STATE OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Amendments to the Rules of the Department of Human Services Governing the Use of Aversive and Deprivation Procedures By Licensed Facilities Serving Persons with Mental Retardation and Related Conditions (Minnesota Rules, parts 9525.2700 to 9525.2810)

STATEMENT OF NEED AND REASONABLENESS

INTRODUCTION AND BACKGROUND

Adopted rule parts 9525.2700 to 9525.2810 and proposed amendments to parts 9525.2700 to 9525.2810, establish standards that govern the use of aversive and deprivation procedures with persons with mental retardation or related conditions who are served by a license holder licensed by the Commissioner of Human Services. Parts 9525.2700 to 9525.2810 became effective on October 1, 1987. No amendments have been promulgated since that time.

Authority for the adopted rules as well as the proposed amendments was established in Minnesota Statutes, section 245.825, which directed the Commissioner of Human Services to promulgate rules governing the use of aversive and deprivation procedures. A number of statutory amendments have been made since the promulgation of parts 9525.2700 to 9525.2810 in October, 1987, which necessitate a number of these proposed amendments. These statutory amendments include Minnesota Statutes, sections 245.825, 253B.03, 256D.01, 626.556, 626.557 as well as the enactment of the Human Services Licensing Act (Minnesota Statutes, sections 245A.01 to 245A.16). Further, amendments are being proposed to comply with changes made in the federal regulations. Code of Federal Regulations, section 483.450, which governs conditions of participation, establishes criteria applicable to client behavior and facility practices. The specific requirements of this section are discussed in further detail in part 9525.2750, subpart 1 of this statement of need and reasonableness.

Other proposed amendments of parts 9525.2700 to 9525.2810 are intended to clarify the rule parts in response to questions from persons contacting the Department of Human Services for assistance in interpretation of the rule, and from participants in training courses offered to parties subject to the provisions of these rule parts. In addition, amendments are also being

proposed based on the review of over 600 individual program plans which include aversive and deprivation procedures, 150 emergency procedure reports and 700 quarterly reports submitted by case managers and services providers to the Regional Review Committees. Finally, on site reviews of individual plans were also conducted which provided information leading to the consideration of a number of the proposed amendments.

RULE DEVELOPMENT PROCEDURE

A Notice of Solicitation of Outside Information or Opinions for the purpose of proposing amendments to parts 9525.2700 to 9525.2810 was published in the State Register on April 1, 1991. An earlier Notice of Solicitation for the same purpose had been published on February 15, 1988. It was necessary to publish another notice due to the period of time which had passed since publication of the first notice regarding proposed amendments.

The Department reviewed the potential scope, content, and impact of the proposed rule amendments and decided to gather public input through the use of the Regional Review Committees as well as regional public meetings. Consumers, parents, license holders, advocates and county agencies were invited to participate in these regional public meetings. Proposed amendments were discussed at the Regional Review Committee meetings held during October 1990 through October 1991. Twelve regional public meetings for the purpose of gathering public input were held statewide. A total of 672 persons attended the informational meetings. These meetings were held from August through October 1991.

The Regional Review Committees were formed pursuant to Minnesota Statutes, section 245.825 and are comprised of the following representation: (1) psychologists with expertise in mental retardation and behavior management; (2) license holders governed by parts 9525.2700 to 9525.2810; (3) parents or guardians of persons with mental retardation or related conditions; (4) other concerned citizens none of whom have a controlling interest in a program or service governed by parts 9525.2700 to 9525.2810; and (5) the Department. One of the primary functions of the Regional Review Committees is to give the Commissioner recommendations regarding the use of aversive and deprivation procedures.

Further public input was obtained by sending a preliminary draft of proposed amendments to parts 9525.2700 to 9525.2810 to key designated parties for additional review and input, including representation from providers, advocates, parents and county agencies.

NEED AND REASONABLENESS OF SPECIFIC PROVISIONS

The specific provisions of proposed amendments to parts 9525.2700 to 9525.2810 are affirmatively presented by the Department in the following narrative which constitutes the Statement of Need and Reasonableness, in accordance with the Minnesota Administrative Procedure Act, chapter 14, and the rules of the Office of Administrative Hearings.

PART 9525.2700 PURPOSE AND APPLICABILITY

Subpart 1. **Purpose.** It is necessary to amend this subpart to be consistent with the authorizing statute. Minnesota Statutes, section 245.825, subdivision 1, which specifies who is governed by rules on aversive and deprivation procedures, was amended to include all "licensed services" as well as "licensed facilities". Therefore, it is necessary to incorporate these services and service providers into rule parts 9525.2700 to 9525.2810.

