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HOUSE RESEARCH

Case Brief

Maureen Bellis, Attorney/Legislative Analyst (296-5044)
Deborah K. McKnight, Attorney/Legislative Analyst (296-5056)

Webster: The Supreme Court Abortion Decision

A case brief of the July 3, 1989 United States Supreme Court decision in the Missouri abortion case. Webster v. Reproductive Health Services, 109 S.Ct. 3040.

Issues Presented in *Webster*

For each issue, this case brief presents the text of the challenged Missouri statute, a statement of the legal issue, the holding with respect to each legal issue, and a short explanation of the rationale for each holding. A final section summarizes the relevance of the Webster case for Minnesota law.

Contents

Issue	Discussion of Issue	Effect on Minnesota Law
Preamble: Life Begins at Conception	Page 2	Page 6
Prohibition on Use of Public Facilities/ Public Employees to Perform Abortions	Page 3	Page 7
Prohibition on Use of Public Funds for Abortion Counseling	Page 4	Page 7
Viability Testing	Page 5	Page 8

Definitional language is set forth in Mo.Rev.Stat. §188.200 (previously Section 1 of "the Act"), which provides:

> **§188.200. Definitions**
>
> As used in sections 188.200 to 188.220, the following terms mean:
>
> (1)"Public employee," any person employed by this state or any agency or political subdivision thereof;
>
> (2) "Public facility," any public institution, public facility, public equipment, or any physical asset owned, leased, or controlled by this state or any agency or political subdivision thereof;
>
> (3) "Public funds," any funds received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, gifts or grants from any source, public or private, federal grants or payments, or intergovernmental transfers.

Decision: The Court concluded on the basis of earlier decisional law that it is constitutional to prohibit public employees and facilities from providing abortions, unless needed to save the woman's life.

Rationale: The Court upheld the statutory ban on performance of abortions (except to save a woman's life) either by public employees or in a public facility. The Court concluded that the Missouri restriction was constitutional based on earlier cases that had upheld limits on public funding for abortion. 109 S.Ct. at 3051-53. Maher v. Roe, 432 U.S. 464, 97 S.Ct. 2376 (1977) (constitutional for state to provide medical payments for childbirth but not for nontherapeutic abortion); Poelker v. Doe, 432 U.S. 519, 97 S.Ct. 2391 (1977) (constitutional for publicly financed hospital to provide services for childbirth but not for abortion); Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671 (1980) (constitutional for federal government, under the Medicaid program, to refuse to reimburse states for abortions, unless necessary to save the woman's life). The Court stated that nothing in the federal Constitution required the states to be in the business of providing abortion services. It noted the general principle of law that there is no affirmative right to receive government aid, even if such aid is the only way an individual can obtain a constitutionally protected right. 109 S.Ct. at 3051.

A major legal issue left unresolved by the Webster decision is what precise definition of "public facility" would satisfy the federal Constitution. Although the definition of "public facility" in the Missouri law is very broad and would include even private facilities on leased public land, Justice O'Connor, in a concurring opinion, recognized that some broad interpretations of "public facility" might be vulnerable to challenge. 109 S.Ct. at 3059. Justice Blackmun noted that this would especially be true if the definition of "public facility" were applied to "that which in all meaningful respects is private." 109 S.Ct. at 3068, n. 1.

Prohibition on Use of Public Funds for Abortion Counseling

Issue: Was it constitutional to prohibit the use of public funds for abortion counseling services?

The challenged statutory provision, Mo.Rev.Stat. §188.205, stated as follows:

> **§188.205. Use of public funds prohibited, when**
>
> It shall be unlawful for any public funds to be expended for the purpose of performing or assisting an abortion, not necessary to save the life of the mother, or for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.
> (L. 1986, H.B. 1596, §A (§2).)

Decision: The Court concluded that this part of the challenge was moot based on the state's interpretation of the law. The Supreme Court directed the Eighth Circuit Court of Appeals to vacate the part of the opinion dealing with the statutory ban on the use of public funds for abortion counseling. This means that the issue was not decided in this case.

