

STATE OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES

In the Matter of Proposed Rules
of the Department of Human Services
Relating to Licensing; Background
Studies, Parts 9543.3000 to 9543.3090

STATEMENT OF NEED
AND REASONABLENESS

INTRODUCTION

Background studies are intended to protect persons receiving services in licensed programs. The use of background checks to identify individuals with certain events in their past that indicate the individual presents a threat to people receiving services in licensed programs is not new. An investigation into the criminal history of workers in human services programs has been mandated in various forms in Minnesota law since 1978, first in the Public Welfare Licensing Act (Minnesota Statutes, section 245.783, subdivision 3) and then in the Human Services Licensing Act (chapter 245A) enacted in 1987. On the federal level, Congress in 1985 enacted Public Law 98-473, requiring states that receive Title XX social services block grant funds to have procedures for background checks for all operators, staff and employees of child care and certain other services. Federal regulations governing intermediate care facilities for the mentally retarded prohibit employment of an individual with a conviction or prior employment history of child or client abuse, neglect or mistreatment [42 CFR section 483.420 (d)(1)(iii)].

In 1989 the Minnesota legislature substantially amended the provisions in the Human Services Licensing Act governing background studies. The Act was amended again in 1990. As amended, Minnesota Statutes, section 245A.04, subdivisions 3, 3a, 3b, and 3c requires the commissioner of Human Services to conduct background studies of specific individuals affiliated with licensed programs and specifies the extent of the search: criminal conviction records of the Bureau of Criminal Apprehension; local agency reports of abuse, neglect, and maltreatment in licensed facilities; juvenile court records; and other local and national law enforcement and court records if the commissioner has reasonable cause to believe such information is pertinent. The amendments further require applicants and license holders to cooperate with the commissioner in conducting the study and relieve them of civil liability for refusing to employ individuals disqualified as a result of the study. The amendments also prohibit charging applicants, license holders or subjects a fee for the study. The amendments establish a reconsideration process whereby disqualified individuals may request the commissioner to set aside the disqualification and provides a contested case hearing appeal to public employees whose disqualification is not set aside.

Finally, section 245A.04, subdivision 3, paragraph (g) states, "The commissioner shall not implement the (background study) procedures... until appropriate rules have been adopted, except for the applicants and license holders for child foster care, adult foster care and family day

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care homes." Accordingly, background studies under rules governing licensing of "Family Systems" programs (adult foster care, child foster care and family day care) have continued. These background checks have been done by the county or private agency that performs the licensing study (in contrast with all other programs, where the licensing study is performed by state licensors) since 1984. There are approximately 17,500 Family Systems programs.

Parts 9543.3000 to 9543.3090 are being proposed to meet the statutory mandate to adopt rules governing background studies. The proposed rule establishes a single, uniform procedure for conducting background studies for all programs required to be licensed under the Human Services Licensing Act except for Family Systems programs.

The department anticipates doing 50,000 to 60,000 background checks annually on staff, applicants and license holders in programs other than foster care and child day care. Because a system for checking the background of individuals affiliated with Family Systems programs is already in place and because of the enormity of instituting background studies of 50,000 to 60,000 individuals, the department has decided not to include Family Systems background studies in the procedural provisions of this rule at this time. The department intends to extend these procedures to Family Systems programs after the background study system is fully operational with respect to the other programs.

Many program licensure rules already include disqualification standards, that is, specified events or characteristics that indicate an individual poses a risk of harm and is unsuitable to be providing services to persons receiving services in the particular kind of program. The provision establishing disqualification standards (part 9543.3070) in the proposed rule as well as the availability of reconsideration (part 9543.3080) will replace those in the separate program rules; parts 9543.3070 and 9543.3080 will apply to all programs required to be licensed under the Human Services Licensing Act, including adult foster care, child foster care and child day care.

The statutory authority for promulgation of the rule is Minnesota Statutes, sections 245A.04, subdivision 3 (1988 and supp. 1989); and 245A.09, subdivision 1 (1988) and 1990 Minnesota Laws, chapter 542, section 7 and chapter 568, article 2, sections 42 to 44.

SMALL BUSINESS CONSIDERATION IN RULEMAKING

The Department has considered the small business consideration requirements in Minnesota Statutes, section 14.115.

The rule implements Minnesota Statutes, section 245A.04, subdivisions 3, 3a, 3b, 3c, and 6. Requirements imposed on small businesses (applicants and license holders) are requirements imposed by statute. There are no alternative methods of establishing less stringent requirements on small businesses without subverting statutory requirements. No fee may be charged applicants, license holders, or subjects under Minnesota Statutes, section 245A.04, subdivision 3, paragraph (a) for the cost of the study.

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RULE DEVELOPMENT PROCEDURES

In the development of the proposed rule, the Department followed the procedures mandated by the Administrative Procedures Act and internal department policies that assure maximum public input. Public input was sought through Notice to Solicit Outside Opinion published September 18, 1989 in the State Register (14 S.R. 810) and establishment of a rule advisory committee. The rule advisory committee consisted of 16 persons representing public employees, associations representing providers of various kinds of programs licensed by the department, Bureau of Criminal Apprehension, and county and private agencies.

A list of the advisory committee members is attached.

The rule advisory committee met on November 21, 1989; December 4, 1989; and December 19, 1989.

Pursuant to Minnesota Statutes, section 245A.04, subdivision 6, on February 8, 1990, a copy of the proposed rule was forwarded to the Commissioner of Human Rights for review and recommendation. No recommendations were received.

