affirmative presentation of fact. The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the adoption of the proposed rules. At the hearing, the Department primarily relied upon its SONAR as its affirmative presentation of need and reasonableness. The SONAR was supplemented by the comments made by the Department at the public hearing and its written post-hearing comments.

The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. *Broen Memorial Home v. Minnesota Department of Human Services*, 364 N.W.2d 436, 440 (Minn.App. 1985); *Blocker Outdoor Advertising Company v.*

Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. App. 1984).  
The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

The Administrative Law Judge must also consider whether a rule "has been modified in a way which makes it substantially different from that which was originally proposed." Minn. Stat. § 14.15, subd. 3 (1992). In determining whether a proposed final rule is substantially different, the Administrative Law Judge is to "consider the extent to which it affects classes of persons who could not have reasonably been expected to comment on the proposed rules at the rulemaking hearing, or goes to a new subject matter of significant substantive effect, or makes a major substantive change that was not raised by the original notice of hearing in such a way as to invite reaction at the hearing, or results in a rule fundamentally different in effect from that contained in the notice of hearing." Minn. Rules pt. 1400.1100 (1991).

This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of the provisions that are not discussed in this Report by an affirmative presentation of facts, that such provisions are specifically authorized by statute, and that there are no other problems that prevent their adoption. Any change proposed by the Department from the rules as published in the State Register which is not discussed in this Report is found not to constitute a substantial change.

#### Proposed Rule 9525.0900 - Definitions

12. Proposed rule part 9525.0900 adds definitions of the terms "base allocation," "home- and community-based waived services," "individual program plan," "legal representative," "living allowance," "participant," "person with a related condition," "residential location," and "targeted allocation," and amends several definitions of terms contained in the existing rules. No comments were received on any definitions established under this rule part other than those discussed in Findings 13 and 14 below. These provisions of the proposed rules have been shown to be needed and reasonable.

#### Subpart 9a - Home- and Community-Based Waivered Services

13. As originally published in the State Register, a definition of "home- and community-based waived services" was included in subpart 9a of the definitional section of the proposed rules. The proposed definition would merely have indicated that the term was to mean services provided under DHS rules part 9525.1800 to 9525.1930. At the hearing, the Department proposed deleting this definition since the term does not appear in the rules as revised. It is needed and reasonable to delete this extraneous portion of the proposed rules. The deletion does not result in a substantial change.

#### subpart 18a - Residential Location

14. Subpart 18a of the proposed rules defines "residential location" to mean "the physical site, including the structure, where a participant resides." This revision was intended to replace a definition of "service site" in the existing rules which is proposed to be deleted. SONAR at 9. The SONAR indicates that SILS services are often provided in a community setting away from the participant's residence. The Department proposes to use the term "residential location" rather than "service site" because it avoids any inference that SILS services must be provided at the participant's home and thus is a more accurate reflection of actual practice.

The Association of Residential Resources in Minnesota ("ARRM") objected that the term "residential location" is poorly defined in the proposed rules. ARRM pointed out that it is not clear whether a multiple-unit apartment building or an entire apartment complex of free-standing multiple unit buildings would be considered a single "residential location." The proposed rules are not unduly vague as written and are not rendered unreasonable by their failure to include language relating to such structures. Subpart 18a thus is found to be needed and reasonable, as proposed.

Proposed Rule 9525.0935 - Residential Location Standards

15. Proposed rule 9525.0935 is composed of three subparts. Subpart I sets certain requirements with respect to the SILS participant's residence and the permissible density of SILS participants within a residential location. Subpart 2 establishes the dates by which counties must comply with subpart I in order to receive reimbursement for the provision of SILS. Subpart 3 allows county boards to request variances from the density limitations of subpart I.C. and sets forth the factors which must be considered by the Commissioner in reaching a determination regarding the variance request. Each subpart will be discussed separately.

Subpart I - Choice, Population, and Location

16. This subpart of the proposed rules originally was entitled "Population, location, and ownership of residential locations." The Department modified the title at the hearing to more accurately reflect the substance of the rule provisions and thereby avoid confusion. The title of the proposed rule part as modified has been shown to be needed and reasonable. The modification clarifies the content of the proposed rule and does not constitute a substantial change from the rule as originally proposed.

Items A through C of subpart I establish three requirements which SILS services must satisfy. Item A requires the participant or the participant's legal representative to make an informed choice of the residential location. In the SONAR, the Department stated that this provision is necessary to ensure that participants are afforded the opportunity to make an informed choice about where they live and asserted that it is reasonable and consistent with the goals of the SILS program to promote the participant's independence in this fashion. SONAR at 13. Several commentators, both county representatives and SILS providers, expressed support for this provision of the proposed rules. Some individuals expressed concern at the hearing that SILS participants are at times told where they should live if they wish to receive SILS services. Requiring informed choice regarding residential location

addresses this problem by ensuring that the participant or the participant's representative is expressly told of the right to choose. The Department has demonstrated that item A is needed and reasonable.

