

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY
DRIVER AND VEHICLE SERVICES DIVISION

In the Matter of the Proposed Rules
of the Department of Public Safety
Governing School Bus Drivers,
Minnesota Rules, Chapter 7414

REPORT OF
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on November 5, 1997 in St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.05 to 14.20 (1996) to hear public comment, to determine whether the Department of Public Safety (hereinafter DPS or Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the proposed rules, whether the proposed rules are needed and reasonable, and whether or not modifications to the rules proposed by the Department after initial publication are impermissible, substantial changes.

The Department's hearing panel consisted of Jane Nelson, Valerie Jensen and Wayne Jerrow.

The record remained open for the submission of initial written comments until November 25. Following a response period, the rulemaking record closed for all purposes on December 4.

This Report must be available for review to all interested persons upon request for at least five working days before the Department takes any further action on the proposed amendments. The Department may then adopt a final rule, or modify or withdraw its proposed amendments.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3, this Report has been submitted to the Chief Administrative Law Judge for his approval of an adverse Finding. If the Chief Administrative Law Judge approves the adverse Finding of this Report, he will advise the Department of actions which will correct the defect and the Department may not adopt the rule until the Chief Administrative Law Judge determines that the defect has been corrected.

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.

If 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 of the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On August 27, 1997, the Department requested the scheduling of a hearing and 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 Dual Notice of Hearing proposed to be issued.
- C. A draft Statement of Need and Reasonableness (SONAR).
- D. A Notice Plan, and a request for prior approval of the Plan.

2. On August 28, the undersigned Administrative Law Judge approved the Notice Plan.

3. On September 18, 1997, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the it for the purpose of receiving such notice. On that date, it also mailed a copy of the Notice, the Rules, and the SONAR to all members of the School Bus Safety Advisory Committee. Copies of the Notice and the Rules were also mailed on that date to an extensive list of persons and organizations who had expressed interest in the rules, or who the Department thought might be interested in them. See Ex. 15 for a list of these persons and organizations. In addition, copies of the Notice were sent to all Deputy Registrars, driver licensing agents, and driver examining sites around the state, along with a request to post the Notice in a conspicuous place. The Department also posted the Notice, the Rules and the SONAR on the Department's Web page. Finally, the Department faxed or sent a press release announcing the proposal of the rules and the

availability of the Notice, Rules and SONAR to all print and major electronic media in the state.

4. On September 22, 1997, the Dual Notice of Hearing and a copy of the proposed rules were published at 22 State Register 487.

5. On the day of the hearing, the Department placed the following documents into the record:

-- A copy of the Department's Request for Comment dated March 19, 1997 and a certificate of mailing the Request to the Department's rulemaking list and the School Bus Safety Advisory Committee.

-- A copy of 21 State Register 1413, March 31, 1997, containing the publication of the Request for Comment.

-- A letter, dated April 10, 1997, to the Minnesota Chiropractic Association, enclosing a draft of the rule, and indicating that the Department would propose no change in its existing policy requiring physicians to perform school bus endorsement medical examinations.

-- A memorandum from Major Dennis Lazenberry, State Patrol Division, dated July 15, 1997, indicating that the School Bus Safety Advisory Committee endorsed the draft rule amendments.

-- A letter dated September 13, 1997, to the Legislative Reference Library submitting the SONAR.

-- A letter from the Minnesota Chiropractic Association dated October 7, 1997 (received October 15, 1997) requesting a change in the rule or a public hearing on part 7414.1100. Enclosed were letters from 32 signatories requesting a public hearing, and various materials in support of the change sought by the Association.

-- A letter dated October 13, 1997 from the Minnesota Nurses Association commenting on part 7414.1100, but not requesting a public hearing.

-- All materials filed with the Administrative Law Judge by the Minnesota Chiropractic Association and the Department in connection with the Judge's Prehearing Order (discussed more fully below).

-- A letter dated November (sic -- should have been October) 16, received October 20, from the St. Paul Public Schools requesting a public hearing.

-- Twenty-six letters dated October 10, 1997, received October 22, 1997, from Hoglund Transportation, Inc. employees requesting a public hearing on part 7414.1100.

-- Various comments filed after the October 22 deadline.

-- The Department's Notice of Hearing which was sent to those who requested a hearing and other interested parties, dated October 28, 1997, with a list of all parties to whom the notice was sent.

All of the above-mentioned documents have been available for inspection at the Office of Administrative Hearings from the date of filing.

