STATE OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Proposed Rules of the Department of Human Services Governing Public Guardianship Services to Adults with Mental Retardation, (parts 9525.3010 to 9525.3100 [proposed]).

STATEMENT OF NEED AND REASONABLENESS

INTRODUCTION AND BACKGROUND

Proposed parts 9525.3010 to 9525.3100 establish standards for county boards administering adult public guardianship services. Authority to adopt the proposed rules, parts 9525.3010 to 9525.3100, is contained in Minnesota Statutes, chapter 252A, known as the Public Guardianship for Adults with Mental Retardation Act.

Proposed parts 9525.3010 to 9525.3100: (1)establish minimum standards that a county must meet in providing public guardianship services to adults with mental retardation; (2)specify the powers and duties of a public guardian or conservator; (3)incorporate statutorily relevant requirements found in the private guardianship law, Minnesota Statutes, section 525.539 to 525.705; (4)establish criteria governing consent to the use of psychotropic medications and the use of aversive and deprivation procedures; and (5)specify exceptions to the public guardian's power to consent to medical procedures including sterilization, electroconvulsive therapy, psychosurgery, experimental treatment, limited treatment plans, and "do not resuscitate" orders.

History of Public Guardianship

In 1917, the Minnesota Legislature passed law which established the first state mandate to provide services to persons with mental retardation. It provided for guardianship services which included the components of supervision, protection, and habilitation. It authorized the commissioner to supervise those citizens with mental retardation by protecting them and assuring that each individual received the full range of needed social, financial, residential, and habilitative services to which they are entitled. At that time, the only way persons with mental retardation could obtain services was to be under commissioner's guardianship. This is no longer true.

In 1970, the Minnesota Legislature passed Minnesota Statutes, chapter 252A, known as the Mental Retardation Protection Act. This act separated the provision of services to persons with mental retardation and guardianship services from state facility commitment. In 1983, the provision of services to persons with mental retardation was separated from guardianship by Minnesota Statutes, section 256B.092, which specified mandated services for the first time.

There have been a number of revisions to chapter 252A since its original passage. The most significant changes to the act occurred recently in the 1987 legislative session, when its name was changed to the Public Guardianship for Adults with Mental Retardation Act. These amendments specifically excluded children under the age of eighteen and further clarified that public guardianship is the most restrictive form of guardianship. Rulemaking authority was also further defined at this time.

Most recently, Laws of Minnesota, Chapter 465, amended the Department's rulemaking authority under Minnesota Statutes, section 252A.21, subdivision 2. The 1992 legislation prohibits the Department from adopting any rules under section 252A.21, subdivision 2, that require that the county staff which act as public guardian for a person with mental retardation can not be the same person that serves as county case manager, unless the state provides sufficient funding to cover the additional county costs of complying with the requirement. Chapter 465 also requires the Department to submit a report to the Legislature by January 15, 1992, on alternatives to public guardianship and establishment of an independent office of public guardianship.

The purpose of guardianship and conservatorship is to ensure that appropriate decisions are made on behalf of a person who is unable to make decisions independently. The critical factor is that the person must be able to make responsible decisions. In Minnesota, a guardian is an individual, organization, or a state agency appointed by a court and given authority to make decisions on behalf of a person found by the court to be legally incompetent. A ward is a person for whom a guardian has been appointed by the court. Full guardianship signifies a legal finding of incompetence and, accordingly, substantially limits the civil rights of the individual.

In Minnesota, conservatorship is a limited form of guardianship. While a conservatorship does limit some specified civil rights, it does not denote total legal incompetence. By definition, conservatorship is less restrictive and as a matter of law, must always be considered prior to the establishment of a full guardianship. Specifically, a conservatorship restricts only those portions of the rights as stated in the court-ordered letters of conservatorship. A conservatorship does not abridge a person's fundamental civil right to vote and does not deem the person to be legally incompetent.

In Minnesota, public guardianship is in the form of commissioner's guardianship for adults with mental retardation. This form of guardianship is governed by Minnesota Statutes, chapter 252A, and is administered through the Minnesota Department of Human Services. This law is applicable only to adults with mental retardation. Persons with related conditions without mental retardation, mental illness, chemical dependency, as well as children under 18 years and the elderly without mental retardation are not provided public guardianship services under Chapter 252A.

In most cases, the Department does not actually perform these guardianship duties, but rather they are "delegated" to the county. In Minnesota, the counties act as "local guardian" or "delegated guardian" and are responsible for the majority of decision-making actions on behalf of the ward. For instance, the majority of the consents discussed in parts 9525.3010 to 9525.3100 are delegated to the counties. However, there are certain consents which are not delegated and for which the state guardianship office retains responsibility, including life-ending decisions, research, electroconvulsive therapy, sterilization, experimental treatment and other consents involving life-threatening issues.

The form of substitute decision-making applied to each ward should be the least restrictive alternative appropriate for that individual. As stated earlier, public guardianship is generally considered to be the most restrictive form of substitute decision-making. Accordingly, as a matter of policy as well as law (Minnesota Statutes, section 252A.03, subdivision 4), private guardianship is preferred over public guardianship and is viewed as less restrictive in nature. To assure the selection of the least restrictive alternative, before a nomination for public guardianship is accepted, it must be documented that no private party is "willing or able" to act as private guardian.

In situations where the ward's family is not willing or able to fulfill the responsibilities of guardian, it should be noted that the ward's family must still be given the opportunity to be involved in planning and decision-making on behalf of the ward (Minnesota Statutes, section 252A.111). However, the commissioner retains the final decision-making authority.

RULE DEVELOPMENT PROCEDURE

The Notice of Solicitation for parts 9525.3010 to 9525.3100 was published in the State Register on July 16, 1990. An advisory committee was formed with representation from the Minnesota Association of Retarded Citizens, county representatives including a county staff person acting as a public guardian, Legal Advocacy for Persons with Developmental Disabilities, the

Minnesota Network for Institutional Ethics Committees, the Minnesota Association of Guardians and Conservators (MAGiC) standards committee, the Ombudsman's Office of Mental Health and Mental Retardation, the Minnesota Board on Aging, two providers of residential services to persons with developmental disabilities, County Director's Association representatives, regional center management representatives, and Department representatives from the Developmental Disabilities Division, the Medical Director's office, Children's Services Division and Residential Program Management. (Members of the advisory committee are listed in SNR attachment #1). The advisory committee met on August 29, 1990; October 3, 1990; November 7, 1990; December 12, 1990; January 23, 1991 and February 27, 1991. The advisory committee was reconvened to meet on June 26, 1992, to discuss the incorporation of 1992 statutory amendments. Comments and recommendations received during the committee meetings were carefully reviewed and considered in writing the proposed rule. The committee members provided valuable input into the rulemaking process.

NEED AND REASONABLENESS OF SPECIFIC PROVISIONS

The specific provisions of proposed rule parts 9525.3010 to 9525.3100, are affirmatively presented by the Department in the following narrative which constitutes the Statement of Need and Reasonableness in accordance with the Minnesota Administrative Procedures Act, Minnesota Statutes, chapter 14, and the rules of the Office of Administrative Hearings.

9525.3010 **Scope.**

Subpart 1. Applicability. This subpart states the applicability of this rule. It is necessary to specify what and who the rule parts govern so that those governed by and those administering compliance with the rule parts know who is affected. Promulgation of this rule was mandated by Minnesota Statutes, chapter 252A, which directs the commissioner of human services to adopt rules which set standards for the performance of guardianship or conservatorship duties. It was therefore necessary for the commissioner to establish standards for these services. The applicability of this rule needs to be stated so that readers know whether they will be held accountable to the requirements of the rule. It is necessary and reasonable to include the statement that this rule applies solely to adults with mental retardation and is not applicable to persons with related conditions, since it is commonly known that the majority of department rules governing services to persons with mental retardation apply to persons with related conditions as well. This is not true of the public guardianship law and consequently this rule. It is reasonable to require that the rule apply to the county boards since they act as the commissioner's designated

representative and, as such, are directly responsible for assuring the appropriate provision of public guardianship services. It is also necessary and reasonable to state that this rule applies to providers where they are providing certain guardianship services pursuant to an agreement entered into with the county of guardianship responsibility.

Subpart 2. Purpose. This subpart states the purpose of parts 9525.3010 to 9525.3110. It is necessary to inform the public of the purpose for promulgation of this rule and to provide a reference for individuals consulting the rule to determine whether these parts are relevant for their purpose. The statement of purpose given is reasonable because it places the rule parts in statutory context and summarizes the functions served by the rule parts.

9525.3015 **Definitions.**

This part defines words or phrases that have a meaning specific to parts 9525.3010 to 9525.3110, that may have several possible interpretations and that need exact definitions to be consistent with statute. Terms used in a manner consistent with common use in the fields related to mental retardation and human services are not defined unless a definition is necessary to clarify the rule.

Subpart 1. Scope. This provision is necessary to clarify that the definitions apply to the entire sequence of parts 9525.3010 to 9525.4040.

Subpart 2. Aversive Procedure. This definition is necessary to define procedures referred to in part 9525.3045. The definition is reasonable because it references the definition given in Minnesota Rules, parts 9525.2700 to 9525.2810, which governs the use of aversive and deprivation procedures. It is reasonable to reference the definition in order to avoid repetition and to contribute to the brevity of the rule.

Subpart 3. Best interest. It is necessary to define "best interest" since the phrase is used throughout this rule. The definition used is reasonable because it is premised on the needs of the ward and is consistent with the principles of normalization and the least restrictive alternative. Defining this term was the subject of considerable advisory committee discussion. In fact, the definition of "best interest" was discussed at three separate committee meetings. The first definition considered was the definition found in the private guardianship law, Minnesota Statutes, section 525.539, subdivision 7. Notwithstanding that a definition already existed in statute, the committee generally felt strongly that this definition did not fit the needs of public guardian and that

rather, a definition specific to public guardianship was needed. The committee also considered other definitions used in the field, but is was ultimately agreed that a definition was needed which could address the specific issues contained in the rule parts. The proposed definition reflects the result of this process.

Subpart 4. Biomedical ethics committee. This definition is necessary because it is referred to in part 9525.3055 with respect to "do not resuscitate" orders and limited treatment issues. It is necessary and reasonable to include this definition because it is likely that a number of those subject to the provisions of parts 9525.3010 to 9525.3100 may not know what biomedical ethics committees are. The definition given is reasonable because it is consistent with the definition used by hospitals which contain biomedical ethics committees and these committees are standard operating procedure in the medical community.

Subpart 5. Case management. This definition is necessary because this phrase is referred to in part 9525.3010, subpart 3, which prohibits the same person from performing the dual roles of providing public guardianship or conservatorship services and case management services. It is reasonable to refer to the administration and services provided under Minnesota Statutes, section 256B.092, to assure consistency with statute. In the 1991 session, section 256B.092 was amended significantly. As a result of these amendments, case management is now divided into two general categories of responsibility: 1) administration; and 2) services. Proposed amendments to parts 9525.0015 to 9525.0165 are currently being developed, which will incorporate in rule the distinction between case management administration and services. However, since these amendments have not been finalized, it is reasonable to merely refer to the appropriate rule cite to assure consistency with the governing rule as well as statute.

Subpart 6. Case manager. This definition is necessary to clarify who is responsible for providing case management services required and described under parts 9525.0015 to 9525.0165 and referred to in these rule parts. It is important that the role of case manager be clear as well as distinguishable from the role of the person acting as public guardian or conservator, since Minnesota Statutes, section 256B.092, subdivision 7, requires that representation required by the screening and individual service planning process for persons under public guardianship must be done by a person separate from the case manager or a provider of other services for the person.

Subpart 7. Commissioner. This definition is necessary to clarify the meaning of "commissioner" in this rule. The term "commissioner" is used throughout this rule as an abbreviation for the commissioner of the Minnesota Department of Human

Services or the commissioner's designated representative. The abbreviation is used to shorten the length of the rule. It is reasonable to use an abbreviation to delete unnecessary words in a reference frequently repeated in the rule.

It is necessary to include within the definition persons to whom the commissioner has the authority to delegate the functions described in the rule because it would be physically impossible for the commissioner to perform all of the tasks assigned to the commissioner in this rule. It is reasonable to allow this delegation to enable the commissioner to delegate her responsibilities to qualified staff who can effectively manage and control the implementation of the rule, including this delegation of responsibility in the definition also serves to notify interested parties of the delegation.

Subpart 8. Conservatee. This subpart is necessary to define a term which is referenced throughout the rule parts and which must be understood to facilitate compliance with the rule parts. The definition given is reasonable because it references the definition given in Minnesota Statutes, section 252A.02, subdivision 10. It is reasonable to define the term by referencing the statute so that the rule will be consistent with the statute that authorizes the rule.