AMENDMENTS TO EXISTING RULES

As noted in the introduction, many program rules already include disqualification standards. To avoid confusion resulting from the multitude of rules and to preclude inconsistency among rules, it is necessary to repeal the program rule provisions that contain disqualification standards based on criminal history or substantiated reports of abuse, neglect or maltreatment.

Because licensing studies for family systems programs are performed by county and private agencies, family systems programs rules are amended by providing a cross reference to the disqualification standards under part 9543.3070. In programs where the licensing study is performed by state licensors, no cross reference to disqualification is necessary since parts 9543.3000 to 9543.3090 apply in their entirety to those programs.

The following rule provisions are amended or repealed:

9502.0335, subpart 6, items C and F are repealed. Crimes listed under item E are deleted and replaced with a cross reference to part 9543.3070 since family and group family day care licensing studies are performed by county agencies.

9502.0335, subpart 7 is repealed. Under part 9543.3070, a subject who has been arrested and is awaiting trial for an act that meets the definition of a crime listed under part 9543.3070, subpart 2, item A is disqualified. Therefore, subpart 7 is unnecessary.

9503.0030, subpart 3, items A, B, and C are repealed. State licensors perform the licensing study for child care centers (Rule 3); no cross reference to part 9543.3070 is necessary.

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9503.0030, subpart 4, items A to C are repealed. Items A to C relate to reconsideration of background study disqualifications based on criminal history and reports of abuse, neglect and maltreatment and are replaced by part 9543.3080. Because disqualification for factors other than background study disqualifications remain (9503.0030, subpart 4, items D and E), the general reevaluation procedure language is retained.

9525.0235, subpart 6, items A and B are repealed. State licensors perform the licensing study for residential programs for persons with mental retardation (Rule 34); no cross reference to part 9543.3070 is necessary.

9525.0235, subpart 7, items A to C are repealed. Items A to C relate to reconsideration of background study disqualifications based on criminal history and reports of abuse, neglect and maltreatment and are replaced by part 9543.3080. Because disqualification for factors other than background study disqualifications remain (9525.0235, subpart 6, items C and D), the general reevaluation procedure language is retained.

9525.1520, subpart 5 is repealed. Subpart 5 requires completion of a background study before issuance of a license. This subpart is unnecessary since background study requirements are set forth in parts 9543.3000 to 9543.3090.

9525.1520, subpart 6, item A is repealed. This item is unnecessary since subitem (1) simply restates Minnesota Statutes, section 245A.04, subdivision 3, paragraph (d), and subitem (2) is addressed under parts 9543.3070 and 9543.3080.

9525.2020, subpart 3, items A and B are repealed. State licensors perform the licensing study for licensure of home and community-based services for persons with mental retardation and related conditions (Rule 42); no cross reference to part 9543.3070 is necessary.

9525.2020, subpart 4, items A to C are repealed. Items A to C relate to reconsideration of background study disqualifications based on criminal history and reports of abuse, neglect and maltreatment and are replaced by part 9543.3080. Because disqualification for factors other than background study disqualifications remain (9525.2020, subpart 3, items C and D), the general reevaluation procedure language is retained.

9530.4270, subpart 1, item B is repealed. State licensors perform the licensing study for chemical dependency rehabilitation programs (Rule 35); no cross reference to part 9543.3070 is necessary.

NEW RULE PROVISIONS

9543.3000 PURPOSE.

This part is necessary to identify the purpose of the rule. The purpose of conducting background studies is to protect persons served in licensed programs. The purpose of parts 9543.3000 to 9543.3090 is to establish procedures for conducting background studies of individuals affiliated with programs subject to licensure under Minnesota Statutes,

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chapter 245A and standards for determining whether an individual's background demonstrates unsuitability to provide services in licensed programs. Because programs licensed under chapter 245A serve vulnerable populations it is necessary and reasonable to conduct background studies to identify individuals who pose a risk of harm to persons being served and to prevent such individuals from direct contact with persons being served. Parts 9543.3000 to 9543.3090 are necessary to implement Minnesota Statutes, section 245A.04, subdivisions 3, 3a, 3b, 3c, and 6.

9543.3010 APPLICABILITY.

This part is necessary to inform and clarify that parts 9543.3000 to 9543.3090 apply to all residential and nonresidential programs subject to licensure under Minnesota Statutes, chapter 245A except child foster care, adult foster care, and family day care programs. Minnesota Statutes, section 245A.04, subdivision 3 requires that the commissioner conduct a background study before issuing a license and identifies the individuals to be studied. Minnesota Statutes, section 245A.04, subdivision 3, paragraph (g) states that the Commissioner shall not implement background study procedures until rules have been adopted, "except for the applicants and license holders for child foster care, adult foster care and family day care homes." Because county and private agencies have been conducting background studies as part of the licensing study of these programs, it is reasonable to continue this practice until background study procedures for the many other licensed programs are fully operational. This is consistent with the Commissioner's authority under Minnesota Statutes, section 245A.16, subdivision 1, to delegate licensing functions and activities to county and private agencies.

It is reasonable to apply parts 9543.3070 and 9543.3080 to foster care and day care programs. This assures fair and consistent treatment of subjects in all licensed programs in terms of the types of events that are a disqualification and the opportunity for a quick, easily available means of having a disqualification reviewed. Subjects affiliated with these programs will be evaluated using the same disqualification standards (part 9543.3070) as subjects affiliated with other licensed programs and reconsideration (part 9543.3080) will be available as well.

9543.3020 DEFINITIONS.

Subpart 1. **Scope.** This provision is necessary to clarify that the definitions apply to the entire sequence of parts 9543.3000 to 9543.3090. This subpart and the definitions that follow in subparts 2 to 11 are necessary to inform persons consulting the rule of the meaning of specific words used in this rule.

