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STATE OF MINNESOTA

Office Memorandum

Department of Economic Security

To : Maryanne Hruby
Legislative Commission to
Review Agency Rules

Date: February 15, 1995

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Subject : Statement of Need and Reasonableness Filing

Pursuant to Minnesota Statutes § 14.131, I have enclosed a copy of the Statement of Need and Reasonableness (SONAR) for the proposed relating to: Vocational Rehabilitation Services, Minnesota Rules, Part 3300.5000 to 3300.5060.

The DUAL Notice fo Intent to Adopt Rules is expected to be published in the **State Register** on February 21, 1995 .

The SONAR is now available to the public.

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**STATE OF MINNESOTA
DEPARTMENT OF ECONOMIC SECURITY**

**In the Matter of the Proposed
Adoption of Amended Rules of the
State Department of Economic
Security Governing Vocational
Rehabilitation Services**

**STATEMENT OF NEED
AND REASONABLENESS**

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INTRODUCTION

These proposed rules are presented by the Department of Economic Security in accordance with Minnesota Statutes §§ 14.22 to 14.28 of the Administrative Procedures Act. These rules have been developed as authorized by Minnesota Statutes § 268A.03(m), which requires the Commissioner to adopt, amend, suspend, or repeal rules governing programs which the Commissioner administers under Minnesota Statutes, chapter 268A.

DISCUSSION

Background and Need for Rule Amendment

In 1992 the Department's Division of Rehabilitation Services (DRS) began a process to develop a state rule to more clearly define its policies and procedures for the vocational rehabilitation (VR) program. Some changes were mandated by the reauthorization of the federal Rehabilitation Act in 1992 and others were formulated by a work group comprised of internal and external stakeholders. Input was solicited regarding the proposed changes at town meetings held throughout 1992 and 1993. Based on the resulting consumer and staff input, rules were proposed. A public hearing was held on the proposed rules; DRS proposed certain modifications to the proposed rules as a result of comments received at the hearing and in the comment period following the hearing. DRS also modified the rules in accordance with recommendations in the reports on the proposed rules issued by the Administrative Law Judge and the Chief Administrative Law Judge. The VR rules, Minnesota Rules 3300.5000 -- 3300.5060, were adopted, and became effective April 25, 1994.

After the rules became effective, DRS received input from advocates and staff members expressing concern that the rule requiring consumer financial participation in the cost of interpreter services, notetakers, readers, and other auxiliary aids and services may be a violation of the Americans with Disabilities Act. Consequently, on July 5, 1994 DRS published in the *State Register* a Notice of Intent to Adopt an

Emergency Rule to eliminate the requirement for consumer financial participation in the cost of "auxiliary aids and services for effective communication." The proposed emergency rule was submitted to the Attorney General, who disapproved it, indicating that the Department of Economic Security did not have statutory authority, in this instance, to adopt an emergency rule on this topic. Therefore, DRS is addressing this key issue through the regular, non-emergency, rulemaking process. Comments and questions from DRS staff, consumers and advocates made it evident that it was necessary to clarify or revise certain other provisions of the rules to improve services to consumers. Timely modification of rules is consistent with DRS's commitment to Total Quality Organization principles, including continuous improvement of its services, and is also consistent with the Minnesota Administrative Procedures Act.

A Notice of Solicitation of Outside Information or Opinions was published in the October 3, 1994 *State Register* requesting public input on the following key issues identified by DRS: 1) eliminating the requirement for consumer financial participation in the cost of sign language interpreter services and other auxiliary aids and services in accordance with the Americans with Disabilities Act; 2) the expectation that sign language interpreters and other auxiliary aids and services will be provided by post-secondary educational institutions under the Americans with Disabilities Act, and not by DRS; 3) clarifying the terms and conditions under which DRS may provide transportation services; 4) clarifying the services DRS may provide to assist eligible consumers establish a small business; 5) clarifying that DRS will purchase only new equipment when vehicle adaptations are being provided; 6) adjusting the cap on DRS payments for post-secondary tuition and fees for two-year programs and specialized institutions such as Gallaudet University and the National Technical Institute for the Deaf; 7) clarifying that vehicle adaptations are considered rehabilitation technology; 8) clarifying how to prorate the tuition cap for part-time graduate school programs; and 9) specifying that consumers have free choice of vendor for mental health services.

The amendments DRS is proposing are based on input from DRS staff, consumers, advocates and others interested in vocational rehabilitation services.

Additional Future Rule Amendment

DRS understands from staff and consumer comments that there are concerns about the terms and conditions for DRS for services relating to postsecondary training. Some of those concerns are being addressed in the rule amendments currently being proposed. However, other concerns about other postsecondary training issues, including maintenance for consumers who are postsecondary students, need further clarification before rule changes are developed. After obtaining further information and data on postsecondary training issues from staff and consumers, DRS plans to

propose additional rule amendments, if necessary, to take effect before the beginning of the 1996-97 academic year.

The federal Department of Education, Rehabilitation Services Administration, is developing proposed revised federal regulations for the vocational rehabilitation program. When final federal regulations are published, DRS will determine if it is necessary to propose amendments to the state vocational rehabilitation rule in order to conform to the revised federal regulations.

Statutory and Regulatory Background

Under Minnesota Statutes 268A the commissioner of the Department of Economic Security is granted the power to administer the vocational rehabilitation program. Vocational rehabilitation services for most persons are provided by DRS. Vocational rehabilitation services for persons who are blind are provided by State Services for Blind and Visually Handicapped Persons, a separate division of the Department of Economic Security, generally known as SSB. Each year DRS develops a state plan for vocational rehabilitation in accordance with Minnesota Statutes § 268A.03(h), and the federal Rehabilitation Act of 1973, as amended. Federal regulations (Code of Federal Regulations, title 34, part 361) implement the Rehabilitation Act and govern the vocational rehabilitation program. The federal Department of Education's Rehabilitation Services Administration provides policy guidance to state vocational rehabilitation agencies, allocates federal funds to state agencies under the Rehabilitation Act, and monitors the performance of the vocational rehabilitation program nationwide.