Subpart 9. Contract. While the term "contract" is a general term of common usage, its definition is necessary because it has a meaning specific to the rule parts. Defining a contract as a "legally enforceable agreement" is reasonable because it is consistent with the definitions in both legal and nonlegal dictionaries and with the public's understanding of the legal nature of contracts. It is reasonable to reference the definition given in Minnesota Rules, part 9525.0015, subdivision 7, because referencing the definition rather than reproducing it shortens the rule parts and is further reasonable because parts 9525.0015 to 9525.0165 are widely circulated and thus available to those affected by the rule.

Subpart 10. County of guardianship responsibility. This definition is necessary to clarify which entity is primarily responsible for assuring the delivery of guardianship services and compliance with these rule parts. The definition given is reasonable because it establishes the general supervisory responsibility of the county of guardianship responsibility.

Subpart 11. County staff acting as guardian. This definition is necessary because the phrase "county staff acting as guardian" is used throughout parts 9525.3010 to 9525.3100 to identify the specific person responsible for the provision of guardianship services identified in the rule. It is reasonable to specify the person to provide clarification and avoid confusion. Such clarification is necessary to distinguish those duties which are

performed by the Department and not delegated to the county. It is reasonable to refer to a specific person rather than the local agency generally because Minnesota Statutes, section 252A.21, requires that the duties of public guardianship and case management cannot be performed by the same staff person.

Subpart 12. Department. This definition is necessary to clarify that the specific department referred to in the rule parts is the Minnesota Department of Human Services. Substituting "department" for the full name of the department is a reasonable way of shortening the rule parts.

Subpart 13. Deprivation procedure. The need and reasonableness of this definition are the same as for the definition of aversive procedure found in subpart 3.

Subpart 14. "Do not resuscitate." This definition is necessary because it is referred to in rule part 9525.3055 and its meaning must be understood to facilitate compliance with the rule part. Minnesota Statutes, section 252A.21, subdivision 2, mandates that the rules must specify standards for action on "do not resuscitate" orders. The definition given is reasonable because it is the currently accepted medical definition.

Subpart 15. Electroconvulsive therapy or electroshock therapy. This definition is necessary because the term is referred to in rule part 9525.3060 and its meaning must be understood to facilitate compliance with the rule part. The definition given is reasonable because it is consistent with the definition commonly-used and accepted in the medical community. (See, Stedman's Medical Dictionary, 25th Ed. (1990) p.1587). It is reasonable to use the definition of the currently-accepted term "electroconvulsive therapy" in the rule and to make reference to the term "electroshock therapy," which is used in Minnesota Statutes, section 525.56, subdivision 3(4)(a), to assure that this rule is reflective of current practice and is written using current terminology. It is further reasonable to provide clarification and to avoid confusion which may be caused by the use of two different terms.

Subpart 16. Experimental treatment. This definition is necessary because the term "experimental treatment" is referred to in part 9525.3060 and must be understood in order to facilitate compliance with the rule parts. The definition given is reasonable because it is consistent with federal Food and Drug Administration regulations governing the use of promising investigational new drugs which may be made available to patients with life-threatening or other serious disease for which no satisfactory alternative drug or other therapies exist. (See, Code of Federal Regulations, title 21, section 312.34(b)).

Minnesota Statutes, section 252A.111, subdivision 1, provides

that section 524.56, subdivisions 1 to 3 apply to the powers and duties of a public guardian and section 525.56, subdivision 3 (4)(1) specifies that a court order is required for consent to, among other medical procedures, experimental treatment. However, both statutes are silent as to the definition of experimental treatment. Since the term is used in the rule part and the rule sets forth the procedures to be followed where experimental treatment is involved, it is necessary to include a definition in the rule.

First attempts in drafting a definition of "experimental treatment" revealed the fact that the term is actually inaccurate. Medical research conducted by the Assistant to the DHS Medical Director confirmed that "experimental treatment" is not a commonly used term in the medical or scientific communities. The Department contacted a number of medical providers in the area, including PHP and Group Health to inquire regarding the definition of "experimental treatment" which is used by these providers of medical services. PHP described "experimental treatment" as services and drugs that are experimental, unproven or not approved by the Food and Drug Administration (FDA) for a particular use. Group Health considers experimental medical services to be those techniques or services that have been confined largely to laboratory and or animal research or have progressed to limited human application and trials, but lack wide recognition as a proven and effective measure of clinical medicine. Further, the advisory committee recommended a number of key components to be incorporated into the definition of "experimental treatment" including: 1) known therapeutic value; 2) more accepted methods have been tried and found to be ineffective; 3) generally recognized; 4) unusual, new or different; and 5) the scientific community has not reached a consensus on it's application or use. These elements were carefully considered by the Department and incorporated to the extent deemed appropriate.

However, since no exact definition of the term could be incorporated by reference into the rule, the Food and Drug Administration regulations governing treatment use of investigational drugs is used. The use of these regulations is reasonable since the intent of including experimental treatment within the guardianship law was twofold; (1)to make promising treatments available to wards with life-threatening or other serious diseases for which no satisfactory drug or therapy exists; and (2)to safeguard the best interest of the ward through monitoring the drug's or therapy's safety and effectiveness. Accordingly, with the support of the advisory committee, the Department determined that incorporating the FDA standards into the definition of experimental treatment for purposes of this rule was quite reasonable and the most sound approach since the definition would reflect established standards commonly accepted and followed in the scientific as well as medical communities.

The federal standards governing the treatment use of investigational new drugs are found at Code of Federal Regulations, title 21, section 312.34(b). The FDA published these procedures in the Federal Register on May 22, 1987 (52 FR 19466). These standards set forth criteria by which the FDA evaluates whether a drug in clinical trials may be used under a treatment protocol. The definition in subpart 20 incorporates the first two criteria.

A United States Department of Health and Human Services information sheet dated May 1989 (attached as Exhibit), was designed to assist Institutional Review Boards in understanding the "treatment use" provisions. This information sheet explained the following: (1)for a drug intended to treat a serious disease, the Commissioner (referring to the Commissioner of the U.S. Department of Health and Human Services) may deny a request for treatment use under a treatment protocol if there is insufficient evidence of safety and effectiveness to support such use; and (2)for a drug intended to treat an immediately life-threatening disease, the commissioner may deny a request for the use of the investigational drug under a treatment protocol if the available scientific evidence, taken as a whole, fails to provide a reasonable basis for concluding that the drug may be effective for its intended use in its intended patient population or would not expose the patients to whom the drug is to be administered to an unreasonable and significant additional risk of illness or injury. Use of these standards is reasonable because it is clear that these standards act as a safeguard of the ward's best interests.

Subpart 17. Individual service plan. This term is used throughout the rule parts and is necessary to identify the documents in which the client's needs are identified. It is reasonable to reference the plan required by Minnesota Statutes, section 256B.092, subdivision 1b, since this statute governs case management services to persons with mental retardation and related conditions and specifically requires the individual service plan. Referencing the statute rather than repeating a long definition and description, promotes consistency between the Department's rules and contributes to the brevity of the rule. It is further reasonable to incorporate the individual service plan requirements already in practice into the guardianship rule, thereby avoiding additional and/or duplicative requirements.

Subpart 18. Informed consent. This definition is necessary because the term "informed consent" is used throughout the rule as it relates to the consent to medical procedures, the use of aversive and deprivation procedures, and the use of psychotropic medications. It is necessary that those affected by this rule understand what is involved in informed consent in order to protect the best interests of the ward or conservatee and to

facilitate compliance with these rule parts. The definition given is reasonable because it includes those elements which are commonly-accepted in the field of guardianship and conservatorship as those which must be present in order for informed consent to be valid, including capacity, voluntariness and understanding of risks and benefits. For example, in *Legal Challenges to Behavior Modification*, Reed Martin indicates that the first step in any behavior change program is to gain consent and that basically, consent requires capacity to understand, voluntariness, and notice of the risks and benefits of the proposed program.

The definition is further reasonable because it is similar to the definition of informed consent which was developed by the MAGiC (Minnesota Association of Guardians and Conservators) standards committee. This committee is comprised of a variety of professionals and experts in the area of guardianship services and is commonly recognized as a group with a high degree of expertise in the field.

Subpart 19. Least restrictive alternative. It is necessary to define "least restrictive alternative" because the term is used in the rule parts and is terminology which is commonly used in the guardianship field. The definition given is reasonable because it encompasses the major elements of supervision, protection and individualization.

The concept of "least restrictive alternative" is based in law. According to R.C. Scheerenberger, a noted author in the field of mental retardation, as a legal doctrine, the theory of "least restrictive alternative" was first noted as early as 1819 in the case of *McCulloch v. Maryland*. The principle was specifically stated in 1960 in *Shelton v. Tucker*, when the Supreme Court stated:

> In a series of decisions the Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle the fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Scheerenberger, R. C., *A History of Mental Retardation-A Quarter Century of Promise*, p.122-123.

According to R.C. Scheerenberger, supra, the legal statements regarding least restrictive alternative were focused on a state's right to infringe on individual freedoms. The principle of "least restrictive alternative" with respect specifically to persons with mental retardation was first cited in 1972, in *Wyatt v. Stickney*, and was subsequently applied in other cases. By 1985, the least restrictive alternative automatically involved:

1. Equal protection under the law;
2. Due process and related hearings;
3. Right to treatment and habilitation based on an individual plan;
4. Informed consent by the person or guardian, if necessary;
5. The right to deny as well as to accept treatment; and
6. The right to receive programming in the least personally restrictive environment.

Scheerenberger, R.C., *A History of Mental Retardation-A Quarter Century of Promise*, p.123.

Scheerenberger aptly summarizes the significance of the least restrictive alternative in the following statement:

> Taken in their totality, the principles and theories associated with normalization, the developmental model, the least restrictive alternative, and mainstreaming implied that each mentally retarded person should live in an open society, if at all possible, and that any environment in which the individual resided should provide as normal a way of life as the individual is capable of handling effectively. They also mandated that every effort be made to assist the mentally retarded child or adult, regardless of degree of retardation of accompanying handicaps, to attain the highest degree of societal integration feasible.

Scheerenberger, R.C., *A History of Mental Retardation-A Quarter Century of Promise*, p.123.

Subpart 20. Licensed physician. This definition is necessary to ensure that the term has the same meaning in this rule as it is given in statute. This definition is reasonable because it references the definition given in the public guardianship statute.

Subpart 21. Local agency. It is necessary to define this term because it is used throughout the rule part and the term has a specific meaning in this rule. It is reasonable because local agencies have certain responsibilities specified in this rule and the county of guardianship responsibility is responsible for the provision of services unless a supervising agency has been designated.

Subpart 22. Near relative. This definition is necessary to assure that the term "near relative" has the same meaning in this rule as it is given in statutes. This consistency is needed because the term is referenced throughout the rule parts. The definition is reasonable because it states the definition given in Minnesota Statutes, section 252A.02, subdivision 6. It is reasonable to provide the full statutory definition because the term is used in several parts of the rule and its meaning is integral to the understanding of these provisions.

Subpart 23. Person with mental retardation. This term is used throughout the rule parts to describe persons who have a particular condition that entitles them to receive those public guardianship or conservatorship services under Minnesota Statutes, chapter 252A, which the court deems necessary. It is necessary to define this group of persons in terms of the condition that makes them eligible for services.

It is reasonable to refer to the definition of "person with mental retardation" contained in part 9525.0015, subpart 20, because parts 9525.0015 to 9525.0165 (Rule 185) govern case management for persons with mental retardation or related conditions. Specifically, Rule 185 contains the rule provisions which govern the diagnosis of mental retardation. Because proposed amendments to Rule 185 are currently being developed which may impact the definition and diagnostic requirements of mental retardation, it is reasonable to simply refer to the appropriate governing rule provision to assure consistency between rules, notwithstanding future amendments. Since Rule 185 governs the diagnosis of mental retardation, it is appropriate to cross-reference it in this definition in order to assure consistency and to avoid duplication.

It is reasonable to use the term "person with mental retardation," rather than "mentally retarded person," as is used in the statute, because this represents current, commonly-accepted terminology. The term has been changed from "mentally retarded person" to "person with mental retardation" to reflect changes in the terminology used in the field of mental retardation and to stress that mental retardation is a condition a person may have rather than a type of person.