Subp. 2. **Background study.** This subpart is necessary to clarify a term used in the rule. Minnesota Statutes, section 245A.04, subdivision 3 refers to a "study" and requires criminal conviction data and substantiated reports of abuse and neglect of adults and maltreatment of children in licensed facilities (under Minnesota Statutes, sections 626.557 and 626.556) to be provided to the commissioner. The commissioner is also authorized to check other criminal record sources

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for pertinent information. Since the information is background history on individuals, it is reasonable to refer to the process as a "background study."

Subp. 3. **Commissioner.** This subpart is necessary to clarify a term used in the rule. The "commissioner" is named in Minnesota Statutes, section 245A.04 as the official responsible for conducting the background study. The commissioner is defined in Minnesota Statutes, section 245A.02, subdivision 5 as the commissioner of human services or the commissioner's designated representative. It is necessary to include designated representative within the definition since it is impossible for the commissioner herself to perform all the responsibilities assigned in statute. Including this delegation of responsibility in the definition informs interested parties of the delegation. This subpart is reasonable because it is consistent with statute and use of the term "commissioner" shortens the length of the rule.

Subp. 4. **County agency.** This subpart is necessary to clarify a term used in the rule. Minnesota Statutes, section 245A.04, subdivision 3 requires review of county agency reports of abuse or neglect or maltreatment substantiated under Minnesota Statutes, sections 626.557 and 626.556. The definition is reasonable because it refers to the statutory definition used in Minnesota Statutes, section 245A.02, subdivision 6.

Subp. 5. **Direct contact.** This subpart is necessary to clarify a term used in the rule. Minnesota Statutes, section 245A.04, subdivision 3 requires the study of employees, contractors and volunteers who will have "direct contact" with persons served by the program. Section 245A.04, subdivision 3, paragraph (f) prohibits an individual who is disqualified from having a position involving direct contact with persons served by a program. The definition is reasonable because it is the definition used in Minnesota Statutes, section 245A.04, subdivision 3.

Direct contact includes direct access to children in programs serving children and to persons receiving service in adult foster care programs.

To assure the health, safety and rights of children in licensed programs, it is necessary to prohibit individuals with the most serious disqualifications (that is the crimes listed in part 9543.3070, subpart 2 as well as substantiated maltreatment, abuse or neglect) from direct access to children. Children are particularly vulnerable and unable to protect themselves. It is not always possible for a license holder to assure that a disqualified individual who is not in direct contact (working in a kitchen or laundry for example) is supervised and will not be alone with a child. Indeed, the most frequent licensing violation citation issued to child care centers is lack of supervision and inadequate staffing. Therefore, it is reasonable to prohibit persons whose background indicates a serious risk to children from direct access as well as direct contact with children. This provision is currently in chapter 9503 governing child care centers. This prohibition is effectively in child day care and foster care rules, which apply disqualification standards to anyone living or working in the residence or in the residence while the program is being operated. Other rules

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governing child placing agencies and child caring institutions do not presently include disqualification based on background study information.

It is also necessary and reasonable to extend the prohibition against direct access to adult foster care programs. Persons served in these programs are particularly vulnerable not only because of impairment but also due to the isolated nature of adult foster care. These programs are limited to serving no more than four persons in a family type residence (house or apartment). The caretaker is usually the license holder or, in the case of corporate foster care, a single individual on duty 24 hours. Adult foster care programs are not subject to the degree and variety of outside monitoring that day care and institutions are, and it is reasonable to prohibit direct access to residents by a disqualified subject.

Subpart 6. Disqualification or disqualified. This subpart is necessary to define a term used throughout the rule. Minnesota Statutes, section 245A.04, subdivision 3 requires a background study only of specified individuals; when the study reveals characteristics ("disqualifications") that are defined in rules governing the program (Minnesota Statutes, section 245A.04, subdivision 6), the individual is prohibited from having direct contact with persons served by licensed programs. The definition is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3 and references the disqualification standards set forth in part 9543.3070.

Subp. 7. License. This subpart is necessary to clarify a term used in the rule. Minnesota Statutes, section 245A.04, subdivision 1 requires that individuals subject to licensure under Minnesota Statutes, section 245A.03 must apply for a license. Minnesota Statutes, section 245A.04, subdivision 3 requires that before the commissioner issues a license, the commissioner must conduct a study of the applicant. Therefore, it is necessary to define the term "license." The definition is reasonable because it is the definition used in Minnesota Statutes, section 245A.02, subdivision 8.

Subp. 8. Perpetrator. This subpart is necessary to define a term used in practice and in this rule. Although the term "perpetrator" is not defined in statute, it is commonly used in practice. The definition is reasonable because it specifies the relationship between a child or vulnerable adult and an individual committing harm that is mandated in order for a report to be within the purview of Minnesota Statutes, sections 626.556 and 626.557 and includes the common meaning, that is, the individual who has maltreated a child or abused or neglected a vulnerable adult.

Subp. 9. Program. This subpart is necessary to clarify a term used in the rule. Unless exempt under Minnesota Statutes, section 245A.03, subdivision 2, nonresidential and residential programs must be licensed by the commissioner. As part of the licensing process, background studies must be completed on individuals identified in Minnesota Statutes, section 245A.04, subdivision 3. It is reasonable to use the single term "program" and to refer to the definitions used in Minnesota Statutes, section 245A.02, subdivisions 10 and 14 for the sake of rule brevity.