Rationale: The Missouri statute contained three restrictions relating to public abortion counseling services.[2] The Court of Appeals invalidated all three. The State of Missouri appealed only the decision on one of the provisions--the prohibition on the use of public funds for abortion counseling found in section 188.205. The Supreme Court dismissed the appeal on this provision as moot. The effect is that the case makes no law on the validity of banning public funds for abortion counseling.

In addressing the issue of banning public funding for abortion counseling, the Supreme Court accepted the state's interpretation that the ban was not directed at the primary conduct of any private or public health care provider, but only at those state fiscal officers responsible for expending the public funds. 109 S.Ct. at 3053. Given this interpretation, the plaintiff public employees and nonprofit abortion providers withdrew their objections to the ban, since it did not affect their conduct with patients. Once the plaintiffs dropped this issue, it became moot as a legal matter, and the Court refused to issue any opinion on the validity of the provision. Thus, it remains an open issue whether it is constitutional to forbid the use of public funds for abortion counseling services.

Two justices in concurring opinions noted that although the funding issue was moot in Webster, it could be relitigated later if a Missouri state court ever decided that the statute does restrict public employee health professionals from giving specific medical advice to pregnant women. (O'Connor concurring, 109 S.Ct. at 3060; Blackmun concurring and dissenting, 109 S.Ct. at 3069, n. 1)

Viability Testing

Issue: Was it constitutional to require viability testing before certain abortions could be performed?

The relevant provision of the Missouri law, Mo.Rev.Stat. §188.029, read as follows:

> **Physician, determination of viability, duties**
>
> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother. (L. 1986, H.B. No. 1596, §A.)

Decision: The Court found the viability testing requirement constitutional.

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[2]Section 188.205 banned the use of public funds for abortion counseling. Section 188.210 banned abortion counseling by public employees. Section 188.215 banned abortion counseling in public facilities. The Eighth Circuit decision invalidated the latter two statutes as to abortion counseling. The State of Missouri did not appeal those portions of the decision; hence, proposals like them would be unconstitutional in the Eighth Circuit, which includes Minnesota, unless the Supreme Court were to decide differently in a future case.

Rationale: The Missouri statute contained a requirement that tests be conducted before an abortion was performed in a case where the physician had reason to believe the fetus was 20 weeks or more gestational age.[3] The purpose of the tests was to determine whether the fetus could survive outside the uterus--whether it was "viable." Five justices, a majority of the Court, voted to uphold the constitutionality of the test requirement [Rehnquist, White, Kennedy, O'Connor, and Scalia]. Four of these justices [Rehnquist, White, Kennedy and O'Connor] found that the lower court had committed "plain error" in reading the Missouri statute always to require that all viability tests be performed at 20 weeks or more gestation.

> If we construe [the second sentence of the provision] to require a physician to perform those tests needed to make the three specified findings [in that sentence] in all circumstances, including when the physician's reasonable professional judgment indicates that the tests would be irrelevant to determining viability or even dangerous to the mother and the fetus, the second sentence would conflict with the first sentence's requirement that a physician apply his reasonable professional skill and judgment. 109 S.Ct. at 3055. (emphasis original)

The four justices stated that the statute should be read as follows: The first sentence of section 188.029 requires the physician to use professional judgment in testing for viability; hence, the second sentence of this provision must be read to require only tests which the physician finds necessary in each case. 109 S.Ct. at 3054-55 (Rehnquist), 109 S.Ct. at 3060 (O'Connor concurring). It would thus appear that any statute related to viability testing of the unborn should require only those tests that are useful in making findings about viability. A fifth justice [Scalia] concurred in the decision to uphold the statute, but did not agree with the rationale used. He would have preferred to re-examine the decision in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973).

The four justices concluded the viability testing requirement "is reasonably designed to ensure that abortions are not performed where the fetus is viable--an end which all concede is legitimate--and that is sufficient to sustain its constitutionality." 109 S.Ct. at 3058. In other words, the provision is constitutional since it permissibly furthers the state's interest in protecting potential human life.

Effect of *Webster* in Minnesota

The immediate relevance of the Webster case for Minnesota lawmakers can best be discerned by a comparison of the provisions at issue in Webster with current Minnesota laws and pending bills.