Subpart 24. Psychotropic medications. This definition is necessary because Minnesota Statutes, section 252A.21, subdivision 2, requires that the commissioner shall adopt rules which include standards for the performance of guardianship and conservatorship duties, including the use of psychotropic medication. Part 9525.3080 specifically addresses consent by the public guardian to the use of psychotropic medications. The definition given is reasonable because it is consistent with the definition commonly accepted in the medical field. (See, The Psychiatric Dictionary, Robert J. Campbell, M.D., 5th Ed. (1981), pp. 523-524). This definition is further reasonable because it includes the treatment of mental illness as well as associated behaviors within the scope of the use of psychotropic medications.

The definition of "psychotropic medication" was the focus of much discussion and debate by the advisory committee. Based upon public input received, the Department decided to include the phrase, ". . . and associated behaviors . . .", in recognition of the fact that it is a commonly known fact in the field that

psychotropic medications are often prescribed to persons with a diagnosis of mental retardation (i.e., where no dual diagnosis of mental illness is present) for the purpose of treating maladaptive behaviors. In view of this fact, the inclusion of this section of the definition is reasonable to assure protection of the ward through monitoring the use of psychotropic medications for such purposes.

This subpart is further reasonable because it lists those groups of medications which are commonly-classified in the medical community as being psychotropic medications. This list reflects the input of the psychiatric profession through representation from the Minnesota Psychiatric Society on the rule advisory committee. The representative provided considerable input with regard to the definition of "psychotropic medication" as well as the consent provisions. A copy of the rule draft was also furnished to some other members of the Minnesota Psychiatric Society for review and comments. Further, this definition was reviewed by the DHS Health Care Division to assure consistency with the medications listed in the Drug Formulary developed pursuant to Minnesota Statutes, section 256B.0625, subdivision 13.

Subpart 25. Public conservator. It is necessary to define this term because it is referenced throughout the rule and it is needed to identify the party responsible for fulfilling the responsibilities outlined in this rule. It is reasonable to use the definition which is consistent with that definition given in Minnesota Statutes, chapter 252A, in order to assure that "public conservator" has the same meaning in rule as it is given in statute.

Subpart 26. Public guardian. It is necessary to define this term because it is referenced throughout the rule and it is needed to identify the party responsible for fulfilling the responsibilities outlined in this rule. It is reasonable to use the definition which is consistent with that definition given in Minnesota Statutes, chapter 252A, in order to assure that "public guardian" has the same meaning in rule as it is given in statute.

Subpart 27. Regional center or regional treatment center. This definition is needed to specify what facilities are included in the references to "regional center" that appear in the rule parts. It is reasonable to reference the definition given in Minnesota Statutes, section 252A.02, subdivision 4, to ensure that the definition in rule is consistent with the definition in statute.

Subpart 28. Research. This definition is necessary because the commonly used term "research" has a specific meaning within the rule parts. Part 9525.3055, subpart 4, governs consent to the ward's participation in research. The definition given is

reasonable because it is consistent with the definition found in the Code of Federal Regulations, title 45, section 46.102. It is reasonable to restate the definition given in the Code of Federal Regulations rather than merely referencing it, due to the recommendation of advisory committee members who felt that the definition should be set out in the rule to assist those who the rule affects and because the Code of Federal Regulations are often not readily available to county staff and providers.

Subpart 29. Residential service. This definition is necessary because Minnesota Statutes, section 252A.21, subdivision 2, directs that this rule must include standards for the guardian's quarterly review of records from the residential service. It is reasonable to reference the definition given in the rules governing case management services because referencing the definition rather than reproducing it shortens the rule parts and because parts 9525.0015 to 9525.0165 are widely circulated and thus available to those affected by the rule. It is also reasonable to use this definition because it is consistent with other department rules.

Subpart 30. State facility. This definition is necessary because state facilities are referenced in the rule parts. It is reasonable to reference the statutory definition to ensure that rule is consistent with statute. It is necessary and reasonable to specifically state that the term "state facility" includes state-operated community services (SOCS) to provide clarification and avoid confusion. During the advisory committee process, some members suggested that the term "state-operated community services" should be defined separately in the rule. While some members were aware that the definition of "state facility" includes SOCS, others were not. Therefore, it is reasonable to clarify in this definition that SOCS are included in the definition of "state facility."

Subpart 31. Sterilization. This definition is necessary because Minnesota Statutes, section 252A.21, subdivision 2, directs that this rule must include standards to be followed for action on sterilization requests. These standards are set forth in part 9525.3075. The definition is reasonable because it is consistent with the definition commonly-used and accepted in the medical community. (See, Stedman's Medical Dictionary, 25th Ed. (1990), p. 1475). This definition is also consistent with the definition given in the Medical Assistance Provider Manual which addresses those medical services which are authorized under Medical Assistance. The definition is further reasonable because it clarifies that the result is intended to be permanent. There was considerable committee input to the effect that the element of permanency must be clearly stated in the definition.

Subpart 32. Supervising agency. This definition is necessary in order to clarify duties and distinguish the "supervising agency"

and the "county of guardianship responsibility." The definition is reasonable because it establishes the relationship between the supervising agency and the county of guardianship responsibility. It is further reasonable because it clarifies that the supervising agency may be the same entity as the county of guardianship responsibility, but that this is not always the case.

Subpart 33. Terminal condition. It is necessary to define this term because it is discussed in the rule parts in the context of life-sustaining treatment. The definition given is reasonable because it clarifies that the condition must be incurable or irreversible in order to be considered terminal. The definition is further reasonable because it incorporates those elements of the definition of "terminally ill" found in the Residential Facilities Manual, policy #1600, July 10, 1990, which is the manual used by the Minnesota Board on Aging. Jean Orsello, the Legal Services Developer for the Minnesota Board on Aging, was a member of the advisory committee that provided the definition used by this board. Using the definition already in use by other department divisions provides for consistency among department rules and regulations. This definition is also reasonable because it is consistent with the definition commonly-accepted by the medical profession.

Subpart 34. Ward. This subpart is necessary to define a term which is referenced throughout the rule parts and which must be understood to facilitate compliance with the rule parts. The definition given is reasonable because it references the definition given in Minnesota Statutes, section 252A.02, subdivision 9; the statutory authority under which a public guardian is appointed to a ward. It is reasonable to define the term by referencing the statute so that the rule will be consistent with the authorizing statute. It is reasonable to repeat the statutory definition in rule since the term "ward" is an integral part of the purpose of the entire rule.

9525.3020 **Adults Subject to Public Guardianship.**

Subpart 1. Private guardianship preferred. Minnesota Statutes, section 252A.03, subdivision 4, provides that public guardianship or conservatorship may be imposed only when no acceptable, less restrictive form of guardianship or conservatorship is available. Further, this section requires that the commissioner shall seek parents, near relatives and other interested persons to assume private guardianship for persons with mental retardation who are currently under public guardianship. This subpart is necessary to establish from the outset that private guardianship is preferred as the less restrictive form of supervision and that all private guardianship options must first be considered before a public guardianship is established. It is reasonable to

include this language in the rule because it is consistent with the philosophy of the least restrictive form of supervision, which is endorsed by such groups as the National Guardianship Association and the Minnesota Association of Guardians and Conservators (MAGiC). It is further reasonable because this rule part reinforces the legislative intent of the preference for private guardianship.

Subpart 2. Commissioner as adviser. This subpart is necessary to ensure that those individuals who require public guardianship services are informed of their right to such services and are provided the necessary assistance to enable them to obtain appropriate supervision and services. It is reasonable to only reference the statutory authority, Minnesota Statutes, section 252A.14, since in today's system individuals in need of public guardianship services are generally identified through the Rule 185 case management process. Historically, there was a significant need for the local agency to actually seek out these individuals; however, this is no longer the case, due to the case management system as well as the vulnerable adult system. Accordingly, it is not necessary to set forth the local agency's specific responsibilities with respect to "seeking out" persons in need of guardianship services. Rather, this can and should be left to the county's best judgment.

Subpart 3. Guardian of the estate. This subpart is necessary to establish for those to whom the rule applies, that in a public guardianship the commissioner does not assume the guardianship of the ward's estate. Based upon input from a number of rule advisory committee members, the Department determined it was necessary to include a brief provision regarding guardianship of the estate for clarification purposes. Input from the committee revealed that situations involving a ward's estate arise from time to time and all too often those involved are uncertain as to how to handle the situation. This subpart is reasonable because it provides a safeguard mechanism for the ward's estate and further, because it refers to the criteria set forth in the private guardianship statute, Minnesota Statutes, section 525.54, subdivision 3, for determining whether a guardianship of estate is needed.

9525.3025 **Process of Appointing a Public Guardian.**

Subpart 1. Nomination of commissioner. This subpart is necessary to clarify the procedure to be followed in nominating the commissioner to act as public guardian or conservator. It is reasonable to provide this language in the rule because it clarifies how to request nomination of the commissioner as well as specifies who may nominate. It is further reasonable because, throughout the advisory committee process, many county and provider representatives commented that it is very helpful to

them if a rule clearly specifies the procedures to be followed and that by putting the procedures required by statute which are particularly important to those whom the rule applies, this provides for ease of access and implementation of the rule.

Subpart 2. Comprehensive evaluation. This subpart is necessary to define and clarify the role of the local agency in completion of the comprehensive evaluation required by section 252A.04. In order to facilitate compliance with statute, it is necessary to specify the contents of the comprehensive evaluation and to address those cases where the proposed ward is under medical care. It is reasonable to summarize in rule, the statutory requirements regarding the comprehensive evaluation, to provide counties who are responsible for carrying out this function with an easily accessible summary of the requirements. As stated herein, county representatives on the advisory committee urged that such requirements be included in the rule in order to provide an easily accessible tool that contains all of the public guardianship responsibilities in one location.

Subpart 3. Commissioner's acceptance or rejection of nomination. This subpart is necessary to specify the next step in the appointment process following the receipt of the comprehensive evaluation. It is reasonable to provide clarification by stating in rule the statutory criteria for acceptance as well as the action that may be taken if the commissioner rejects the nomination. It is further reasonable to summarize the statutory requirements for the reasons stated in subpart 2 above.

Subpart 4. Petition. This subpart is necessary to specify clearly in rule, the next step in the process of appointing a public guardian. It is reasonable to establish the steps involved beginning with the nomination of the commissioner through the hearing in order to provide the counties with a clear statement and clarification of the process in chronological order. It is reasonable to refer to the statutory provision which contains the requirements for the content of the petition based upon committee input that while in larger counties the county attorney generally writes the petition, the county case manager frequently assumes this responsibility in smaller counties. Accordingly, some committee members suggested that in the case of these smaller counties, a reference in the rule to the appropriate statutory provision would be helpful to county staff.

It is necessary and reasonable to provide information to those governed by this rule regarding what persons or parties are entitled to file a petition. It is further reasonable because the language provides a clearer understanding of the process and requirements of the petition process.

Subpart 5. Filing the comprehensive evaluation. This subpart is necessary to inform the counties of the procedure to be followed in filing the comprehensive evaluation. It is reasonable to provide the counties with information regarding the specific timelines for filing the comprehensive evaluation in order to facilitate ease of implementation and compliance with statutory requirements. In subpart 5a, it is necessary to state the exception to the comprehensive evaluation requirement in order to assure the intent of section 252A.07. This provision is reasonable because it enables the appointment process to go forward in those cases where the proposed ward refuses to participate in the comprehensive evaluation but may still be in need of the supervision and protection of guardianship.

Subpart 6. Exception. This subpart is necessary to notify those governed by the rule that the statute provides for an exception to the requirements of subpart 5, under very limited circumstances. Minnesota Statutes, section 252A.07, subdivision 3, provides that an action may proceed and a guardian be appointed if the local agency files an affidavit that the proposed ward files an affidavit that the proposed ward refused to participate in the comprehensive evaluation. It is reasonable to provide notice of the exception because it may at some time, be applicable.

Subpart 7. Notice of hearing. This subpart is necessary and reasonable to provide counties with a summary of the notice process as well as to relate the notice chronologically to the entire process of appointing a public guardian. Since the counties will be responsible for the implementation and compliance with these rule parts, it is reasonable to provide them with the essential information and framework of the process involved.

Subpart 8. Hearing. This subpart is necessary to specify the process involved in the hearing and the conclusion of the appointment process. It is reasonable to reference the statutory requirement to give notice to those governed by the rule of the applicable statutory provision.

9525.3030 **Limits of Guardianship Powers and Duties.**

This part is necessary to be consistent with statutory requirements. Minnesota Statutes, section 525.56, provides that a guardian has only those powers granted by the court which are necessary to provide for the demonstrated needs of the ward. Minnesota Statutes, section 252A.111, subdivision 1, specifies that section 525.56, subdivisions 1 to 3 apply to a public guardian as well as a private guardian. During the advisory committee process, some members raised concern over the possibility that, in the absence of a stated limitation or

restriction, the guardian could possibly assume too much power or act in an overly-restrictive manner. It was determined that a reference to the relevant provision in the private guardianship law addressing the civil rights and personal freedoms of the ward would address this concern. This provision is reasonable because it is consistent with the principle of the least restrictive alternative and it assures protection of the ward's civil rights and personal freedoms.