Use of the term "license holder" is reasonable because it is consistent with the Minnesota Statutes, Chapter 245A and other department rules. It is further reasonable because it clarifies that all license holders as defined in Minnesota Statutes, section 245A.02, subdivision 9, must comply with the requirements of parts 9525.2700 to 9525.2810. The term "license holder" replaces the terms "program" and "facility" throughout these rule parts. In order to avoid redundancy, the need and reasonableness specified in this subpart applies to all other amendments contained in parts 9525.2700 to 9525.2810 which replace the terms "program" and "facility" with the term "license holder." This amendment occurs in the following provisions:

9525.2700 subpart 2
9525.2710 subpart 21
9525.2750 subpart 1
9525.2750 subpart 2
9525.2770 subpart 5
9525.2790 subpart 2
9525.2800 subpart 2

Accordingly, these amendments will not be addressed separately hereafter in this Statement of Need and Reasonableness

Item C: Amendment of this item by replacing the term "facility review committee" with "internal review committee" is necessary to assure consistent application of these parts to licensed services as well as providers. Throughout current parts 9525.2700 to 9525.2810, reference is made to "facility review committees". While this was an accurate term to describe the type of review committee that a licensed facility would use, it is not the type of committee which all licensed services would use. Since parts 9525.2700 to 9525.2810 now apply equally to licensed facilities and services, it is necessary and reasonable to use a broader term that more accurately portrays the nature of

the committee since the committee is not only required of facilities. It is reasonable to use the term "internal review committee" since committees comprised of similar representatives are required of both facilities and services under parts 9525.0215 to 9525.0355 (Rule 34) and parts 9525.1500 to 9525.1690 (Rule 38). It is reasonable to update terminology used in rules in order to assure consistency with the current state of service delivery.

The term "internal review committee" replaces the term "facility review committee" throughout these rule parts. In order to avoid redundancy, the need and reasonableness specified in this subpart applies to all other amendments regarding the use of the term "internal review committee" throughout parts 9525.2700 to 9525.2810. This change occurs in the following provisions:

9525.2710 subpart 14 (definition of "facility review committee repealed)
9525.2710 subpart 19a (definition of "internal review committee" added)
9525.2750 subpart 1, item E
9525.2750 subpart 2

Accordingly, such amendments will not be addressed separately hereafter in this Statement of Need and Reasonableness.

Amendment of item C by requiring the development of an individual program plan and deleting reference to the individual habilitation plan is necessary to be consistent with 1991 amendments to Minnesota Statutes, section 256B.092, which governs the provision of case management services to persons with mental retardation and related conditions. Section 256B.092 now identifies the development of an individual program plan rather than an individual habilitation plan. The term "individual habilitation plan" is replaced by "individual program plan" throughout parts 9525.2700 to 9525.2810. It is reasonable to reorganize this subpart to reflect the proper order of the steps necessary to incorporate controlled procedures into the individual program plan. The need and reasonableness for this change is stated further in part 9525.2710, subpart 16.

Subpart 2. **Applicability.**

Amendments in this subpart are necessary to expand the list of facilities and services which are governed under these parts to include services governed by department rules which were promulgated after parts 9525.2700 to 9525.2810. It is necessary to expand the applicability of these parts to include all licensed facilities and services since their inclusion is required by Minnesota Statutes, section 245.825. It is reasonable to include these items in the applicability section of these parts in order to place the affected facilities and services on notice that they are governed by these parts.

Item A: It is necessary to amend this item to assure that day training and habilitation services licensed under parts 9525.1500 to 9525.1690 (Rule 38) are specifically identified as a service which is subject to the requirements of this rule. Rule 38 was adopted subsequent to the adoption of parts 9525.2700 to 9525.2810 and therefore, was not specifically included. It is reasonable to update rules to reference other department rules which have been recently promulgated to promote consistency among department rules.

Item B: It is necessary to amend this item to accurately reference current state and federal regulations governing licensure of residential services for persons with mental retardation, including ICF/MR facilities. Minnesota Rules, parts 9525.0210 to 9525.0430 were repealed and replaced by parts 9525.0215 to 9525.0355 in 1989. Further, Code of Federal Regulations, title 42, sections 483.400 to 483.480 are the current sections which govern certification of ICF/MR facilities. It is reasonable to amend the reference to both regulations to assure consistency with current state and federal regulations.

Item C: The addition of the cited rule parts is needed to extend the applicability of rule parts 9525.2700 to 9525.2810 to residential-based habilitation services, which is one of the licensed services required by Minnesota Statutes, section 245.825 to be governed by rules on aversive and deprivation procedures. Parts 9525.2000 to 9525.2140, which governs the licensure of residential-based habilitation services became effective October 1989. The residential-based habilitation services rule includes the supported living services which were originally stated in this item. It is reasonable to include this language in the applicability section of these parts in order to place the affected services on notice that they are governed by these parts.

Items D-G: The addition of items D to G expands the list of facilities and services which are governed under these parts. It is necessary to add the facilities and services in these items since their inclusion is required by Minnesota Statutes, section 245.825. It is reasonable to include these items in the applicability section of these parts in order to place the affected facilities and services on notice that they are governed by these parts.

Subpart 3. **Exclusion.**

Item A: It is necessary to delete reference to the term "state hospital" and replace it with the term "regional treatment centers" in order to be consistent with current statutory and rule language. Use of the term "regional treatment center" is reasonable because it reflects commonly-used terminology and because the term "state hospital" is no longer being used in

rules. It is reasonable to update rule terminology to assure consistency with the current terminology commonly used in the field.

PART 9525.2710 DEFINITIONS

Subpart 3. **Advocate.** It is necessary and reasonable to add to this definition the phrase, "no direct or indirect financial interest in the provision of services," to assure that the person is represented by an objective person with no conflict of interest. It is reasonable to avoid such a conflict of interest in order to facilitate protection of the client's best interests. It is further reasonable to add the phrase "speak on the person's behalf", because this clarifies the role of an advocate by reflecting what the advocate actually does.