Item B prohibits the chosen residential location from being adjacent to or within a licensed group residential program. This item contains an exception for SILS services provided pursuant to part 9525.0950, subp. 5 of the proposed rules to persons who reside in intermediate care facilities for the mentally retarded ("ICFs/MR") in order to prepare them to move from the ICF/MR to a semi-independent living arrangement. Item B also specifies that a residential location where more than eight SILS participants reside must not be adjacent to another SILS residential location where more than eight participants reside. In the SONAR, the Department indicated that item B "is necessary to ensure that SILS participants are not denied their right to normal, integrated residential settings." SONAR at 14. The Department asserted that it is reasonable to include item B in the proposed rules because it discourages excessive concentration of facilities serving persons with mental retardation or related conditions. The Department indicated that the exception for SILS provided to individuals residing in ICFs/MR is necessary to clarify the relationship between item B and rule part 9525.0950, subp. 5. Id.

Item C provides that no more than eight SILS participants may be served per residential location unless fewer than 25 percent of that residential location's residents are receiving SILS. In the SONAR, the Department stated that item C serves the same objectives as item B. The Department noted that item C "modifies the standard previously found in in part 9525.0930, subpart 2" and asserted that "[t]he change is principally a format change." SONAR at 14. The Department asserted that it is reasonable to establish an upper limit on the number of participants who may be served per residential location to avoid high concentration and that the 25 percent exemption affords flexibility while preventing over-concentration. The Department further noted that "[t]he need for and reasonableness for this item as previously presented by the Department for part 9525.0930 remains applicable." Id.

Several commentators, including Minnesota SILS ProvidErS, ARRM, Client Community Services, Inc., Homes, Inc., the Harry Meyering Center, Inc., RESA, Homework Center, Inc., Home and Community Options, Inc., and Woodvale Management Services, Inc., objected to the population and density restrictions in items B and C as unnecessary, unreasonable, and infringing on participants' rights to choose where they wish to live. Many of these commentators asserted that it is degrading to SILS participants to be told where they may choose to live and emphasized that the restrictions will create a hardship in rural areas or small towns where options for affordable housing are limited and no public transportation exists. They also indicated that the confidentiality restrictions would make it difficult to enforce the provisions and expressed concern regarding which SILS participant would be told he or she had to move if the density restrictions were discovered to have been exceeded in a particular location. Other commentators, including the Minnesota Disability Law Center, ARC of Ramsey County, Yellow Medicine County Family Service Center, and the Human Services Departments of Ramsey, Redwood, Anoka, Mower, Winona, Blue Earth, and Polk Counties, expressed support for the Department's

inclusion in items B and C of limitations on density and location. They argued that the avoidance of large congregate sites at which SILS services are offered is consistent with the purposes of the SILS program to ensure normalization, integration into the local community, and the provision of services in the least restrictive environment.

As mentioned above, the Department relied in large part upon the existing rules as a basis for its inclusion of items B and C. In fact, at the hearing, members of the agency panel stated that "[s]ection B and section C are the standards that existed in the previous rule in the previous part. He have not changed these standards, we are simply moving them from one to the other." Hearing Transcript at 27; see also Transcript at 106-108 (items B and C "are not new standards" but "are existing standards"; the Department is merely "reformatting" the rule and adding "some clarification") and the Department's March 1, 1993, post-hearing comments at 4 (the standards set forth in items B and C "do not represent a change but rather are essentially the same as those restrictions currently contained under part 9525.0930, subpart 2" and "have been in force since 1985"). The existing rule provisions to which the agency panel referred provide as follows:

Subp. 2. Population and location of service sites. Services provided by the provider must meet the requirements in items A and B or items A and C:

A. no service site shall be adjacent to or within a group residential program licensed under parts 9525.0210 to 9525.0430 and no service site where more than four clients are served shall be adjacent to another SILS service site where more than four clients are served; and

B. no more than eight clients may be served per service site; or,

C. more than eight clients may be served per service site if fewer than 25 percent of the occupants of that service site building are receiving SILS.

Minn. Rule 9525.0930, subpart 2 (1991). While the wording of the existing rule provisions is somewhat unclear, \*/ they appear to have the following effect: (1) a SILS participant's service site may not be located next to a licensed group residential program; (2) a service site where more than four SILS participants are served may not be located next to another service site where more than four are served; and (3) while, as a general rule, no more than eight SILS participants may be served in a single service site, it is possible to serve more than eight if less than 25 percent of the occupants of that building are receiving SILS services.

