UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, Guardians and next friends of Bradley J. Jensen, et al.,
Plaintiffs,

v.

Minnesota Department of Human Services, an agency of the State of Minnesota, et al.,

Defendants.

Civil No. 09-1775 (DWF/FLN)

REPORT TO THE COURT: SETBACK REGARDING MODERNIZATION OF RULE 40

David Ferleger
Court Monitor
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May 13, 2015

REPORT TO THE COURT: SETBACK REGARDING MODERNIZATION OF RULE 40

This is to advise the Court of the status of the "Modernization of Rule 40" under the Settlement Agreement and the Comprehensive Plan of Action ("CPA" .[1] A major setback has occurred. There will be delay in adoption and implementation of the rule which had been approved by the parties.

As the Court knows, this litigation which challenged as unacceptable extensive use of mechanical restraints, and procedures such as seclusion and others which cause pain. Introducing the Rule 40 report, the Department of Human Services declared, "DHS will prohibit procedures that cause pain, whether physical, emotional or psychological, and establish a plan to prohibit use of seclusion and restraints for programs and services licensed or certified by the department"[2]

The modernization, which must "reflect best practices," was to be embodied in a DHS-initiated rule-making process.[3] Recognizing possible limits to the rule-making process, the parties agreed and the Court ordered that components not adequately or properly addressed in the rule-making process will first be addressed through the Olmstead Plan and, then, "Unresolved issues may be presented to the Court for resolution by any of the above,[4] and will be resolved by the Court."[5]

The DHS Administrative Law Judge recently approved the proposed rule, but with a significant limitation which would permit thousands of

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[1] See CPA, Part II, at 31 ff.

[2] CPA at 31.

[3] *Id*. at 32.

[4] Those who may seek the Court's action are Plaintiffs' Class Counsel, the Court Monitor, the Ombudsman for Mental Health and Developmental Disabilities, or the Executive Director of the Governor's Council on Developmental Disabilities. *Id.* at 33, EC 103,

[5] *Id.* at 33, EC 103.

Department licensees to exempt themselves from the rule simply by filing a statement claiming an exemption.[6] *Any such licensee can obtain the exemption if it has "less than 50 full-time employees."*[7] This result followed from the ALJ's disapproval of DHS' cost determination for compliance and the resulting trigger of a statutory exemption.[8]

"Importantly," in the ALJ's word, the exemption does not apply "if the Governor waives application of these provisions." ALJ Report at 22. The exemption could also be eliminated by legislative action.[9]

The Court Monitor observes that the intentions of the parties, and the requirements of the Court's Orders, would be substantially undermined by the self-exemption structure. DHS is considering the ALJ decision; the Court Monitor will continue to discuss it with DHS.

The State, including the Governor and the Department of Human Services, are urged to undertake substantial efforts to secure full implementation of the rule, and to ensure that all intended beneficiaries will benefit from its full intended scope.

The Court Monitor will provide updates to the Court as this situation develops.[10]

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[6] The April 22, 2015 ALJ decision is Attachment A to this report.

[7] *Id*. at 22.

[8] "The hearing record does not establish that the total compliance costs for a licensed provider with 50 or fewer employees will be less than $25,000 in the first year." *Id*. at 22. That finding means that the exemption is automatic upon a claim under Minn. Stat. §14.127, subd. 1. (ALJ Report at 22). That statute provides:

> any business that has less than 50 full-time employees or any statutory or home rule charter city that has less than ten full-time employees may file a written statement with the agency claiming a temporary exemption from the rules. Upon filing of such a statement with the agency, the rules do not apply to that business or that city until the rules are approved by a law enacted after the agency determination or administrative law judge disapproval.

[9] The Court Monitor does not address here options available to the Court regarding the current situation.

[10] A draft of this report was provided to the parties for comment. None was

Respectfully submitted,

s/David Ferleger

David Ferleger
Court Monitor

May 13, 2015

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received.

ATTACHMENT A

April 22, 2015

Karen E. Sullivan Hook
Administrative Law Advisor
Minnesota Department of Human Services
444 Lafayette Road Mail Stop 0941
PO Box 64998
Saint Paul, MN 55164

Re: In the Matter of the Proposed Rules of the Department of Human Services Governing Positive Support Strategies, Person-Centered Planning, Limits on Use
OAH 8-1800-32056; Revisor R-4213

Dear Ms. Sullivan Hook:

Enclosed herewith and served upon you is the **REPORT OF THE ADMINISTRATIVE LAW JUDGE** in the above-entitled matter. The Administrative Law Judge has determined there are no negative findings in these rules.

The Office of Administrative Hearings has closed this file and is returning the rule record so that the Minnesota Department of Human Services can maintain the official rulemaking record in this matter as required by Minn. Stat. § 14.365. The original transcript is also enclosed. Please ensure that the agency's signed order adopting the rules is filed with our office. The Office of Administrative Hearings will request copies of the finalized rules from the Revisor's office following receipt of that order. Our office will then file four copies of the adopted rules with the Secretary of State, who will forward one copy to the Revisor of Statutes, one copy to the Governor, and one to the agency for its rulemaking record. The Department will then receive from the Revisor's office three copies of the Notice of Adoption of the rules.

The Department's next step is to arrange for publication of the Notice of Adoption in the State Register. Two copies of the Notice of Adoption provided by the Revisor's office should be submitted to the State Register for publication. A permanent rule with a hearing does not become effective until five working days after a Notice of Adoption is

published in the State Register in accordance with Minn. Stat. § 14.27.

If you have any questions regarding this matter, please contact Denise Collins at (651) 361-7875.

Sincerely,

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

Enclosure
cc: Office of the Governor
Office of the Attorney General
Legislative Coordinating Commission (lcc@lcc.leg.mn)
Revisor of Statutes (paul.marinac@revisor.mn.gov)

OAH 8-1800-32056
Revisor R-4213

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Department of Human Services Governing Positive Support Strategies, Person-Centered Planning, Limits on Use of Restrictive Interventions and Emergency Use of Manual Restraint, and Repeal of Rules Governing Aversive and Deprivation Procedures in Minnesota Rules, 9525.2700 to 9525.2810

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Eric L. Lipman for a rulemaking hearing on February 23, 2015. The public hearing was held in Conference Rooms 2370 and 2380 of the Elmer L. Andersen Human Services Building in Saint Paul, Minnesota.