Subpart 4. **Aversive procedure.** It is necessary and reasonable to amend this definition by deleting the term individual habilitation plan and replacing it with the individual program plan for the reasons stated in part 9525.2710, subpart 16.

Subpart 12. **Deprivation procedure.** Subitems (1) and (2) have been deleted and language substituted for clarification because the definition of deprivation procedures has been an area of considerable confusion in the past. It is necessary and reasonable to include language that serves to individualize the determination of deprivation. Many parents, case managers and license holders have indicated that removal or delay of goods, services or activities should be based on individual criteria that is documented in the permanent record. Data regarding the use of deprivation, response cost and time out have yielded findings that the length of time of delay or removal or the type of good, service or activity being removed is not as important a criteria as the impact that the delay or removal had or expected to have on the person. See, Carr, Robinson, Palumbo, *The Right Issue: Aversive Versus Nonaversive Treatment, The Wrong Issue: Functional Versus Nonfunctional Treatment*, State University of New York at Stony Brook and Suffolk Child Development Center, November 1989, Sycamore Press (in press).

For example, removing a radio during sleep time for three hours will not have the same level of intrusiveness for many people as removing a radio for two minutes during a preferred broadcast (i.e., a Twins baseball game). Another example would be to delay telephone use for two minutes after a set time during the week which has historically been the time the person makes telephone calls. In this case, this delay of two minutes would be perceived as intrusive due to historical use. Another consideration that must be addressed is the person's ability to understand time concepts. For some individuals, if an item is removed even for a very short time, the person may not understand

that it will return.

In both of the previous examples, intrusiveness varies depending on the perception and past history of the affected person. In the first example, removal of the radio would not be intrusive for the three hours it is removed, but would be intrusive if removed for two minutes during the preferred broadcast. In the second example, delay for a few minutes would be intrusive on the basis of history of use. In summary, time and place as well as the circumstances surrounding the situation must all be considered when determining the intrusiveness of the removal or delay of the good, service or activity.

The decision regarding whether the planned delay or withdrawal of goods, services or activities is a controlled procedure governed by parts 9525.2700 to 9525.2810 is made by the affected person and/or the person's legal representative.

It is also reasonable that documentation be made in the person's permanent record to describe the process by which the determination was made in terms of whether to consider the planned delay or withdrawal of goods, services or activities a controlled procedure.

It is necessary and reasonable to amend this definition by deleting language which serves only to place unnecessary criteria for the use of deprivation procedures. Deprivation procedures have been implemented without compliance to the standards set forth in parts 9525.2700 to 9525.2810 due to lack of documentation or discussion with the person or the person's legal representative.

Subpart 14a. **Expanded interdisciplinary team.** It is necessary to add the definition of "expanded interdisciplinary team" because it is referred to throughout parts 9525.2700 to 9525.2810 and has a meaning integral to the understanding the rule provisions. Since the list of persons included in this group is the same as those included in the definition of "interdisciplinary team" under subpart 18, with the addition of an experienced qualified mental retardation processional (QMRP), it is reasonable to use the word "expanded" to describe and differentiate the "expanded interdisciplinary team" from the "interdisciplinary team". It is reasonable to require that the QMRP have at least one year of direct experience in the assessment, planning, implementation, and monitoring of a plan which includes a behavior intervention program because behavioral intervention is an integral component of parts 9525.2700 to 9525.2810. It is further reasonable to require a QMRP with direct experience because a person meeting these qualifications will have knowledge combined with a certain level of expertise about the provision of services to persons with mental retardation and related conditions.

The significance of direct experience is illustrated in a study reviewing state department standards, which found that state standards required competence in demonstrated areas. See, Morgan, Striefel, Baer and Percival, *Regulating Behavioral Procedures for Individuals with Handicaps: Review of State Department Standards*, Research in Developmental Disabilities, 1991, Vol. 12, pp. 63-85.

Further, the National Association of Retarded Citizens (NARC) recommended in their guidelines that a major prerequisite for the appropriate use of behavioral techniques is demonstrated skill. See, Sajwaj, *Issues and Implications of Establishing Guidelines for the Use of Behavioral Techniques*, Journal of Applied Behavioral Analysis, 1977, pp. 531-540.

Subpart 14. **Facility review committee.** It is necessary and reasonable to repeal the definition of "facility review committee", since that term is being replaced throughout these parts by the term "internal review committee". The need and reasonableness for repealing this subpart is specified further in part 9525.2700, subpart 1, item C.

Subpart 16. **Individual habilitation plan.** It is necessary and reasonable to repeal this definition to comply with current statutory requirements. Minnesota Statutes, section 256B.092 was amended in both the 1990 and 1991 sessions. As a result of these amendments, a separate individual habilitation plan is no longer required. Rather, section 256B.092, subdivision 1b, now requires that the individual service plan must identify the need for an individual program plan. The need and reasonableness for the definition of "individual program plan" is stated below in subpart 16a.

Subpart 16a. **Individual program plan.** It is necessary to amend this subpart to assure consistency with the case management statute. As stated in subpart 16, Minnesota Statutes, section 256B.092 was amended in both the 1990 and 1991 sessions, deleting the individual habilitation plan requirement. Minnesota Statutes, section 256B.092, subdivision 1b now requires that the individual service plan must identify the need for an individual program plan. Further, section 256B.092, subdivision 1c, requires that if the individual service plan identifies the need for individual program plans, the case manager shall assure that the individual program plans are developed by the providers. The terminology "individual habilitation plan" is no longer used in the statute. Rather, the statute now refers to the terms "individual service plan" and "individual program plan." Accordingly, it is reasonable to amend rule language to assure consistency with current statutory requirements.