Life Begins at Conception

Minnesota presently has no law relating to when life begins. Since the Webster case provides little guidance on whether and under what circumstances such a law would be unconstitutional, a similar law passed in Minnesota would likely be challenged when it was actively enforced against a party.

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[3]In a part of his opinion joined by J. White and J. Kennedy, the Chief Justice interpreted this language to create a presumption of viability at 20 weeks gestational age. 109 S.Ct. at 3055. Before performing an abortion, the physician must rebut the presumption with tests indicating that the fetus is not viable.

Prohibition on Use of Public Facilities/Public Employees to Perform Abortions

Minnesota presently has no restriction on the use of public facilities or public employees for performance of abortions.[4] Minnesota could enact a law banning abortions in public facilities if such a law were modeled on the Missouri statute upheld in Webster. (Addendum A contains a list of the hospitals which are presently licensed as "public facilities" in Minnesota.) Since the Missouri statute was interpreted to apply even to a private hospital located on land leased from a political subdivision (Blackmun concurring opinion, 109 S.Ct. at 3068, n. 1), it would appear that the Court is willing to uphold a broad definition of the term "public facility." Hence, the ban could well be applied to hospitals not listed in the addendum. However, if a proposed Minnesota law defined "public facility" more expansively than the Missouri law, it could be subject to challenge.

In addition, legislators should be aware of state constitutional issues that might be raised by a definition of "public facility" that included the University of Minnesota hospitals. Under the federal Constitution as interpreted by the Supreme Court in Webster, University hospitals would qualify as "a public facility" from which most abortions could be banned. However, there might be a different result under the Minnesota Constitution.

The state constitution gives the University a special legal status, known as constitutional autonomy. The special status is designed to promote academic freedom by placing University management under the control of the Regents, rather than the Legislature or Governor. A statute preventing the performance of most abortions at University Hospitals could be challenged as an unconstitutional infringement of the Regents' power to manage medical education by limiting the opportunity to teach an otherwise lawful procedure. No existing cases in Minnesota or other states with university autonomy are close enough to this fact situation to allow a prediction of how such a lawsuit might come out.[5]

Prohibition on Use of Public Funds for Abortion Counseling

Since the Supreme Court did not rule on the issue of public funding for abortion counseling, the Webster case makes no law in that area. As discussed above, plaintiffs withdrew this issue because the state read the Missouri statute to apply only to fiscal officers. Minnesota presently has no law relating to public funds for abortion counseling. Were Minnesota lawmakers to pass such a law,

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[4]Minnesota does restrict public funding for abortions under the Medicaid program to cases in which the mother's life is at risk or when the pregnancy results from rape or incest. Minn. Stat. §256B.0625, subd. 16 (1988).

[5]See McKnight, **University of Minnesota Constitutional Autonomy** (Legal Analysis, House Research Department, 1988 at 15-16). The federal Constitution takes precedence over a state constitution (1) on any matter when the federal Constitution has a conflicting provision, or (2) any matter where the federal Constitution would place greater restrictions on the state. In the area of university autonomy, there is no similar federal constitutional provision with which the state constitution could conflict. Thus, unless the University's constitutional autonomy could somehow be interpreted to violate a federal law or constitutional right, federal courts would decline to be involved in any lawsuit arising under the state provision. The reason would be lack of a federal law question. A challenge involving a state constitutional question would have to be heard by the Minnesota Supreme Court, and the decision of that court, if based only on state constitutional grounds, would not be appealable to the federal courts.

it could be challenged; and if the law passed were read to apply to the primary conduct of counselors (i.e., advice-giving) the Eighth Circuit decision in Webster would provide sufficient grounds for a challenge.[6]

Viability Testing

Last session, the Minnesota House of Representatives gave approval to a bill on viability testing (H.F. 962). The language of H.F. 962 was very similar to the Missouri law as interpreted and upheld in Webster. Hence, the provisions of that bill, if enacted into law, would likely survive a constitutional challenge.