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Subp. 10. **Provider.** This subpart is necessary to clarify a term used in the rule. "Provider" means specifically in this rule either an "applicant" as defined in Minnesota Statutes, section 245A.02, subdivision 2, or "license holder" as defined in Minnesota Statutes, section 245A.02, subdivision 9. Because the applicant and license holder are referred to frequently throughout the rule, it is reasonable to use a single term, "provider," in lieu of "applicant and license holder"; the single term contributes to rule brevity and clarity.

Subp. 11. **Subject.** This subpart is necessary to clarify a term used in the rule. Minnesota Statutes, section 245A.04, subdivision 3 requires studies on the applicant, license holder, persons over the age of 13 living in the household where the licensed program will be provided, current employees or contractors of the applicant who will have direct contact with persons served by the program, and volunteers who have direct contact with persons served by the program if the contact is not directly supervised. It is reasonable to use the term "subject" rather than "the individual who is the subject of the study" to shorten the length of the rule.

9543.3030 INDIVIDUALS WHO MUST BE STUDIED.

This part is necessary to identify the individuals on whom a background study must be conducted. Minnesota Statutes, section 245A.04, subdivision 3, paragraph (a) identifies individuals who must be studied. This part is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3 which specifically names the individuals in items A, B, C, and E.

Item D is necessary to assure the health, safety and rights of persons receiving services in licensed programs. It is not uncommon for license holders to contract with outside services for personnel as substitutes for regular program staff or to provide specialized professional services. An example is nursing services. These individuals are employees of or under contract with an entity or individual other than the program license holder. It would be unreasonable not to conduct a background study of service personnel who perform the same duties as regular employees and contractors and have direct contact with clients simply because they were not, strictly speaking, employees or contractors of the license holder. Item D is structured to apply only to service providers who have direct contact with clients and work under the direction of the license holder. Item D excludes the individual who may have direct contact with clients but is not under the direction of the license holder. Examples are a fast food employee who directs a developmentally disabled worker as part of a DAC work program or a teacher in a child care institution who is under the supervision of the local school district.

9543.3040 RESPONSIBILITIES OF PROVIDER.

Subpart 1. **General.** This subpart is necessary to inform applicants and license holders of their responsibility to require individuals identified in part 9543.3030 to complete the background information form prescribed by the commissioner. Minnesota Statutes, section 245A.04,

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subdivision 3, paragraph (b) requires the individual who is the subject of the study to provide the applicant or license holder with sufficient information to assure an accurate study. The applicant or license holder is required to provide that information about an individual to the commissioner on forms prescribed by the commissioner. This subpart is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3, paragraph (b).

Subp. 2. Form submission. This subpart is necessary to establish a time limit for submitting the background study form to the commissioner. Minnesota Statutes, section 245A.04, subdivision 3, paragraph (a) requires a study of specified individuals before the commissioner issues a license and also that a study of those individuals be conducted on at least an annual basis. Item A is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3, paragraph (a). Because it is sometimes necessary to replace staff quickly, item B permits new staff to provide service before the commissioner has issued the results of the background study. However, the provider must send a completed study form to the commissioner before allowing an individual to be in a position involving direct contact with persons receiving service.

Subp. 3. Direct contact prohibited. This subpart is necessary to inform applicants and license holders of their responsibility to ensure that a subject who has been disqualified by the commissioner does not have direct contact with persons receiving services from the program. Minnesota Statutes, section 245A.04, subdivision 3, paragraph (f) states "No person in paragraph (a), clause (1), (2), (3), or (4) who is disqualified as a result of this act may be retained by the agency in a position involving direct contact with persons served by the program." This subpart is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3, paragraph (f).

Subp. 4. Employment termination. Minnesota Statutes, section 245A.04, subdivision 3, paragraph (h) states, "Termination of persons ... made in good faith reliance on a notice of disqualification provided by the commissioner shall not subject the applicant or license holder to civil liability." This subpart is necessary to inform providers of the statutory relief from civil liability if, in good faith reliance on the commissioner's notice of disqualification, they fire or refuse to hire a subject. This subpart is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3, paragraph (h).

Subp. 5. Record retention. This subpart is necessary to inform providers of their responsibility to maintain in each subject's personnel file the commissioner's notice that a background study was completed and the subject is or is not disqualified. Minnesota Statutes, section 245A.04, subdivision 3a states, in part, "When the study is completed, a notice that the study was undertaken and completed shall be maintained in the personnel files of the program."

Since a study must be completed on at least an annual basis, it is reasonable to require in the personnel file the notice that a background study was completed within at least 12 months. This subpart is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3a.

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9543.3050 **RESPONSIBILITIES OF SUBJECT.**

This part is necessary to identify information that a subject must disclose in order that the commissioner is able to conduct a background study. Items A, B, D, E and F are information required under Minnesota Statutes, section 245A.04, subdivision 3, paragraph (b). Item C, requiring a subject's county of residence for the past five years, is necessary to make an adequate search of records; a background study limited to a current address might miss relevant information on individuals who have moved from one county to another. Item G, requiring the subject to provide information on prior convictions and substantiated reports of abuse or neglect of adults or maltreatment of children, is reasonable to assure an accurate background study. In order to adequately protect persons served in licensed programs, it is reasonable to ask individuals to report a conviction or incident of abuse or neglect which might disqualify him or her from providing services to vulnerable clients. This is the practice in other states. In Illinois, for example, foster parent applicants are required to furnish information about any offense (other than minor traffic violations) for which they have been charged (Ill. Admin. Reg. section 402.13). See also California regulations governing family day care at Cal. Admin. Reg. section 102370.1 and child care centers at section 101170(c). New Jersey and New York also require self-disclosure. This subpart is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3, paragraph (b).