Item A: It is reasonable to require that the individual program plan be developed consistent with all aspects of the person's individual service plan because the individual service plan is the main document that identifies the individual service needs of the person and serves as the basis for authorization of services.

Item B: In item B it is reasonable to refer to state and federal regulations which govern services to persons with developmental disabilities, in order to specifically implement the statutory requirements as well as to assure compliance with the relevant developmental disabilities regulations and applicable law.

Item C: Item C is reasonable because it incorporates the requirements under Minnesota Statutes, section 256B.092, subdivision 1b(5), that the individual program plan must "be developed by the provider according to the respective state and federal licensing and certification standards...." It is reasonable to further require that the individual program plan be developed in consultation with the expanded interdisciplinary team in order to assure the input and expertise of all relevant parties.

It is necessary and reasonable to include the words, "coordinated", "integrated" and "comprehensive" to convey the need to ensure that the individual program plan represents and incorporates the various needs, approaches to enhance and reduce behavior into one document. Regional review committee members have found that interdisciplinary teams frequently have separate plans which address a variety of issues and needs. It is not uncommon to find separate plans for eating, dressing, communication and behavior management which rarely incorporate similar assessment, implementation or monitoring approaches. These plans appear to be written for different individuals due to the various goals, objectives, strategies, data collection and monitoring systems. The unfortunate result of such an uncoordinated approach is the inconsistent and misdirected application of treatments. By including this language, interdisciplinary team members will be made aware of the need to create a single plan that incorporates the expertise of various team members into a document that reflects consistency, integration and comprehensiveness.

Parts 9525.2700 to 9525.2810 are amended throughout to replace the term "individual habilitation plan" with the current term "individual program plan." In order to avoid redundancy, the need and reasonableness specified in this subpart shall apply to all other amendments in parts 9525.2700 to 9525.2810 deleting the term "individual habilitation plan." Accordingly, all such amendments will not be addressed separately hereafter in this document.

Subpart 16b. **Individual service plan.** This definition is necessary because the term individual service plan is used throughout parts 9525.2700 to 9525.2810. The definition of individual service plan was amended in both the 1990 and 1991 sessions and therefore it is reasonable to simply refer to Minnesota Statutes, section 256B.092 to assure that the rule is consistent with the current statutory definition. It is reasonable to amend rules as necessary to assure consistency with statute. This need and reasonableness for this subpart is stated further in subpart 16 above.

Subpart 18. **Interdisciplinary team.** The language deleted here was used to define an expanded interdisciplinary team. Since that term is now defined in subpart 13a, it is necessary and reasonable to delete this language from subpart 18.

Subpart 19a. **Internal review committee.** This subpart is necessary because the term "internal review committee" is used throughout the amendments of parts 9525.2700 to 9525.2810. It is reasonable to refer to part 9525.2750, subpart 2 in the definition since this is the part which contains the specific requirements for the internal review committee.

Subpart 21. **Licensed facility.** It is necessary and reasonable to repeal this definition to assure consistency with current statutory terminology. The term "license holder" rather than "licensed facility" is now used in the Human Services Licensing Act (Minnesota Statutes, Chapter 245A), which governs the Department's licensure of programs and services. It is reasonable to repeal definitions were are now obsolete and do not accurately reflect the state of services being delivered. The need and reasonableness for the substitution of the term "licensed facility" with "license holder" is stated further in subpart 21a below.

Subpart 21a. **License holder.** This subpart is necessary to replace the definition of "licensed facility" with "license holder" since Minnesota Statues, section 245.825 requires that licensed services as well as facilities be covered under these rule parts. The term "license holder" applies to all providers governed by these parts, and is consistent with the usage of this term in other department rules and statutes. It is reasonable to define this term as it is defined by Minnesota Statutes, section 245A.02 in order to assure consistency between statutes and rules.

Subpart 24. **Person with mental retardation or a related condition.** It is necessary to amend this subpart to make it consistent with statute and other department rules. The definition refers to the diagnosis of mental retardation according to parts 9525.0015 to 9525.0165 (Rule 185). It is reasonable to refer to the diagnosis under Rule 185 to assure

consistency among department rules governing services to the same target population. The definition of "related conditions" contained in Minnesota Statutes, section 252.27, subdivision 1a. Since this definition was amended in the 1991 session, it is necessary and reasonable to amend this portion of the definition by deleting the obsolete rule language and to cross-reference the statute to accommodate any future change.

The definition given is further reasonable because it is consistent with the commonly-accepted definition used in the field of mental retardation. See, e.g., *Mental Retardation: Definition, Classification and Systems of Support*, American Association on Mental Retardation, 9th Edition, 1992; the Developmental Disabilities Act, 42 U.S.C. §§6000 et seq.

Subpart 27. **Qualified Mental Retardation Professional**. It is necessary to amend this subpart to assure consistency with the applicable federal regulations. The definition of a qualified mental retardation professional contained in the Code of Federal Regulations was amended since the original promulgation of parts 9525.2700 to 9525.2810 and is now found in Code of Federal Regulations, title 42, section 483.430. Since the definition contained in this rule cites to the federal definition, it is necessary and reasonable to amend this subpart to reflect the change.