Minnesota had a statute related to fetal viability which was declared unconstitutional in Hodgson v. Lawson, 542 F.2d 1350 (8th Cir. 1976) and is presently not operative.[7] Minn.Stat. §145.412, subd. 3 made it a criminal offense for a physician to perform an abortion on a "potentially viable" fetus (defined as any fetus in the second half of the gestational period, i.e., at 20 weeks or more) except to save the mother's life. Thus, the Minnesota law contained an outright prohibition on all abortions in the last half of pregnancy, except when the mother's life was in danger. The Missouri law at issue in Webster prohibits abortions only when the fetus is viable and requires a physician to test to determine viability. Under Webster, a physician's determination of viability is essential before a state can constitutionally ban abortions beginning with the 20th week. Hence, Minn. Stat. §145.412 would likely still be unconstitutional under a Webster analysis, since the Minnesota statute banned all abortions beginning at 20 weeks and contained no provision for viability testing by a physician.

To be certain of avoiding challenge, any Minnesota law enacted to prohibit abortions beginning with the 20th week would have to provide for physician testing to determine viability and should be drafted to read like the Missouri law, as interpreted by the U.S. Supreme Court in the Webster case.

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[6]See footnotes 1 and 2 above. Certain holdings of the Eighth Circuit decision in Webster remain the governing law in Minnesota. The Eighth Circuit invalidated Missouri's direct ban on abortion counseling by public employees and public facilities. That portion of the case was not appealed. Hence, any law passed in a state within the Eighth Circuit (such as Minnesota) would be subject to scrutiny under the circuit court decision unless the Supreme Court were to decide otherwise.

[7]See Shapiro, **Minnesota Abortion Law** (Information Brief, House Research Department, 1989).