In 1992 the federal Rehabilitation Act was significantly amended. Although the federal regulations for vocational rehabilitation services have not yet been amended, all state vocational rehabilitation agencies must comply with the amended Rehabilitation Act. Both the state plan which took effect October 1, 1993 and the amended and updated state plan effective October 1, 1994 incorporate the provisions of the amended Act.

Impact on Small Businesses

The department has determined that these proposed rules do not affect small business as defined by Minnesota Statutes § 14.115. The department acknowledges references to "business" or "small business" in the proposed rules, parts 3300.5060, subpart 3, item C, and 3300.5060, subpart 11. These references are to vocational rehabilitation services provided under an individualized written rehabilitation program in order to assist an eligible consumer to establish a small business. The proposed rules do not establish compliance or reporting requirements, design or operational

standards, or other requirements that impact small businesses as described in Minnesota Statutes § 14.115.

Impact on Local Public Bodies

Minnesota Statutes § 14.11, subdivision 1, requires agencies to consider the effect of implementing proposed rules on local public bodies if the estimated total cost to public bodies of implementing the rules exceeds \$100,000 per year in either of the first two years of implementation. The department has determined that Minnesota Statutes § 14.11, subdivision 1, does not apply because adoption of these amended rules will not result in additional spending by local public bodies in excess of \$100,000 per year for the first two years following adoption of the rules.

DISCUSSION OF PROPOSED RULE

3300.5010 DEFINITIONS

3300.5010, subp.3a. Auxiliary aids and services for effective communication. It is necessary to define this term, which is used in proposed rules 3300.5040, subp. 6, item J, and 3300.5060, subparts 1a and 9. The proposed definition references the definitions in federal regulations implementing the Americans with Disabilities Act. The first definition referenced is:

" Auxiliary aids and services includes:

- (1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- (2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- (3) Acquisition or modification of equipment or devices; and
- (4) Other similar services and actions." [Code of Federal Regulations, Title 28, §35.104, applicable to state and local government services]

The second definition referenced is:

"(b) Examples. The term " auxiliary aids and services" includes --

- (1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- (2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- (3) Acquisition or modification of equipment or devices; and
- (4) Other similar services and actions." [Code of Federal Regulations, title 28, §36.303, paragraph (b), applicable to public accommodations]

It is reasonable to define the term by referring to federal regulations. DRS considered the alternative of including the federal regulatory definition word-for-word in 3300.5010 subpart 3a. However, DRS determined that it was more appropriate to reference the federal definition; if the federal regulations change, the revised definition will apply without the need to amend the state rule. It is reasonable to include the phrase "for effective communication" in the term being defined. The United States Department of Justice's regulatory analysis states:

"Auxiliary aids and services include a wide range of services and devices for ensuring effective communication" (emphasis added; regulatory analysis of Code of Federal Regulations, title 28, §35.104 and title 28, §36.303 in *Americans with Disabilities Act Handbook*, published by the U.S. Equal Employment Opportunity Commission and the U.S. Department of Justice, December 1991, pages II-13 and III-78).

3300.5010, subp. 27. Paratransit. DRS is proposing a change to clarify the definition of "paratransit." This change is necessary and reasonable to clarify that "paratransit" is a service provided by a "public entity" as required by the Americans with Disabilities Act (for example, Metro Mobility in the Twin Cities metro area). The definition itself is reasonable; it references the paratransit requirements in the

Americans with Disabilities Act. DRS considered alternate ways to revise this definition; the proposed definition is based on a recommendation by the Client Assistance Project of Mid-Minnesota Legal Assistance. DRS found that there was some confusion in applying the previous definition; some persons believed that specialized private transportation services provided by private companies not under contract to a "public entity" could be considered "paratransit" within the meaning of the rule. It is DRS's intent to consider those specialized private transportation services provided by private companies not under contract to a "public entity" as "other available transportation" under the proposed amended definition of "transportation services" (3300.5010, subpart 43) and the proposed amended terms and conditions for the provision of transportation services (3300.5060, subpart 12, item H).

3300.5010, subp. 28a. Physical and mental restoration services. DRS is proposing to change the term "restoration services" to "physical and mental restoration services" to conform to the language of the definition of this term in section 103(a)(4) of the Rehabilitation Act of 1973, as amended, and in federal vocational rehabilitation regulations, Code of Federal Regulations, title 34, § 361.1(c)(2). This change is reasonable because it conforms to federal statutory and regulatory usage. It is necessary because DRS has found that some consumers and DRS staff believed that the term "restoration services" did not include mental health services; the use of the term "physical and mental" restoration services will emphasize that mental health services may be provided.

The only change in the definition from the earlier definition of "restoration services" is the proposal to delete the reference to "durable medical equipment" that appears in the definition of "restoration services" in the current rule. This change is necessary and reasonable in order to allow for the new terms and conditions for the provision of durable medical equipment that DRS is proposing in 3300.5060, subpart 3a. The current definition of "Durable medical equipment" will be retained in 3300.5010, subpart 8 :

"Durable medical equipment" means wheelchairs; three-wheel self-propelled devices; canes, crutches, and other mobility aids; and other commercially available nonconsumable equipment whose primary purpose is to enable an individual to perform life functions that, due to the individual's physical or mental impairment, the individual cannot adequately perform without the equipment."