Subpart 30. **Residential facility**. It is necessary and reasonable to repeal the definition of "residential facility" because the term is no longer used in parts 9525.2700 to 9525.2810.

Subpart 33. **Separation**. It is necessary to repeal the definition of separation because the term "separation" is no longer referred to in parts 9525.2700 to 9525.2810. As amended, parts 9525.2700 to 9525.2810 will refer to "room time out" rather than "separation". It is reasonable to delete from rules terms that no longer reflect current terminology used in the field of mental retardation.

Subpart 33a. **Substantial change.** It is necessary to add a definition of "substantial change" because the term is used throughout parts 9525.2700 to 9525.2810, as amended. Originally, the term was defined in part 9525.2780, subpart 1, for purposes of that part only. However, the proposed amendments use this term in other parts, making it necessary to include this term in the definitions part. The definition given is reasonable because it describes in items A to D, major changes which if occurring could put the person at risk.

Subpart 35. **Time out.** Amendment of this subpart by deleting the term "separation" is necessary and reasonable for the reasons stated in subpart 33 above.

PART 9525.2720 EXEMPTED ACTIONS AND PROCEDURES

It is necessary to amend this part to clarify that the person's individual program plan must address the use of any actions or procedures that are exempted under items A through H.

Items B and C. Amendment of items B and C is necessary to change the language of this part to provide clarification regarding the distinction between manual restraint and physical contact. Manual restraint is a controlled procedure, while physical contact is an exempt procedure or action where the individual is not held immobile or limited in movement.

Participants in training sessions on aversive and deprivation procedures, and others who have requested technical assistance, have raised numerous questions about the difference between manual restraint and physical contact when the individual is not held immobile or limited in movement. These questions revealed that current language in this part is inconsistent with the definition of manual restraint contained in part 9525.2710. The definition of manual restraint, which is a controlled procedure, excludes three types of physical contact. However, part 9525.2720 identifies physical contact of specific duration and frequency as a form of manual restraint. This has caused confusion among those providing services pursuant to these rule parts.

Accordingly, the proposed amendments provide a consistent interpretation of the meaning of physical contact and place the focus on the <u>type</u> and purpose of the physical contact as opposed to the frequency and duration of contact.

Item F. This amendment is necessary to include language which is consistent with the proposed amended definition of deprivation. The proposed amendment is reasonable because it is important that the same criteria be used to determine when a procedure is not considered controlled and exempt from the rule.

Item H. The addition of this item is necessary to clarify those forms of physical contact that are exempt from restrictions established by parts 9525.2700 to 9525.2810. The addition of this language is not designed to change the application of the rule restrictions, it is designed only to clarify that these actions are not intended to be restricted by the rule. These two exemptions are reasonable because these forms of physical contact serve to protect the person's health and safety. It is reasonable to expand upon rule language to provide clarification to those responsible for complying with the rule requirements.

PART 9525.2730 PROCEDURES AND ACTIONS RESTRICTED OR PROHIBITED

Subpart 1. **Restrictions.**

Item C: In item C, it is necessary to delete the reference to "facility" in this rule and replace it with the term "program" which applies more generally to all services. It is reasonable to use the term "program" since this term would cover both licensed facilities and services.

Subpart 2. **Prohibitions.** The subtitle change was recommended by the Office of the Revisor of Statutes for simplification and to avoid unnecessary duplication.

Item H. It is necessary and reasonable to add item H to assure compliance with federal regulations. Under the Code of Federal Regulations, title 42, section 483.450(c), the placement of a client in a time out room in an emergency situation is prohibited. The use of time out historically been the source of confusion and concern. During the public informational meetings, a number of questions were raised regarding the use of room time out. It became apparent that some people were not aware of the federal prohibition against the use of time out in an emergency situation. Therefore, it is reasonable to clearly state the prohibition in rule to facilitate compliance as well as to give notice of the prohibition to those affected by parts 9525.2700 to 9525.2810.

Item I. The addition of walkers and wheelchairs is necessary because it clarifies and gives additional illustration of the types of equipment and devices which are considered under this part to facilitate a person's functioning. This addition was suggested by participants attending public informational meetings on proposed amendments to parts 9525.2700 to 9525.2810. It is necessary to add the provision, "...or serious damage to the equipment or device...", to safeguard the best interests of the persons requiring such equipment. Because devices such as walkers, wheelchairs, hearing aids and communication boards are essential to a person's basic functioning, it is reasonable to restrict access to these devices only under extraordinary circumstances. The addition of serious damage to the equipment or device is reasonable because it prevents the destruction or damage of these types of devices, which if destroyed would result in the person's use of the device being lost until it could be repaired or replaced. It is reasonable to include mobility aids such as walkers and wheelchairs because if destroyed, the absence of these devices would significantly hinder or even preclude the person's mobility. It is the department's position that it is in the best interest of a person to avoid such destruction of essential devices since the dependence of the user upon such devices would make the destruction or damage of the equipment a serious impediment to daily functioning and learning.

Restriction of access under such limited circumstances is further reasonable because it diminishes the need for repeated costly replacement of such devices.