Items B and C of the proposed rules impose limitations which are similar in several respects to the above provisions of the existing rule: (1) item B prohibits a SILS participant's residential location from being located adjacent to or within a licensed group program unless the ICF/MR exception applies; and (2) item C provides that no more than eight participants may be served per residential location unless fewer than 25 percent of the residents of that location are receiving SILS. Item B does, however, differ in one important respect from the current rules. It provides that a residential location where more than eight participants reside must not be adjacent to another SILS residential location where more than eight participants reside, rather than incorporating the current rules' prohibition of adjacent sites serving more than four clients each. The proposed rules thus are not limited

to mere format changes but would accomplish a substantive changes in the

\*/ The Administrative Law Judge reads the current rules to contain a complete prohibition against adjacent SILS service sites which serve more than four participants and to permit single, non-adjacent SILS service sites to serve more than eight participants as long as less than 25 percent of the residents in each site are receiving SILS. The recommended language proposed by the Judge to cure the defect found in this rule part is based upon the assumption that this is the proper interpretation of the language of the current rule. The Judge recognizes, however, that the current rules are ambiguous with respect to the applicability to adjacent service sites of the 25 percent exemption set forth in subpart 2.C. and it is possible to construe the existing rules to permit application of the 25 percent exemption to adjacent sites. Should the Department find support for the latter interpretation in the prior rulemaking proceedings regarding subpart 2 of the current rules, it may modify the language of the proposed rule to clarify the applicability of the 25 percent exemption in adjacent building situations.

existing rule. DHS did not discuss or provide any facts in its SONAR, at the hearing, or in its post-hearing comments supporting the need for or reasonableness of increasing the adjacent building standard from four participants to eight participants. The Department's failure to provide any support for this substantive change from the existing rule constitutes a defect in the proposed rule.

To cure this defect, the Department must retain the existing standard requiring no more than four participants in adjacent residential locations. The Administrative Law Judge suggests that the Department modify item B as follows:

B. a residential location must not be adjacent to or within a group residential program licensed under parts 9525.0215 to 9525.0355 (Residential Programs and Services for Persons with Mental Retardation for Related Conditions), except as permitted under part 9525.0950, subpart 5, and a residential location where more than four participants reside must not be adjacent to another SILS residential location where more than four participants reside . . . .

The four-participant limitation set forth in the existing rules was previously shown to be needed and reasonable and may be incorporated within the proposed rules' revised format. The suggested language does not constitute a substantial change. The Department has provided adequate justification for the retention of this proximity limitation as well as a proper basis for the inclusion of the remaining provisions of subpart 1. With the suggested modification, subpart I of the proposed rules has been shown to be needed and reasonable.

17. Client Community Services, Inc., Minnesota SILS Providers, Harry Meyering Center, and ARRM asserted that the proposed rule violates the 1988 amendments to the Fair Housing Act (42 U.S.C. § 3601 et seq.). The Department, joined by the Minnesota Disability Law Center and ARC of Ramsey County, opposed this view. The Department and the Minnesota Disability Law Center cited *Familystyle of St. Paul v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991) as support for their contention that the proposed rule does not

violate any statutory right to freedom from discrimination in housing. In *Familystyle*, the U.S. Court of Appeals for the Eighth Circuit held that state and local laws limiting the proximity of residential group homes for the mentally ill did not violate the Fair Housing Act, as amended. The Court stated:

Congress did not intend to abrogate a state's power to determine how facilities for the mentally ill must meet licensing standards. Minnesota's dispersal requirements address the need of providing residential services in mainstream community settings. The quarter-mile spacing requirement guarantees that residential treatment facilities will, in fact, be "in the community," rather than in neighborhoods completely made up of group homes

that re-create an institutional environment . . . . He cannot agree that Congress intended the Fair Housing Amendment Act of 1988 to contribute to the segregation of the mentally ill from the mainstream of our society. The challenged state laws and city ordinance do not affect or prohibit a retarded or mentally ill person from purchasing, renting, or occupying a private residence or dwelling . . . . [T]he dispersal requirement as part of the licensure process is a legitimate means to achieve the state's goals in the process of deinstitutionalization of the mentally ill.

Id. at 94. The Court further determined that the dispersal requirements did not have a disparate impact on the mentally ill or otherwise discriminate against the mentally ill. Indeed, the Court of Appeals noted that, "[h]ad the state or city intended to discriminate against the mentally ill, one sure way would be to situate all group homes in the same neighborhood." Id. at 94-95.

The proposed rules similarly seek to advance the statutory objective of allowing persons with mental retardation and related conditions to live independently in the community to the greatest extent possible. Among the goals stated in the SILS enabling legislation is to "increase the [participant's] opportunities to interact with nondisabled individuals who are not paid caregivers" and to "increase the [participant's] opportunities to use community resources and participate in community activities." Minn. Stat. § 252.275, subd. 1a (3), (4) (1992). While the proposed rules may impose some limitations on residence choices of individuals who wish to receive SILS services through their counties of residence, they do not prohibit such individuals from renting or buying a particular residence. Subpart I of the proposed rules has not been shown to violate the Fair Housing Act, as amended.