9525.3035 **General Standards for Guardianship.**

Subpart 1. Generally. This subpart is necessary to establish criteria by which the public guardian shall assess and make a determination in each request for a consent on behalf of the ward. It is reasonable to summarize the standards into four general categories of action to provide explanation and clarification.

Subpart 2. Planning. Subpart 2 is necessary to assure that the guardian assist the ward in receiving services required by statute. Minnesota Statutes, section 252A.01, subdivision 1, authorizes the commissioner to protect persons with mental retardation from violation of their human and civil rights by assuring that they receive the full range of needed social, financial, residential and habilitative services to which they are lawfully entitled. It is reasonable to require that the guardian be involved in the planning of services for the ward in order to safeguard the rights of the ward. It is necessary and reasonable to specify that this planning must be done in cooperation with the case manager and providers of services, since each respective party has a distinct and separate role in the planning process, but at the same time, cooperation is necessary. Items A to D are necessary to specify what factors the guardian must consider when planning on behalf of the ward.

Item A is reasonable because the guardian must have sufficient knowledge of the ward in order to make a prudent determination of what is in the best interest of the ward.

Item B is reasonable because the guardian must be knowledgeable about both entitlements and service options that are available in order to make a fully informed decision and to match the ward with the services that best meet the individual needs of the ward. Specifically, the guardian should have adequate information regarding housing, residential services, day training and habilitation services, support services, medical, dental and psychological services, public benefits, community resources and communication with persons with developmental disabilities.

Item C is reasonable because the guardian is responsible to protect the rights of the ward and therefore, must advocate for services that represent the least restrictive alternative available and that are in the best interest of the ward.

Item D is reasonable because generally, community-based services have been determined to be the least restrictive alternative and typically can meet the individualized needs of the ward more effectively.

Subpart 3. Protection of rights. It is necessary to include protection of rights as one of the general standards for guardianship because this is the primary function of a guardian. Minnesota Statutes, section 252A.01, subdivision 1, authorizes the commissioner to protect adult persons with mental retardation from violation of their human and civil rights. It is necessary and reasonable to require the guardian to take appropriate action if it is determined that the ward's legal rights are abridged, since such action may be ultimately necessary in order to fully protect the ward. It is further reasonable because Minnesota Statutes, section 252A.11, subdivision 2, provides that the public guardian has the power to begin legal action or defend against legal action in the name of the ward.

Subpart 4. General standards for consent determination. It is necessary to establish general criteria for consent determination because consent determination is one of the primary functions of a guardian.

Item A is reasonable because the standard of best interest is a commonly-used standard in the area of guardianship. Historically, the concept of guardianship was developed by the king or landowner who was given the authority to protect the property and estate interests of a person who was incapacitated. At that time, a person could be deemed to be "incapacitated" for a variety of reasons such as mental illness, mental retardation, sickness, old age, drug use or simply for purposes of political control. The king or landowner made decisions which were in the "best interest" of the property. Best interest of the property mean decisions that would protect the integrity of the property. These decisions did not necessarily protect the interests of the person or promote the person's wishes. Over time, the "best interest" was determined to mean to protect the interest of the person rather than the property. The meaning of "best interest" was further formed over time to mean a protection of the interest of a person, but not to necessarily promote the opinion of that person.

Nationally, in the past five to ten years, the concept of "substituted judgement" has developed as a means of promoting the person's wishes. Simply stated, the principle of "best interest" is viewed as promoting what is best for the person, while the

"substituted judgement" principle is considered to promote what the person's desires and wishes. Nationally, a combined approach has generally been adopted. (See, *Guardianship: An Agenda for Reform*, American Bar Association Commission on the Mentally Disabled, Commission of Legal Problems of the Elderly; *Decision-Making, Incapacity, and the Elderly*, Legal Counsel for the Elderly). While parts 9525.3010 to 952.3100 refer to the "best interest" standard, the standard truly encompasses the premise of both principles and thus is consistent with the current national trend in guardianship services.

Item B is reasonable because the concept of least restrictive alternative is consistent with the current, commonly accepted philosophy in the field of guardianship services. For example, it is the policy of the American Bar Association to encourage less restrictive alternatives to full guardianship and to divert inappropriate cases out of the guardianship system. (See, *Guardianship: An Agenda for Reform*, American Bar Association Commission on the Mentally Disabled, Commission on Legal Problems of the Elderly). In 1973, the American Association on Mental Deficiency, then the leading authority on mental retardation and mandated services, issued as series of basic rights statements. One of the statements concerned the right to live in the least restrictive individually appropriate environment. The objective of the legal as well as the social services field is to protect the civil rights of persons with developmental disabilities and to limit any restriction on their civil rights to those which benefit the person. (See, Scheerenberger, R.C., *A History of Mental Retardation: A Quarter Century of Promise*).

Item C is reasonable because it is consistent with Minnesota Statutes, section 252A.111, subdivision 1, which provides that Minnesota Statutes, section 525.56, subdivisions 1-3 apply to the public guardian. Minnesota Statutes, section 525.56, subdivision 3 (4)(a) states that:

> "[T]he guardian or conservator shall not consent to any medical care for the ward or conservatee which violates the known conscientious, religious, or moral belief of the ward or conservatee."

It is reasonable to honor and respect the beliefs of the ward where these beliefs are known and strong.

Item D is reasonable because it is consistent with statutory requirements. Minnesota Statutes, section 252A.111, subdivision 5 (4), requires that the guardian shall permit and encourage input by the nearest relative of the ward in planning and decision-making on behalf of the ward. It is further reasonable to consider the input of the nearest relative because they likely have a long-standing relationship with the ward and, therefore, may have valuable information to contribute that is important in reaching the best decision on behalf of the ward.

Subpart 5. Monitoring and evaluation. This subpart is necessary because the guardian must monitor and evaluate the ward's services in order to make an informed determination of whether the services represent the least restrictive alternative and are in the best interest of the ward. Part 9525.3065, as referenced in this subpart, requires the guardian to conduct quarterly and annual reviews. These reviews provide the guardian with the mechanisms for making informed decisions regarding services to the ward. The need and reasonableness for monitoring and evaluation are stated further in part 9525.3065.

Subpart 6. Release of information. It is necessary to establish general criteria governing the release of information regarding the ward to protect the privacy rights of the ward. It is necessary and reasonable to inform the counties that the public guardianship staff must not release information regarding the ward unless certain conditions and safeguards are met. This provision is reasonable because it requires that any release of information by the guardian must be in compliance with all applicable data practices laws. It is further reasonable because the guardian must also, in each request for a release of information regarding the ward, consider whether the release is in the best interest of the ward. This provides the guardian with the authority to deny release of information where it may be contrary to the best interest of the ward. It is further reasonable to require that the release of information be in the best interest of the ward in order to protect the ward and to prevent unnecessary or inappropriate release of information.

9525.3040 **Powers and Duties of Public Guardian.**

This part is necessary to specify all powers and duties of the public guardian or conservator which are specifically required by statute. It is reasonable to restate all of these powers and duties in this rule, since parts 9525.3010 to 9525.3100 govern the responsibilities of county staff acting as public guardians. Since county staff will be acting as public guardian, it is necessary that their duties be stated clearly in the rule in order to facilitate fulfillment of all responsibilities required by statute. It is reasonable to divide the powers and duties into general, additional and special in order to be consistent with Minnesota Statutes, chapter 252A, and to facilitate compliance with each specific power and duty.

Subpart 1. General powers. This subpart is necessary to inform the counties that the public guardianship law (Minnesota Statutes, chapter 252A) requires the public guardian to be responsible for those general powers which are specified in the private guardianship law (Minnesota Statutes, section 525.56, subdivisions 1 to 3). It is reasonable to clarify for the public guardian, that is this context, these specific provisions of the

private guardianship law are applicable to them.

In item D, it is necessary and reasonable to qualify the power to consent to medical care by specifying exceptions under parts 9525.3055 to 9525.3060, since this is consistent with the exceptions to consent to medical procedures found in Minnesota Statutes, section 525.56, subdivision 3(4)(a). The reference to the specific rule parts which identify and discuss these exceptions is reasonable because it clarifies which medical consents the public guardian does not have the general power to consent to. This provision is further reasonable because it facilitates compliance with statute and rule. It is reasonable to specify that the public guardian has the general power to consent to the use of aversive and deprivation procedures and psychotropic medications because Minnesota Statutes, section 252A.21, subdivision 2, specifically requires that the Department set standards for public guardianship action on these matters.

Subpart 2. Additional powers. This subpart is necessary to inform the public guardian and to clarify that in addition to the general powers and duties specified in subpart 1, the public guardian has the three specific powers delineated in items A to C. It is reasonable to state these statutory requirements in rule to facilitate compliance with Minnesota Statutes, chapter 252A, since the rule applies to the county staff acting as public guardian.

Subpart 3. Special duties. This subpart is necessary to further specify the duties of the public guardian as required by Minnesota Statutes, section 252A.111. It is reasonable to state each specific duty required by statute for the same reasons as stated in subparts 1 and 2. In item B, it is necessary to clarify the statutory requirements in order to adequately protect the best interests of the ward. During the committee process, a number of committee members commented that it is necessary to distinguish consent to filming on the basis of the intended use of the film. There was a general consensus that there should be a safeguard to address those situations where the film is intended for wide dissemination. However, some felt that all uses of filming should not be prohibited; i.e. personal filming by the ward and their family. Accordingly, the phrase "for public dissemination" was added to the item to clarify that this provision does not control filming for private purposes. Further, some committee members pointed out that filming may at times, have a very specific purpose, such as in use as a teaching tool. It was suggested that in such cases, the consent must be very specific and limited with respect to the scope of filming in order to protect the best interests of the ward.

9525.3045 Consent to Use of Aversive and Deprivation Procedures.

This part is necessary to implement the provisions of Minnesota Statutes, section 252A.21, subdivision 2, which requires that the Department set standards for the public guardian's actions on the use of aversive procedures.

Subpart 1. Generally. This subpart is necessary to inform the public guardian of their role in terms of consenting to the use of aversive and deprivation procedures. It is necessary and reasonable to state in rule that the Department will provide technical assistance, since the Department has staff with considerable expertise and experience in the area of aversive and deprivation procedures. This provision is further reasonable because the Department's technical assistance will facilitate understanding as well as compliance with rules and regulations governing the use of these procedures. Such technical assistance will facilitate quality decision-making by guardians on behalf of wards.

Subpart 2. Informed consent. This subpart is necessary to inform the public guardian that certain requirements must be met before the public guardian has the authority to consent to the use of an aversive or deprivation procedure. Minnesota Statutes, §252A.21, subdivision 2, requires the commissioner to promulgate rules which set standards for the use of aversive and deprivation procedures. It is reasonable to refer to rule parts 9525.2700 to 9525.2810 (Rule 40), since this rule specifically governs the use of aversive and deprivation procedures with persons who have mental retardation or related conditions and who are served in or by a program licensed by the commissioner under Minnesota Statutes, chapter 245A (Human Services Licensing Act) and section 252.28, subdivision 2. Rule 40 contains specific criteria necessary for informed consent. It is further reasonable to reference Rule 40 in these parts to assure consistency among department rules, to avoid unnecessary duplication and to contribute to the brevity of the rule. Also, Rule 40 is readily available to county staff. It is reasonable to provide that all requirements of Rule 40 are met in order to protect the best interests, health and safety of the ward as well as to facilitate compliance with other rules and regulations governing the use of aversive and deprivation procedures.

It is reasonable to reference the requirements of Code of Federal Regulations, title 42, section 483.13 because these regulations apply to the use of aversive and deprivation procedures in long-term care facilities. Rule 40 is not applicable to skilled nursing facilities because these facilities are certified by the Health Department rather than the Department of Human Services. As stated above, the scope of Rule 40 is limited to those programs licensed by the commissioner of Human Services. Therefore, it is reasonable to include the Code of Federal

Regulations requirements to assure that wards residing in skilled nursing facilities are also afforded protection with respect to the use of aversive and deprivation procedures. Specifically, Code of Federal Regulations, title 42, section 483.13 provides that:

(a) The resident has the right to be free from any physical restraints imposed or psychoactive drug administered for purposes of discipline or convenience, and not required to treat the resident's medical symptoms.