Subpart 3. **Faradic shock.** Revision of the subtitle was recommended by the Office of the Revisor of Statutes for the reasons stated in subpart 2 above. It is necessary to add item E to this subpart to comply with statutory requirements. This sentence requires that whenever faradic shock is used, that a plan be in effect to reduce and eliminate its use. Subsequent to the promulgation of parts 9525.2700 to 9525.2810, Minnesota Statutes, section 245.825, subdivision 1, was amended to state: "For any persons receiving faradic shock, a plan to reduce and eliminate the use of faradic shock shall be in effect upon implementation of the procedure." It is reasonable to amend rules to incorporate statutory changes.

9525.2740 PROCEDURES PERMITTED AND CONTROLLED.

Subpart 1. **Controlled procedures.** It is necessary to amend this subpart by adding deprivation to the list of controlled procedures under item G because under part 9525.2710, subpart 12. deprivation of goods, services or activities constitutes a controlled procedure by definition. Regional Review Committee members felt that it is important to categorize deprivation procedures as permitted and controlled so as to provide consistent interpretation and application of these often used procedures. Numerous inquiries have been made by case managers and service providers regarding the categorization of procedures which delay goods, services or activities to which a person is entitled. It is clear from these questions that deprivation procedures have been inconsistently implemented due to inconsistencies in interpretation. It is reasonable to amend this rule part to define and clarify the area of aversive procedures and to protect the best interests of consumers of services by assuring that deprivation procedures are subject to the same standards as are other controlled procedures.

PART 9525.2750 STANDARDS FOR CONTROLLED PROCEDURES.

Subpart 1. **Standards and conditions.** The amendments in paragraph one of this subpart are necessary to be consistent with changes made in the case management statute. As stated in part 9525.2710, subpart 16, Minnesota Statutes, section 256.092 was amended in the 1990 and 1991 sessions eliminating the requirement of an individual habilitation plan and instead requiring that if the individual service plan identifies the need for an individual program plan(s), that the individual program plan(s) shall be developed by the providers. It is reasonable to require that the controlled procedure must be based upon need as identified in the

individual service plan and then implemented as a part of the individual program plan because this is consistent with the current statutory requirements.

Allowing the use of a controlled procedure only when the controlled procedure is based upon need identified in the person's individual service plan and is proposed, approved, and implemented as part of the individual program plan is necessary and reasonable as a safeguard to the person's health and safety. The requirements in items A through I collectively, are reasonable because they establish standards for the monitoring of the use of controlled procedures and promote use of the least intrusive alternative.

According to experts in the field of behavior management, the more intrusive an intervention the greater the need for continuous public monitoring and the greater the need for procedural regulation. See, Horner et al., *Toward a Technology of "Nonaversive" Behavioral Support*, Journal of the Association for Persons with Severe Handicaps, 1990, vol. 15, No. 3, 125-132.

With respect to procedural regulation specifically, Horner et al. note:

> The greater social or physical intrusiveness of an intervention, the more appropriate are procedural regulations that restrict (a) who may use the intervention, (b) when the intervention may be used, and (c) the conditions for monitoring the intervention.

Id. at 129.

Further, according to Gerhardt et al., the fact that misuse and abuse of aversive interventions has occurred and the possibility of its recurrence, supports the need for greater control of aversive procedures through such mechanisms as peer and human rights review, staff training and systematic monitoring, the use of functional analysis in all treatment decisions, ongoing medical monitoring, and a complete and appropriate data collections system. (*Social Policy on the Use of Aversive Interventions: Empirical, Ethical., and Legal Considerations*, Journal of Autism and Developmental Disorders, 1991, Vol. 21, No. 3, 265-280). The protection afforded by these safeguards is illustrated in the following statement:

> While not eliminating the potential for abuse, the use of such safeguards may minimize the potential risks to the individual as well as enhance the expected benefits.

Id. at 270.

The need for standards in rule which safeguard the use of controlled procedures is aptly stated by Gerhardt, et al. in the following quote:

> There appears to be sufficient empirical, ethical, and legal support for the continued availability of a aversive intervention as treatment options in the reduction of problematic behaviors displayed by some individuals with developmental disabilities. This support, however, is restricted to the use of such interventions only when stringent safeguard are firmly in place. These include the documentation of other, less restrictive interventions, a positive risk/benefit analysis, the provision of free and informed consent, and critical review and approval by peer and human rights committees. In addition, a comprehensive functional analysis needs to be conducted prior to the design and implementation of any intervention, and active programming designed to enhance the generalization and maintenance of treatment gains needs to be conducted throughout the process. Finally, the utilization of aversive interventions to decrease disruptive behaviors requires that teaching programs designed to increase appropriate, functionally equivalent responses be incorporated into the total treatment plan.

Id. at 274.

The requirements in items A through I are in keeping with the idealogy of the aforementioned experts and are further necessary and reasonable for the specific reasons stated below.

Item A: It is necessary and reasonable to amend item A by substituting the word "approved" for the word "authorized" to more accurately reflect the process. The Department's Licensing Division recommended this revision as a more accurate statement on the basis that these controlled procedures have already been authorized by the rule. It is reasonable to amend rules to clarify and more accurately portray the intent of the provision.

Item D. The proposed change in this item involves moving the language in item E to item D. This is necessary to properly reflect the chronological order of the review and authorization process for controlled procedures as outlined in subpart 2 of this part. It is reasonable to list these steps in chronological order to facilitate understanding by those providing services governed by parts 9525.2700 to 9525.2810.