18. Several commentators also maintained that the proposed rule violates the federal Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) ("the ADA"). They did not cite any particular provision of the ADA that they believe would be violated by the proposed rule or explain in detail the basis of this assertion. The Department contends that the proposed limitation on overconcentration of SILS participants is in harmony with the ADA's basic objective to protect the rights of persons with disabilities.

Title II of the ADA protects qualified individuals with disabilities from exclusion from the benefits of services, programs, or activities provided by public bodies. See 42 U.S.C. §§ 12131-12134. The proposed rules concern a program that is specifically aimed at benefiting persons with developmental disabilities, and thus cannot properly be viewed as preventing disabled persons from gaining access to a service available to non-disabled persons. Moreover, the objectives served by the proposed rules--the integration of persons with mental retardation into the community and the discouragement of the development of large congregate sites or segregated neighborhoods--are consistent with the underlying intent of the ADA to remove barriers to disabled persons entering the mainstream of life.

The Department has demonstrated that some limitations on the numbers of participants in a residential location are needed and reasonable to accomplish the goals of the SILS program. The proposed rule has not been shown to

violate the ADA. With the modifications suggested above, proposed subpart I has been shown to be needed and reasonable.

19. An earlier draft of the proposed rule incorporated a new item D which would have prohibited SILS providers from providing SILS services to persons who resided in housing owned by the same provider. Upon further consideration, the Department determined that it may not have the proper authority to include this provision in the rules. Although the Department neglected to delete the discussion of this item from the SONAR, item D was in fact removed from the proposed rule before it was published in the State Register.

ARC Minnesota, ARC of Ramsey County, and the Minnesota Disability Law Center objected to the deletion of item D from the proposed rule. They urged the Department to include the provision in order to guard against the inherent conflict between the functions of providing service and serving as a landlord and to avoid situations in which SILS participants may be pressured to reside in provider-owned locations. Woodvale, ARRM, and RESA emphasized that providers often have become landlords for SILS participants because it is the only way to assure that SILS participants may obtain decent low-cost housing.

Whether the alleged conflicts of interest exist and are sufficiently troubling to warrant attention is a matter for the agency to determine in setting policy. Based on the information presented at the hearing, there is no basis for the Administrative Law Judge to rule that the Department is compelled to include such a prohibition in the proposed rules. The Department's failure to include item D thus is not a defect in the proposed rule .

#### Subpart 2 - Effective Date

20. Subpart 2 sets forth the dates by which the counties must achieve compliance with subpart I of the proposed rules in order to receive reimbursement from the state for the provision of SILS services. The required date is dependent upon whether the participant was determined eligible for SILS before or after the date on which the proposed rules are promulgated. No

one objected to this subpart of the proposed rules. The Department has provided adequate justification for the provision.

Subpart 3 - Variance from Residential Location Standards

21. The Department recognizes that some residential locations may be appropriate for SILS participants even though they include more than eight participants and do not meet the requirements for the 25 percent exemption.

In such instances, the county board may submit a request for a variance under

subpart 3. The proposed rule specifies that:

The commissioner's determination [regarding the variance request]

must be based on the following:

A. that the participant may move to another residence in the same community and continue to receive SILS; and

B. that granting the variance would not result in a high concentration of persons with mental retardation at the residential location, town, municipality, or county.

The Minnesota Disability Law Center supported the inclusion of the variance provision as adequate to address existing and unusual situations. Home and Community Options and Homework Center, Inc., commented that the variance provision was unnecessary and should be deleted.

Minn. Stat. § 14.05, subd. 4 (1992), authorizes agencies to grant variances to rules where such variances are not otherwise prohibited by law. Before granting a variance, however, the agency must "adopt rules setting forth procedures and standards by which a variance shall be granted or denied." I, . Discretionary power may appropriately be granted to public officials if the rule specifies a reasonably clear policy or standard which provides guidance in order that the rule "takes effect by virtue of its own terms and not according to the whim and caprice of the administrative officer." Anderson v. Commissioner of Highways, 126 N.W.2d 778, 780 (Minn. 1964). The Department in subpart I has established numerical population standards which could, in some circumstances, be inappropriate.

The Department has shown that it is needed and reasonable to include a variance provision within the proposed rules which would allow the Commissioner to waive the rule provisions in appropriate situations. As currently written, however, item A of the proposed rule is unduly vague and does not provide adequate guidance to the Commissioner regarding the standard that will govern the granting or denial of a variance request. First, it is unclear whether the Commissioner's determination that the participant "may move to another residence in the same community and continue to receive SILS" will have a positive or negative effect upon the consideration of the variance request. Second, it is unclear under what circumstances, if ever, a determination could be reached that an individual "may not" move to another residence. These deficiencies in item A constitute a defect in the proposed rule .