The initial period for submission of written comment and statements remained open through November 25, 1997, the period having been extended by order of the Administrative Law Judge to 20 calendar days following the hearing. The record finally closed on December 4, the fifth business day following the close of the comment period.

Prehearing Motion and Ruling

6. On October 14, 1997, the Department filed a letter with the Administrative Law Judge, asking for a determination of the validity of the requests for hearing which had been filed by the Minnesota Chiropractic Association and various persons associated with it. The gist of the Department's position was that the requests for hearing were invalid because they asked for a hearing on an issue which was not "fair game" for consideration in this rulemaking proceeding. Attached to the Department's letter were numerous documents outlining the history of the existing rule at issue and varying interpretations of it over the years. (DPS Exhibit 28)

7. The Administrative Law Judge faxed a copy of the Department's letter to the Minnesota Chiropractic Association and offered them the opportunity to comment on it.

8. On October 21, 1997, the Minnesota Chiropractic Association did file a response, generally opposing the Department's motion. Attached to the response were a number of documents supporting the Association's view.

9. On October 28, 1997, the Administrative Law Judge issued a Prehearing Order which held that he would not declare the requests for hearing to be invalid based upon the record before him at that time, but that he would review the matter further after the hearing when all affected parties had an opportunity to comment on the issue. This Order was faxed to the Department and the Association on October 28.

10. Upon further review, the Administrative Law Judge now decides that the rule at issue is "fair game" for comment. This is discussed in Finding 21 below.

Overview of Judge's Analysis

11. Minn. Stat. § 14.50 requires the Administrative Law Judge to take notice of the degree to which the Department has demonstrated the need for and

reasonableness of its proposed rules with an affirmative presentation of facts. Minn. Stat. § 14.14, subd. 2 requires the Department to make an affirmative presentation of facts establishing the need for and reasonableness of its proposed rules. That statute also allows the Department to rely upon facts presented by others on the record during the rule proceeding to support the proposal. In this case, the Department prepared an extensive Statement of Need and Reasonableness ("SONAR") to support the adoption of each of the proposed amendments. At the hearing, the Department supplemented the SONAR, both in prepared statements and also by dialogue with members of the public throughout the hearing session. The Department also submitted written post-hearing comments, both at the end of the initial comment period and at the end of the responsive comment period.

In addition to need and reasonableness, the Administrative Law Judge must assess whether the Legislature has granted statutory authority to the Department, whether rule adoption procedure was complied with, whether the rule grants undue discretion to Department personnel, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another, or whether the proposed language is impermissibly vague.

12. Most of the amendments proposed by the Department drew no criticism. This Report is generally limited to reviewing those proposed amendments that received significant critical comment or otherwise need to be examined. Accordingly, this Report will not discuss each subpart of each rule, nor will it respond to each comment which was submitted. Persons or groups who do not find their particular comments referenced in this Report should know that each and every submission has been read and considered. Moreover, because most 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 provisions of the rule that are not discussed in this Report, that such provisions are within the Department's statutory authority noted above, and that there are no other problems that prevent their adoption.

13. Where changes were made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally. Minn. Stat. § 14.05, subd. 2 and Minn. Rule pt. 1400.2240, subp. 7. Upon review, the Administrative Law Judge concludes that the changes proposed by the Department which differ from the rule as published in the State Register are not substantially different from the language published in the State Register.

Statutory Authority and Nature of the Proposed Rule Amendments

14. Minn. Stat. § 299A.01, subd. 6 grants the Commissioner of Public Safety the power to "promulgate such rules pursuant to chapter 14 as are necessary to carry out the purposes of Laws 1969, chapter 1129." Chapter 1129, art. 1, § 18, subd. 2 states:

All the powers and duties now vested in or imposed upon the Department of Highways and the Commissioner of Highways in regard to drivers' licensing and safety responsibilities as prescribed in Minnesota Statutes 1967, chapters 169, 170 and 171 are hereby transferred to, vested in, and imposed upon the Commissioner of Public Safety.

More particularly, Minn. Stat. § 171.321, subd. 2 authorizes the Commissioner of Public Safety to:

prescribe rules governing the physical qualifications of school bus drivers and tests required to obtain a school bus endorsement. The rules must provide that an applicant for a school bus endorsement or renewal is exempt from the physical qualifications and medical examination required to operate a school bus upon providing evidence of being medically examined and certified within the preceding 24 months as physically qualified to operate a commercial motor vehicle, pursuant to Code of Federal Regulations, Title 49, Part 391, subpart E, or rules of the Commissioner of Transportation incorporating those federal regulations.