The Department of Human Services (Department or agency) proposes to amend its rules governing positive support strategies and person-centered planning techniques, establishing a process to phase out the use of restrictive interventions and regulating the emergency use of manual restraint.

The Department proposes that the new rules shall apply to all facilities and services that are provided to persons with a disability or those who are age 65 and older. The Department's proposal includes home and community-based services provided under Minnesota Statutes Chapter 245D (2014). Additionally, the Department proposes to apply the new requirements to all Department-licensed facilities and licensed services serving persons with a developmental disability or a related condition.

The hearing was conducted so as to permit agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The agency panel at the public hearing included Karen Sullivan Hook, Administrative Law Advisor; Alexandra Bartolic, Director of the Disability Services Division; Charles Young, Positive Supports Lead; and Timothy R. Moore, PhD, LP, BCBA-D, Clinical Director of the Minnesota Life Bridge program.

Forty-eight people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an

opportunity to be heard concerning the proposed rules. Nineteen members of the public made statements or asked questions during the hearing.

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until March 16, 2015 – to permit interested persons and the agency to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the agency an opportunity to reply to earlier-submitted comments. The hearing record closed on March 23, 2015.

SUMMARY OF CONCLUSIONS

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

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

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. Both the delegation of rulemaking authority and specific provisions of the proposed rules, are part of a state effort to comply with the Stipulated Class Action Settlement Agreement in *Jensen, et al. v. Minnesota Department of Human Services, et al.* (*Jensen*).[1] For that reason, a brief exposition of the claims and settlement in the *Jensen* case is useful here.

2. Prior to June 30, 2011, the state of Minnesota operated Minnesota Extended Treatment Options (METO) to provide treatment and care for persons with developmental disabilities. Plaintiffs Bradley J. Jensen, Thomas M. Allbrink, and Jason R. Jacobs were residents of METO. In their Amended Complaint, the resident plaintiffs asserted that the State permitted METO to restrain and seclude them in ways that violated their protected liberties. To address the claimed deprivations, they sought damages and injunctive relief, for themselves and others who were similarly situated.[2]

3. In order to resolve the claims made by the *Jensen* plaintiffs, the Department agreed, as part of a wider set of exchanges between the parties, to:

> (a) utilize best efforts to require counties and providers to comply with the Comprehensive Plan of Action, through all necessary means within the Department of Human Services' authority, including but

[1] *Jensen, et al. v. Minnesota Dep't of Human Servs., et al.*, Case No. 09-CV-1775 (D. Minn.) (*Jensen*).

[2] STIPULATED CLASS ACTION SETTLEMENT AGREEMENT, *Jensen, supra*, at 1-43 (D. Minn. Dec. 5, 2011) (Document 136-1).

> not limited to incentives, rule, regulation, contract, rate-setting, and withholding of funds ….
>
> (b) [w]ithin the scope set forth above, the rule-making process initiated by the Department of Human Services pursuant to the Settlement Agreement, the Department shall by December 31, 2014 propose a new rule in accordance with this Comprehensive Plan of Action (Proposed Rule) ….
>
> (c) [t]he Proposed Rule shall be consistent with and incorporate, to the extent possible in rule, the Rule 40 Advisory Committee's consensus recommendations …. During the rule-making process, the Department shall advocate that the final rule be fully consistent with the Rule 40 Advisory Committee's recommendations. The phrase 'to the extent possible in rule' above is intended to recognize that some elements of the Committee's recommendations are not susceptible to the format of rules and, therefore, will be implemented by the Department through policies, bulletins, contract provisions, and by other means.[3]

4. The United States District Court for District of Minnesota continues to monitor the implementation of the Settlement Agreement between the parties.[4]

5. In 2012, the Minnesota Legislature revised the regulatory standards for home and community-based businesses. Among the reforms it made that year was to prohibit license holders from "using restraints or seclusion under any circumstance, unless the commissioner has approved a variance request from the license holder that allows for the emergency use of restraints and seclusion according to terms and conditions approved in the variance."[5]

6. Likewise, the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services (CMS) recently updated the federal requirements for home and community-based settings. The federal rule now requires that a home and community-based setting must:

> have all of the following qualities, and such other qualities as the Secretary determines to be appropriate, based on the needs of the individual as indicated in their person-centered service plan:
>
> ….
>
> (iii) Ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint.

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[3] COMPREHENSIVE PLAN OF ACTION, *Jensen, supra*, at 2, 32 and 33 (D. Minn. March 12, 2014) (Document 283) (linked at Ex. 5, n. 8).

[4] Ex. 5 at 62, n. 2 (Statement of Need and Reasonableness or SONAR).

[5] 2012 Minn. Laws, Ch. 216, Art. 18, § 21.

(iv) Optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including but not limited to, daily activities, physical environment, and with whom to interact.

(v) Facilitates individual choice regarding services and supports, and who provides them.[6]

7. In 2014, the Minnesota Legislature extended the prohibitions on the use of seclusion and restraints by home and community-based services to include all facilities and services, licensed by the Department, when those facilities and services are "serving persons with a developmental disability or related condition." For example, under the amended law, the prohibition on the use of restraints would apply to both community-based group homes and licensed child care facilities.[7]

II. Rulemaking Authority

8. The Department cites Minn. Stat. § 245.8251 (2014) as its source of statutory authority for these proposed rules. Subdivision 1 of this statute provides:

> The commissioner of human services shall, by August 31, 2015, adopt rules to govern the use of positive support strategies, and ensure the applicability of chapter 245D prohibitions and limits on the emergency use of manual restraint and on the use of restrictive interventions to facilities and services governed by the rules. The rules apply to all facilities and services licensed under chapter 245D, and all licensed facilities and licensed services serving persons with a developmental disability or related condition. For the purposes of this section, 'developmental disability or related condition' has the meaning given in Minnesota Rules, part 9525.0016, subpart 2, items A to E.[8]

9. The Administrative Law Judge concludes that the Department has the statutory authority to adopt rules governing positive support strategies, person-centered planning, limits on use of restrictive interventions and emergency use of manual restraint.[9]

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[6] 42 C.F.R. § 441.301 (c)(4)(iii) - (v) (2014); 79 *Federal Register* 2948, 3030 (January 16, 2014).

[7] 2014 Minn. Laws, Ch. 312, Art. 27, § 4.

[8] Minn. Stat. § 245.8251; Ex. 5 at 4.

[9] *Id*.