In its post-hearing comments, the Department indicated that the variance provision is drawn from part 9525.0930, subp. 3, of the existing rules but has been "reformatted by renumbering in order to make the rule more user-friendly." The existing rule provision indicates in part that the application for a variance "must document the lack of available rental

housing" and must show that the county's proposal for a variance "meets the individual needs of clients." The Administrative Law Judge thus concludes that the Department intended that the Commissioner grant a variance request if he or she determines that (A) there is no housing available in the community which meets the needs of the participant to which the participant may move and continue to receive SILS and (2) an impermissibly high concentration will not result under item B. The Administrative Law Judge accordingly suggests that the Department cure the defect in item A by modifying the language of that item along the following lines:

A. that there is no housing available in the same community which meets the needs of the participant to which the participant may move and continue to receive SILS; and . . . .

The standard incorporated in the new item A is drawn from the existing rules. The modification serves to clarify the factors which are to be considered by the Commissioner in evaluating variance requests. Subpart 3, as modified, has been shown to be needed and reasonable to permit the granting of variances to the density standards. The suggested modification will not result in a substantial change in the rule as originally proposed.

#### Proposed Rule 9525.0940 - County Board and Provider Contract

##### Subpart 1 - Written Contract Requirements

22. Subpart I of proposed rule 9525.0940 provides that county boards may receive reimbursement for the cost of SILS provided by others only if there is a written contract between the county board and the SILS provider that meets specified requirements. The proposed rule clarifies the provisions of the existing rule, cross-references Minn. Rules pt. 9550.0010 to 9550.0092, and adds several specific items which must be included in qualifying contracts. At the hearing, the Department modified the rule to require that contracts that are entered into or renewed after December 31, 1993 (rather than December 31, 1992), meet the requirements of items A and B of the proposed rule. The modification was made to correct an error in the rule as originally proposed. Subpart 1, as modified, is needed and reasonable. The change in dates is necessary to avoid retroactive application of the rule and does not constitute a substantial change.

##### Subpart 1a - Exception

23. Subpart 1a of the part 9525.0940 of the proposed rules specifies that a contract that meets the requirements of subpart 1 is not required for demonstration projects authorized under part 9525.0996 of the proposed rules. Demonstration projects are experimental SILS programs which explore alternative methods of SILS delivery. A three-party agreement (between the participant, provider, and county board) is required in lieu of a contract in

such instances. The proposed rules require that the three-party agreement include a description of the services to be provided, health and safety assurances, costs for providing services, duration of the agreement, conditions for termination of the agreement, and requirements for notice to the participant.

The Minnesota Disability Law Center urged that the notice requirement be clarified to ensure that the participant is aware that SILS are being provided under a demonstration project. The Department agreed that it is appropriate to provide affected participants and their legal representatives with such notice. In its post-hearing comments, the Department thus modified subpart 1a, item F, to incorporate a requirement that the three-party agreement contain "requirements for notice to the participant according to the agreement under part 9525.0996, subpart 3." The Department also proposed new language to be included in part 9525.0996, subpart 3, which is discussed in Finding 32 below. Proposed subpart 1a, as modified, has been shown to be needed and reasonable to permit flexibility in the provision of SILS services through demonstration projects and ensure adequate notice to participants. The modification suggested by the Department in the language of the proposed rule does not constitute a substantial change.

Proposed Rule 9525.0950 - Reimbursement Standards

Subpart I - limits on Unit of Service Activities

24. As discussed above, the statute which governs the provision of SILS services requires that the Commissioner of Human Services reimburse county boards for their eligible costs in providing SILS. Pursuant to proposed rule 9525.0940, the written contract between the county board and the SILS provider must specify the activities which are to be included in the "unit of service." "Unit of service" is defined in the proposed rules to mean one hour of SILS services "delivered according to the participant's individual program plan as limited in part 9525.0950, subpart I." Subpart I of proposed rule 9525.0950 limits the activities that are allowable as service unit components. The subpart specifies that direct contact activities, collateral activities, individual program planning activities, and staff member's travel time constitute activities for which staff time "may" be charged in determining a unit of service.

Numerous providers of SILS services, including Hoodvale, ARRM, Minnesota SILS Providers, Homework Center, Inc., Harry Meyering Center, Inc., Client Community Services, Inc., RESA, and Homes, Inc., urged that the word "may" in subpart 1 be changed to "shall" in order to require the components of items A through D to be included in every county contract with a SILS provider and thereby mandate reimbursement for each hour of service provided to SILS participants in any of these areas. These commentators pointed out that the provision of the enumerated services are required under applicable licensure requirements. They also stated that SILS providers are frequently called upon to provide guidance regarding personal crises, medical problems, economic changes, and other unexpected problems experienced by SILS participants. Some SILS providers may feel that they have an ethical obligation to assist the participant or are concerned about potential liability if they fail to provide assistance.