(b) The resident has the right to be free from verbal, sexual, physical or mental abuse, corporal punishment, and involuntary seclusion.

(c) The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect or abuse of residents.

(1) The facility must-

(i) Not use verbal, mental, sexual, or physical abuse, including corporal punishment, or involuntary seclusion; and

(ii) Not employ individuals who have been convicted of abusing, neglecting, or mistreating individuals.

(2) The facility must ensure that all alleged violations involving mistreatment, neglect or abuse, including injuries of unknown source, are reported immediately to the administrator of the facility or to other officials in accordance with State law through established procedures.

(3) The facility must have evidence that all alleged violations are thoroughly investigated, and must prevent further potential abuse while the investigation is in progress.

(4) The results of all investigations must be reported to the administrator or his designated representative or to other officials in accordance with State law within 5 working days of the incident, and if the alleged violation is verified, appropriate corrective action is taken.

These standards assure protection of wards residing in skilled nursing care facilities.

Subpart 3. Monitoring of data. This subpart is necessary to protect the best interests of the ward by requiring the public guardian is aware of and monitoring the use of such procedures. Such information and knowledge is necessary to enable the public guardian to make an informed and sound judgement on the ward's behalf. It is reasonable to include the provision that documentation of the review of this data be included in the quarterly review since Minnesota Statutes, section 252A.21, subdivision 2, requires the Department to include in these rules, standard for the public guardian's quarterly review of records from day, residential, and support services. Data pertaining to the use of any aversive or deprivation procedures would necessarily be a part of these records and, therefore, is a reasonable part of the quarterly review. It is reasonable to refer to the monitoring standards required under parts 9525.2700

to 9525.2810 as well as the Code of Federal Regulations, title 42, section 483.13, for the reasons set forth in subpart 2 above.

9525.3050 **Consent to the Use of Psychotropic Medications.**

This part is necessary to implement the provision of Minnesota Statutes, section 252A.21, subdivision 2, which requires that the Department set standards for the public guardian's actions on the use of psychotropic medications.

Subpart 1. Generally. This subpart is necessary to inform the public guardians of their role in terms of consenting to the use of psychotropic medications. It is necessary and reasonable to state in rule that the Department will provide technical assistance, since the Department has staff with considerable expertise and experience in the area of psychotropic medications. This provision is further reasonable for the reasons stated in part 9525.3045, subpart 1.

Subpart 2. Informed consent. This subpart is necessary to inform the public guardian of the documented information which the public guardian must review before they have the authority to consent to the use of a psychotropic medication. The information delineated in items A to F is reasonable because it is consistent with the Department's policy on the monitoring of psychotropic medications which is contained in Psychotropic Medication Monitoring Checklist and Manual for Rule 34 Facilities, (John E. Kalachnik, Department of Human Services, Licensing Division, 1988). Development of rules standards which are consistent with this manual is reasonable because the Department has no one rule that specifically governs the overall use of psychotropic medications for persons with mental retardation. Rather, the aforementioned manual was developed to address the monitoring of psychotropic medications in Rule 34 facilities which serve persons with mental retardation. This subpart is further reasonable for the reasons stated in 9525.3040, subpart 2 above.

Subpart 3. Monitoring side effects. This subpart is necessary to protect the health and safety of the ward by requiring that the public guardian monitor the presence of side-effects as a result of the use of psychotropic medications in order to avoid high-risk side effects. It is reasonable to include a provision for monitoring of side effects because the public guardian must have adequate information regarding possible side effects and their frequency, risk, etc. in order to make an informed judgement on behalf of the ward whether the use or continued use of psychotropic medications is in the best interest of the ward.

This subpart specifically refers to the monitoring of tardive dyskinesia and akathisia. It is necessary and reasonable to require monitoring of tardive dyskinesia (TD) and akathisia

because these side effects represent a public health concern for persons with developmental disabilities as well as the mentally ill and geriatric populations. According to John E. Kalachnik, Robert L. Sprague and Kenneth M. Slaw, monitoring of TD specifically is important for the following reasons:

> "First, conservative estimates place the prevalence of TD in the 20% range with more recent reports placing this figure in the 20 to 30% range. Annual incidence of TD which persists for at least six months is approximately 3%. Second, while most cases are mild, TD can be severe or life-threatening. Third, TD may be persistent for years and, in some cases, irreversible. Fourth, while some therapies may help some patients, there is at this time no consistent long-term pharmacological treatment. And fifth, litigation has awarded upwards of $2,000,000 at the expense of physicians and providers to patients who develop TD when proper standards related to the use of antipsychotics are not followed."

Training Clinical Personnel to Assess for Tardive Dyskinesia, Prog. Neuro-Psychopharmacological and Biological Psychiatry, 1988, vol. 12, pp. 749-750.

It is necessary to require the use of a standardized instrument rating scale including the DISCUS or the MOSES to assure consistent and thorough assessment of the presence of deleterious side effects. According to R. M. Wettstein, "In the absence of a uniform method of assessment, particularly for tardive dyskinesia, symptoms ratings become idiosyncratic to the individual examiner." (See, R. M. Wettstein, Legal Aspects of Neuroleptic-Induced Movement Disorders, In: Legal Medicine, C.H. Wecht (Ed)., pp. 117-118, Praeger, New York (1985)).

Further, requiring the use of the DISCUS is reasonable because, ". . . a wide variety of professionals can be trained to reliably assess patients for abnormal involuntary movement. This makes large scale TD monitoring systems eminently possible. By use of support staff to assess patients for TD and forwarding these assessments to physicians for evaluation and determination if differential diagnostic tests or neurological complication are necessary, a cost-effective system in terms of time and money can be implemented." John E. Kalachnik, Robert L. Sprague and Kenneth M. Slaw, Training Clinical Personnel to Assess for Tardive Dyskinesia, Prog. Neuro-Psychopharmacological and Biological Psychiatry, 1988, vol. 12, pp. 749-750.

Similarly, the use of the MOSES as a standardized assessment of general side effects is reasonable because it provides for the systematic monitoring of general side effects. The MOSES monitors the presence of general side effects such as drooling, tics, grimaces, slurred speech etc.

Item A. It is necessary and reasonable to define the term "tardive dyskinesia" because its meaning is not commonly known. The meaning of TD is integral to the understanding of monitoring for side effects. The definition given is reasonable because it is consistent with the definition used by the American Psychiatric Association as well as the definition contained in The Psychiatric Dictionary, Robert J. Campbell, M.D., 5th Ed. (1980), p. 196.

Item B. It is necessary and reasonable to define the term "akathisia" because it also has a meaning which is not commonly known and is essential to the understanding of the guardian's monitoring of side effects function. The definition given is reasonable because it is consistent with the definition commonly accepted by the medical community. (See, Stedman's Medical Dictionary, 25th Ed. (1990), p. 38; The Psychiatric Dictionary, Robert J. Campbell, M.d., 5th Ed, (1981), p. 21).

Item C. It is necessary and reasonable to define the term "Dyskinesia Identification System: Condensed User Scale" of DISCUS because use of this standardized assessment tool is required for the monitoring of TD under this part. The definition given is reasonable because it is consistent with the description contained on the DISCUS instrument itself and includes reference to each of the specific body areas assessed for involuntary movement by the DISCUS. A copy of the DISCUS instrument is included as SNR attachment #2.

Item D. It is necessary and reasonable to define the term "Monitoring of Side Effects Scale" or MOSES because use of this standardized assessment tool is required for the monitoring of general side effects under this part. The definition given is reasonable because it is consistent with the description contained on the MOSES instrument itself and includes reference to the specific body areas assessed by the instrument. A copy of the MOSES instrument is included as SNR attachment #3.

Subpart 4. Monitoring schedules. This subpart is necessary to establish standards for schedule by which side effects must be monitored. The monitoring requirements referred to in items A to C are reasonable because they are consistent with the criteria for monitoring of side effects used by the Department's licensing division in monitoring the use of psychotropic medications in Rule 34 facilities. (Psychotropic Medication and Monitoring Checklist and Manual for Rule 34 Facilities, see above).

The schedules in items A to C are further reasonable because they are consistent with current and past practice as set forth in the Minnesota Department of Human Services Guidelines for the Use of Psychotropic Medication for Individuals with Developmental Disability, (1988). Since there was no department rule governing the use of psychotropic medications, guidelines for their use and

monitoring were needed to protect individuals with developmental disabilities due to the intrusive nature of these medications and the potential for deleterious side effects associated with their use.

Subpart 5. Data Review of Target Behavior.

This subpart is necessary to protect the best interest of the ward. Data review is necessary as a means of evaluating the level of effectiveness of a medication. It is reasonable to require that the public ward cannot consent to the use of a psychotropic medication unless a recognized, systematic data collection method is used to evaluate the effectiveness of the medication because the guardian requires this information to determine that the least restrictive alternative is being used to address the target behavior and that further, a psychotropic medication is not being used inappropriately or unnecessarily.

9525.3055 **Nondelegated Consent.**

Subpart 1. Generally. This subpart is necessary to clearly identify for those to whom this rule applies, those consents which only the commissioner has the authority to consent to. It is reasonable for the Department to retain authority in the following areas because it provides for uniform and consistent application of criteria in decision-making areas of significant life consequences.

Subpart 2. "Do not resuscitate" orders. This subpart is necessary to implement the provision of Minnesota Statutes, section 252A.21, subdivision 2, which requires the commissioner to set standards for actions on "do not resuscitate" orders. It is reasonable to require the commissioner's consent for "do not resuscitate" orders given the potentially life-ending nature of the order. This subpart is further reasonable because it is consistent with the practice which was followed as a matter of policy for the past seven years and was contained in the Department's guardianship policy manual prior to the development of parts 9525.3010 to 9525.4010. It was determined by the Department that the practice of requiring the commissioner's consent for a DNR order has been an effective means of safeguarding the best interests of the ward. In the past, there have been cases where DNR orders existed based primarily on the ward's disability. Counties have indicated that they believe that consent to a "do not resuscitate" order should be given by the Department based on the nature of the order.

It is important to note that DNR orders are standard practice in the medical arena for those under guardianship as well as for person's who are not under any form of guardianship. The specific criteria identified in items A to G are necessary and

reasonable to provide safeguards in the form of procedures which must be complied with in order for a request for a DNR order to be approved.

Item A. This item is necessary and reasonable because the county staff acting as guardian is responsible for submitting an application to the Department for consent when the guardian believes the DNR order is necessary. In order to make an informed judgement of whether a DNR order is in the best interest of the ward, the guardian must necessarily have first-hand knowledge of the ward's condition which can be best obtained through actually visiting and observing the ward's condition.

Item B. Item B is necessary and reasonable because it requires that the guardian's actions be in the best interest of the ward. The best interest of the ward is safeguarded by the guardian's weighing of the desires and objectives of the ward against the benefits and harms to the ward, which is a component of the definition of "best interest" under part 9525.3015, subpart 4. This item is reasonable because it addresses the issue of the right of self-determination, which is a particularly difficult issue when the choice involved is whether to undergo or terminate medical treatment. In the case of a public ward, the decision-making responsibility for these decisions is ultimately the responsibility of the Department. There are two primary theories in the field of guardianship which are aimed at preserving the rights of self-determination for persons with developmental disabilities who are under guardianship: (1) the best interest test; and (2) the substituted judgement test. According to William A. Krais, in the article, The Incompetent Developmentally Disabled Person's Right of Self-Determination: Right-to-Die, Sterilization and Institutionalization, American Journal of Law and Medicine, Vol. XV, Nos. 2-3, the best interest test disregards the expressed desires and intentions of the incompetent person and focuses primarily on needs. With substituted judgement, the court, through the perspective of the incompetent individual, renders the decision which the developmentally disabled person would render if he or she were actually competent.

Krais argues in this article that the best interest test should be applied in cases involving an alleged violation of the disabled person's constitutional rights on the basis that the best interest standard more effectively and genuinely incorporates the individual's disability and that courts can more realistically ascertain the disabled person's best interests. According to Krais, rights of self-determination have a constitutional basis and the law concerning the rights of the developmentally disabled to refuse medical treatment remains unresolved. Illustrative of this controversy is the case of *In re Conroy*, 486 A.2d 1208 (N.J. 1985), in which the court held that an adult, no longer competent, has the right to refuse

medical treatment. In so holding, the court stated that, "mentally retarded persons...are unable to speak for themselves on life-and-death issues concerning their medical care. This does not mean, however, that they lack a right of self-determination." (486 A.2d 1229).