III. Procedural Requirements of Chapter 14

10. The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act. The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.[10]

11. The agency must establish that the proposed rules are necessary and reasonable; that the rules are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.[11]

A. Publications

12. On January 30, 2012, the Department published in the *State Register* a Request for Comments seeking suggestions on its possible amendment to rules governing aversive and deprivation procedures in licensed facilities serving persons with developmental disabilities.[12]

13. On August 26, 2013, the Department published in the *State Register* a second Request for Comments seeking suggestions on its possible amendment to rules governing the use of positive support strategies, safety interventions and emergency use of manual restraint and repeal of rules governing aversive and deprivation procedures in licensed facilities and services that serve persons with developmental disabilities and persons age 65 and older.[13]

14. On August 25, 2014, the Department published in the *State Register* an additional Request for Comments seeking suggestions on its possible adoption of rules governing the use of positive support strategies, person-centered planning, limits on use of restrictive interventions and emergency use of manual restraint, repeal of rules governing aversive and deprivation procedures, and related matters.[14]

15. On November 26, 2014, the Department requested approval of its Notice of Hearing (Hearing Notice) and Additional Notice Plan.[15]

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[10] *See,* Minn. Stat. §§ 14.131-.20 (2014).

[11] Minn. Stat. §§ 14.05, .131, .23, .25 (2014).

[12] 36 *State Register* 878 (January 30, 2012).

[13] 38 *State Register* 277 (August 26, 2013).

[14] 39 *State Register* 266 (August 25, 2014).

[15] Ex. 7a.

16. By way of an Order dated December 2, 2014, the undersigned Administrative Law Judge approved the Department's Hearing Notice and Additional Notice Plan.[16]

17. On December 26, 2014, the agency mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131, .23.[17]

18. On January 9, 2015, the agency mailed a copy of the Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice and to all persons and associations identified in the additional notice plan.[18]

19. On January 9, 2015, the agency mailed a copy of the Notice of Hearing and the statement of need and reasonableness to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over home and community-based services regulated by the Department.[19]

20. The Notice of Hearing, published in the January 12, 2015 *State Register*, set Monday, February 23, 2015 as the date of the hearing. The Notice similarly identified the location of the hearing.[20]

21. At the hearing on February 23, 2015, the agency filed copies of the documents and materials required by Minn. R. 1400.2220 (2013).[21]

B. Additional Notice Requirements

22. Minn. Stat. §§ 14.131, .23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.[22]

23. On January 9, 2015, the agency provided the Notice of Hearing in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

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[16] Ex. 7b.

[17] Ex. 6.

[18] Exs. 12b – 12i.

[19] Exs. 13a – 13d.

[20] 39 *State Register* 1031 (January 12, 2015).

[21] Exs. 1, 2 and 3 (Requests for Comments), 4 (Proposed Rules), 5 (Statement of Need and Reasonableness), 6 (Certificates of Mailing), 11b (Amended Notice of Hearing), 12a – 12i (Certificates of Mailing, Additional Notice and Accuracy), 13a – 13d (Certificates of Mailing to Legislators), and 15 (Copies of Written Comments); *see also,* Minn. R. 1400.2220.

[22] Minn. Stat. §§ 14.131 and 14.23.

- The Notice of Hearing was posted on the Department's website and the agency has maintained these materials continuously since they were posted.

- Notice of the rulemaking was sent by first class mail to its rulemaking list.

- A copy of the Notice of Hearing was sent by Electronic Mail to several hundred subscribers for whom the agency had valid electronic mail addresses and subscribers to the agency's distribution lists for managed care organizations, aging, child welfare, mental health, children's mental health, chemical dependency, and child care.

- Agency staff included notice of the rulemaking in its newsletter on licensed health care programs.[23]

C. Notice Practice

1. Notice to Stakeholders

24. On January 9, 2015, the agency provided a copy of the Notice of Hearing to its official rulemaking list (maintained under Minn. Stat. § 14.14), and to stakeholders identified in its additional notice plan.[24]

25. There are 45 days between January 9, 2015 and February 23, 2015.[25]

26. The Administrative Law Judge concludes that the agency fulfilled its responsibilities under Minn. Stat. § 14.14, subd. 1(a), to provide notice "at least 30 days before the date set for the hearing" of its intention to adopt the proposed rules.[26]

2. Notice to Legislators

27. On January 9, 2015, the agency sent a copy of the Notice of Hearing and the Statement of Need and Reasonableness to Legislators as required by Minn. Stat. § 14.116 (2014).[27]

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[23] Ex. 6 at 12; Exs. 12a – 12k.

[24] Exs. 12a – 12i.

[25] *See generally,* Minn. Stat. § 645.15 (2014).

[26] *Id*.

[27] Exs. 13a – 13d.

28. Minn. Stat. § 14.116 requires the agency to send a copy of the Notice of Hearing and the SONAR to certain legislators on the same date that it mails its Notice of Hearing to persons on its rulemaking list and pursuant to its additional notice plan.[28]

29. The Administrative Law Judge concludes that the agency fulfilled its responsibilities to mail the Notice of Hearing "at least 30 days before the date set for the hearing" of its intention to adopt the proposed rules.[29]

3. Notice to the Legislative Reference Library

30. On December 26, 2014, the agency mailed a copy of the SONAR to the Legislative Reference Library.[30]

31. Minn. Stat. § 14.23 requires the agency to send a copy of the SONAR to the Legislative Reference Library no later than the date that the Notice of Hearing is mailed.[31]

32. The Administrative Law Judge concludes that the agency fulfilled its responsibilities, to mail the SONAR "at least 30 days before the date set for the hearing" of its intention to adopt the proposed rules.[32]

D. Impact on Farming Operations

33. Minn. Stat. § 14.111 (2014) imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.[33]

34. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the agency was not required to notify the Commissioner of Agriculture.[34]

E. Statutory Requirements for the SONAR

35. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its Statement of Need and Reasonableness (SONAR). Those factors are:

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[28] Minn. Stat. § 14.116, .14.

[29] Minn. Stat. § 14.14, subd. 1(a).

[30] Ex. 6.

[31] Minn. Stat. § 14.23.

[32] *Id*.

[33] Minn. Stat. § 14.111 (2014).

[34] Ex. 4.

(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

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

(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

(8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.[35]

[35] Minn. Stat. §§ 14.14, .23.