15. The Administrative Law Judge concludes that, except as noted below, the Department does have statutory authority to adopt the proposed rule amendments.

Section-by-Section Analysis

16. Minnesota Rules Chapter 7414 governs the qualifications of an individual to obtain and maintain a school bus endorsement on the individual's state driver's license. Under Minn. Stat. § 171.321, the individual must first obtain a class A, B or C commercial driver's license with a school bus endorsement which authorizes the person to drive a school bus. The Department is seeking to amend existing rule part 7414.1100 by replacing the disease and condition specific language with a general reference to the examination form and medical certificate of Code of Federal Regulations, title 49, section 391.43 (f) and (g). The Department is also proposing to eliminate the phrase "reputable physician designated by the local school authority" and replace it with the phrase "physician licensed under Minnesota Statutes, chapter 147". The Department does not want to alter its long standing policy of allowing only physicians to perform the required physical examination and to complete the examination form and certificate. The only controversial issue in this proceeding was the Department's "physician only" policy and whether certain other health care practitioners should be allowed to perform these physical examinations.

7414.1100 Physician's Certificate

17. The Department has proposed the following amendment to existing part 7414.1100:

~~An applicant for a school bus driver's endorsement shall be in good physical and mental health, able-bodied, and free from communicable disease. As evidence of physical fitness and mental alertness, the applicant shall submit to a physical examination by a reputable physician designated by the local school authorities; and the physician's certificate of physical fitness and mental alertness shall accompany the application for school bus driver's endorsement when presented to the Department of Public Safety. An applicant for an initial endorsement on the applicant's driver's license to drive a school bus must be physically qualified to operate a school bus. As evidence of physical qualification, the applicant shall submit to the department the form specified in part 7414.1300 completed by a physician licensed under Minnesota Statutes, chapter 147, when the application for the school bus endorsement on the driver's license is made to the department.~~

18. In its SONAR, the Department stated that the proposed amendment to existing part 7414.1100 is intended to address three issues. (1) The existing disease or condition specific language is proposed to be replaced by a general reference to the examination form and medical certificate proposed in part 7414.1300 which adopts the form and certificate required by Code of Federal Regulations, title 49, section 391.43, paragraphs (f) and (g). The Department maintains that such replacement is reasonable because the Department is proposing to replace the physical qualifications in part 7414.1200 with the standards in Code of Federal Regulations, title 49, section 391.41. (2) The proposed amendment also clarifies that it is DPS that must receive the examination form and medical certificate. (3) The Department also proposes to eliminate the phrase "reputable physician designated by the local school authority" and replace it with the phrase "physician licensed under Minnesota Statutes, chapter 147". The Department explains that this proposed amendment is reasonable because it is not DPS or local school authorities that assess the reputation of physicians but the Board of Medical Practice under the provisions of Minnesota Statutes, chapter 147. (SONAR, pp. 23-24).

19. The majority of the comments received by the Department and the Administrative Law Judge came from members of the Minnesota Chiropractic Association (MCA), the Minnesota Board of Chiropractic Examiners (MBCE), and the Minnesota Medical Association (MMA). The controversy concerns the provision in part 7414.1100 which allows only licensed physicians to complete the required medical examination form for school bus driver endorsements.

20. Initially, the Department maintained that it was not opening up this rule to propose a change to the existing rule requirement that a physician perform the medical examination for school bus driver endorsements and thus the issue of who could perform them was not "fair game" for comment. According to the Department, the determination of who is qualified to perform the physical examination "has been addressed in previous rulemaking proceedings and determinations as to consistency

with existing state laws and rules". (SONAR, p. 13; DPS Exhibits 6, 28-1 to 28-11, and 41).

The MCA, in response, argued that the proposed language's reference to chapter 147 was indeed new language which opened up the issue for debate. Attached to the MCA's responses was a copy of a recent (April 1997) letter from Deputy Attorney General Lucinda Jesson affirming an earlier (May 1994) memorandum from Assistant Attorney General Robert Holley, which opined that the legislative history of Minn. Stat. § 148.01, subd. 3, coupled with a 1993 amendment to Minn. Stat. § 171.321, subd. 2, and a review of all past legislation, litigation and other materials compelled the conclusion that chiropractors could perform the examination and sign the certificate for MnDOT commercial motor vehicle operations. MCA argued that the language proposed by the Board was in direct contradiction of the statutes under the Jesson and Holley opinions, and the rule was "fair game" for comment.