3300.5010, subp. 31a. Public entity. This new definition is necessary in order to understand the revised definitions of "paratransit" (3300.5010, subp. 27) and "transportation services" (3300.5010, subp. 43). The present rule refers to "public transportation"; DRS has determined that the phrase "public transportation" has caused confusion among some staff and consumers, who in some instances have

asked if "public transportation" was meant to refer to taxis, interurban busses (like Greyhound Lines busses), or passenger aircraft. DRS is proposing the term "public entity" to clarify this issue; the definition is based on the definition of "public entity" in the federal regulations implementing the Americans with Disabilities Act, Code of Federal Regulations, title 28, § 35.104. The effect of the use of this term in the phrase "transportation provided by a public entity" in proposed rules 3300.5010 subpart 27 and 3300.5060, subpart 12, items D, E, F, G and H is to clarify that "transportation provided by a public entity" is transportation provided by state or local government or a governmental "instrument" like the Metropolitan Council Transit Operations in the Twin Cities Metro area, and similar bodies in other Minnesota communities. The definition is reasonable; it is based on current federal regulations and improves public and staff understanding of the rules.

3300.5010, subp. 38. Restoration services. DRS proposes repealing this subpart, and replacing the term "restoration services" with the term "physical and mental restoration services," (please refer to the discussion of proposed 3300.5010, subp. 28a) which is the term used for this category of services in section 103(a)(4) of the Rehabilitation Act of 1973, as amended, and in federal vocational rehabilitation regulations, Code of Federal Regulations, title 34 § 361.42(a)(3). This change is necessary and reasonable for consistency with terminology used in federal statute and regulations.

3300.5010, subp. 43. Transportation services. DRS is proposing four changes in this definition. The first, in proposed item B, is a change from the phrase "public transportation" to the phrase "transportation provided by a public entity," to conform to the changes described in the discussion of 3300.5010, subpart 31a. This change is necessary to improve public and staff understanding of the rules by clarifying that "transportation provided by a public entity" is transportation provided by a state or local government or governmental "instrument." It does not include forms of transportation that may commonly be referred to as "public transportation," like taxis or interurban busses. Paratransit (Metro Mobility in the Twin Cities Metro area and similar services elsewhere) is still included in the definition of "transportation services," as one form of "transportation provided by a public entity."

The second proposed change is the deletion of "the purchase of vehicle adaptations" from the definition of "transportation services." This change is necessary to clarify that, in the state-federal vocational rehabilitation program, vehicle adaptations are considered to be rehabilitation technology, not transportation services. This change in the definition is a clarification, not a substantive policy change. In the Statement of Need and Reasonableness for the VR rule as originally proposed in 1993, DRS acknowledged that vehicle adaptations are rehabilitation technology, and are therefore exempt from the "comparable benefits and services" requirement. DRS is also

proposing to amend 3300.5060, subpart 9, the terms and conditions for rehabilitation technology, by moving the terms and conditions for vehicle adaptations to that subpart and deleting them from 3300.5060, subpart 12, the terms and conditions for transportation services. These changes are reasonable because they will make it clearer that the rule conforms to federal law and policy, and they will make it easier for DRS staff and members of the public to locate references in the rule to "vehicle adaptations" under the expected "rehabilitation technology" headings.

The third change, in item C, is the addition of language stating that "transportation services" includes payments for a driver if one is required. This change is necessary for appropriate consumer service. In some instances DRS consumers cannot drive a vehicle or do not own a vehicle, and do not have access to transportation provided by a public entity, including paratransit. In such instances, a reasonable solution to consumers' needs for transportation to participate in another vocational rehabilitation service may be to arrange to join a carpool, or to be driven in another person's vehicle, and pay for the driver's services, if necessary. Therefore, DRS wishes to clarify that payments for drivers are included in "transportation services." See also the discussion of 3300.5060, subpart 12, dealing with the terms and conditions for transportation services.

The fourth change, in item D, is the addition of language dealing with "other available transportation if transportation provided by a public entity, including paratransit, and transportation by private vehicle are unavailable." This new provision is necessary and reasonable to meet consumer service needs. There are instances where neither transportation provided by a public entity, paratransit, transportation in a vehicle driven by the consumer, nor transportation in a carpool or other private vehicle driven by someone else is available to assist a DRS consumer to participate in another vocational rehabilitation service. In those instances it is reasonable to utilize "other available transportation" to meet the consumer's transportation needs. See also the discussion of the proposed changes to the terms and conditions for transportation services, 3300.5060, subpart 12.

3300.5010, subp. 44, item B. Tuition cap. DRS is proposing to change the tuition cap for undergraduate programs that do not lead to a bachelor's or higher degree. The current cap is the average annual cost of tuition and mandatory fees needed for a student to complete 45 credits in three quarters at a state community college. DRS counselors, consumers and other stakeholders have pointed out that in some instances the current cap is inadequate. In some situations, due to the structure of the training program at a technical college, community college, business school or trade school, a DRS consumer must take up to a total of 60 credits, and must attend for three quarters plus a summer session. The tuition and fees for training programs at public Minnesota institutions in such instances can exceed the current DRS tuition

cap. As was explained in the discussion of "tuition cap" in the Statement of Need and Reasonableness for the VR rule as originally proposed in 1993, the intent of the DRS tuition cap rule for programs below the bachelor's degree level is to "adequately cover eligible consumers' tuition and fees at both community colleges and technical colleges." In many instances a combination of grants, scholarships and consumer financial participation will cover the costs of tuition and fees. In keeping with that intent, therefore, DRS is proposing to raise the tuition cap for programs below the bachelor's degree level to an amount equal to 60 credits in a period of 12 consecutive months at a Minnesota community college. Since public community college tuition and fees are higher than technical college tuition and fees, the community college rate is adequate for both community and technical colleges.