1. The agency's regulatory analysis

(a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

36. The Department asserts that the classes of persons affected by this rule include "persons with disabilities and their families, persons age 65 and older and their families, and providers that are required to be licensed under the Human Services Licensing Act, chapter 245A."[36]

37. Moreover, the Department maintains that the proposed rule will provide regulatory protections to disabled persons regardless of which Department-licensed entity provider extends services to those persons.[37]

(b) The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

38. The Department projects that it will incur costs in two agency cost centers – both the Disability Services Division and the Licensing Division. It forecasts the Disability Services Division will incur costs of approximately $60,000 to prepare and deliver training to providers as to the new regulatory requirements.[38]

39. Additionally, the Department projects that it will incur additional enforcement-related costs, ensuring "through program audits, complaint investigations, provider challenges to enforcement actions, and related activities," that the new standards are effective. While some of the sums that are now dedicated to enforcement of the current rule, known as "Rule 40," would be available to support enforcement efforts of the proposed rule, "[g]iven the additional, more specific requirements in new rule, however, and the substantially expanded rule scope" the Department maintains "that additional resources will be needed for rule enforcement."[39]

40. The Department projects that the combined total or new training and enforcement costs will exceed $100,000 in the first year.[40]

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[36] Ex. 5 at 4.

[37] Ex. 5 at 2, 10, 39, 40 and 64, n. 15.

[38] *Id.* at 4.

[39] *Id.* at 4-5.

[40] *Id.* at 5.

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

41. The agency concedes that with respect to "positive support strategies, community integration, and person-centered planning," the Department did not thoroughly explore less costly or less intrusive methods, other than rulemaking, to achieve the same purposes. This is because the Department understood that its pledge to undertake rulemaking as part of the settlement of the *Jensen* plaintiff's claims obliged it to propose revisions to Rule 40.[41]

(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

42. Similarly, the Department acknowledges that it did not thoroughly explore alternative methods, other than rulemaking, to achieve the same purposes. As noted above, the Department understood that its pledge to undertake rulemaking around the Rule 40 Advisory Committee recommendations obliged it to propose new rules on positive support strategies, community integration and person-centered planning.[42]

(e) The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

43. The Department asserts that "the cost of rule compliance would include any cost to phase out the use of restraints" after the effective date of the new rules.[43]

44. While this is certainly true, the Department is oblique about the cost impact of complying with the proposed rule, particularly in the first year after implementation. In the SONAR, the Department puts forward two different views of the cost impacts – both that the proposed rule will result in additional compliance costs approximately $300 per patient during the first year and net overall savings.[44] Both contentions, pointing in opposite directions, are described in more detail below.

45. With respect to the $300 per-patient estimate, the Department obtained the assistance of a provider that offers "transitional and long-term adult foster care" and related social services. This provider now uses restraints with some of the patients who

[41] *Id.* at 5-6.

[42] *Id.* at 6.

[43] *Id.* at 7.

[44] *Id*.

receive residential care and, like other providers, it will be required to phase out this practice under Minn. Stat. § 245D.06, subd. 8. The provider currently provides residential care services to approximately 100 patients.[45]

46. As part of the compliance cost calculations requested by the Department, the provider "excluded any costs of phasing out the use of restraints from its analysis of costs of rule compliance." As the Department reasons, any costs attributable to prohibiting the use of restraints followed directly from "statutory compliance, not compliance with the rule."[46]

47. Once the costs of using alternatives to restraints were separated out, the provider went on to price the remaining compliance costs: "person-centered planning; staff training; preparing required program documentation and records; and quality assurance and improvement requirements." The provider determined that this subset of compliance costs would amount to approximately $300 per resident, over a client roster of 100 residential patients, during the first year following application of the rule. As the Department explained:

> This provider offers transitional and long-term adult foster care, supported employment services, independent living skills training to support persons in transition to an independent life, structured day programs, and other services. It works with families and social workers primarily dealing with mental illness, traumatic brain injuries, and addiction issues. For purposes of the rule compliance cost analysis, the provider focused on its residential services to 100 persons, which are governed under chapter 245D.
>
> For this provider, both the positive supports requirements and the requirements to phase out the use of restraints through a positive support transition plan apply. In other words, the provider currently programmatically uses restraints with some residents, which the provider is required to phase out under Minnesota Statutes, section 245D.06, subdivision 8. Because chapter 245D governs this provider, the compliance cost related to phasing out the use of restraints is a cost related to statutory compliance, not compliance with the rule. Thus, the provider excluded any costs of phasing out the use of restraints from its analysis of costs of rule compliance.
>
> The first year of coming into compliance with a rule is the most expensive year because policies must be developed, and staff training is most concentrated during this year. The provider considered the following rule compliance costs: person-centered planning; staff training and competency; preparing required program documentation and records; and quality assurance and improvement requirements. The provider

[45] *Id.* at 6.

[46] *Id.* at 7.

> determined the cost of compliance with the rule during the first year of implementation to be roughly $300 per resident. In total, with over 100 residents, the costs are roughly estimated to be just over $30,000 in the first year.
>
> The cost projection for a program not governed by chapter 245D would be different. As explained above, the proposed rule incorporates the requirements of chapter 245D and extends them to providers not otherwise governed by chapter 245D. For such a provider who is programmatically using restraints, the cost of rule compliance would include any cost to phase out the use of restraints.[47]

48. Likewise important, the Department points to a 2011 white paper published by the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) on the costs of preventing the use of restraint and seclusion. As the Department explained:

> In this report, the author, Janice LaBel, Ed.D., evaluated the economic burden of restraint and seclusion use; the costs associated with reducing restraint and seclusion; and the savings that result from restraint and seclusion reduction. LaBel found that restraint and seclusion are violent, expensive, and largely preventable events. The net budgetary effect of shifting to use of positive supports is therefore positive, due to the enhanced environment of care and overall decrease in violence and injuries.

Pointing to Dr. LaBel's report, the Department maintains that "the shift from use of restraints to use of positive behavior supports has a net positive fiscal effect."[48]

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

49. The Department asserts that among the consequences of not adopting the proposed rules will would be a failure to implement the legislative directive in Minn. Stat. § 245.8251 and its obligations under the terms of the *Jensen* settlement agreement.[49]

50. Additionally, the Department maintains that the rates of transition toward restraint-free best practices will be slower if the proposed regulations were not adopted.

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[47] *Id*. at 7-8.