Item E. It is necessary and reasonable to add language to specify that facilities or providers licensed under parts 9525.0215 to 9525.0355 as a residential program, parts 9525.1500 to 9525.1690 as a training and habilitation service, or parts 9525.2000 to 9525.2140 as a license holder for residential-based

habilitation services, must have controlled procedures approved by an internal review committee because these services have committees for this purpose.

Item F. Amendment of this item is necessary to provide clarification and to be consistent with statute. The restatement of the training requirement for staff directly responsible for implementing, supervising and monitoring the controlled procedure clarifies the requirement. By amending this item to refer to "license holder", licensed services as well as licensed facilities are included, as required by Minnesota Statutes, section 245.825, subdivision 1. Based on public comments, there is a feeling that staff training has been inconsistent and, in some cases, inadequate. This amendment affords the consumer greater protection as well as gives providers notice that appropriate staff training on the use of controlled procedures is essential.

Item G. It is necessary to delete current items G, H, I and J in order to substitute language which clarified the criteria for incorporating the use of a controlled procedure into an individual program plan.

Item G as amended is reasonable based on the following subitems:

Subitem (1): It is necessary and reasonable to amend this provision to provide clarification. The addition of the qualifying phrase, "whenever possible" is reasonable because interdisciplinary team members will first consider the possibility of using time out in less restrictive areas rather than in rooms designated solely for time out which is seen as less intrusive.

Comparison of data collected regarding time out procedures from 1987 to present indicated interdisciplinary team preference for the use of common living areas for time out rather than rooms. Data further suggested that there were no significant differences between person's precipitating behavior for those involved in room time out and other less intrusive forms of time out. Documentation was found supporting the use of time out areas due to the availability of living areas, that fact that these areas typically do not cause undue negative attention to the person, ease in transitioning the person back to the activity or task and living areas do not require special construction. Further, interdisciplinary team members still have the option of using a room solely for time out.

The substitution of the word "solely" for the word" specifically" is reasonable because time out rooms may be used for other training or leisure activities which do not involve time out. By using the word "specifically" some interdisciplinary team members have not used these rooms other than for room time out. This

change in wording would provide the option of using the rooms for activities or events that do not involve time out.

Subitem (2): This requirement is necessary and reasonable because data collected by the Department from 1987 to present indicates that about 24% of individual program plans which utilize time out do not typically specify the areas or activities that persons are to be returned too. In addition, regional review committee members have found that some plans do not offer the person positive activities or tasks after the conclusion of time out only that the person will be observed.

Subitem (3): This provision is necessary and reasonable because Regional Review Committee members felt that continuous monitoring should be in delineated in a subitem rather than in a paragraph. This change will serve to emphasize the importance of continuous monitoring. Continuous monitoring is perhaps one of the most important functions that staff perform because it places staff in a position to immediately act given the person's observable behavior in time out.

Subitem (4): This provision contains the requirements previously found in part 9525.2750, subpart 1, item D(1). The change is a format change only and is necessary and reasonable to accomplish the reorganization of this subpart. As discussed earlier, this reorganization is necessary for clarification and ease of reading. The need and reasonableness for this requirement as previously presented by the Department remains applicable.

Subitem (5): It is necessary to add the word "consecutive" to provide clarification regarding access to a bathroom and drinking water for persons involved in time out. The addition to this subitem is reasonable because it promotes consistent interpretation and application of access to a bathroom and drinking water.

Subitem (6): It is necessary to add the requirement that time out procedures not exceed sixty minutes to be consistent with federal requirements. The Code of Federal Regulations, title 42, section 483.450, (c)(2), requires that placement of a client in room time out not exceed sixty minutes. Therefore, it is reasonable to amend this item to reflect this change in federal requirements.

Subitem (7): It is necessary to add the word "visual" to describe the type of monitoring which is required during time out procedures to comply with federal regulations. The Code of Federal Regulations, title 42, section 483.450, (c)(1)(ii), requires visual supervision of time out. It is reasonable to amend rules as changes occur in federal regulations.

It is necessary and reasonable to amend the size requirement for the time out room from six feet by six feet to thirty six square feet based on feedback received from the Division of Licensing, license holders and case managers, all of whom reported that if a room is a few inches smaller in any one dimension than currently required (i.e., six feet by six feet) that costs associated with remodeling or new construction will not permit the use of room form of time out. Feedback indicated that more intrusive controlled procedures were implemented as the only other alternative which was seen by many interdisciplinary team members as being more restrictive and intrusive than room time out. The requirement in this subitem that the room be large enough for the person to stand, to stretch their arms, and lie down provides protection against the use of rooms that are too small.

Item H. Amendment of this subpart is necessary to distinguish manual restraint from mechanical restraint. Since the promulgation of Rule 40, the requirements for manual versus mechanical restraint have been a source of considerable confusion among those responsible for implementation of the rule. The Department has determined that this confusion would be best addressed by separating manual and mechanical restraint into two rule items with requirements specific to each form of restraint.

The criteria applicable to manual restraint contained in subitems (1) through (4) are reasonable because they facilitate protection of the health and safety of the person with whom the manual restraint is being implemented. The change is this subitem reflects a reorganization of the material which resulted from feedback from the regional review committee members and from the statewide informational meetings. Persons who attended the informational meetings felt very strongly that manual and mechanical restraint should be separated into their own respective areas. License holders and case managers felt that manual restraint should include similar protections to that of someone involved in mechanical restraint due to the fact that limb(s) or other body parts are being held immobile and may be subject to potential injury.