3300.5040 CONSUMER FINANCIAL PARTICIPATION IN COST OF VOCATIONAL REHABILITATION SERVICES.

3300.5040, subp. 6, item J. Auxiliary aids and services for effective communication. DRS is proposing a change to the requirements for consumer financial participation in the cost of vocational rehabilitation services. This change will exempt interpreters, notetakers and readers for persons who are deaf or hard of hearing, as well as other "auxiliary aids and services for effective communication," from the consumer financial participation requirement.

Consumers with gross family income higher than the Minnesota median income, as adjusted for family size, must pay for some purchased vocational rehabilitation services in an amount equal to the percentage by which their gross family income exceeds the adjusted median income. (Currently, for a single person the median income is \$24,189; for a four-person family, it is \$46,518. The amount changes every year, as determined by the federal Department of Health and Human Services.) This policy does not apply to those whose gross family income is below the median income, or who receive AFDC, SSI, General Assistance (GA), or Medical Assistance (MA).

Under federal vocational rehabilitation regulations, state VR agencies may establish consumer financial participation requirements for services except for those services exempted from the requirement by federal vocational rehabilitation regulations. The federal vocational rehabilitation regulations do not categorically exempt auxiliary aids and services such as interpreter, notetaker and reader services from consumer financial participation (Code of Federal Regulations, title 34, §361.47). In some instances those services may be "recurring" and may cost more than \$300, in which case they are not exempt under Minnesota Rules 3300.5040, subpart J (relettered as 3300.5040, subpart K in the proposed rules).

Based on public comments received from DRS town meetings, an exemption from consumer financial participation for "interpreters, readers and notetakers" was originally included in the proposed VR rule in 1993. During the public hearing on the proposed rule on November 30, 1993, however, several individuals questioned why interpreter, notetaker and reader services were exempt from consumer financial participation. They suggested that this appeared to give special consideration to a group of people.

In response to this concern DRS proposed a change to the rule in the DRS response to the Administrative Law Judge (ALJ). The change, which was approved by both the ALJ and the Chief Administrative Law Judge, eliminated the exemption from consumer financial participation for interpreters, readers and notetakers. Many community members expressed concern about the effect of the change, suggesting that DRS policy was in violation of the federal regulations implementing the Americans with Disabilities Act (ADA). Their interpretation of the federal ADA regulations was that a DRS requirement for a consumer to help pay for interpreting services would result in additional cost (or a surcharge) for that individual, in violation of the ADA regulations.

The federal ADA regulations state that "a public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part" [Code of Federal Regulations, title 28, §35.130(f)]. "Auxiliary aids" are defined in the ADA regulations as including

"(1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions." [Code of Federal Regulations, title 28, §35.104; also Code of Federal Regulations, title 28, §36.303, paragraph (b)] Personal devices such as eyeglasses or hearing aids,

readers for personal use or study and services of a personal nature are specifically excluded from the "auxiliary aids" definition (Code of Federal Regulations, title 28 §35.135, also Code of Federal Regulations, title 28, §36.306).

DRS itself is clearly a "public entity" as defined in the ADA regulations: "Public entity means -- (1) Any State or local government; (2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government" (Code of Federal Regulations, title 28, §35.104). Many providers of services to DRS consumers (for example, public Minnesota postsecondary institutions) are also "public entities."

"Public accommodations," defined in ADA regulations (Code of Federal Regulations, title 28, §36.104) are also required to provide "auxiliary aids and services" (Code of Federal Regulations, title 28, §36.303) and are prohibited from making a surcharge on an individual or group of individuals to cover the cost of such services. (Code of Federal Regulations, title 28, §36.301). Many providers of services to DRS consumers (for example, private postsecondary institutions, community rehabilitation programs, physicians, or psychologists) are "public accommodations."

DRS solicited clarification on its responsibility as a "public entity" under the ADA with regard to the consumer financial participation issue from the Great Lakes Disability and Technical Assistance Center, the Region V Rehabilitation Continuing Education Program and the U.S. Department of Justice. Although official written responses were not received from those organizations, it is DRS's understanding now that if another "public entity," "public accommodation" or other organization refuses to provide interpreter services, or other services that are "auxiliary aids and services," and DRS accepts that responsibility, applying consumer financial participation would be a "surcharge" and a violation of the ADA regulations. DRS firmly believes that it is the responsibility of *all* "public entities" and "public accommodations" to provide auxiliary aids and services. In the past several months, DRS has worked with training programs, community rehabilitation programs and employers to advocate that they provide communication accessibility for all individuals who are deaf or hard of hearing. DRS will continue to provide information and technical assistance about ADA responsibilities to service providers and employers.

The proposed change is necessary and reasonable to conform to federal ADA regulations by exempting "auxiliary aids and services for effective communications" from consumer financial participation, which would constitute an impermissible "surcharge."

3300.5040, subp. 6, items K and L. As a result of adding "auxiliary aids and services" as a new item J in this subpart, the items previously lettered J and K had to be relettered as items K and L, respectively. The relettering does not affect the exemptions from consumer financial participation listed in these two items.

3300.5050 COMPARABLE BENEFITS AND SERVICES

3300.5050, subp. 2, item C. The words "physical and mental" are added to the proposed rule to conform to the proposed new definition of "physical and mental restoration services," a term which is consistent with usage in the Rehabilitation Act and federal vocational rehabilitation regulations. See the discussion of 3300.5010, subp. 28a. The change in terminology does not change the consumers' responsibilities described in this subpart.

3300.5060 TERMS AND CONDITIONS FOR PROVISION OF VOCATIONAL REHABILITATION SERVICES.

3300.5060, subp. 1a. Auxiliary aids and services for effective communication. This proposed new subpart is necessary and reasonable to clarify for DRS staff, consumers, postsecondary institutions, community rehabilitation programs, physicians, psychologists, other service providers, and members of the public the responsibilities for providing auxiliary aids and services for effective communication, including sign language interpreters, notetakers and readers, for DRS consumers. Under the Americans with Disabilities Act (ADA) "public entities" and "public accommodations" have the responsibility for providing auxiliary aids and services to assure access to programs and services by individuals with disabilities.