[48] Ex. 5 at 8 and n.22; *see also, The Business Case for Preventing and Reducing Restraint and Seclusion Use*, HHS Publication No. (SMA) 11-4632 Rockville, MD; SAMHSA 2011. Retrieved from http://store.samhsa.gov/shin/content/SMA11-4632/SMA11-4632.pdf.

[49] Ex. 5 at 7.

If this were to occur, continues the Department, "persons with disabilities and persons age 65 and older in Minnesota would not experience the benefits of using positive support strategies and person-centered thinking in social services programs to the same extent that will result from the proposed new rule …."[50]

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

51. The Department asserts that adoption of the proposed rule will bring social service programs licensed by the Department "into even closer alignment" with the practices of nursing facilities regulated by the federal requirements under 42 C.F.R. Part 441 (2014). It maintains that both the federal rule and the proposed requirements require that "the person be placed at the center of the planning process, with the person's preferences and choices reflected in the selection of services and supports."[51]

(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

52. The Department asserts that adoption of the proposed rule will not result in additional, cumulative effects because the proposed rule, and the requirements of 42 C.F.R. Part 441, address different types of facilities.[52]

53. The Administrative Law Judge finds that the Department met the evaluation requirements of Minn. Stat. § 14.131.[53]

2. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

54. As required by Minn. Stat. § 14.131, the Department sought the assessment of the Commissioner of Minnesota Management and Budget (MMB) as to the fiscal impacts and benefits of the proposed rules on local units of government.[54]

55. By way of a letter dated February 13, 2015, Executive Budget Officer Susan Earle, detailed her conclusions that the proposed rules added new oversight responsibilities to county governments, and that as a result, "these rules will have a fiscal impact on local units of government."[55]

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[50] *Id*.

[51] *Id*. at 8.

[52] *Id*. at 8-9.

[53] Minn. Stat. § 14.131.

[54] Ex. 14a.

[55] Ex. 14b at 1.

3. Performance-Based Regulation

56. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the Board in meeting those goals.[56]

57. The Department maintains that the proposed rules meet the regulatory standards for superior achievement and flexibility because they "maximize opportunities for individuals to make choices for themselves that enhance their quality of life and thus promote physical and behavioral health." As it argues:

> Proposed rule part 9544.0030, subpart 1 permits flexibility because it permits providers to incorporate positive support strategies into any existing treatment, service, or other individual plan that is required. Different licensed services have varying requirements about a treatment plan, service plan, or other plan. The proposed rule provision avoids adding a requirement for yet another plan, and instead permits providers to work within existing service plan requirements to integrate the new requirements. Part 9544.0030, subpart 4, by specifying widely-accepted, reputable national standards for providers to choose from as a resource to develop positive support strategies, emphasizes superior achievement in meeting the agency's objective of moving licensees to the use of current best practices in positive behavior supports.[57]

4. Summary

58. The Administrative Law Judge finds that the agency has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules; including consideration and implementation of the legislative policy supporting performance-based regulatory systems and evaluating the fiscal impact on units of local government.[58]

F. Cost to Small Businesses and Cities under Minn. Stat. § 14.127 (2014)

59. Minn. Stat. § 14.127, requires the agency to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The

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[56] Minn. Stat. §§ 14.002, .131 (2014).

[57] Ex. 5 at 10 (SONAR).

[58] Minn. Stat. § 14.131.

agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[59]

60. This statute provides a regulatory "safe harbor" for small cities and small businesses, if the compliance costs associated with the proposed rules are likely to be greater than $25,000 in the first year after the rules are effective. The statute provides:

> If the agency determines that the cost exceeds the threshold in subdivision 1, or if the administrative law judge disapproves the agency's determination that the cost does not exceed the threshold in subdivision 1, any business that has less than 50 full-time employees or any statutory or home rule charter city that has less than ten full-time employees may file a written statement with the agency claiming a temporary exemption from the rules. Upon filing of such a statement with the agency, the rules do not apply to that business or that city until the rules are approved by a law enacted after the agency determination or administrative law judge disapproval.[60]

61. The Department determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed $25,000 for a small business and will have no impact upon cities.[61]

62. As described in Section III (E)(1)(e) above, the Department maintains that:

a. the cost of prohibiting the use of restraints by licensed service providers is wholly attributable to legislative action, and thus these are not costs of "complying with a proposed rule" as those terms are used Minn. Stat. § 14.127;

b. the costs of complying with the proposed rule are limited to the person-centered planning, staff training, record-keeping, and quality assurance functions described in Part 9525;

c. based upon an estimate that the Department received from a Minnesota adult foster care provider, it estimates that the costs of person-centered planning, staff training, record-keeping, and quality assurance functions, will amount to $300 per-patient, per year; and,

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[59] Minn. Stat. § 14.127, subds. 1 and 2.

[60] Minn. Stat. § 14.127, subd. 3.

[61] Ex. 5 at 13

d. based upon Dr. LaBel's report, the Department maintains that abolition of the use of restraints "has a net positive fiscal effect."[62]

63. In its post-hearing submissions, the Department noted that the adult foster care provider that it asked to calculate the costs of compliance with the proposed rules was an entity with more than 50 full-time employees.[63]

64. Additionally, the Department maintains that "there is no data in the record from a large or small provider regarding costs of complying with the proposed rules other than that supplied to the Department and included in the SONAR."[64]

1. Construing the Terms of Minn. Stat. § 14.127

65. In the view of the Administrative Law Judge, the Department has not read the provisions Minn. Stat. § 14.127 correctly and has not developed an accurate estimate of the costs that small-business licensees will incur complying with the proposed rules.[65]

66. It is not proper to exclude the costs that follow from statutory directives when making the required costs assessments. The text of Minn. Stat. § 14.127 does not provide for such a division or the exclusion of these cost impacts. For the purposes of the cost calculation, the terms "the cost of complying with a proposed rule in the first year after the rule takes effect" includes all compliance costs that are reflected in the proposed rule.[66]

67. The Legislature's purpose when enacting Minn. Stat. § 14.127, was to understand the impact of its regulatory delegations. For example, in its 1993 review of Minnesota's rulemaking process, the State Commission on Reform and Efficiency observed that the Legislature is often "not aware of the specific costs of preparing and adopting the rules it authorizes or requires" and "lacks cost information when considering bills authorizing rulemaking."[67] In this context, we understand that the provisions of Minn. Stat. § 14.127 operate as a self-check against the Legislature misjudging the cost of regulatory programs when it delegates rulemaking authority.