With respect to the best interest standard, Krain observes the following:

> If the various burdens and benefits are weighed, the court can decide which procedures will be psychologically and physically painful to the disabled person and which ones will be inconvenient. In addition to these immediate considerations, the court, with the assistance of the guardian ad litem, should consider the incompetent patient's anticipated "quality of life." Additionally, the best interest test requires the court to consider the actual best interests of a developmentally disabled person, and not the interests of others or the general public.

William A. Krais, The Incompetent Developmentally Disabled Person's Right of Self-Determination: Right-to-Die, Sterilization and Institutionalization, American Journal of Law & Medicine, Vol, XV, Nos. 2-3, p. 352.

Item C. This item is reasonable because it is consistent with the provision of Minnesota Statutes, §252A.111, subdivision 6 (4), which requires the guardian to encourage input by the nearest relative of the ward in planning and decision-making on behalf of the ward. It is particularly reasonable to obtain the input of near relatives with respect to potentially life-ending matters.

Item D. It is reasonable to require a physician's recommendation which includes the statements delineated in subitems 1 through 4 because DNR orders are, of course, premised on medical facts. The provision under subitems 3 and 4 requiring that death must be imminent unless initiating CPR would be medically futile or would harm the ward, was recommended by advisory committee members who represented the Minnesota Hospital Association Ethics Committee and the Minnesota Board on Aging, both of whom deal with DNR orders and related issues of limited treatment in the course of their profession. These members advised the Department that DNR orders are deemed appropriate by the medical community in situations where the administration of CPR is medically futile, as discussed below, or would be considered inhumane due to the harm and pain it would inflict upon a medically fragile individual. Committee members overall felt that this issue must be appropriately addressed in Rule 175.

According to a publication by the Center for Biomedical Ethics entitled, Biomedical Ethics Reading Packet #6-Resuscitation Decisions, since cardiopulmonary arrest is commonly the last step of the dying process, almost every dying person is a potential

candidate for CPR. The article states, "CPR when successful, restores heartbeat and breathing, and may enable patients to resume their previous lifestyles. Often, however, CPR restores basic life functions but leaves the patient brain damaged or otherwise impaired" (at page 1). According to the Center for Biomedical Ethics, studies indicate that 10 to 25% of CPR patients survive to be discharged from the hospital, but long-term survival is infrequent. Further, it states, "Because of the poor outcomes for many patients, it is now generally recognized that CPR is not appropriate for every patient suffering cardiac or respiratory arrest."

With regard to the ethical issues involved in DNR orders, the publication states, "The traditional ethical presumptions favors preserving life, and the corresponding legal presumption assumes patient consent to emergency treatment. Accordingly, CPR is routinely initiated" (at page 2).

According to an article printed in the New England Journal of Medicine (Tomlinson, Tom, Ph.D. and Howard Brody, M.D., Ph.D., Ethics and Communication in Do-Not-Resuscitation Orders, *The New England Journal of Medicine*, 1988; 318(1):43-46), there are three main rationales for DNR orders.

(1) **No medical benefit.** A commonly-accepted ethical principle is that physicians have no obligation to provide, and patients and their families have no right to demand, medical treatment that is of no demonstrable benefit. Tomlinson and Brody state that, "[T]here are circumstances when a DNR order is justified because resuscitation would almost certainly not be successful, and so would be of no benefit to the patient." (at page 19).

(2) **Poor quality of life after CPR.** According to Tomlinson and Brody, a second rationale for withholding CPR is that the quality of life that would result after the cardiac arrest and the subsequent CPR effort is unacceptable, even though survival might be prolonged. "The crucial feature of this rationale is that the arrest, the resuscitation effort, or both threaten a change in the patient's quality of life, from one that is at least minimally acceptable to one that is unacceptable." (at page 19).

(3) **Poor quality of life before CPR.** The third rationale concerns the patient's current quality of life-before any anticipated arrest and resuscitation. According to this reasoning, although the patient may survive the resuscitation, his or her current quality of life is judged to be unacceptable, either to the person or their family.

Item E. This item is necessary and reasonable to assure that the civil rights of the ward are protected and to prevent discrimination based on the ward's mental retardation. It is reasonable to specify that such discrimination cannot be the basis for a decision to include a DNR order in a ward's medical

chart. The following statement characterizes the issue of discrimination:

> Discrimination, as it applies to decisions to withhold or withdraw life-sustaining treatment for persons with mental retardation, can be either direct or reverse. Direct means that a decision is based on a prior belief that mental retardation is reason, of itself, to forego life-sustaining treatment. Conversely, discrimination may be manifested in the provision of disproportionately burdensome treatment to persons with mental retardation because decision makers fear social or legal sanction should they decide to withhold or withdraw life-sustaining treatment even when it is morally appropriate to do so in a particular situation.

Guidelines for Limited Treatment Decisions for Persons Under Public Guardianship, Recommendations from the Minnesota Hospital Research and Educational Trust Fund to the Minnesota Commissioner of Human Services, June 1988, p.2.

The fact that history indicates that such discrimination has in fact occurred or potential for such discrimination exists, necessitates and justifies a statement in rule against this type of discrimination.

Item F. It is reasonable to require a report from the biomedical ethics committee since the function of this committee is to address ethical dilemmas; particularly those dealing with issues of a life-ending nature. It is reasonable to include the provision, ". . .if one exists within the health care institution. . .," since such committees are not available in all areas or all health care institutions. To require consultation with a biomedical ethics committee by all health care providers may be unduly burdensome and unreasonably costly in some instances. In such cases, the DNR order is of course based on medical judgement.

Item G. It is reasonable to require a recommendation from the county staff acting as guardian because this person will have visited the ward and obtained the information delineated in items A to F above which will enable them to make an informed recommendation based on the best interest of the ward.

Subpart 3. Limited medical treatment. This subpart is necessary to establish that the commissioner's consent is required in issues involving limited medical treatment of the ward and to establish criteria upon which determinations involving limited medical treatment shall be based. It is reasonable to include a provision for issues of limited treatment other than DNR orders because issues involving the withholding or withdrawing of life-sustaining treatment in contexts in addition to the administration of cardiopulmonary resuscitation. According to the Guidelines for Limited Treatment Decisions for Persons Under Public Guardianship, supra, the scope of limited medical

treatment is broader than resuscitation decisions because treatment dilemmas are increasingly more complicated, primarily because of the aging population of wards with mental retardation. It is reasonable to incorporate the recommendations of the Minnesota Hospital Research Trust Fund into this rule because these recommendations are the result of input by the DNR Project advisory committee comprised of diverse representation, including recognized experts in the area of limited medical treatment.

It is reasonable to apply the standards delineated in subpart 2 regarding DNR orders to other issues involving limited medical treatment because the DNR order is a specific form of limited treatment. Therefore, the same decision-making principles are equally applicable to other limited treatment issues.

It is further necessary and reasonable to define the term "limited medical treatment" because it has a meaning specific and integral to this subpart only. The term requires definition because its meaning is not commonly known to the public as a whole. The definition given is reasonable because it is consistent with the meaning commonly accepted in the medical community. (See Guidelines for Limited Treatment Decisions for Persons Under Public Guardianship, p. 3).

Subpart 4. Research. This subpart is necessary to clarify that the commissioner's consent is required before a public ward can participate in research of any kind. It is reasonable to require the commissioner's consent in the case of research to avoid the ward's participation in research that is not in his or best interest for reasons of being dangerous, high risk, degrading, or not in the ward's best interest or against public policy for other reasons. Commissioner's consent also provides for statewide consistency in consent to research. This subpart is further reasonable because the requirement of commissioner's consent to research is consistent with the practice which has been followed by the guardianship office for the past seven years and is contained in the public guardianship policy manual.

The criteria delineated in items A to K are necessary and reasonable because they establish criteria upon which a request for a determination regarding a ward's participation in research must be based. These requirements are reasonable because this is the criteria which governs informed consent to research involving human subjects contained in Code of Federal Regulations, title 45, section 46.116. According to section 46.116, no investigator may involve a human being as a subject in research unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative. This section contains the basic elements of informed consent. It is reasonable to refer to federal standards in order to assure consistency and compliance with federal regulations.

Subpart 5. Temporary care placement. This subpart is necessary to clarify that any temporary placement of a ward in a state-operated regional treatment center requires the commissioner's consent. This requirement is reasonable in order to protect the best interests of the ward by preventing unwarranted and unnecessary placements in regional treatment centers in cases where less restrictive alternatives are feasible. This subpart further acts, to prevent excessive lengths of placement in cases where temporary care placement is deemed appropriate.

Because protection from involuntary institutionalization warrants constitutional protection, institutionalization requires both due process and equal protection. (See, William A. Krais, The Incompetent Developmentally Disabled Person's Right of Self Determination: Right-to-Die, Sterilization and Institutionalization, American Journal of Law and Medicine, Vol. XV, Nos. 2-3). In *People v. Reliford*, 382 N.E.2d 72 (Ill. App. 1978), the court held that "[t]he due process clause . . .prevent[s] the involuntary institutionalization of a person by the State solely because he is mentally retarded. Involuntary commitment can only be justified by a State purpose related to the person's mental affliction and established by clear and convincing evidence." (382 N.E.2d at 78).

Historically, due to haphazard application of inconsistent standards, there have been instances in which persons with mental retardation have been temporarily placed in regional centers under inappropriate circumstances. Accordingly, it is reasonable for the Department to require that the request must include a plan for establishment of a community placement for the ward within 90 days, in order for the request to be approved by the Commissioner. It is reasonable to establish criteria upon which temporary placements to regional centers are based to facilitate uniform and consistent treatment of all wards involved in such placements and to ensure that the ward is protected against unnecessary placement.

9525.3060 **Non-Delegated Consent Requiring a Court Order.**

Subpart 1. Generally. This subpart is necessary to facilitate compliance with Minnesota Statutes, section 525.56, subdivision 3(4)(a), which prohibits a guardian from consenting to psychosurgery, electroconvulsive therapy, sterilization, or experimental treatment without a court order of approval. This part is also necessary and reasonable to identify and clarify for those affected by this rule, those procedures which require such a court order. This subpart is further reasonable because it provides information regarding the petition, the process the local agency is to follow according to Minnesota Statutes, chapter 252, and factors the court considers in issuing its order. It is reasonable to provide all of this information to the public guardian in order to facilitate compliance with

statute.

Subpart 2. Sterilization. This subpart is necessary to implement Minnesota Statutes, §252A.21, subdivision 2, which requires that the commissioner shall adopt rules which must include standards including sterilization requests. It is reasonable to state the required contents of the application and reports in order to inform the local agencies of their responsibility to submit an application to the Department when requesting sterilization.

Historically, at the beginning of the twentieth century, sterilization was viewed as an appropriate means of preventing and controlling mental retardation. According to R.C. Scheerenberger, many in the professional community genuinely believed that heredity was the prime etiological factor associated with mental retardation. Throughout this period, the professional community pursued restrictive measures such as controlled marriage, sterilization and segregation through institutionalization based on scientific data obtained from hereditary studies. The philosophy of sterilization during that time is further illustrated by the following:

> In addition to reducing the occurrence of mental retardation in subsequent generations, some support was given to sterilization for other reasons, including these:
>
> 1. Sterilized mentally retarded adults would be allowed to marry since they could not reproduce their kind.
>
> 2. Mentally retarded adults were not intellectually capable of providing a proper environment and training for children.
>
> 3. Sterilization would control undesirable sexual behavior which, in some instances, was apparently limited to masturbation.

R.C. Scheerenberger, *A History of Mental Retardation*, p.155.

By 1912, eight states had passed enabling legislation in the area of sterilization. According to Scheerenberger, between 1907 and 1958, 30 states recorded a total of 31,038 sterilizations of persons with mental retardation.

Studies of persons with mental retardation took new directions in the 1920's and 1930's, including the onset of study in the area of environmental factors. The etiological significance of heredity was greatly diminished as evidenced by the following statement:

> In essence, during this period, the notion of heredity changed significantly. The estimated incidence of mental retardation that was related to such factors decreased from nearly 100 percent at the turn of the century to approximately 30 percent by the early 1930s.

R.C. Scheerenberger, *A History of Mental Retardation*, p. 186.

By 1940, most states had abandoned the principle of sterilization as a primary means of controlling mental retardation. The increasing number of persons with mental retardation identified, the proliferation of special programs, revised expectancies regarding the stability of IQ scores and heredity and the lack of public and legislative support rendered widespread use of sterilization impracticable. Further, there was growing opposition to the use of sterilization as a substitute for the adequate supervision of persons with mental retardation in the community. (R.C. Scheerenberger, *A History of Mental Retardation*, p. 225).

The requirements delineated in items A to D are necessary to protect and safeguard the best interest of the ward. Adequate information is necessary to prevent unnecessary and inappropriate sterilizations.