9543.3060 **RESPONSIBILITIES OF COMMISSIONER.**

Subpart 1. **Negative licensing action.** This subpart identifies the negative licensing actions available to the commissioner if a provider fails to cooperate with the commissioner in conducting a background study or permits a disqualified subject to have direct contact with persons served by the program. Minnesota Statutes, section 245A.04, subdivision 3, paragraph (d) states, in part, "An applicant's or license holder's failure or refusal to cooperate with the commissioner is reasonable cause to deny an application or immediately suspend, suspend, or revoke a license." Minnesota Statutes, section 245A.04, subdivision 3, paragraph (f) states, "No person ... who is disqualified as a result of this act may be retained by the agency in a position involving direct contact with persons served by the program." It is reasonable to inform the applicant and license holder that violation of Minnesota Statutes, section 245A.04, subdivision 3, paragraph (f) is grounds for a negative licensing action. This subpart is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3, paragraphs (d) and (f).

Subp. 2. **Review of records.** This subpart is necessary to identify the records the commissioner must review in conducting background studies. Minnesota Statutes, section 245A.04, subdivision 3, paragraph (a) requires the Bureau of Criminal Apprehension and county agencies to help with the study by giving the commissioner criminal conviction data and reports about abuse or neglect of adults in licensed programs substantiated under Minnesota Statutes, section 626.557 and maltreatment

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of minors in licensed programs substantiated under Minnesota Statutes, section 626.556.

Section 245A.04, subdivision 3, paragraph (c) states, in part, "A study must include information from the county agency's record of substantiated abuse or neglect of adults in licensed programs, and the maltreatment of minors in licensed programs, and information from the bureau of criminal apprehension."

Item C. Minnesota Statutes, section 245A.04, subdivision 3 was amended in 1990 to authorize (and require) access to juvenile court records. Juvenile courts are required to provide the commissioner existing records on individuals over the age of 13 living in the household where a licensed program will be provided. Records relating to delinquency proceedings held within either the 5 years immediately preceding the application or the 5 years immediately preceding the subject's 18th birthday, whichever is longer, must be provided. Item C is reasonable because it is consistent with statute and informs persons consulting the rule of the added dimension to background studies.

The commissioner is also authorized to conduct a more extensive investigation. Section 245A.04, subdivision 3, paragraph (c) goes on to state, "The commissioner may also review arrest and investigative information from the bureau of criminal apprehension, a county attorney, county sheriff, county agency, local chief of police, other states, the courts, or a national criminal record repository if the commissioner has reasonable cause to believe the information is pertinent to the disqualification of an individual listed in paragraph (a), clauses (1) to (4)."

This subpart is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3, paragraph (c).

Subp. 3. Determination of disqualification. This subpart requires the commissioner to evaluate the results of the study and any other available information and determine whether a subject is disqualified under the standards in part 9543.3070. Minnesota Statutes, section 245A.04, subdivision 6 states, in part, "The commissioner shall evaluate the results of the study required in subdivision 3 and determine whether a risk of harm to the persons served by the program exists. In conducting this evaluation, the commissioner shall apply the disqualification standards set forth in rules." This subpart is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 6.

Subp. 4. Notice by commissioner to subject. Minnesota Statutes, section 245A.04, subdivision 3a requires the commissioner to notify the applicant or license holder and the individual who is the subject of the study, in writing, of the results of the study. This subpart is necessary to identify the information to be included in the commissioner's notice. It is reasonable to state the reason for the disqualification so the subject has adequate notice of the source of the disqualification and the exact nature. It is reasonable to provide a description of the reconsideration process and the factors used in deciding whether to set aside a disqualification. This information

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enables a subject who wishes to dispute a disqualification to submit a timely request and information relevant to the reconsideration decision. This subpart is reasonable because it assures the subject has adequate notice of the reason he or she is disqualified and therefore the means to challenge the disqualification by showing that the study information is incorrect or that the subject does not pose a risk of harm to persons served by the program. This subpart is also reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3b, which provides for reconsideration of disqualification.

Subp. 5. Notice by commissioner to provider. Minnesota Statutes, section 245A.04, subdivision 3a requires the commissioner to notify the applicant or license holder as well as the individual who is the subject of the study, in writing, of the results of the study. This subpart is necessary to establish in rule the elements to be included in that notice.

Item A provides that if the subject is disqualified, the notice shall inform the provider that the study indicates the subject is disqualified; that the subject has 30 days to request reconsideration of the disqualification and the commissioner's decision will be issued within 15 working days after receipt of a request; and that the provider may request a variance under part 9543.3040, subpart 3 pending the commissioner's decision whether to set aside the disqualification. Item A is reasonable because it implements Minnesota Statutes, section 245A.04, subdivision 3a which provides that an applicant or license holder who is not the subject of the study shall be informed that the commissioner has found information that disqualifies the subject from direct contact with persons served by the program. Since the subject may request the commissioner to reconsider the disqualification, it is reasonable to inform the provider of this option (and the statutory timeframes) in the notice. Item A, subitem (3) permits the provider to request a variance in order to allow a disqualified subject to continue working in the program. This subitem is reasonable because Minnesota Statutes, section 245A.04, subdivision 9 authorizes variances to rules if the health and safety of persons in the programs are assured. Because subpart 3 requires a provider to assure that a subject who is disqualified does not have direct contact with persons served by the program, this subpart provides a reasonable means of protecting persons served by the program if the provider is able to meet the variance requirements and has good reason for wanting to retain the subject. Item B prohibits the commissioner from disclosing the nature of the disqualification unless the subject consents to disclosure in writing or the Minnesota Government Data Practices Act authorizes disclosure to the provider. This item is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3a.