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[62] *See,* Findings 43 - 48, *supra*; *see also,* DEPARTMENT'S INITIAL POST-HEARING COMMENTS, at 2 (the Department contends that "costs related to training and reporting on requirements of the proposed rules would be considered under Minnesota Statutes § 14.131, but costs related to additional staff needed to phase out prohibited procedures or to meet positive support transition plan requirements flow from Minnesota Statutes, Chapter 245D and would not be considered in reviewing the proposed rules").

[63] DEPARTMENT'S INITIAL POST-HEARING COMMENTS, at 9.

[64] *Id*. at 10.

[65] *See* Minn. Stat. § 14.127.

[66] *Id*.

[67] *See* Finding 6, *Reforming Minnesota's Administrative Rulemaking System* (State Commission on Reform and Efficiency, 1993).

68. The structure and text of the exemptions found in Minn. Stat. § 14.127, subd. 4, confirm this conclusion. Subdivision 4 provides that there is no safe-harbor from regulatory compliance for small cities and small businesses when:

a. the Legislature has appropriated sufficient funds for the costs of complying with the proposed rule;

b. the proposed rule follows from "a specific federal statutory or regulatory mandate;"

c. the rules were promulgated under the limited exemption of the "good cause exempt" rulemaking procedure;

d. the Legislature exempted the proposed rules from compliance with Chapter 14 (2014) rulemaking procedures;

e. the rules were promulgated by the Public Utilities Commission; or,

f. the Governor waives the safe-harbor provisions by filing a notice with both houses of the Legislature and publishing the same in the *State Register*.

Individually, and collectively, these exemptions reflect a single assumption: specifically, the Legislature assumes that when it makes a delegation of rulemaking authority, the newly-authorized rules will not result in compliance costs of more than $25,000 for a small city or small business during the first year. If that assumption is not generally true for an agency (such as the Public Utilities Commission), or true as to a particular program (such that an exemption or appropriation accompanies the rulemaking delegation), the Legislature wants to provide for these specific cases in the law.[68]

69. Moreover, to accept the Department's view that "statutory compliance costs" are separate from "regulatory compliance costs," for purposes of the required calculation, one must also believe that the proposed regulations are themselves separate from the delegation of statutory authority. This is not our law. If a regulation does not directly follow from a grant of statutory authority, it is unenforceable.[69]

70. There is no purpose in assessing the cost impact of regulations that are otherwise illegal and unenforceable. The Department's reading of Minn. Stat. § 14.127 is too narrow.[70]

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[68] Minn. Stat. § 14.127, subd. 4.

[69] Minn. Stat. § 14.05, subd. 1.

[70] *See generally*, Minn. Stat. § 645.17 (1) (2014) ("In ascertaining the intention of the legislature the courts may be guided by the following presumptions ... the legislature does not intend a result that is absurd, impossible of execution, or unreasonable"); *see also,* Minn. Stat. §§ 14.05, .381, .45, 14.50(i) (the Legislature provides other procedures for challenging unauthorized rules).

2. The Agency's Cost Calculation is Doubtful

71. As noted above, the Department asked a particular provider to price a series of regulatory compliance costs – specifically, "person-centered planning; staff training; preparing required program documentation and records; and quality assurance and improvement requirements." The provider determined that this subset of compliance costs would be approximately $300 per-resident, when divided across its client base of 100 residential patients. Further, the Department maintains that the abolition of the use of restraints, generally, "has a net positive fiscal effect."[71]

72. In the view of the Administrative Law Judge, neither claim reflects the costs that are likely to be incurred by a small business during the first year of compliance. The proposed rules will be applicable to all of the Department's "licensed services and settings" when these programs serve "a person with a developmental disability or related condition."[72]

73. These settings include: family child care services; family adult day services; adult day centers; adult foster care; child foster care; residential programs for persons with physical disabilities; and nonresidential programs that provide services under a youth's independent living plan.[73]

74. There are more than 10,000 family child care providers in Minnesota. This is the largest single category of Department licensees. Many of these providers have small client rosters and an even smaller number of employees.[74]

75. In the view of the Administrative Law Judge, it is inappropriate to exclude increased staffing costs from the estimated costs of complying with proposed Part 9544. This is because the proposed rules prohibit the use of "any aversive or deprivation procedure" "as a substitute for adequate staffing … to reduce or eliminate behavior, as punishment, or for staff convenience." A new, and more rigorous, set of staff interventions is integral to compliance with the proposed rules.[75]

76. It is likewise inappropriate to extrapolate the compliance costs for a small business by using estimates drawn from a large social service provider, and divide these costs by a client roster of one-hundred persons. Particularly as to training costs,

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[71] *See,* Findings 43 - 48, *supra*.

[72] Ex. 5, at 2 (SONAR); *see also,* Ex. 4, at 2 (proposed Part 9544.0100, subp. 2) ("This chapter applies to other licensed providers and in other settings licensed by the commissioner under Minnesota Statutes, chapter 245A, for services to persons with a developmental disability or related condition").

[73] *See* Ex. 5, at 29-30 (SONAR).

[74] *Id.* at 6 and 51 (SONAR) ("One or two individuals with limited support staff typically administer family child care, family foster care and family adult day services. They also typically provide services to only a limited number of persons receiving services.... [T]he providers of these services are typically self-employed and serve few persons ...."); *see also,* Tr. at 56.

[75] *See* Ex. 4, at 16-18 (proposed Part 9544.0060, subp. 2).

a large provider, with a sizeable client roster, is able to achieve significant economies of scale. These are advantages that a small business is unlikely to possess.[76]

77. The Department maintains that there "is no data in the record which refutes" its claim that compliance costs "will not exceed $25,000."[77]

78. The Administrative Law Judge disagrees. The evidence in the rulemaking record is that the increased staffing costs under the new rules could be very significant during the first year. As Joe Fuemmeler, the Program Director of the Chrestomathy Center, a day training habilitation center for adults, testified at the rulemaking hearing:

> If you look at just the amount of cost it takes to support people with transportation and behavior intervention, the $25,000, the cost of employing one person, one staff person who's a direct care professional for a year, with benefits and wages, you're getting close to that number right there. And if we have to provide one-to-one support for two clients, you've already crossed it. Not to mention the training hours that I already mentioned we'd have to do regularly…. [I]n just looking on the face, the cost of employing one employee for a year would bring us up to there.[78]

79. Likewise important, under Chapter 14, members of the public do not bear the burden of refuting the Department's cost calculations. Minn. Stat. §§ 14.14, .127 place the duty of establishing the cost estimate upon the agency.[79]

80. The SAMHSA Report, relied upon by the Department, does not point to a different conclusion. Significantly, the cited report does not state that the "net positive fiscal effect" will occur contemporaneously with a provider's discontinuing the use of restraints. Instead, the authors of the report argue that the ability to realize cost savings is a function of several other factors – such as size of the organization, the skills of facility leadership and the ability of the organization to "reallocate dollars" to in favor of the needed process changes. The report explains:

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[76] *See generally,* Tr. at 88 (Schmidt) ("I think speaking with more than one provider would be the next step for DHS as far as figuring that number. We do believe it would be much more than those figures.").