Item A. It is necessary and reasonable to require specific reasons why the sterilization is being requested in order to provide adequate information upon which to base an informed decision. The reasons for requesting a sterilization must be clearly defined to assure that unnecessary and inappropriate sterilization are not being sought. The need and reasonableness for this provision is stated further in subpart 2a below.

Item B. This item is reasonable because it protects the ward by assuring that less intrusive alternative methods must be considered first and used whenever possible. It is reasonable to require information regarding less restrictive options given the highly intrusive as well as permanent impact of the sterilization procedure.

Item C. It is necessary and reasonable to require information whether sterilization is in the best interest of the ward because this judgement is required in all decision-making on behalf of a public ward. In sterilization decisions, it is important to bear in mind that the best interest to be considered is that of the individual ward. In *In re Grady*, 426 A.2d 467 (N.J. 1981), an influential case applying the best interest test to the issue of sterilization, the court recognized that the developmentally disabled have a right to choose whether to be sterilized and acknowledged that its role is as a surrogate and not an interpreter. In this case, the court substituted its decision, based on specific criteria, for that of the disabled woman. In making its determination, the court held that the interests to be considered are solely the best interests of the individual involved. In so holding, the court stated that:

> In determining whether to authorize sterilization, a court should consider the best interest of the incompetent person, not the interests or convenience of society in having the incompetent person sterilized.

(426 A.2d at 481).

Item D. It is necessary and reasonable to require information regarding the risks of sterilization as well as the consequences of not performing the sterilization to provide the Department with adequate information upon which to base an informed decision. To be able to make a recommendation for or against the sterilization, the guardian must weigh the benefits of the sterilization request against the potential harm to the ward. Therefore, medical information which considers the risks are essential to this weighing process.

Subpart 3. Department recommendation. This subpart is necessary to establish specific criteria upon which to base the Department's recommendation to the court regarding a request for sterilization of a ward. The criteria delineated in items A to D are necessary to provide the Department with adequate information upon which to base an informed judgement.

Items A to D are reasonable because they protect the rights of the ward by assuring that the sterilization is both necessary and in the ward's best interest. Items A to D are reasonable because they are consistent with factors which are considered by courts in making a determination on a petition for a sterilization. In an illustrative case, *Grady*, supra, the court outlined nine factors to be considered when a court is determining what is in the best interest of the disabled person:

1. Can the incompetent person become pregnant?
2. What is the possibility of trauma or psychological damage as a result of either giving birth or being sterilized?
3. Will the individual be in a situation where sexual intercourse, either voluntary or imposed, can occur?
4. Does the incompetent person understand reproduction or conception?
5. Are there less drastic measures of contraception?
6. Should the sterilization procedure take place now or would it be more appropriate to take place some time in the future?
7. Can the incompetent person care for a child?
8. Will medical technology advance to either: (a) improve the incompetent person's condition; or (b) make the sterilization procedure less drastic?
9. Is the sterilization being sought in good faith and in the best interests of the incompetent person?

(426 A.2d at 482).

Item A. Item A is necessary and reasonable to prevent inappropriate sterilizations. It is reasonable to require as a prerequisite to the Department's recommendation regarding a sterilization request, that the ward must have engaged in or be reasonably likely to engage in sexual intercourse because in the absence of such sexual activity or likelihood of activity, the sterilization may well be unnecessary as well as contrary to the

best interest of the ward.

Item B. This item is necessary to afford the ward the opportunity to express his or her wishes, which is consistent with the definition of "best interest" in part 9525.3015, subpart 4. Given the permanent outcome of a sterilization procedure, it is paramount that the ward's wishes be considered. This item is further necessary and reasonable for the reasons stated in subpart 2, item B above.

Item C. Item C is necessary and reasonable for the reasons set forth in part 9525.3055, subpart 4, item E.

Item D. Item D is necessary and reasonable for the reasons set forth in part 9525.3055, subpart 2, item B.

Subpart 4. Electroconvulsive therapy, psychosurgery, and experimental treatment. This subpart is necessary to facilitate compliance with Minnesota Statutes, section 252A.111, subdivision 1, which requires that the provisions of Minnesota Statutes, section 525.56, subdivisions 1 through 3, apply to the powers and duties of a public guardian. Under section 525.56, subdivision 3 (4)(a), no guardian or conservator may give consent for psychosurgery, electroshock, sterilization, or experimental treatment of any kind unless the procedure is first approved by order of the court.

It is reasonable to require that the county staff acting as guardian be the one who submits the application regarding these procedures since this individual will have first-hand knowledge of the ward's circumstances. It is reasonable to require the information delineated in items A to D in order to provide the Department with adequate information upon which to base a recommendation reflecting informed judgement.

Items A to D are reasonable because they are consistent with requirements recognized by the Food and Drug Administration (FDA) with respect to the treatment use of investigational new drugs. The FDA published new procedures in the Federal Register on May 22, 1987 (52 FR 19466) by which investigational new drugs may be made available to patients with life-threatening or other serious diseases for which no satisfactory alternative drug or therapies exist. According to a bulletin issued by the United States Department of Health and Human Services in May 1989, the intent of these regulations is to make promising new drugs available to patients as early in the drug development process as possible.

The treatment use regulations (21 CFR 312.34 (b)) set forth criteria by which the FDA evaluates whether a drug in clinical trials may be used under a treatment protocol. The FDA will permit an investigational drug to be used for a treatment use

under a treatment protocol if:

1. the drug is intended to treat a serious or life-threatening disease;
2. there is no comparable or satisfactory alternative drug or other therapy available to treat that stage of the disease in the intended patient population;
3. the drug is under investigation in a controlled clinical trial under an investigational new drug application (IND) in effect for the trial, or all clinical trials have been completed; and
4. the sponsor of the controlled clinical trial is actively pursuing marketing approval of the investigational drug with due diligence.

For a drug intended to treat an immediately life-threatening disease, there must be a reasonable basis for concluding that the drug: 1) may be effective for its intended use in its intended patient population; or 2) would not expose the patients to whom the drug is to be administered to an unreasonable and significant additional risk of illness or injury.

Item A. Due to the highly intrusive and experimental nature of electroconvulsive therapy, psychosurgery and experimental treatment, it is both necessary and reasonable to require that these treatments are considered only for the treatment of serious or life-threatening diseases, conditions or behavior patterns. This limitation is reasonable to protect the ward because in the absence of such restrictions, inappropriate treatment could conceivably be employed.

Item B. This item is necessary to assure that less intrusive forms of treatment are considered, tried and exhausted prior to the consideration of these more intrusive treatments. It is reasonable to establish such limitations in order to protect the health and safety of the ward.

Item C. Item C is necessary to allow for the use of the treatments identified in this subpart where no acceptable alternative treatments exist. This allowance is reasonable because in the absence of any feasible alternatives, the administration of such a treatment may well be in the best interest of the ward.

Item D. This item is necessary and reasonable to protect the ward by assuring that the Department has adequate information upon which to base an informed decision regarding recommendation to a court for or against electroconvulsive therapy, psychosurgery or experimental treatment. It is reasonable to require the information specified in subitems 1 to 7 as a prerequisite for a request for any of these procedures to prevent unnecessary and inappropriate requests.

9525.3065 **Monitoring and Evaluation.**

Subpart 1. Annual review. This subpart is necessary to implement statutory requirements. Minnesota Statutes, §252A.16 requires that the commissioner must provide an annual review of the physical, mental, and social adjustment and progress of every ward. This section further requires that a copy of the annual review must be kept on file at the Department and that the review shall contain information required under the rules of the commissioner. It is reasonable to require that the county staff acting as guardian submit a copy of the annual review to the Department in order to facilitate compliance with Minnesota Statutes, section 252A.16. It is reasonable to designate the time for the submission of the annual review to assure that it is on file and available at the Department as required by statutes. The designation of the birthday of each ward as the annual review submission time is reasonable because it disperses the work load since all annual reviews will not be due at the same time, thereby allowing the county adequate time to complete the required reports.

During the advisory committee process, counties recommended that the form of the annual review as well as quarterly reviews be left to the determination of the local agencies. Many county representative felt that prescriptive reporting requirements required in rule would be more costly and time-consuming for the local agencies. Since caseloads vary from county to county, affording local agencies, this flexibility allows each county to efficiently utilize a monitoring and evaluation system that best suits the needs of their wards while efficiently utilizing the available resources.

The requirements set forth in items A to D are reasonable because they are a restatement of those requirements specified in Minnesota Statutes, section 252A.16. It is reasonable to restate those areas which must be specifically addressed in the annual review to inform the county staff acting as guardian of their responsibility and to facilitate compliance with the statutory requirement.

Lastly, in order to facilitate compliance with the requirements of Minnesota Statutes, section 252A.16, it is reasonable to inform the county staff acting as guardian of their responsibility to review the legal status of the ward as part of the annual review and to petition for a termination or modification of public guardianship where deemed necessary based on the annual review.

Subpart 2. Quarterly review of records. Subpart 2 is necessary to comply with Minnesota Statutes, section 252A.21, subdivision 2, which requires that the commissioner shall adopt rules which set standards for, among other duties, the quarterly review of

records from day, residential and support services. It is reasonable to allow local agencies flexibility regarding the form of the quarterly review for the reasons specified in subpart 1.

It is reasonable to require the guardian to review records from day, residential, and support services to facilitate compliance with Minnesota Statutes, §252A.21, subdivision 2. It is reasonable to require that the quarterly review also contain documentation of review of data regarding the use of aversive and deprivation procedures and psychotropic medications since this information will necessarily be a part of the service records and the guardian is responsible to review these areas under parts 9525.3045 and 9525.3050.

Further, it is necessary and reasonable to require the local agency to maintain records on file in order to maintain pertinent historical data on the ward's status and progress. Allowing the counties the flexibility to follow their respective record retention schedules protects the ward by assuring records are maintained while at the same time avoid additional requirements. It is reasonable to inform the counties that they may be requested to furnish copies of quarterly reviews to the Department upon request for the reasons specified in subpart 3 below.

Subpart 3. Additional reports. This subpart is necessary to give the local agencies that, on occasion, they may be requested to provide the Department with additional reports regarding the status of a ward. Provision for such additional reports safeguards the best interest of the ward by assuring that additional information can be obtained where deemed necessary. In most cases, the purpose of requesting additional information will be for clarification purposes. Additional information may also be useful in assisting the Department in evaluating the effectiveness of guardianship services throughout the state.

9525.3070 **County of Guardianship Responsibility.**

Subpart 1. Responsibilities delegated to county of guardianship responsibility. This subpart is necessary to inform the county of guardianship responsibility that they are accountable for all of the responsibilities set forth in Rule 175, with the exception of parts 9525.3055 and 9525.3060. It is reasonable to exempt parts 9525.3055 and 95125.3060 because these two parts deal with consents that are non-delegated to their intrusive nature as well as consents which require a court order.

Subpart 2. Maintenance of records. This subpart is necessary to assure that public guardianship records are properly maintained by the county of guardianship responsibility. It is reasonable to require record maintenance to protect the ward by assuring

that adequate historical information in areas such as health and medical; day, residential and support services; behavioral needs; financial and family are adequately maintained and available when needed.

During the advisory committee process, a number of counties indicated that mandating an additional, prescriptive record-keeping requirement in rule would be very costly and would require significant staff resources. Based on this input, it was determined that while a record maintenance requirement is imperative, the record would not have to be maintained in a new or separate system. It is reasonable not to require a separate record-keeping system in order to avoid duplication of effort. It is reasonable to state specifically that a separate record is not required to provide clarification.

It is reasonable to require that the county of guardianship responsibility retain records on its ward until the guardianship is terminated to assure that adequate, pertinent historical information regarding the ward is available in the form of records. It is further reasonable to provide that the guardianship record may be destroyed four years after the file is closed because this is consistent with current county practice for retention of records in other human services areas and therefore does not impose an additional burden on the local agencies.

Subpart 3. Ward relocation. This subpart is necessary to assure continued supervision and protection of a public ward who relocates to another state or visits another state on a temporary but extended stay. To assure that the Department has knowledge at all times of the health, safety and location of all public wards, it is reasonable to require that the local agency advise the Department when consent has been given for a ward to move to another state permanently or to make an extended visit to another state. Further, since the Department retains consent as well as supervisory authority in a number of areas governed by parts 9525.3010 to 9525.3100, it is imperative that the Department be aware of the ward's whereabouts.