The term "auxiliary aids and services" is defined in Code of Federal Regulations, title 28, § 35.104; that definition is quoted in the discussion of 3300.5040, subp. 6, item J, in this Statement of Need and Reasonableness.

Public entities and the provision of auxiliary aids and services. "Public entities" are defined in the federal regulations for the ADA:

"Public entity means --

- (1) Any state or local government;
- (2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government" (Code of Federal Regulations, title 28, § 35.104).

Regarding public entities' responsibility for provision of auxiliary aids and services, the federal ADA regulations state:

"(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities." (Code of Federal Regulations, title 28 § 35.160)

Federal regulations also state:

"A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part" [Code of Federal Regulations, title 28, § 35.130(f)].

Therefore, DRS concludes that public entities (including public postsecondary institutions) cannot require payment from DRS for the costs of auxiliary aids or other services to assure program accessibility for an individual DRS consumer or all DRS consumers being served by the public entity, since an individual DRS consumer is an "individual with a disability" and DRS consumers constitute a "group of individuals with disabilities."

To summarize, under the ADA, it is the responsibility of other public entities, not DRS, to provide auxiliary aids and services when necessary for DRS consumers to access the other public entities' programs or services. DRS will, of course, continue to provide auxiliary aids and services when necessary for DRS consumers to access DRS programs.

Public accommodations and the provision of auxiliary aids and services. ADA regulations also require public accommodations to provide auxiliary aids and services.

"Public accommodation means a private entity that owns, leases (or leases to), or operates a place of public accommodation." (Code of Federal Regulations, title 28, § 36.104)

The regulations define "place of public accommodation" as follows:

"Place of public accommodation means a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories --"

Twelve categories are listed; those which are especially significant for the discussion of the proposed DRS rule, because they include many potential providers of vocational rehabilitation services purchased or arranged by DRS, include the following:

"(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(10) a nursery, elementary, secondary, graduate, or postgraduate private school, or other place of education;

(11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment;"(Code of Federal Regulations, title 28, § 36.104).

Regarding postsecondary institutions, the U. S. Department of Justice's regulatory analysis specifically states, "Private schools, including elementary and secondary schools, are covered by the rule as places of public accommodation." (*Americans with Disabilities Act Handbook*, published by the U.S. Equal Employment Opportunity Commission and the U.S. Department of Justice, December 1991, page III-31)

Federal ADA regulations applicable to public accommodations (Code of Federal Regulations, title 28, § 36.303) state:

"(a) General. A public accommodation shall take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or

accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense."

(f) Alternatives. If provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages or accommodations being offered or in an undue burden, i.e., significant difficulty or expense, the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result in such an alteration or such burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation."

The U. S. Department of Justice's regulatory analysis of Code of Federal Regulations, title 28, § 36.303 states:

"Implicit in this duty to provide auxiliary aids and services is the underlying obligation of a public accommodation to communicate effectively with its customers, clients, patients, or participants who have disabilities affecting hearing, vision, or speech." (*Americans with Disabilities Act Handbook*, published by the U.S. Equal Employment Opportunity Commission and the U.S. Department of Justice, December 1991, page III-78).

Federal ADA regulations applicable to public accommodations state:

"(c) Charges. A public accommodation may not impose a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part."
[Code of Federal Regulations, title 28, § 36.301(c)]

Therefore, DRS concludes that public accommodations (such as private postsecondary institutions, community rehabilitation programs, physicians, psychologists, and placement agencies) cannot require payment from DRS for the costs of auxiliary aids or other services to assure program accessibility for an individual DRS consumer or all DRS consumers, since an individual DRS consumer is an "individual with a disability" and DRS consumers constitute a "group of individuals with disabilities."

To summarize, under the ADA, it is the responsibility of public accommodations, not DRS, to provide auxiliary aids and services when necessary for DRS consumers to access the public accommodations' programs or services.

In light of the above explanation, the proposed new 3300.5060, subpart 1a is necessary and reasonable in order to conform to the ADA requirements; DRS does not have the responsibility for providing auxiliary aids and services for DRS consumers who are receiving services from, or participating in the programs of, public entities or public accommodations.

3300.5060, subp. 3. Computer hardware and software. DRS is proposing to change the phrase "computer hardware, software, or modems, printers, and other peripherals," to "computer software or hardware, including modems, printers and other peripherals" throughout this subpart to clarify that peripherals are a form of "hardware." This change is reasonable because it is consistent with current usage and understanding of computer-related terms.

In item E DRS is proposing to clarify that the person who conducts an evaluation must be "knowledgeable about computers" and not just someone who is generically "knowledgeable." This is reasonable and was suggested by the Office of the Revisor of Statutes as clearer wording.

In item G DRS is proposing a change that will exempt software from the \$3,000 cap . Previously in item G, "software" was also included in the list of purchases to which the \$3,000 computer cap applied. DRS has determined that it is more appropriate for the cap to apply only to computer hardware. There is a wide variation in the amount of software required by an individual consumer. In some cases of a technical or very specialized business the software needs might not be met within the \$3,000 cap. Purchases of software, if necessary as initial supplies for a small business, will be made outside the \$3,000 computer cap, but within the \$5,000 cap described in proposed 3300.5060, subpart 11, item G.