[77] DEPARTMENT'S INITIAL POST-HEARING COMMENTS, at 9.

[78] Tr. at 72 (Fuemmeler); *accord,* Tr. at 87 (Schmidt) ("The estimates also do not account for 245A providers cost in phasing out the use of restraints, which will include expert consultation and staff training").

[79] *See* Minn. Stat. § 14.127, subd. 1 ("An agency must determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for ... (1) any one business that has less than 50 full-time employees"); Minn. Stat. § 14.14, subd. 2 ("At the public hearing the agency shall make an affirmative presentation of facts … fulfilling any relevant substantive or procedural requirements imposed on the agency by law or rule"); *accord,* Minn. Stat. § 14.001 ("The purposes of the Administrative Procedure Act are ... to increase public accountability of administrative agencies; ... to increase public access to governmental information; ... [and] to increase public participation in the formulation of administrative rules; ... with the expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained").

> Since the beginning of the national initiative, many organizations have reduced the use of restraint and seclusion with little to no additional fiscal resources. Weiss and colleagues reported, '…with strong leadership, the physical restraint of patients can be minimized—indeed, nearly eliminated—safely and without exorbitant cost.' Likewise, the GAO found:
>
> > [T]raining in alternatives to restraint and seclusion and maintaining adequate staff levels are costly, but they can save money in the long run by creating a safer treatment and work environment…. Staff training has been found to save the State money by directly reducing the frequency of restraint-related staff injuries, which represent costs of sick leave and overtime payments for staff to cover the shifts.
>
> Successful organizations typically reallocate dollars to support an initiative to reduce the use of restraint and seclusion. In general, the costs identified by programs that have reduced the use of restraint and seclusion include (1) purchasing or implementing training curricula to promote practice change (e.g., models of care, crisis prevention, dispute resolution, etc.); (2) increasing staff supervision; and (3) training staff (e.g., compensating staff to attend or cover for those being trained, trainer costs, training costs [venue, food, technology, materials]).[80]

81. In this case, the interrelationship between facility leadership, cash flow, added supervision, training and the hoped-for cost reductions is not clear. Specifically, the hearing record does not establish that during the first year following promulgation of the proposed rules reductions in restraint-related staff injuries, sick leave and overtime payments will lower provider costs in the same (or greater) amount than the costs of "increasing staff supervision" and training. The hearing record does not establish that lower personnel costs will likely offset the new compliance costs in the first year.[81]

82. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127, but that this determination is not adequately supported in the rulemaking record. The hearing record does not establish that the total compliance costs for a licensed provider with 50 or fewer employees will be less than $25,000 in the first year.[82]

83. The cost determination is disapproved under Minn. Stat. § 14.127.[83]

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[80] SAMHSA Report, *supra,* at 13 (citations omitted).

[81] *Id.* and Ex. 5.

[82] *See,* Findings 71 - 81, *supra*.

[83] *Id*.

3. The Effect of Disapproving the Cost Calculation

84. As provided in Minn. Stat. § 14.127, subd. 1, qualifying small businesses and small cities may be able to claim a temporary exemption from compliance of the proposed rules. The statute states:

> any business that has less than 50 full-time employees or any statutory or home rule charter city that has less than ten full-time employees may file a written statement with the agency claiming a temporary exemption from the rules. Upon filing of such a statement with the agency, the rules do not apply to that business or that city until the rules are approved by a law enacted after the agency determination or administrative law judge disapproval.[84]

85. Importantly, however, the "safe harbor" provisions do not apply if the Governor waives application of these provisions, sends notice of the waiver "to the speaker of the house and the president of the senate" and publishes "notice of this determination in the State Register."[85]

G. Adoption or Amendment of Local Ordinances

86. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[86]

87. The Department concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The proposed rule should not require local governments to adopt or amend those more general ordinances and regulations.[87]

88. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.128 and approves that determination.[88]

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[84] Minn. Stat. § 14.127, subd. 3.

[85] Minn. Stat. § 14.127, subd. 4.

[86] Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.

[87] Ex. 5 at 12; *see also,* Ex. 14a.

[88] Minn. Stat. § 14.128.

IV. Rulemaking Legal Standards

89. The Administrative Law Judge must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[89]

90. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record, "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy), and the agency's interpretation of related statutes.[90]

91. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[91]

92. By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[92]

93. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one. Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[93]

94. Because both the agency and the Administrative Law Judge suggest changes to the proposed rule language after the date it was originally published in the

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[89] *See,* Minn. R. 1400.2100 (2013).

[90] *See, Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240-44 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991); *see also, United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).

[91] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

[92] *See, Mammenga*, 442 N.W.2d at 789; *Manufactured Hous. Inst.*, 347 N.W.2d at 244; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n,* 251 N.W.2d 350, 357-58 (Minn. 1977).

[93] *Minnesota Chamber of Commerce*, 469 N.W.2d at 103; *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

State Register, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed.[94]

95. On February 23, 2015, the Administrative Law Judge outlined ten different sections of the proposed rules as to which there were potential defects in the proposed rules. This listing was included in the rulemaking record as Hearing Exhibit A at the rulemaking hearing.[95]

96. On March 16 and March 20, 2015, the Department detailed the revisions it would make to the proposed rules in response to stakeholder comments. It outlined these revisions in its post-hearing comments on those dates.[96]

97. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

> (1) the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;
>
> (2) the differences are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice; and
>
> (3) the notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.[97]

98. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether:

> (1) persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;
>
> (2) the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing; and

[94] *See* Minn. Stat. § 14.15, subd. 3.

[95] Hearing Exhibit A.

[96] *See* DEPARTMENT'S INITIAL POST-HEARING COMMENTS; DEPARTMENT'S REBUTTAL COMMENTS.