21. The Administrative Law Judge now determines that the proposed language is arguably different enough from the existing language that the rule is "fair game" for comment and review.

Comments in Support of or in Opposition to Allowing Chiropractors to Perform the Required Physical Examination

22. The MCA challenges the Department's position that only physicians may perform the required medical examination for school bus driver endorsements. The MCA maintains that doctors of chiropractic should be allowed to perform the required physical examinations and sign the health certificates. In support of its position the MCA cites to the explicit language of Minn. Stat. § 148.08, subd. 2, which states that chiropractors shall be entitled to sign health and death certificates, and to the definition of "medical examiner" in the Code of Federal Regulations, title 49, section 391.05, which includes doctors of chiropractic, advanced practice nurses and physician assistants. In addition, the MCA points to advisory memoranda issued by Assistant Attorney General Robert Holley and Deputy Attorney General Lucinda Jesson which each reached the conclusion that chiropractors may perform physical examinations and sign corresponding health certificates for commercial motor vehicle drivers.

23. Since 1990, staff attorneys of the Attorney General's Office have issued conflicting advisory memoranda on the question of the authority of chiropractors to sign health certificates. These memoranda have not been in the form of official attorney general opinions and are advisory only. They do not have the force or effect of law, nor do they establish any legal precedent. The relevant memoranda are summarized as follows:

(a) On December 4, 1990, Jacquelyn Albright, Assistant Attorney General, submitted a memorandum to Gary Cunningham, Assistant Director of the Department's Driver and Vehicle Services Division, on the issue of whether chiropractors are authorized to sign school bus driver physical and health certificates. Based on a narrow interpretation of the scope of chiropractic practice under Minn. Stat. § 148.01, Ms. Albright concluded that chiropractors were not authorized to perform school bus driver physical examinations. (DPS Exhibit 50).

(b) On May 27, 1994, Melissa Wright, Assistant Attorney General, submitted a memoranda to Elizabeth Parker, attorney for the Office of Motor Carriers, on the question of whether chiropractors may sign medical certificates on behalf of motor carrier driver applicants. Ms. Wright construed the scope of practice of chiropractors to be limited to preparing or detecting a chiropractic condition. Consequently, Ms. Wright concluded that until the legislature authorizes chiropractors to conduct physical examinations for purposes other than to detect chiropractic conditions, the Office of Motor Carriers Services had a reasonable basis to reject medical certificates signed by chiropractors. (DPS Exhibit 49).

(c) On February 21, 1995, Robert Holley, Assistant Attorney General, submitted a memorandum to Larry Spicer, Executive Director of the Board of Chiropractic Examiners, on the authority of chiropractors to perform Minnesota Department of Transportation (MnDOT) physical exams. The memorandum provides a detailed analysis of the legislative history of section 148.01, subdivision 3, relative to a chiropractors' diagnostic authority. Based on his analysis, Holley concluded that doctors of chiropractic are authorized to sign MnDOT physical examination forms. (DPS Exhibit 26).

(d) By letter dated April 28, 1997, Lucinda Jesson, Deputy Attorney General, responded to concerns raised by Larry Spicer, Executive Director of the Board of Chiropractic Examiners, regarding these conflicting advice memoranda. Referring to Assistant Attorney General Robert Holley's earlier memo on the scope of chiropractic practice under Minn. Stat. § 148.01, Jesson concluded that the legislature did not intend to limit the chiropractic diagnosis to the detection of chiropractic conditions or to prohibit chiropractors from conducting physical examinations for a variety of purposes. Consequently, Jesson stated that it was the legal opinion of the Attorney General's Office that doctors of chiropractic have the authority to perform the necessary tests required by the MnDOT physical examination form and to sign the corresponding certificates. (DPS Exhibit 25).

24. In its remarks at the hearing, the Department emphasized that it has been the long-standing practice of the Department to have the medical examination for school bus driver endorsements performed by physicians only. The Department further stated that it cannot adopt rules which may be construed as expanding or interpreting the scope of practice of other health care professionals absent specific statutory direction. Consequently, the Department maintained that the most prudent course of action is to continue the current practice that a physician perform the medical examination. (DPS Exhibit 41).