3300.5060, subp. 3a. Durable medical equipment. DRS is proposing new terms and conditions for the provision of durable medical equipment. Under the current rule, durable medical equipment is provided under the terms and conditions for restoration services, 3300.5060, subpart 10 (revised and renumbered as 3300.5060, subpart 7a in the proposed rule). The proposed separate terms and conditions for durable medical equipment are necessary and reasonable for effective and appropriate consumer service. The terms and conditions for "physical and mental restoration services" state that DRS will not pay for "restoration services that an eligible consumer would require regardless of participation in an individualized written rehabilitation program" (proposed rule, 3300.5060, subpart 7a, item C; in the rule currently in effect this provision

appears at 3300.5060, subpart 10, item C). DRS recognizes, in response to concerns raised by DRS counselors and consumers, that there are situations in which durable medical equipment is necessary for an individual to participate in an individualized written rehabilitation program, even though it might also be necessary if the consumer were not participating in VR services. Therefore, the proposed new terms and conditions for durable medical equipment do not include that requirement.

DRS also recognizes that private insurance or Medical Assistance do not cover every type of durable medical equipment. Therefore, the proposed new terms and conditions for durable medical equipment do not reference the absolute requirement in 3300.5050, subpart 2, item C that the consumer must make a claim with his or her health insurer, if any, or apply for Medical Assistance. However, the requirement under 3300.5050, subpart 2, item D for consumers to assist in the search for comparable benefits that DRS determines may be available to them is included in the terms and conditions for durable medical equipment, in accordance with section 101(a)(8) of the Rehabilitation Act, as amended.

3300.5060, subp. 4. Interpreter services for postsecondary training. DRS is proposing to delete this subpart, which will be replaced by the proposed new 3300.5060, subpart 1a. This change is necessary and reasonable, as explained above in the discussion of 3300.5060, subp. 1a, because postsecondary institutions are required by the Americans with Disabilities Act to provide interpreters (as well as other auxiliary aids and services) for students, and DRS is not responsible for providing or purchasing such services when they are the responsibility of another public entity or a public accommodation.

3300.5060, subp. 6. Notetaker services for postsecondary training. DRS is proposing to delete this subpart, which will be replaced by the proposed new 3300.5060, subpart 1a. This change is necessary and reasonable, as explained above in the discussion of 3300.5060, subp. 1a, because postsecondary institutions are required by the Americans with Disabilities Act to provide notetaker services (as well as other auxiliary aids and services) for students, and DRS is not responsible for providing or purchasing such services when they are the responsibility of another public entity or a public accommodation.

3300.5060, subp. 7a. Physical and mental restoration services. The terms and conditions in items A, B and C have been moved, unchanged, from their previous location in 3300.5060, subpart 10. Moving these provisions allows the new heading "Physical and mental restoration services" to appear in alphabetical order in the terms and conditions part of the rule. As is explained in the discussion of proposed 3300.5010, subpart 28a, the term "physical and mental restoration services" better reflects usage in the Rehabilitation Act and federal vocational rehabilitation regulations,

and also makes it more evident that mental health services may be provided as part of "physical and mental restoration services."

In item D, subitems (1), (2) and (4) also appeared in the previous 3300.5060, subpart 10, and are being moved unchanged to this new location. DRS is proposing a new item D, subitem (3) to allow eligible consumers choice of "any qualified professional to provide mental health services." This proposed item is reasonable: it is consistent with the emphasis on consumer choice of service provider in the 1992 amendments to the Rehabilitation Act [section 102(b)(1)(B)(x)], and it parallels the existing provisions for DRS consumer choice of licensed physicians and dentists and vendors of braces or artificial limbs. It is also reasonable because it recognizes the reality of mental health service provision: mental health services are provided by many qualified professionals who are not psychiatrists (physicians). Examples of a wide range of qualified mental health service providers are included to recognize the variety of possible mental health service providers. The inclusion of "traditional American Indian healer" among the examples of possible qualified mental health service providers is necessary and reasonable to address the service needs and choices of DRS consumers who are American Indians; this provision also is consistent with federal vocational rehabilitation regulations allowing state VR programs to pay "costs of native healing practitioners who are recognized as such by an Indian tribe when services are being provided to handicapped American Indians under the State plan and when the native healing practitioner services are necessary to achieve the individual's vocational rehabilitation objective" [Code of Federal Regulations, title 34, § 361.71(b)].

3300.5060, subp. 8. Reader services for postsecondary training. DRS is proposing to delete this subpart, which will be replaced by the proposed new 3300.5060, subpart 1a. This change is necessary and reasonable, as explained above in the discussion of 3300.5060, subp. 1a, because postsecondary institutions are required by the Americans with Disabilities Act to provide reader services (as well as other auxiliary aids and services) for students, and DRS is not responsible for providing or purchasing such services when they are the responsibility of another public entity or a public accommodation.

3300.5060, subp. 9. Rehabilitation technology. DRS is proposing four changes in the terms and conditions for rehabilitation technology. In item A, DRS is adding language to clarify that some rehabilitation technology may also be "auxiliary aids and services for effective communication" and thus exempt from consumer financial participation under the regulations for the Americans with Disabilities Act, as explained in the discussion of 3300.5040, subp. 6, item J. An example of a rehabilitation technology service that would also be an "auxiliary aid and service for effective communication" is a telephone amplifier to assist a DRS consumer who is hard of hearing in contacting a DRS rehabilitation counselor or placement staff member to

obtain job leads and advice on interview techniques during a search for employment.

In item C, DRS is proposing to move the terms and conditions for vehicle adaptations into this rehabilitation technology subpart, deleting them from 3300.5060, subpart 12, the terms and conditions for transportation services, where they appeared as item H. This change is reasonable because it will make it clearer that the rule conforms to federal law and policy. As DRS indicated in the Statement of Need and Reasonableness for the VR rule as originally proposed in 1993, vehicle adaptations are considered to be rehabilitation technology. The proposed change will also make it easier for DRS staff and members of the public to locate references in the rule to "vehicle adaptations" under the expected "rehabilitation technology" headings.