ADDENDUM A -- Minnesota Department of Health Survey and Compliance Section

HOSPITAL	ADDRESS	CITY	ZIP	PHONE	LICTYPE
ORTONVILLE MUN HOSP	750 EASTVOLD AVE	ORTONVILLE	56278	612/839-2502	13
SLEEPY EYE MUNICIPAL HOSPITAL	400 FOURTH AVE NW	SLEEPY EYE	56085	507/794-3571	13
SPRINGFIELD COMMUNITY HOSP	625 N JACKSON STREET	SPRINGFIELD	56087	507/723-6201	13
MERCY HOSPITAL + C+NC	P. O. BOX 469	MOOSE LAKE	55767	218/485-4481	15
WACONIA RIDGEVIEW HOSP	500 SOUTH MAPLE ST	WACONIA	55387	612/442-2191	13
CHIPPEWA CO MONTEVIDEO HOSP	824 NO 11TH ST	MONTEVIDEO	56265	612/269-8878	14
RUSH CITY HOSPITAL	760 WEST 4TH STREET	RUSH CITY	55069	612/358-4708	13
CLEARWATER CO MEMORIAL HOSP.	203 FOURTH STREET NORTHWEST	BAGLEY	56621	218/694-6501	12
COOK CO NORTHSHORE HOSPITAL	GUNFLINT TRAIL	GRAND MARAIS	55604	218/387-1500	12
MOUNTAIN LAKE COMM HOSP	801 THIRD AVENUE	MOUNTAIN LAKE	56159	507/427-2511	13
WINDOM AREA HOSPITAL	HWY 60 + 71 NORTH	WINDOM	56101	507/831-2400	13
CUYUNA RANGE DIST HOSPITAL		CROSBY	56441	218/546-5147	15
DOUGLAS COUNTY HOSPITAL	111 17TH AVENUE EAST	ALEXANDRIA	56308	612/762-1511	12
UNITED HOSPITAL DISTRICT	515 SOUTH MOORE ST	BLUE EARTH	560130160	507/526-3273	15
CANNON FALLS COMM HOSPITAL	1116 WEST MILL STREET	CANNON FALLS	55009	507/263-4221	15
GRANT CO HOSPITAL	PO BOX 1016	ELBOW LAKE	56531	218/685-4461	12
HENNEPIN COUNTY MEDICAL CTR	701 PARK AVE SOUTH	MINNEAPOLIS	55415	612/347-2121	12
UNIV. OF MN. HOSPITAL & CLINIC	HARVARD @ E.RIVER RD, BOX 604	MINNEAPOLIS	55455	612/626-5003	11
NORTHERN ITASCA HOSP DIST	258 PINE TREE DRIVE	BIGFORK	56628	218/743-3177	15
ITASCA MEMORIAL HOSPITAL	126 FIRST AVE SE	GRAND RAPIDS	55744	218/326-3401	12
HERON LAKE MUN HOSP & C&NC	941 CO RD 9	HERON LAKE	56137	507/793-2346	13
JACKSON MUNICIPAL HOSP	NORTH HIGHWAY	JACKSON	56143	507/847-2420	13
LAKEFIELD MUNICIPAL HOSP	220 MILWAUKEE STREET	LAKEFIELD	56150	507/662-5295	13
KANABEC HOSPITAL	300 CLARK STREET	MORA	55051	612/679-1212	14
RICE MEMORIAL HOSPITAL	301 BECKER AVE SW	WILLMAR	56201	612/235-4543	13
KARLSTAD MEMORIAL HOSP	1ST AND ROOSEVELT	KARLSTAD	56732	218/436-2141	13
LITTLEFORK MEDICAL CENTER	BOX N	LITTLEFORK	56653	218/278-6634	13
JOHNSON MEMORIAL HOSP & HOME	WALNUT STREET & MEMORIAL PLACE	DAWSON	56232	612/769-4323	15
WEINER MEM MEDICAL CTR	300 SO BRUCE ST	MARSHALL	56258	507/532-9661	13
TRACY MUNICIPAL HOSPITAL	5TH STREET EAST	TRACY	56175	507/629-3200	13
GLENCOE AREA HEALTH CENTER	705 E 18TH STREET	GLENCOE	55336	612/864-3121	13
HUTCHINSON COMMUNITY HOSPITAL	1095 HWY 15 SOUTH	HUTCHINSON	55350	612/587-2148	13
MAHNOMEN CO & VILLAGE HOSP	414 WEST JEFFERSON	MAHNOMEN	56557	218/935-2423	14
MEEKER CO MEM HOSP	612 SO SIBLEY AVE	LITCHFIELD	55355	612/693-3242	12
MURRAY COUNTY MEM HOSP	2042 JUNIPER AVE	SLAYTON	56172	507/836-6111	12
COMMUNITY HOSP & HCC	618 W BROADWAY	ST PETER	56082	507/931-2200	13
ARNOLD MEM HOSPITAL	601 LOUISIANA AVE BOX 279	ADRIAN	56110	507/483-2668	13
WORTHINGTON REGIONAL HOSP	1018 6TH AVE	WORTHINGTON	56187	507/372-2941	13
ADA MUNICIPAL HOSPITAL & C&NC	405 EAST 2ND AVE	ADA	56510	218/784-2561	13
OLMSTED COMM HOSPITAL	1650 FOURTH ST SE	ROCHESTER	55901	507/285-8433	12
PARKERS PRAIRIE DIST HOSP	BOX 33, 310 N. CLAYBORN AVENUE	PARKERS PRAIRIE	56361	218/338-4011	15
PELICAN VALLEY HEALTH CENTER	211 EAST MILL ST	PELICAN RAPIDS	56572	218/863-3111	15
PERHAM MEMORIAL HOSP & HOME	665 THIRD ST SW	PERHAM	56573	218/346-4500	15
PIPESTONE COUNTY MEDICAL CNT	911 5TH AVE SW	PIPESTONE	56164	507/825-5811	12