Subp. 6. Record retention. This subpart is necessary to develop a data base for background study purposes. Minnesota Statutes, section 245A.04, subdivision 3, paragraph (i) authorizes the commissioner to establish records to fulfill the requirements of this section but restricts access to the information contained in the records to the commissioner for the purposes authorized. The restricted access to information is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3, paragraph (i).

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Minnesota Statutes, section 245A.04, subdivision 3 (as amended by 1990 Minnesota Laws, chapter 542, section 7) requires the commissioner to destroy juvenile court background study records when the subject reaches age 23. It is reasonable to inform anyone consulting the rule of the statutory record destruction requirement.

9543.3070 DISQUALIFICATION STANDARDS.

Minnesota Statutes, section 245A.04, subdivision 6 requires the commissioner to evaluate the results of the background study and "determine whether a risk of harm to the persons served by the program exists. In conducting this evaluation, the commissioner shall apply the disqualification standards set forth in rules...." The commissioner is also required to revise all rules authorized by chapter 245A to include disqualification standards. Subparts 1 to 5 are necessary to establish clear, consistent and relevant disqualification standards governing individuals who work in the various programs licensed by the commissioner.

Program rules promulgated by the Department in recent years have included disqualification standards. These include rules governing family day care (part 9502.0335) in 1985 and 1986; child care centers (part 9503.0030, subpart 3) in 1986; adult foster care (part 9555.6125, subpart 4) in 1987; adult day care (part 9555.9620, subpart 7, item A) in 1987; day training and habilitation services for persons with developmental disabilities (part 9525.1525, subpart 6, item A) in 1987; chemical dependency rehabilitation programs (part 9530.4270, subpart 1) in 1988; residential facilities for persons with developmental disabilities (part 9525.0235, subpart 6) in 1989; and waived services for persons with developmental disabilities (part 9525.2020, subpart 3) in 1989. Disqualification standards are also included in the rule adopted in 1977 governing child foster care (part 9545.0090).

Some program rules governing licensed programs do not yet include disqualifications standards or the rules state vague qualifications such as "good moral character". These include rules governing private child placing agencies, child caring institutions and group homes, as well as programs serving persons with mental illness.

Because the requirements are inconsistent -- some program rules lack disqualification standards and the disqualification standards governing other programs are dissimilar as different rules were developed over time -- the department determined that disqualification standards applicable to all programs licensed by the department should be included in a single provision in this rule. This would provide individuals affected by the standards (applicants, license holders, subjects) a single reference point for ascertaining disqualification criteria as well as contribute to more efficient administration by the department. A single provision would establish clear and consistent criteria, provide for equitable enforcement and assure that disqualification standards are applied sooner than otherwise possible to individuals affiliated with programs governed by rules lacking such standards. Because the most recently adopted rules include quite detailed standards, developed after much discussion and after public comment and hearing, the department decided to incorporate the recent standards,

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with minor modifications based on enforcement experience since their adoption, into this rule.

Subpart 1. General prohibition. This subpart is necessary to clearly inform persons consulting the rule that subjects with a disqualification identified under subparts 2 to 5 must not have direct contact with persons served by a program. Minnesota Statutes, section 245A.04, subdivision 6 requires the commissioner "to evaluate the results of the background study and determine whether a risk of harm to the persons served by the program exists. In conducting this evaluation, the commissioner must apply the disqualification standards set forth in rules adopted under this chapter." Minnesota Statutes, section 245A.04, subdivision 3, paragraph (f) prohibits a subject who is disqualified from having direct contact with persons served. Subparts 2 to 5 identify specific disqualifications. This subpart is reasonable because it makes clear that the statutory prohibition against direct contact results from application of the standards in subparts 2 to 5 that indicate whether the subject poses a risk of harm to persons being served.

Subp. 2. Disqualifications. The disqualifications in subpart 2 reflect standards already adopted in rules governing family day care, child care centers, and residential and waived services for persons with developmental disabilities.

Item A, subitems 1 through 7, enumerates disqualifications based on serious, often violent crimes against persons or crimes related to the provision of services. The listed disqualifications are reasonable because they are based on the risk of harm to children and vulnerable adults posed by persons who have been convicted of such crimes. It is reasonable to disqualify from direct contact with children and vulnerable adults an individual who has been convicted of any of these crimes.

Although rules adopted earlier disqualified only for felony convictions related to illegal drugs (subitem 7), it is reasonable to disqualify for any prohibited drug conviction. It would not be administratively feasible to ascertain the seriousness of a drug-related conviction on the basis of available conviction information. The conviction itself may be the result of a plea bargain down from a more serious charge. Impaired judgment may seriously affect the provision of service. A conviction of any degree under chapter 152 demonstrates involvement with prohibited drugs, use and/or sale, that supports disqualification from programs serving vulnerable populations. A subject who has been disqualified as a result of this subitem has the opportunity to avail himself or herself of the reconsideration process.

Item B disqualifies where there is an admission of, the individual has been arrested and is awaiting trial for, or a preponderance of the evidence indicates the individual has committed an act that meets the definition of crimes in item A. Disqualification on the basis of a preponderance of evidence, that is evidence which is less than that required for a criminal conviction ("beyond a reasonable doubt") but sufficient to be "more convincing than the evidence which is offered in opposition to it" (Black's Law Dictionary, 5th ed., p. 1064) is

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reasonable because of the particular vulnerability of persons in licensed programs.