The Minnesota Association of County Social Service Administrators and the Human Services Departments of Winona, Mower, Polk, Yellow Medicine, Ramsey, Redwood, Anoka, and Blue Earth counties expressed their support for the proposed rule as drafted. They indicated that services should be reimbursed only if they are identified in the participant's individual service plan and authorized by the county case manager. They further asserted that making the change suggested by the providers would have a significant financial impact on the counties by mandating county expenditures for which no funds had been appropriated and emphasized that the Department's fiscal note had not taken such expenses into consideration.

The Department declined to make the suggested change in the language of the proposed rule based upon its determination that the specific components of a SILS contract are best determined by the parties to that contract, i.e., the particular county and SILS provider. The Department indicated that "Lilt is not necessary or reasonable for the Department to strictly prescribe the terms of each and every county SILS contract" and asserted that the provisions of the proposed rules "provide counties with adequate parameters from which to develop a SILS contract which best meets the needs of the SILS participants receiving services in their county." SONAR at 18-19. The Department further stressed that the current rules use the term "may" and include the standards

set forth in items A through C of subpart 1. See Minn. Rules 9525.0950, subp. 1 (1991). Item D, which pertains to transportation time, is the only new provision.

The proposed rules, like the existing rules, do not require that counties and SILS providers enter into contracts for any particular services but merely establish billing parameters. Counties and providers are given flexibility under the proposed rules to enter into contracts that they deem will best meet the needs of the particular SILS participants involved. The use of the term "may" in the proposed rules recognizes that the needs of participants vary and that it is appropriate for the contracting parties to bargain regarding which activities will constitute a unit of service for billing purposes. The use of the term "may" in subpart I has been shown to be needed and reasonable and does not vest undue discretion in the Commissioner. Once the parties enter into their contractual agreement to provide SILS services, the Commissioner is bound to reimburse the county for expenses which are appropriately incurred by the SILS provider under that contract, in accordance with applicable funding limitations.

25. Item D of subpart I specifies that a staff member's transportation time to and from locations where SILS are provided is an activity for which staff time may be charged in determining a unit of service. As originally proposed, item D stated that "[c]osts of transportation time between a staff member's residence and the location where SILS are provided may not be charged" and provided that "[c]osts of transportation between a staff member's residence and the location of the first site visit of the service day may be charged only when the distance is less than the distance between the first site visit and the provider's central office."

RESA, Inc., Minnesota SILS Providers, Homework Center, Inc., Client Community Services, Inc., ARRM, and Woodvale objected to the transportation

time limitations. They stated that the limitations are not appropriately applied to SILS staff persons who live far from the SIL provider's central office and suggested the inclusion of language permitting costs of transportation to be charged if the time exceeds the normal driving time between the staff member's residence and the location where SILS are provided.

The Department agreed in its post-hearing comments that the second sentence of item D as proposed is confusing and unnecessary. The Department has modified item D by deleting the second sentence of the item and adding the word "time" to the third sentence of item D. As modified, item D provides as follows:

D. Staff member's transportation time to and from locations where SILS are provided. Costs of transportation time between a staff member's residence and the location of the first site visit of the service day may be charged only when the distance is less than the distance between the first site visit and the provider's central office.

Pursuant to the proposed rule as modified, the costs of transportation time between the staff member's residence and the first site visit of the day is chargeable only if the distance from the residence to the site is less than the distance from the provider's central office to the site. The proposed

rule is consistent with the general rule that employees are not paid or otherwise reimbursed for the time they spend commuting to their place of employment. The proposed rule addresses an area of some controversy and confusion for counties and providers and is designed to ensure that SILS funds are used in a proper and prudent fashion. The Department has shown that it is needed and reasonable to clarify the extent to which transportation time is chargeable. The modifications proposed by the Department were made in response to comments made during the rulemaking process. They serve to clarify the rule and do not constitute a substantial change.

#### Subpart 2a - Semi-Independent Living Services

26. Subpart 2a lists twelve areas in which training and assistance services are reimbursable. Woodvale Management Services suggested that the rule clearly indicate reimbursement for such services is mandatory. The Department declined to make the suggested revision.

As discussed in Finding 24 above, the Department has provided adequate justification for permitting such contract issues to be the subject of negotiations between the county and the SILS provider. Subpart 2a has been shown to be needed and reasonable as proposed.

#### Proposed Rule 9525.0995 - County Variances

##### Subpart I - Generally

##### Subpart 2 - County Request for Variance

27. As originally proposed, subparts I and 2 would have permitted county boards to apply to the Commissioner for a variance to any portion of the SILS rules except the penalty provision contained in part 9525.1020. ARC Minnesota questioned whether the Department has the authority to grant a waiver to all of the SILS rules. The Minnesota Disability Law Center also objected to the availability of variances in such broad circumstances and requested that the provision be modified to clarify that the provisions of the SILS rules cannot be waived if the requirements are otherwise contained in state or federal law.