HOSPITAL	ADDRESS	CITY	ZIP	PHONE	LICTYPE
GLACIAL RIDGE HOSPITAL	10 4TH AVE SE	GLENWOOD	56334	612/634-4521	15
MINNEWASKA DISTRICT HOSP	610 W 6TH ST	STARBUCK	56381	612/239-2201	15
GILLETTE CHILDREN'S HOSPITAL	200 UNIVERSITY AVE EAST	ST PAUL	55101	612/291-2848	15
ST PAUL RAMSEY MEDICAL CENTER	640 JACKSON STREET	ST PAUL	55101	612/221-3318	15
REDWOOD FALLS MUN HOSP	100 FALLWOOD ROAD	REDWOOD FALLS	56283	507/637-2907	13
RENVILLE COUNTY HOSPITAL	611 EAST FAIRVIEW	OLIVIA	56277	612/523-1261	12
RICE COUNTY DIST 1 HOSPITAL	631 1ST ST SE	FARIBAULT	55021	507/334-6451	15
NORTHFIELD CITY HOSPITAL	801 WEST FIRST STREET	NORTHFIELD	55057	507/645-6661	13
COMMUNITY HOSPITAL	305 E LUVERNE	LUVERNE	56156	507/283-2321	13
ROSEAU AREA HOSPITAL	715 DELMORE DRIVE	ROSEAU	56751	218/463-2500	15
COOK COMMUNITY HOSP	THIRD AVENUE & CEDAR STREET	COOK	55723	218/666-5945	13
MILLER DWAN HOSP & MED CENTER	502 E 2ND ST	DULUTH	55805	218/727-8762	13
VIRGINIA REG MED CTR & NH	901 9TH ST NORTH	VIRGINIA	55792	218/741-3340	13
ARLINGTON MUNICIPAL HOSPITAL	601 W CHANDLER	ARLINGTON	55307	612/964-2271	13
GAYLORD COMMUNITY HOSP & NH	640 3RD STREET	GAYLORD	55334	612/237-2905	13
MELROSE HOSP & PINE VILLA	11 NORTH 5TH AVE W	MELROSE	56352	612/256-4231	13
PAYNESVILLE COMMUNITY HOSP	200 1ST ST W	PAYNESVILLE	56362	612/243-3767	13
ST MICHAELS HOSPITAL & NH	425 NORTH ELM ST	SAUK CENTRE	56378	612/352-2221	13
HEALTH CENTRAL OF OWATONNA	903 SOUTH OAK STREET	OWATONNA	55060	507/451-3850	13
STEVENS CO MEMORIAL HOSP	400 EAST FIRST ST	MORRIS	56267	612/589-1313	12
APPLETON MUNICIPAL HOSPITAL	30 SOUTH BEHL STREET	APPLETON	56208	612/289-2422	13
SWIFT COUNTY-BENSON HOSPITAL	1815 WISCONSIN AVE	BENSON	56215	612/843-4232	14
WHEATON COMMUNITY HOSPITAL	401 12TH ST NORTH	WHEATON	56296	612/563-8226	13
LAKE CITY HOSPITAL	904 SOUTH LAKESHORE DR	LAKE CITY	55041	612/345-3321	13
UNITED DISTRICT HOSP & HOME	401 PRAIRIE AVE NO	STAPLES	56479	218/894-1515	15
DISTRICT MEMORIAL HOSPITAL	246 11TH AVE SE	FOREST LAKE	55025	612/464-3341	15
MONTICELLO BIG LAKE COMM HOSP	1013 HART BLVD. PO BOX 480	MONTICELLO	55362	612/295-5116	15
MUNICIPAL HOSP & GRANITE MANOR	345 TENTH AVE	GRANITE FALLS	56241	612/564-3111	13

HOSPITAL	ADDRESS	CITY	ZIP	PHONE	LICTYPE
ANOKA METRO REG TREATMENT CTR	3300-4TH AVE NO	ANOKA	55303	612/422-4150	11
MOOSE LAKE REG TREATMENT CTR	1000 LAKESHORE DRIVE	MOOSE LAKE	55767	218/485-4411	11
BRAINERD REG HUMAN SERV CTR	1777 HIGHWAY 18 EAST	BRAINERD	56401	218/828-2201	11
WILLMAR REG TREATMENT CTR	BOX 1128	WILLMAR	56201	612/231-5100	11
MN SUPERVISED LIVING FACILITY	100 FREEMAN DRIVE	ST PETER	56082	507/931-7115	11
ST PETER REG TREATMENT CTR	100 FREEMAN DRIVE	ST PETER	56082	507/931-7115	11
FERGUS FALLS REG TREATMENT CTR	FIR AND UNION AVENUES	FERGUS FALLS	56537	218/739-7200	11
FARIBAULT REGIONAL CENTER	802 CIRCLE DRIVE	FARIBAULT	55021	507/332-3000	11

Licensee Types

11	State	14	City-County
12	County	15	Hospital District or Authority
13	City		