It is also reasonable to disqualify where charges are pending against an individual ("has been arrested and is awaiting trial"). The crimes listed involve serious, often violent acts harmful to people. It is reasonable to prohibit direct contact with vulnerable clients until the individual charged has succeeded in establishing in court that he or she is innocent and therefore does not pose a risk of harm to persons served in licensed programs.

Items C and D are necessary to establish standards for disqualification when the subject is identified in county agency records of substantiated maltreatment of minors or abuse and neglect of adults. All counties are required to investigate reports of abuse and neglect and make a determination, if possible, whether abuse, neglect or maltreatment occurred. However, the standards for determining whether a report is substantiated are sometimes inconsistent from county to county and even from worker to worker within counties. Furthermore, the county's emphasis is often on determining whether abuse or neglect or maltreatment occurred and ensuring protection of the child or vulnerable adult as distinguished in the criminal justice system from identifying the perpetrator and gathering sufficient evidence to result in conviction.

Therefore, the standard of evidence used here is a modification of the "substantial evidence" standard used in current rules. The modification establishes the same evidentiary standard adopted in rules of the Office of Administrative Hearings governing contested case hearings (part 1400.7300, subpart 5). Whereas previously a subject was disqualified if "more than a scintilla " of evidence indicated a disqualification, now the greater weight of the evidence in a report must demonstrate that the individual is a perpetrator of abuse, neglect, or maltreatment.

The department will also review county reports to assure that statutory elements in the definition of abuse, neglect and maltreatment in Minnesota Statutes, sections 626.557 and 626.556 are met and that there is sufficient evidence in the report to support identification of the subject as the individual who abused, neglected or maltreated a vulnerable adult or child. Because of inconsistency among county agencies as to the kinds of actions that are substantiated as abuse, neglect or maltreatment and because of the serious consequences to the subject (prohibited from employment in licensed programs) who is identified as the perpetrator in a report, it is reasonable to define disqualifying acts as those that are serious and/or recurring. While the subjects must be held to a high standard of behavior, these qualifiers permit the commissioner to set a reasonable standard that is applicable statewide and does not disqualify individuals whose actions arguably have not met a generally-accepted definition of abusive or neglectful behavior. An example of an incident that was substantiated as abuse but would not be disqualifying under these criteria is the provider who was reported to be saying "shut up" to clients.

Because vulnerable adult investigations are undertaken when an adult may be self-neglected or abusive, it is reasonable to exclude from disqualification individuals who may be named in a report as their own

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perpetrators. The purpose of disqualification is to protect vulnerable people from risk posed by others providing services to them.

Subp. 3. **Terminated parental rights.** This subpart is necessary to protect children in licensed programs. Minnesota Statutes, section 260.221, paragraph (b) establishes grounds for involuntary termination of parental rights. To assure the health and safety of children in licensed programs, it is reasonable to disqualify an individual whose conduct toward his or her own child has been so unsuitable that a court has taken the extreme step of terminating the individual's rights as a parent to a child.

Subp. 4. **Disqualification from programs providing chemical abuse or dependency services to adults.** This subpart is necessary to establish disqualification standards applicable to programs providing chemical abuse or dependency services to adults. It is reasonable to establish less stringent standards in these programs because, except for detoxification programs, adults receiving chemical dependency services generally are less vulnerable than adults in programs for persons with mental retardation or mental illness. However, the Department receives far more complaints of abuse and neglect involving Category 1 detoxification programs than other kinds of chemical dependency services. Because of greater risk to clients in detoxification programs, it is reasonable to apply the standards in subpart 2 to Category 1 detoxification programs. The standards in item B, applicable to all other chemical dependency programs, are reasonable because they are currently in Rule 35 and the experience of the department since adoption of that rule in 1987 is that the disqualifications are reasonable and effective.

Subp. 5. **Residential programs.** It is necessary to establish disqualification standards to protect the assets of clients in residential programs. Some programs have control over clients' finances. At a minimum, residents will have personal items of value with them in the residential program. Individuals who have committed theft-related crimes have demonstrated lack of respect for the property rights of others. To protect vulnerable residents, it is reasonable to disqualify individuals who have been convicted of, have admitted to, or have been arrested and are awaiting trial for theft-related crimes. Although earlier program rules disqualified on basis of theft-related crimes from all licensed programs, the department determined that the disqualification should relate more closely to the risk posed. Therefore, theft-related acts in a subject's background disqualify only from residential programs where the risk to client property is greater.

9543.3080 RECONSIDERATION OF A DISQUALIFICATION.

Subpart 1. **Application for reconsideration.** This subpart is necessary to establish a procedure for reconsideration of disqualification. Minnesota Statutes, section 245A.04, subdivision 3b permits the individual who is the subject of the study to request reconsideration of the disqualification within 30 days after receiving the commissioner's notice of disqualification. The individual must submit information showing that the information that the commissioner relied upon is incorrect or that the individual does not pose a risk of harm to any

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person served by the program. Subpart 1 is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3b.

Subp. 2. **Extension.** This subpart is necessary to permit the subject of the study additional time to obtain information necessary for reconsideration if the information cannot be obtained within the prescribed 30 days. The advisory committee noted that 30 days may in some cases be insufficient time to obtain the information needed for reconsideration and recommended allowing an extension. If the subject of the study requests reconsideration within 30 days but the necessary evidence to support the request cannot be obtained within that time, it is reasonable to allow additional time to obtain the information. It is incumbent upon the subject of the study to request the extension and to show why the information cannot be obtained within the initial 30 days. This subpart is necessary to assure that individuals who may not have timely access to relevant information are able to obtain reconsideration.