In its post-hearing comments, the Department acknowledged that variances

should only be available with respect to certain parts of the SILS rules. The Department accordingly has modified subpart I of the proposed rule to refer only to certain rule provisions:

Subpart 1. Generally. A county board may apply to the commissioner for a variance from parts 9525.0920, 9525.0930, 9525.0935, 9525.0940, 9525.0950 and 9525.0970 according to subparts 2 to 6.

The Department also deleted the words "from compliance with parts 9525.0900 to 9525.1000" from the first sentence of subpart 2. As revised, that sentence merely provides, "A county board may apply for a variance by submitting a written application to the commissioner documenting the reason the county is unable to comply with the identified requirement." Pursuant to the proposed rule as modified, variances will be available only with respect to the rules relating to participant eligibility criteria, approved provider standards, residential location standards, county board and provider contract requirements, reimbursement standards, and state reimbursement and payment.

The proposed rule no longer authorizes requests for variances from the rule parts which set forth definitions, a statement of the purpose and applicability of the rules, standards for the allocations of funds to counties, reporting requirements, variance provisions, standards for demonstration projects, and provisions for the repayment of funds.

The Department has demonstrated that it is needed and reasonable to permit variances to be granted with respect to only particular portions of the rules and thereby avoid compromising the underlying tenets of the SILS program. The modification was made in response to comments received during the rulemaking process and does not constitute a substantial change.

#### Subpart 4 - Notice to County Boards

28. As originally proposed, subpart 4 of the rules was entitled "Notice." In its post-hearing comments, the Department revised the title to state, "Notice to county boards." The revision more accurately reflects the content of subpart 4 and does not constitute a substantial change.

#### Subpart 6 - Agreement of Affected Participants

29. The Minnesota Disability Law Center also suggested that affected participants and providers receive notice regarding the terms of a variance. The Department agreed with the suggestion that participants be provided notice of variances to programs from which they are receiving services and added the following new subpart to the rule:

Subp. 6. Agreement of affected participants. A county board granted a variance under this part must obtain the agreement of each participant whose services will be modified by the variance and the participant's legal representative. The agreement must be in writing and must state the terms of the variance. The agreement must be signed by the participant and the participant's legal representative before services are provided under the variance.

The Department stated that this new language was intended to ensure that participants receive adequate notice of the variance and are able to make informed choices regarding their services. DHS maintained that this additional requirement is not a substantial change because it "does not affect the right of the county to a variance but only requires minimal administrative action on the part of the county once the variance is granted." Department's

March 1, 1993, response at 18.

The proposed subpart 6 encompasses far more than the provision of notice to participants, however. The proposed language would prohibit the provision of SILS services under a variance if a participant or a participant's legal representative refused to agree to the variance. In essence, the proposed subpart 6 would accord a SILS participant the power to veto a variance granted by the Commissioner. Subpart 6 of the proposed rules is defective because the Department has not demonstrated that such a stringent requirement is needed or reasonable. In addition, the Department's proposal of such a dramatic change

in the variance procedures at the end of the 20-day comment period failed to give adequate notice to all of the classes of affected persons who might otherwise have commented on the proposed rule. The change is a major substantive change which was not raised in such a way as to invite reaction at the hearing and results in a rule that is fundamentally different in effect from that contained in the Notice of Hearing. Such a change is a substantial change as defined by Minn. Rules pt. 1400.1100, subp. 2 (1991),

The Administrative Law Judge suggests that the following language be substituted in subpart 6 in order to ensure that both SILS participants and providers receive meaningful notice of any proposed variance:

Subp. 6. Notice to affected participants and providers. A county board applying for or granted a variance under this part must give written notice to each provider and participant whose services will be modified by the variance. Such notice must also be given to the participant's legal representative. The notice must state the terms of the requested or granted variance and, if the variance has not yet been approved, inform the notice recipients that the request has been submitted to the commissioner. The notice provided to participants and their legal representatives shall inform them of any known alternative SILS services or providers which may be available to them in the same community. If the variance has already been approved, the notice must be given to the provider, the participant, and the participant's legal representative before services are provided under the variance.

The suggested language would provide notice of variance requests and approved variances to both participants and providers, as suggested during the rulemaking proceeding. Pursuant to this approach, counties which have demonstrated the propriety of a variance request will be accorded the right to offer SILS under that variance. Providers or participants who have an objection to a requested variance will be able to notify the Commissioner of their concerns prior to the time the variance is granted. Participants and their legal representatives will be informed of known alternative SILS services or providers which may be available to them. The suggested language accomplishes these goals without unduly restricting the rights of a county board to seek a variance and is needed and reasonable. Since the new language does not grant a veto to the participant and imposes only a minimal administrative requirement on a county board, the suggested language does not

constitute a substantial change.