25. On November 25, 1997, the Administrative Law Judge received post-hearing comments from Larry Spicer, Executive Director of the Minnesota Board of Chiropractic Examiners (MBCE). In his comments, Dr. Spicer argues that the issue to be determined is whether the Department has the legal authority to exclude chiropractors from performing physical examinations and signing health certificates in light of Minn. Stat. § 148.08, subd. 2; 49 C.F.R. 391.43; and the advisory memoranda of Assistant Attorney General Robert Holley and Deputy Attorney General Lucinda Jesson.

26. On November 25, 1997, the ALJ also received a response from the Minnesota Medical Association (MMA). The MMA supports the Department's proposed rules. In its post-hearing response, the MMA reiterated the comments presented at the hearing by Dr. Paul Sanders. The MMA contends that the examinations specified in Minn. R. 7414.1100 are thorough medical examinations requiring medical examiners trained in diagnosing and managing medical problems. According to the MMA, the scope of the examination falls within the parameters of the definition of the practice of medicine and falls outside the scope of chiropractic practice as defined by Minn. Stat. § 148.01, subdivisions 1-3. Consequently, the MMA argues that the examinations should be left to licensed physicians.

27. The Department also submitted post-hearing comments received by the ALJ on December 4, 1997. The Department argues that it has incorporated by reference only the set of physical qualifications contained in 49 C.F.R. § 391.41 and not the definition of "medical examiner" contained in 49 § 390.5. The Department insists that it has the discretion to select what provisions of the federal regulations it will incorporate by reference and that it does not have to follow the definition of "medical examiner" contained in C.F.R. § 390.5. Even so, the Department points out that the definition of a "medical examiner" in 49 C.F.R. §390.5 contains the qualification that the practitioner must be licensed, certified or registered "in accordance with applicable State laws and regulations". It is the Department's position that performing physical examinations is outside the scope of practice for chiropractors and consequently not in accordance with applicable Minnesota laws and regulations. The Department argues that it does not have the authority to determine or enforce the chiropractors' scope of practice.

Comments in Support of Allowing Nurse Practitioners to Perform the Required Physical Examinations

28. By letter dated October 13, 1997, the Minnesota Nurses Association (MNA) proposed that Minn. R. 7414.1100 be amended to allow Nurse Practitioners to perform the physical examination. According to the MNA, nurse practitioners are specifically hired by most medical clinics to perform basic physical examinations. Such examinations are within nurse practitioners' scope of practice. Moreover, all insurance companies and health maintenance organizations in Minnesota reimburse Nurse Practitioners for providing physical examinations. The MNA also points out that limiting the performance of the physical examinations to only physicians requires clinics and patients to use a more expensive health care provider.

29. On November 6, 1997 the ALJ received a letter from Linda Lindeke, Ph.D., R.N., C.P.N.P, in support of allowing nurse practitioners to perform the required physical examination of school bus endorsement applicants. Ms. Lindeke is an Assistant Professor at the University of Minnesota School of Nursing and has been an educator of nurse practitioners for nearly twenty years. Ms. Lindeke pointed out that Nurse Practitioners perform physical examinations and that such examinations are accepted both for high school athletes and as forensic evidence in child abuse trials. Ms. Lindeke contends that the Department's position that only physicians be allowed to perform the required physical examination is very regressive and not in step with current health care thinking. (DPS Exhibit 42).

30. The Department's position on these comments is the same as its position on the chiropractors: that the rule should not be fair game for debate, but if it is, then the appropriate resolution is physicians only.

Analysis of Part 7414.1100 as to Legality

31. The Department's specific statutory authority to promulgate the rules relative to school bus endorsements is contained in Minn. Stat. § 171.321, subd. 2 which states as follows:

The commissioner of public safety shall prescribe rules governing the physical qualifications of school bus drivers and tests required to obtain a school bus endorsement. The rules must provide that an applicant for a school bus endorsement or renewal is exempt from the physical qualifications and medical examination required to operate a school bus upon providing evidence of being medically examined and certified within the preceding 24 months as physically qualified to operate a commercial motor vehicle, pursuant to Code of Federal Regulations, title 49, part 391, subpart E, or rules of the commissioner of transportation incorporating those federal regulations.