Subp. 3. **Decision by commissioner.** This subpart is necessary to establish criteria for determining whether a disqualification should be set aside. Minnesota Statutes, section 245A.04, subdivision 3b, paragraph (b) states, "The commissioner may set aside the disqualification if the commissioner finds that the information the commissioner relied upon is incorrect or the individual does not pose a risk of harm to any person served by the applicant or license holder. The commissioner shall review the consequences of the event or events that could lead to disqualification, the vulnerability of the victim at the time of the event, the time elapsed without a repeat of the same or similar event, and documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event." Items A and B are reasonable because they are consistent with Minnesota Statutes, section 245A.04, subdivision 3b, paragraph (b).

Subitems (1) through (6), which list factors to be considered by the commissioner in deciding whether to set aside a disqualification, are reasonable because they reflect criteria found in Minnesota statutes and link the disqualifying event to the present risk of harm posed by the subject.

Subitems (1) through (4) reflect the requirement in Minnesota Statutes, section 245A.07, subdivision 1 that the commissioner consider the nature, chronicity or severity of the violation and the effect on persons served before ordering a negative licensing action. Subitems (1) through (6) also reflect factors enumerated in the Criminal Offenders Rehabilitation Act, Minnesota Statutes, section 364.03, subdivision 3(c). Although that Act is specifically not applicable to licensed programs after adoption of rules establishing disqualification standards (Minnesota Statutes, section 245A.04, subdivision 6), it is reasonable to utilize the same types of factors already in statute to determine whether a subject is suitable for direct contact with clients.

Subp. 4. **Notice of commissioner's decision.** This subpart is necessary to establish a time limit for notifying a subject whether a time extension has been granted or whether the disqualification has been set aside. Minnesota Statutes, section 245A.04, subdivision 3b, paragraph (c) states, "The commissioner shall respond in writing to all

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reconsideration requests within 15 working days after receiving the request for reconsideration. If the disqualification is set aside, the commissioner shall notify the applicant or license holder in writing of the decision." Item A is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3b, paragraph (c). Item B is reasonable because it assures that a request for a time extension receives a timely response and assures that reconsideration of a disqualification is conducted in a timely manner even when an extension is granted.

Subp. 5. Finality of decision. This subpart is necessary to inform the subject of the study that the commissioner's decision to grant or deny reconsideration is the final administrative agency action, except as provided at subpart 6. This clarifies that a disqualified subject has exhausted remedies available within the department. This subpart is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3b, paragraph (d).

Subp. 6. Employees of public employers. This subpart is necessary to inform employees of public employers that the commissioner's decision not to set aside a disqualification may be appealed in a contested case proceeding under Minnesota Statutes, chapter 14. This subpart is reasonable because it is consistent with Minnesota Statutes, section 245A.04, subdivision 3c.

9543.3090 APPLICABILITY AND IMPLEMENTATION OF RULES.

This part is necessary to inform providers and subjects when background studies must be initiated. Because of the number of studies that must be performed, because the system is new and implementation problems are not unlikely, and to assure that initial studies are performed as efficiently and quickly as possible, it is reasonable to establish a gradual schedule of implementation.

Item A. It is reasonable to require background studies of subjects affiliated with programs seeking initial licensure once the rule is adopted. Unlike current employees and license holders, new program applicants will involve subjects without a history of working with persons served in licensed programs. Furthermore, it will be feasible for the department to conduct background studies as initial applications are received in a timely manner.

Item B. It is reasonable to perform initial studies for licensed programs at the time of license renewal. This will evenly distribute the workload in future years, as the program's relicensure will be the normal time and process for the annual study. This will contribute to administrative efficiency by distributing the background study workload over the course of the first year of implementation.

Item C. It is reasonable to permit subjects working in a program at the time of rule adoption to continue in direct contact pending the reconsideration decision. Some individuals currently working in licensed programs may be identified as the perpetrator in county abuse/neglect reports or as the subject of a criminal record. However,

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identification in a county abuse/neglect report may not meet the disqualification criteria in part 9543.3070 and criminal history records are not entirely accurate if an individual has a common name. Because these individuals have been working in licensed programs, it is assumed that they have not presented an overt risk of harm to persons receiving services or they would have been terminated from employment. Because the consequences of disqualification are so serious (loss of employment), it is reasonable to allow them to continue employment pending reconsideration and is less disruptive to providers and persons receiving services.

AMENDMENTS TO EXISTING RULES

9545.0090, item A, subitems (1), (4), and (5) are repealed. Crimes listed under subitems (1), (4) and (5) are deleted and replaced by a cross reference to part 9543.3070 since background studies for family foster care programs are performed by county and private agencies.

9555.6125, subpart 4, items D, E and F are repealed. Crimes listed under items D, E, and F are deleted and replaced by a cross reference to part 9543.3070 since background studies for adult foster care programs are performed by county agencies.

9555.9620, subpart 7, item A is repealed. State licensors perform the licensing study for adult day care centers (Rule 223); therefore, no cross reference to part 9543.3070 is necessary.

REPEALER.

Repealers have been addressed under SNR sections describing amendments to existing rules.

EXPERT WITNESS:

If this rule should go to public hearing, the Department does not plan to have outside expert witnesses testify on its behalf.

DATE:

8-8-90



ANN WYNIA
Commissioner

1. The first part of the document is a list of names and addresses of the members of the committee.

2. The second part is a list of the names and addresses of the members of the committee who have been elected to the office of the secretary.

3. The third part is a list of the names and addresses of the members of the committee who have been elected to the office of the treasurer.

4. The fourth part is a list of the names and addresses of the members of the committee who have been elected to the office of the clerk.

5. The fifth part is a list of the names and addresses of the members of the committee who have been elected to the office of the recorder.