It is also reasonable to require that the supervising agency in the State of Minnesota contact the appropriate local social services agency in the state in which the ward is permanently relocating to in order to assure that ward continue to receive protection and supervision and that his or her needs continue to be met. It is in the best interest of the ward to continue such protections. When a ward relocates to another state permanently, it is reasonable that the local agency shall proceed to seek a discharge of the public guardianship because Minnesota public guardianship laws will no longer be applicable. Further, due to location as well as varying state requirements, the needs and best interest of the ward will be better served by having a

guardian in the state in which he or she now resides.

9525.3075 **Supervising Agency.**

Subpart 1. Referral. This subpart is necessary to assure continuation of guardianship services when a ward relocates. The provision for referral by the current county of guardianship responsibility for the county in which the ward has relocated or plans to relocate is reasonable because in many instances due to distance involved, the needs of the ward may be better served by having a county staff person in the county in which the ward now resides designated as the public guardian.

Subpart 2. Transfer of responsibility. This subpart is necessary to assure that the ward continues to receive appropriate guardianship services in the county in which they have relocated. Where the county of guardianship responsibility has determined that is in the best interest of the ward to transfer guardianship responsibility to the new county, a written agreement is necessary to assure that the guardianship responsibilities are delineated and fulfilled by the county to which they are transferred. A written agreement is further reasonable because it provides for accountability on the part of both counties as parties to the agreement.

It is reasonable to require that the county of guardianship responsibility provide the Department with a copy of the transfer agreement to assure that Department is informed of the status of each ward who has relocated and to provide for county accountability for such wards. Fourteen calendar days is a reasonable period of time because it allows counties ample time to submit the agreement to the Department while assuring that the department is advised in a timely manner.

Subpart 3. Transfer of venue. This subpart is necessary and reasonable because it clarifies that the county of guardianship responsibility may be changed through a formal transfer of venue. It is reasonable to refer to the statutory provision which governs transfer of venue because the process is delineated in statute and it avoids unnecessary duplication.

9525.3080 **County Contracting for Public Guardianship Services.**

Subpart 1. **Limited contracting.** Subpart 1 is necessary to comply with Minnesota Statutes, section 256B.092, subdivision 7(a), which states that:

> "County social service agencies may contract with a public or private agency or individual who is not a service provider for the person for the public guardianship representation required by the screening or individual

service planning process. The contract shall be limited to public guardianship representation for the screening and individual service planning activities."

Because Minnesota Statutes, section 256B.092, subdivision 7, limits county contracting for public guardianship representation to only two specific areas, it is reasonable to state in this subpart for clarification that the local agency shall not contract for other public guardianship responsibilities required under parts 9525.3010 to 9525.3100. It is further reasonable to restate this statutory limitation in this subpart because when gathering public input on Rule 175, the Department learned that confusion existed regarding the ability of counties to contract for public guardianship services and that specifically, some counties were under the mistaken impression that they would be able to contract for all public guardianship services. Therefore, clarification in rule is both necessary and reasonable.

9525.3085 **Modification/Termination of Public Guardianship.**

Subpart 1. Generally. It is necessary and reasonable to advise the local agencies of the process involved in the modification or termination of a public guardianship. During the advisory committee process, counties as well as service providers expressed a desire that the rule contain some basic information regarding the modification and termination of public guardianships in order to assist them in the process. This part, including subpart 1, is reasonable because it provides basic information regarding the process while referencing Minnesota Statutes, section 252A.19, for the specific information, thereby contributing to the brevity of the rule.

Subpart 2. Petition. This subpart is necessary to inform those governed by this rule what persons or parties may petition the court for a modification or termination of a public guardianship. This subpart is necessary and reasonable because it provides the local agency with notice of their responsibility to petition the court for a termination or modification of public guardianship if it is determined by the county staff acting as guardian that public guardianship is no longer necessary or appropriate. This subpart is further reasonable for the reasons stated in subpart 1 above.

Subpart 3. Specific modifications. This subpart is necessary to inform those governed by parts 9525.3010 to 9525.3100 that any modification of a public guardianship requires a court hearing. It is reasonable to state this requirement in this subpart in order to assure compliance with statute. It is reasonable to simply refer to the specific forms of modification available under Minnesota Statutes, section 252A.19, subdivision 2, because

generally such petitions are handled by the county attorney who is quite aware of the requirements and, therefore, it is not necessary to repeat the specifics in rule. This subpart is further necessary and reasonable for the reasons stated in subpart 1.

Subpart 4. Comprehensive evaluation. Subpart 4 is necessary to give the county staff acting as guardian notice that they may be called upon by the court to arrange for a comprehensive evaluation to assist the court in making a determination regarding a petition for a modification or termination of a public guardianship.

9525.3090 **Death of a Ward or Conservatee.**

Subpart 1. Report. This subpart is necessary to assure that the Department is promptly notified of all deaths involving public wards or conservatees. It is reasonable to require that the Department be informed of all deaths of public wards to protect public wards as a group. It is necessary and reasonable to require a written report regarding the death in order to provide for specific information which may be maintained for historical purposes. Fourteen days is a reasonable time period to provide for reporting because it provides timely notice to the Department while providing a reasonable amount of time for the county staff acting as guardian to complete an accurate, detailed written report of the death and to submit this report to the Department. It is necessary and reasonable to require that the report of death be in writing to provide for an historical record of information pertaining to deaths involving public wards including data in areas such as incidence, geographic location, age, and cause of death.

In cases where a vulnerable adult investigation is conducted, it is reasonable to require that the final report be submitted to the Department to protect public wards generally. Information regarding deaths and vulnerable adult investigations involving public wards is necessary in order to assure that the Department is aware and dealing with any related health and safety issues. Minnesota Statutes, section 626.557, governs the reporting of maltreatment of vulnerable adults. According to subdivision 1:

> "The legislature declares that the public policy of this state is to protect adults who because of physical or mental disability or dependency on institutional services, are particularly vulnerable to abuse or neglect;. . ."

Therefore, in order to protect public wards, it is both necessary and reasonable that the Department be provided with all information of vulnerable adult investigations involving public wards.

Subpart 2. Closing of local agency record. This subpart is necessary to provide local agencies with notice of their responsibility for closing the guardianship file. It is reasonable to close a guardianship file upon the death of a ward and after the Department is notified because, as specified in subpart 3 below, the public guardianship itself terminates upon the death of the ward.

Subpart 3. Termination of guardianship. Subpart 3 is necessary and reasonable to be consistent with statutory requirements. Minnesota Statutes, section 525.60, subdivision 1, provides that the guardianship of an adult ward shall terminate upon death. further, Minnesota Statutes, section 252A.19 provides that:

> "The commissioner shall serve as public guardian or conservator with all the powers awarded pursuant to the guardianship or conservatorship, until termination or modification by the court."

9525.3095 **Guardianship training.**

It is necessary to require local agencies to develop and maintain a plan for providing training to county staff persons acting as public guardians in order to facilitate the provision of quality and appropriate guardianship services. Training is necessary to prepare the guardian to manage the personal affairs as well as protect the best interests of the ward. It is reasonable to require training specifically in the areas of guardianship and mental retardation because since under Minnesota Statutes, chapter 252A, wards must have a diagnosis of mental retardation, training in these two areas should provide the county staff with basic knowledge to enable them to understand, assist, and plan for the ward as well as to make reasoned decisions on behalf of the ward.

According to the American Bar Association's Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly, recent studies have begun to document the importance of providing training programs and materials for guardians. Based on this, the 1986 *Statement of Recommended Judicial Practices*, endorsed by the American Bar Association, recommended that courts "encourage orientation, training, and ongoing technical assistance for guardians, including an outline of a guardian's duties and information concerning the availability of community resources. *Guardianship: An Agenda for Reform*, American Bar Association, Commission on the Mentally Disabled, Commission of Legal Problems of the Elderly, p.23.

It is reasonable to establish a minimum standard for the amount of training a guardian must receive annually in order to protect public wards by assuring that their guardian has had at least

some basic training. It is further reasonable to require that this training occur on an annual basis in order to keep guardians informed of developments and trends in the area of public guardianship. Such minimal standards serve to make the local agency accountable for the provision of training while at the same time allowing the local agency the flexibility and discretion to provide other/additional training as they deem necessary. It is reasonable to require documentation and records of staff training for accountability and verification purposes.

9525.3100 **Review of Public Guardianship Matters.**

Subpart 1. Informal review. This subpart is necessary to distinguish the informal review of guardianship matters available from the Guardianship Unit in the form of technical assistance from guardianship appeal rights available under statute. Minnesota Statutes, section 252A.21, subdivision 1, states:

> "The commissioner may appeal from an order of the court entered under sections 252A.01 to 252A.21 to the court of appeals in the manner prescribed by sections 525.71 to 525.731, for appeals by the state. Any persons, other than the commissioner, aggrieved by an order of the court entered under sections 252A.02 to 252A.21, may appeal to the court of appeals in the manner prescribed by sections 525.71 to 525.731."

It is reasonable to state in this subpart regarding review of guardianship matters, that an informal review of guardianship matters by the Guardianship Unit does not preclude appeal rights available under statute because the purpose of an informal review is limited to technical assistance and guidance and is not definitive, final or binding with respect to any issue which may subsequently be appealed. In other words, such provision of technical assistance is not intended to substitute or preclude any appeal rights. Rather, the purpose of technical assistance provided by an informal review is for the Department to furnish expertise and guidance in the form of clarification. Since the court of appeal has specific jurisdiction to hear appeals regarding guardianship matters, those due process rights exist irrespective of and in addition to any technical assistance provided by the Department.

It is both necessary and reasonable to specifically state in this subpart that Minnesota Statutes, §256.045, is not applicable to guardianship matters to be consistent with statute. Minnesota Statutes, §256.045, subdivision 3, establishes the scope of administrative review of human service matters as:

> "Any person applying for, receiving or having received public assistance or a program of social services granted by

the state agency or a county agency under sections 252.32, 256.031 to 256.036, and 256.72 to 256.879, chapters 256B, 256D, 256E, 261, or the federal Food Stamp Act whose application for assistance is denied, not acted upon with reasonable promptness, or whose assistance is suspended, reduced, terminated, or claimed to have been incorrectly paid, or any patient or relative aggrieved by an order of the commissioner under section 252.27, or a party aggrieved by a ruling of a prepaid health plan, may contest that action or decision before the state agency by submitting a written request for a hearing to the state agency within 30 days after receiving written notice of the action or decision, or within 90 days of such written notice if the applicant, recipient, patient, or relative shows good cause why the request was not submitted within the 30-day limit."

Minnesota Statutes, section 256.045, subdivision 4a, further provides for state administrative review of case management. Guardianship services under Minnesota Statutes, chapter 252A, are not included within the scope of section 256.045. Accordingly, since a specific statutory provision for appeals of guardianship matters exists in Minnesota Statutes, section 252A.21, subdivision 1, and is not included in the scope of section 256.045, it is reasonable to clarify the specific applicable appeal rights available by law. It is further reasonable to clarify the applicability of appeals provisions to guardianship matters because this issue has been the subject of past appeals.

Subpart 2. De novo review. This subpart is necessary to give notice to those affected regarding the right of de novo review available under statute. Minnesota Statutes, section 252A.19, subdivision 2, provides that the commissioner, ward, or any interested person may petition the appointing court of the court to which venue has been transferred to review de novo any decision made by the public guardian or conservator on behalf of a ward or conservatee. It is reasonable to reference this right of review in rule to assure that due process is afforded.

Subpart 3. Appeals. This subpart is necessary and reasonable for the reasons set forth in subpart 3 above. It is reasonable to simply reference the applicable statutory provision since the full description of guardianship appeal rights is contained in Minnesota Statutes, section 525.71 to 525.731, and because jurisdiction for guardianship appeals lies with the court of appeals, not the Department. It is further reasonable to cite to the statute to contribute to the succinctness and brevity of the rule.

EXPERT WITNESSES

The Department does not intend to have outside expert witnesses testify on its behalf at the public hearing.

SMALL BUSINESSES

The proposed rule does not affect small businesses as defined in Minnesota Statutes, section 14.115.

AGRICULTURAL LAND

The proposed rule does not have a direct or substantial adverse effect on agricultural land as defined in Minnesota Statutes, section 17.81, subdivision 3 and referenced in Minnesota Statutes, section 14.11, subdivision 2.

CONCLUSION

The foregoing information demonstrates the need for and reasonableness of the provisions in proposed parts 9525.3010 to 9525.3100. The necessity and reasonableness of the proposed amendments are supported by requirements of Minnesota Statutes and rule, and by the commissioner's responsibilities under Minnesota Statutes, chapter 252A.

DATE: 9-3-92

for NATALIE HAAS STEFFEN, COMMISSIONER
Department of Human Services

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