In item C, subitem (1) DRS is proposing to add that the person who evaluates a vehicle and the consumer's needs must be a person "who is not a vendor of vehicle adaptations." This change is necessary to clarify that conflict of interest must be avoided in the evaluation, in order for the DRS counselor and the consumer to obtain objective information, as well as for the prudent use of public funds. This change is supported by a recommendation DRS received in response to the Notice of Solicitation of Outside Opinions and Information. The same recommendation suggested that DRS hire rehabilitation engineers. DRS believes that at this time adding rehabilitation engineers to its staff is not appropriate. DRS agrees there is a need for expertise in rehabilitation engineering; however, DRS believes that using objective "outside" evaluators is effective in meeting consumer needs.

Subitems (2) and (3) in item C are not changes; they are being moved from 3300.5060, subpart 12, item H.

DRS is proposing to add subitem (4) in item C as a result of recommendations from state purchasing staff in the Department of Administration's Materials Management Division and discussions with vocational rehabilitation counselors and supervisors. This provision is reasonable and necessary for quality consumer service in order to assure that vehicle adaptations meet the unique needs of the individual DRS consumer. New equipment or adaptations will be under warranty and will be in good condition, which is not always true of used equipment or structural modifications. This provision is also necessary for prudent use of public funds, in order to clearly track bids and expenditures for vehicle adaptations to assure that DRS is not contributing to the purchase of the vehicle itself.

3300.5060, subp. 10. Restoration services. DRS is proposing to rename this subpart "physical and mental restoration services" and renumber it as proposed 3300.5060, subpart 7a. See the discussion of that proposed subpart for information regarding the proposed changes.

3300.5060, subp. 11. Small business enterprises. In item A, DRS proposes replacing the phrase "goods and services" with "occupational licenses, tools, equipment, and initial stocks and supplies." Item C specifies that DRS assistance in the establishment of a small business enterprise is for "occupational licenses, tools, equipment, and initial stocks and supplies." This change is necessary to clarify the goods and services to which the terms and conditions for "small business enterprises" services apply. This change is consistent with the language of section 103(a)(9) of the Rehabilitation Act, as amended, which deals with the scope of vocational rehabilitation services, and with the language of the federal vocational rehabilitation regulations, Code of Federal Regulations, title 34, § 361.42(14), which lists, among the vocational rehabilitation services that must be provided :

"Occupational licenses, including any license, permit, or other written authority required by a State, city or other governmental unit to be obtained in order to enter an occupation or to enter a small business, tools, equipment, initial stocks (including livestock) and supplies."

Conforming changes using the "occupational licenses, tools, equipment, and initial stocks and supplies" language also occur in proposed items D, E F and G of this subpart.

DRS wishes to point out that other services, if necessary, may be provided as part of an individualized written rehabilitation program to assist a DRS consumer to reach an employment goal prior to the establishment of a small business enterprise. For example, counseling in the selection of an employment goal, training to learn the skills for an occupation, and other services may be provided, depending on individual consumer needs.

DRS is proposing to amend the provision relating to a small business plan in item D. The experience of DRS counselors and consumers has demonstrated that complying with the Small Business Administration (SBA) loan application procedures has not proven to serve the intended purpose of evaluating the viability of the business. Information on the likely success and feasibility of a small business can be obtained through a variety of sources, including the SBA. The specific SBA loan application process, however, has not proven to be well-suited to providing DRS consumers and rehabilitation counselors with useful information about possible sources of funding for a small business. Therefore, DRS is proposing to revise this provision to delete references to the SBA loan application process. The proposed change will require the consumer to obtain advice and consultation regarding a business plan and possible sources of funding, and to develop a business plan and submit it to the rehabilitation counselor. The business plan, and the specific factors to be addressed by the business plan, listed in subitem (2), are reasonable because they will provide the

consumer and the rehabilitation counselor with information useful for making sound choices and decisions regarding whether a small business is a reasonable way for a consumer to reach an employment goal.

3300.5060, subp. 12. Transportation services. In item B, DRS is proposing to delete subitem 2,. This exception to the comparable benefit search requirement is no longer needed in this subpart, because the terms and conditions for providing vehicle adaptations are being moved to 3300.5060, subpart 9, rehabilitation technology.

In item D, DRS is proposing to add language clarifying that DRS will not "lease or otherwise obtain, maintain or insure" vehicles for DRS applicants or consumers. Most of this language is being moved from item G, because it fits more appropriately with the prohibition on the "purchase" of a vehicle. For clarity, DRS is adding "lease" and "otherwise" to cover all possible methods of "obtaining" a vehicle other than by purchase. This addition reinforces the prohibition against obtaining a vehicle that already exists in the rule. DRS believes, as was stated in the original Statement of Need and Reasonableness for the rule as proposed in 1993, "the purchase of a vehicle is an individual's own decision and responsibility. DRS is not required to purchase vehicles for eligible consumers."

In items E, F, G and H, DRS is proposing the revised language "transportation provided by a public entity, including paratransit" to clarify that the situations covered here are where Metropolitan Council Transit Operations bus service, Metro Mobility (or similar services in non-Metro areas) are not available, and to avoid any confusion with a broader popular use of the term "public transportation" that could include taxis, Greyhound interurban busses, or passenger aircraft. See also the discussion of the proposed definitions of 3300.5010, subparts 43 and 27.