Proposed Rule 9525.0996 - Demonstration Projects

Subpart 1 - Request for Demonstration Projects

30. Subpart I of part 9525.0996 of the proposed rules allows county boards to submit requests to the Commissioner to demonstrate alternative methods of providing SILS. The proposed rule requires such requests for demonstration projects to include documentation with respect to seven specified topics which are important in evaluating the merit of the proposed

demonstration projects. As originally proposed, the rule indicated that counties may request a variance from the licensing and contract requirements under "parts 9525.0900 to 9525.1020" as a part of the proposed demonstration project. The Minnesota Disability Law Center suggested that the Department delete the reference to part 9525.1020 because the granting of variances with respect to that provision (which pertains to penalties for noncompliance with applicable laws and rules) would be inappropriate. In its post-hearing comments, the Department accepted this suggestion and modified subpart I to refer only to the availability of variances "under parts 9525.0900 to 9525.1000." This modification is consistent with the proposed rules governing the availability of county variances. The revision is needed and reasonable, was discussed at the hearing, and does not constitute a substantial change.

#### Subpart 2 - Approval of Demonstration Projects

31. As modified in its post-hearing comments, subpart 2 requires that the Commissioner's approval of requests for demonstration projects be based on the following conditions:

- A. services provided under the demonstration project must meet the individual needs and preferences of participants;
- B. the demonstration project must ensure that services will be delivered in the least restrictive environment;
- C. the request must be submitted according to subpart 1; and
- D. the demonstration project must comply with the appropriate state and federal laws governing services to persons with mental retardation or related conditions.

As originally proposed, item D of subpart 2 required compliance with appropriate state and federal laws governing services to persons with mental retardation or related conditions "unless otherwise waived." The Minnesota Disability Law Center objected to this language and questioned the Department's authority to waive state and federal laws. In its post-hearing comments, the Department agreed that item D could be misconstrued and deleted the waiver language to avoid possible confusion. The Department's

modification is consistent with subpart 1, item F. That provision requires that requests for demonstration projects include "assurances that the services will be provided in compliance with applicable state and federal law. The modification made by the Department in item D of subpart 2 ensures that demonstration projects must comply with all applicable laws, removes conflicting language from the proposed rule, and does not constitute a substantial change. Subparts 1 and 2 as finally proposed have been shown to be needed and reasonable.

#### Subpart 6 - Agreement of Affected Participants

32. The Minnesota Disability Law Center commented that knowing participation and approval is important where a new method of providing service is to be attempted. The Center suggested that the proposed rule be

revised to include a provision requiring participant notification and consent to participate in demonstration projects. The Department agreed with this suggestion and added the following new subpart 3:

Subp. 3. Agreement of affected participants- A county board approved to participate in a demonstration project under this part must obtain the agreement of each participant that will receive services under the approved demonstration project. The agreement must specify the terms of the demonstration project, the parts of 9525.0900 to 9525.1020 to be varied, and the manner in which services will be delivered. The agreement must be in writing and must be signed by the participant and the participant's legal representative before services are provided under the demonstration project.

The Department stated that this new language was intended to ensure that participants receive adequate notice and information in order that they may make an informed choice about services. The Department stressed that the notice requirement will merely impose a "minimal administrative task" on the counties. Department's March 1, 1993, response at 19.

Like subpart 6 of the rule provision relating to county variances (see Finding 29 above), proposed subpart 3 requires more than the mere provision of notice to participants. If a participant or a participant's legal representative refuses to agree, the participant cannot receive SILS under the demonstration project. The similar consent requirement contained in the county variance provision was determined to be defective. The Administrative Law Judge concludes, however, that the inclusion of new subpart 3 in this portion of the proposed rules does not constitute a defect. Because demonstration projects are, by definition, alternative approaches which may utilize experimental modes of delivering SILS services, it is appropriate to allow a participant to choose whether to receive such services. Moreover, the suggestion that both notice and consent be obtained from demonstration project participants was discussed at the hearing as well as in post-hearing comments. The Administrative Law Judge thus finds that the approval requirement is needed and reasonable and that the requirement that participant approval be obtained is not a substantial change within the meaning of Minn. Rule pt. 1400.1100, subp. 2 (1991).

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

#### CONCLUSIONS

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

2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14, subds. 1, 1a and 2 (1992), and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii) (1992), except as noted in Finding 21.

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii) (1992), except as noted in Findings 16 and 29.

5. The additions and amendments 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 (1992), and Minn. Rules pts. 1400.1000, subp. 1, and 1400.1100 except as noted in Finding 29.

6. The Administrative Law Judge has suggested action to correct the defects cited at Conclusions 3, 4, and 5 as noted in Findings 16, 21, and 29.

7. Due to Conclusions 3 through 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. 14.15, subd. 3 (1992).

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

9. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the 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 in accordance with the Findings and Conclusions in this Report except where specifically otherwise noted above.

Dated this            day of April, 1993.

BARBARA L. NEILSON  
Administrative Law Judge

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