32. In 1993, Minn. Stat. § 171.321, subdivision 2 was amended to compel DPS to accept federal motor carrier certificates from applicants for school bus endorsements in lieu of the medical examination required by Minnesota Rule parts 7414.1100 to 7414.1400. According to the Department, roughly twenty percent of the applicants for an endorsement present a motor carrier certificate. The Department states that it has interpreted section 171.321, subdivision 2 as requiring DPS to accept federal motor carrier certificates from school bus endorsement applicants residing in Minnesota if the motor carrier certificates were obtained within the past 24 months. (DPS Exhibit 41). The exemption governs intrastate school bus drivers if the applicant had a medical certificate or medical examination form issued under 49 C.F.R., part 391, subpart E within the past 24 months.

33. The examination form and certificate that must be submitted to the Department are specified in Minn. R. 7414.1300. This rule part states that the examination form and medical certificate must substantially comply with Code of Federal Regulations, title 49, section 391.43, paragraphs (f) and (g). According to the Federal Highway Administration (FHWA) regulations, the required physical examination for commercial motor vehicle driver applicants must be performed by a licensed "medical examiner". 49 C.F.R. § 391.43(a)(1).

34. Section 390.5 of the Code of Federal Regulations, title 49 defines the term "medical examiner" as:

[A] person who is licensed, certified and/or registered, in accordance with applicable State laws and regulations, to perform physical examinations. The term includes, but is not limited to, doctors of medicine, doctors of osteopathy, physician assistants, advanced practice nurses, and doctors of chiropractic.

35. In addition, Minn. Stat. § 148.08, subd. 2 provides:

Chiropractors shall be subject to the same rules and regulations, both municipal and state, that govern other licensed doctors or physicians in the control of contagious and infectious diseases, and shall be entitled to sign health and death certificates, and to all rights and privileges of other doctors or physicians in all matters pertaining to the public health, except prescribing internal drugs or the practice of medicine, physical therapy, surgery and obstetrics.

36. The scope of chiropractic practice is described in Minn. Stat. § 148.01, subd. 3 and includes:

. . . those noninvasive means of clinical, physical, and laboratory measures and analytical X-rays of the bones of the skeleton which are necessary to make a determination of the presence or absence of a chiropractic condition. The practice of chiropractic may include procedures which are used to prepare the patient for chiropractic adjustment or to complement the chiropractic adjustment. The procedures may not be used as independent therapies or separately from chiropractic adjustment. . . .

37. The Department maintains that its proposed rule part 7414.1100, which limits the completion of physical examination forms for school bus endorsements to physicians, is not in conflict with any statute. The Department contends that it is incorporating by reference only the medical examination form and certificate specified in 49 C.F.R. § 391.43 (f) and (g) and not the broad definition of “medical examiner” found at 49 C.F.R. § 390.5. The Department asserts that it is not compelled in this proceeding to apply all of the standards applicable to interstate motor carrier drivers to intrastate school bus drivers. However, even if the Department were required to follow the definition of “medical examiner” used in 49 C.F.R. § 391.43, the Department maintains that the definition contains the qualification that medical examiners be licensed, certified or registered “in accordance with applicable State laws and regulations” to perform physical examinations. The Department argues that under Minnesota state laws, chiropractors are not licensed to perform physical examinations because such examinations are outside the scope of practice for chiropractors. The Department bases its opinion on a narrow construction of Minn. Stat. § 148.01, and ignores the clear mandate of section 148.08, subd. 2 expressly authorizing chiropractors to sign health and death certificates. According to the Department, Minn. Stat. § 148.01 limits chiropractors’ scope of practice to the use of procedures to prepare a patient for chiropractic adjustment or to detect chiropractic conditions. In addition, the Department contends that if it were to allow doctors of chiropractic to perform the required physical examinations, the Department would in essence be expanding the chiropractors’ scope of practice without legislative authorization. Consequently, the Department maintains that the most reasonable and prudent course of action is to continue the Department’s long-standing practice of only allowing physicians to perform the required physical examinations for school bus driver endorsements.

38. The Administrative Law Judge finds the Department's proposed amendment to Minnesota Rules part 7414.1100 limiting the performance of physical examinations and the completion of examination forms and certificates for school bus endorsement applicants to licensed physicians to be in conflict with two existing statutes. First, Minn. Stat. § 148.08, subdivision 2 expressly grants authority to chiropractors to sign health certificates. The examination form and certificate referred to in part 7414.1300, which must substantially comply with the form prescribed in 49 C.F.R. § 391.43, may reasonably be regarded as a health certificate within the meaning of Minn. Stat. § 148.08, subd. 2. Moreover, such authority to sign health certificates indicates an intent on the part of the legislature to permit chiropractors to conduct the physical examination that underlies the health certificate. Consequently, the "physician only" provision of proposed part 7414.1100 contradicts and is inconsistent with the express authority granted chiropractors in Minn. Stat. § 148.08, subd. 2.