In item G, DRS is proposing to add clarifying language to indicate that the terms and conditions in this item apply when "the eligible consumer is being transported by personal vehicle." DRS also proposes adding language to state that DRS payments for transportation in such circumstances can include payments for the cost of a driver, and that payments for a driver are to be at the "usual and customary rate for the area." These changes are necessary and reasonable for appropriate consumer service. They continue to allow for situations where the DRS consumer drives a vehicle, and also allow for situations where the consumer cannot drive, or does not have access to a vehicle to drive and must then rely on solutions such as carpooling or hiring someone to drive the consumer. These changes recognize appropriate solutions to consumer's transportation needs and allow for more flexibility than the rule currently does.

DRS proposes to delete the content of the current items H, dealing with vehicle adaptations. The terms and conditions for vehicle adaptations are moved to the rehabilitation technology subpart, 3300.5060, subpart 9, item C, because vehicle adaptations are in fact rehabilitation technology and it is more reasonable to include the terms and conditions for adaptation in that subpart.

In response to DRS's Notice of Solicitation of Outside Information or Opinions, one person recommended raising the current 12-cents-per-mile rate for gasoline, to cover (in part) costs like oil changes and wear on tires. DRS considered this suggestion and has determined that the IRS charitable deduction rate is still appropriate. DRS believes that costs to maintain a vehicle are the consumer responsibility; the mileage rate is intended to cover gasoline costs by using a nationally recognized standard rate. DRS notes that in many instances, if an individual's vehicle gets a moderate number of miles per gallon, the 12-cents-per-mile rate may result in a small amount of extra money that could be used to help pay for some vehicle maintenance costs. For example, at 12 cents per mile, and 15 miles per gallon, the current rate in effect results in \$1.80 per gallon.

3300.5060, subp. 13. Tuition, fees, books, supplies, and tools and equipment for postsecondary training.

In item E, DRS proposes new language about prorating the tuition cap for graduate programs. In a related change, proposed item F is reworded to indicate it applies only to prorating the tuition cap for undergraduate programs. These changes are necessary and reasonable in order to reflect the differences between graduate and undergraduate programs concerning students' full-time or part-time status. The rule as currently written requires prorating the tuition cap for any eligible consumer enrolled for fewer than 12 credits per term, without distinguishing between graduate and undergraduate programs. DRS consumers and rehabilitation counselors have expressed concern with the rule as currently written, because some graduate programs consider graduate students taking 11 credits per term, or even fewer, to be "full-time" students. In addition, some graduate programs do not clearly establish a number of credits as criteria for full-time or part-time status, but make that determination on other bases unique to the program. For undergraduate programs, however, 11 or fewer credit hours per term still constitutes "part-time" status. DRS agrees that, given the reality of the differences between graduate and undergraduate programs in determining "full-time" and "part-time" status, it is appropriate to treat the prorating of the tuition cap differently for graduate and undergraduate programs. Because graduate programs vary widely in their standards for "full-time" and "part-time" status, it is reasonable for DRS to use "the specific program standards for full-time or part-time status without regard to credit hour designations" in prorating the tuition cap for graduate programs.

DRS is proposing to delete the language that currently appears in item F and replace it with a new item G. New item G, like "old" item F, applies to DRS consumers who are students at Gallaudet University and the National Technical Institute for the Deaf. Under the rule as currently written, the tuition cap for those institutions could be raised by an amount equal to the cost of interpreter services needed for class attendance, necessary tutoring, or out-of-class assignments. DRS is proposing to change that provision; instead, for DRS consumers attending those institutions, the tuition cap will not be applied. This change is reasonable; Gallaudet and the National Technical Institute for the Deaf offer unique educational and training experiences which are not limited to the provision of sign language interpreters. The programs at these institutions offer an experience of immersion in, and acceptance and understanding of, Deaf culture, and the tuition and fees reflect, in part, the legitimate additional expenses associated with offering that unique kind of experience. It is reasonable to name Gallaudet and the National Technical Institute for the Deaf specifically in the rule, because they are the only postsecondary institutions in the nation which offer these kinds of experiences. Therefore, recognizing the needs, preferences and cultural choices of persons who are deaf, DRS believes using the tuition cap is inappropriate for these institutions. Instead of applying the tuition cap in calculating DRS payments for tuition, fees, books, supplies and tools and equipment for these institutions, DRS will use the tuition and fees established by Gallaudet or National Technical Institute for the Deaf. This change is also reasonable because DRS does not expect to be making payments to postsecondary institutions for interpreter services for DRS consumers; under the ADA postsecondary institutions have the responsibility for providing interpreters and other auxiliary aids and services.

In item J, DRS is proposing to delete language that required DRS consumers to use any funds from gift aid (for example, grants or scholarships) that exceeds the costs of tuition, fees, books, supplies, tools and equipment to help pay for other services the consumer needed to participate in his or her individualized written rehabilitation program. This change is necessary and reasonable; it allows consumers more choice and flexibility in deciding how to use funds from grants or scholarships. In response to concerns expressed by DRS consumers and rehabilitation counselors, DRS agrees that it is not appropriate for DRS to determine how DRS consumers/students should use gift aid funds, received from non-DRS sources, that are not needed for tuition, fees, books, supplies tools and equipment.

Effective date. Under Minnesota Statutes §14.18 adopted rules become effective five working days after the Notice of Adoption is published in the State Register, unless a later date is stated. If the rulemaking process is completed and a Notice of Adoption is published before late June, DRS wishes to clarify that the rule changes will become effective July 3, 1995. This date, which will precede the late summer months when DRS funding arrangements for postsecondary training are finalized, is

reasonable, since DRS is proposing rule changes that potentially affect DRS consumers' postsecondary training programs. If a July 3, 1995 effective date is not possible, the rules will become effective as provided by law.

CONCLUSION

Based on the foregoing, the Department's proposed amendments to the rules are both necessary and reasonable. The Department of Economic Security recommends the adoption of these proposed rules.

Date

R. Jane Brown
Commissioner
Department of Economic Security