[97] Minn. Stat. § 14.05, subd. 2(b)(1)–(3).

(3) the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.[98]

V. Rule by Rule Analysis

99. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the agency's regulatory choice or otherwise requires closer examination.[99]

100. The Administrative Law Judge finds that the agency has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.[100]

101. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.[101]

102. The Administrative Law Judge finds that the revisions made by the Department (and included in a combined appendix to its March 20, 2015 submission) address all of the areas of potential concern listed in Public Hearing Exhibit A.[102]

103. The agency's proposed revisions are needed and reasonable and would not be a substantial change from the rule as originally proposed.[103]

V. Additional Action Urged By Stakeholders: Minn R. 9544.0130

104. A significant amount of public testimony and later written comment on the proposed rules center on the breadth of the definition of the term "manual restraint" and the ban on using such devices in non-emergency situations. Of particular concern was that devices which prevent a developmentally-disabled passenger from unlocking a seatbelt on his or her own, while a vehicle is moving – sometimes called a "seat belt buddy" or a "seatbelt clip" – would be prohibited under the proposed rule.[104]

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[98] *Id.*

[99] *See generally,* PUBLIC COMMENTS and Ex. 4.

[100] Minn. Stat. § 14.14, subd. 2.

[101] *Id*.

[102] Hearing Exhibit A.

[103] Minn. Stat. § 14.15, subd. 3.

[104] *Compare*, *e.g.,* Ex. 4 at 6 and 18 (Proposed Rule Parts 9544.0020, subp. 28 and 9544.0060, subp. 2 (X)) with Tr. at 82-83 (Turner); Tr. at 93 (Schmidt); Tr. 95-98 (Espeseth); Tr. 152-61 (Schmutzer); Tr. 166 (Fuemmeler); Tr. at 196-98 (Schmidt); Comments of ACR Homes, Inc.; Comments of Lucas Kunach.

105. As suggested by several stakeholders, the Department revised proposed Part 9544.0130 to make clear that the Department's External Program Review Committee would receive and act upon requests for approval of such safety equipment. Moreover, the revisions set forth a clear set of regulatory standards for the Committee to apply in such cases.[105]

106. A significant amount of public testimony and later written comment on the proposed rules center on the breadth of the definition of the term "manual restraint" and the ban on using such devices in non-emergency situations. Of particular concern was that devices that prevent a developmentally-disabled passenger from unlocking a seat-belt on their own, while the vehicle is in motion, would be prohibited under the proposed rule.[106]

107. The revisions made by the Department are needed and reasonable and would not be a substantial change from the rules as proposed.

VI. Recommended Technical Correction: Minn R. 9544.0005

108. The Administrative Law Judge recommends one technical change to the proposed rules. A technical correction is not a defect in the proposed rule; but rather a recommendation that the agency may adopt, if it sees fit, so as to aid in the administration of the rule.

109. The Administrative Law Judge recommends deletion of Part 9544.0005. While this section may be regarded as an introduction to the Department's regulatory goals, the text does not qualify as a rule. None of the aspirational goals listed in this part are an "agency statement of general applicability and future effect" that is "adopted to implement or make specific the law enforced or administered" by the Department.[107]

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Notice of Hearing, the proposed rules and SONAR complied with Minn. R. 1400.2080, subp. 5 (2013).

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[105] *Summary of Modifications,* DEPARTMENT'S REBUTTAL COMMENTS, at 7-8.

[106] *Compare*, *e.g.,* Ex. 4 at 6 and 18 (Proposed Rule Parts 9544.0020, subp. 28 and 9544.0060, subp. 2 (X)) with Tr. at 82-83 (Turner); Tr. at 93 (Schmidt); Tr. 95-98 (Espeseth); Tr. 152-61 (Schmutzer); Tr. 166 (Fuemmeler); Tr. at 196-98 (Schmidt); Comments of ACR Homes, Inc.; Comments of Lucas Kunach.

[107] Minn. Stat. § 14.02, subd. 4 ("'Rule' means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure"); Minn. R. 1400.2100 (G).

2. The Department gave notice to interested persons in this matter. Moreover, the Administrative Law Judge concludes that the agency has fulfilled its additional notice requirements.

3. The agency has demonstrated its statutory authority to adopt the proposed rules.

4. The agency 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, .50.

5. With the exception of the cost calculation required by Minn. Stat. § 14.131, the Department has fulfilled all of the substantive and procedural requirements of Minn. Stat. §§ 14.05, subd. 1; .14, .15, subd. 3; .50 (i), (ii).

6. The modifications to the proposed rules suggested by the Department after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2; .15, subd. 3.

7. The modification to the proposed rules suggested by the Administrative Law Judge after publication of the proposed rules in the *State Register* is not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2; .15, subd. 3.

8. As part of the public comment process, a number of stakeholders urged the agency to adopt other revisions to Part 9544. In each instance, the agency's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

9. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude, and should not discourage, the Department from further modification of the proposed rules – 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 amended rules be adopted.

Dated: April 22, 2015

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

Reported: 1 Transcript

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt the final rules or modify or withdraw its proposed rule. If the agency makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the agency must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
PO BOX 64620
600 NORTH ROBERT STREET
ST. PAUL, MINNESOTA 55164

CERTIFICATE OF SERVICE

In the Matter of the Proposed Rules of the Department of Human Services Governing Positive Support Strategies, Person-Centered Planning, Limits on Use	OAH Docket No. 8-1800-32056 Revisor R-4213

Katie Lin certifies that on April 22, 2015, she served a true and correct copy of the attached **REPORT OF THE ADMINISTRATIVE LAW JUDGE**; by placing it in the United States mail or by courier service with postage prepaid, addressed to the following individuals:

Karen E. Sullivan Hook Administrative Law Advisor Department of Human Services 444 Lafayette Road Mail Stop 0941 PO Box 64998 Saint Paul, MN 55164	Elizabeth Dressel Policy Coordinator Office of Governor Mark Dayton 20 W Twelfth St Ste 116 St Paul, MN 55155
Legislative Coordinating Commission (lcc@lcc.leg.mn)	The Honorable Lori Swanson Minnesota Attorney General 102 Capitol Building 75 Rev. Dr. Martin Luther King Jr. Blvd St. Paul, MN 55155
Paul Marinac Office of the Revisor of Statutes paul.marinac@revisor.mn.gov	