39. Secondly, the Department has incorporated by reference into Minnesota Rules chapter 7414 the medical examination form and certificate prescribed by federal motor carrier regulations at 49 C.F.R. § 391.43. These regulations require that the medical examination of applicants be performed by a "licensed medical examiner" as defined in 49 C.F.R. § 390.5. The term "medical examiner" is defined in 49 C.F.R. § 390.5 as including doctors of chiropractic, advanced practice nurses, and physician assistants who are licensed, certified or registered to perform physical examinations. As described in the next Finding, the scope of practice for chiropractors does include performing these types of physical examinations. Consequently, the Department's "physician only" provision of proposed part 7414.1100 conflicts with 49 C.F.R. § 391.43.

40. The ALJ is persuaded by the exhaustive research and analysis of Assistant Attorney General Robert Holley in his advisory memorandum dated February 21, 1995 (DPS Exhibit 26) which demonstrates that a dispositive amendment to Minn. Stat. § 148.01, subdivision 3, was passed (in 1975) after the legislature discussed at length the appropriate scope of diagnostic work which chiropractors should be allowed to perform, and then determined not to limit chiropractic diagnosis to the detection of only chiropractic conditions or to prohibit doctors of chiropractic from conducting physical examinations for a variety of purposes.

41. Finally, the Department has not established the legality of excluding nurse practitioners or physician assistants from performing the required physical examination for school bus endorsements. According to the Minnesota Nurses Association, the taking of health histories and the performance of physical examinations are within the scope of practice of nurse practitioners. Excluding these practitioners (in Minnesota, nurse practitioners are the same as advanced practice nurses in the federal scheme) from performing physical examinations and completing the required examination form and certificate conflicts with the existing provisions in 49 C.F.R. § 391.43 incorporated by reference at Minnesota Rules 7414.1300.

42. An agency may not adopt rules which conflict with existing statutes. Green v. Whirlpool Corp., 389 N.W.2d 504, 506 (Minn. 1986); J.C. Penny Co., Inc. v. Commissioner of Economic Sec., 353 N.W.2d 243, 246 (Minn. App. 1984). When the words of a law are clear and unambiguous, amendments to the law must be made by the legislature in the form of a statute. They cannot be made by the Department in the

form of a rule. J.C. Penny, 353 N.W.2d at 246. When an administrative rule conflicts with the plain meaning of a statute, the statute controls. Special School Dist. No. 1 v. Dunham, 498 N.W.2d 441, 445 (Minn. 1993). In the instant matter, the ALJ finds that the language of Minn. Stat. § 148.08, subd. 2 is clear and unambiguous with respect to the authority of chiropractors to sign health certificates. Likewise, 49 C.F.R. § 391.43, specifically includes chiropractors, advanced practice nurses, and physician assistants licensed, certified or registered to perform physical examinations in its definition of “medical examiner”. Consequently, the Department’s proposed rule part 7414.1100 excluding chiropractors and other practitioners from completing the physical examination forms conflicts with both Minn. Stat. §§ 148.08, subd. 2 and 171.321, subd. 2 and thus is invalid.

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

CONCLUSIONS

1. That the Minnesota Department of Public Safety 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 42.

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

5. That the amendments and additions to the proposed rules which were suggested by the Department after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

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

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

8. 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 2nd day of January 1998.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded;
No Transcript Prepared

MEMORANDUM

Ultimately, the issue of whether chiropractors, nurse practitioners or other health care practitioners should be allowed to perform physical examinations and sign health certificates for school bus driver endorsements is most appropriately addressed by the legislature. However, absent a clear legislative directive, the ALJ must determine the legality of the Department's proposed rule amendment in light of existing statutes. The fact that it has been the long standing practice of the Department to allow only physicians to perform the required physical examination is insufficient to support the legality of the rule in light of the existing statutes. Based on an examination of the entire rule record, the Administrative Law Judge must conclude that the Department's proposal that only physicians perform the physical examination to be contrary to existing statutes, and thus it cannot be adopted.

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AWK

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