There have been a few cases of manual restraint reported to the regional review committee which have lasted for over one hour for persons who have exhibited dangerous self-injury. There have been six cases of manual restraint reported that have lasted over one hour. It is felt that the opportunity for release from manual restraint and for motion and exercise of restricted body parts for at least ten minutes out of every sixty minutes should be retained in the rule, but reorganized into its own respective section. Even though few cases have been reported, it is felt that it is reasonable to expect that manual restraint will be the treatment of choice for long periods of time for some individuals when mechanical restraint or other controlled procedures have proven ineffective or are contraindicated. Research has shown

that for some persons who exhibit challenging behaviors, mechanical restraint may service to reinforce aggressive or assaultive behavior to self or others.

It was also felt that the manual restraint area should serve to consolidate for the reader those standards and requirements into one area of the rule. This reorganization is reasonable because it should serve to save the readers time in locating different standards. It is reasonable to amend rules to make them more user-friendly.

Item I. It is necessary to add an item containing criteria specific to the implementation of mechanical restraint in order to distinguish mechanical restraint from manual restraint as identified in item H above. The criteria applicable to mechanical restraint delineated in subitems (1) through (4) are reasonable because as identified above, regional review committee members and individuals who attended the statewide informational meetings felt that manual and mechanical restraint should be delineated into two separate areas. The requirements under subitem (2) were previously contained in items J and L and have been reformatted to distinguish manual and mechanical restraints.

Mechanical restraint is now organized according to level of restrictiveness. This change should assist the reader in locating the standards and requirements of individual program plans, which incorporate the use of mechanical restraint of two or fewer limbs and restriction of three or more of a person's limbs into one area. As identified above, this amendment is reasonable because those subject to the provisions of parts 9525.2700 to 9525.2810 will save time by having all the requirements located in one area.

The Department received one recommendation from the public urging that staff continuously supervise a person who has two or fewer limbs in mechanical restraint. Data obtained from reviewing quarterly reports as well as comments made by parents or case managers suggest that persons in this type of restraint do not require this level of supervision. Further, it was felt that continuous supervision would constitute an invasion of privacy for many persons for whom this level of supervision is unwarranted. Continuous supervision for persons with more than three limbs restrained was primarily seen as a safety measure due to the limitations of mobility or protection. Persons who would primarily be affected by this recommendation are persons who wear helmets. It is not necessary to supervise persons with helmets continuously because they have no need to require assistance from a staff person to accomplish daily living activities.

Subpart 1a. **Review and authorization by the expanded interdisciplinary team.** It is necessary to move the language in subpart 3 to subpart 1a to correctly reflect the chronological

order of the assessment, planning and review process for controlled procedures. It is reasonable to place the review of the expanded interdisciplinary team before that of the internal review committee to be consistent with other provisions of parts 9525.2700 to 9525.2810. Morgan, et al., in their review of state standards (supra) found that decision models must: 1) be specific but not complex; 2) be client-centered; 3) be flexible enough to handle exceptions; and 4) should invite the judgements of experts. The role of the expanded interdisciplinary team is be client-centered as well as flexible.

As amended, this subpart now requires review by the expanded interdisciplinary team when a substantial change, as defined in part 9525.2710, subpart 33a, is proposed in the use of a controlled procedure. It is reasonable to require the review of substantial changes since such changes include variations in the type, intensity and frequency of controlled procedures and, as such, could place the person's health or safety at risk.

Subpart 2. **Review and approval by internal review committee**. It is necessary to amend this part to assure consistency with Minnesota Statutes, section 245.825. By adding the provision, "A license holder licensed under parts 9525.0215 to 9525.0355; 9525.1500 to 9525.1690; or 9525.2000 to 9525.2140...", the applicability of this subpart is extended to licensed services as required by Minnesota Statutes, section 245.825. It is necessary and reasonable to delete the requirement regarding the submission of data on the use and effectiveness of the procedure because the submission of data is now addressed in subpart 2a. The need and reasonableness of moving these requirements to a separate subpart is stated in subpart 2a below.

Item A. Amendment of this item is necessary and reasonable for the reasons specified in part 9525.2710, subpart 13a with respect to the experience of the qualified mental retardation professional.

Subpart 2a. **Quarterly reporting.** This amendment is necessary to specify the requirements for submission of data on the use and effectiveness of controlled procedures. Specifically, the amendment requires that the data be sent to the expanded interdisciplinary team and the internal review committee as well as the regional review committee by the license holder. In addition, it is important that the case manager assure this is done consistent with the requirements of Minnesota Statutes, section 256B.092, subdivision 1e. Data collected by regional review committees has shown that quarterly reports are often submitted late due to confusion regarding responsibilities. In some cases, data is not being submitted at all. This amendment is reasonable because it delineates specific responsibilities of the license holder and case manager with respect to quarterly reporting. It is reasonable to require that the expanded

interdisciplinary team and the internal review committee review behavioral data because these groups are closer to the day-to-day activities of the client as well as the provider.

It is necessary and reasonable to establish a timeline for submission of the data on the use and effectiveness of the controlled procedure in order to assure adequate review to protect the person from the inappropriate use of a controlled procedure. Submission of and review of such data on a quarterly basis or as specified in the individual service plan is reasonable because it provides for review at least quarterly or as often as determined by the expanded interdisciplinary team at the time the controlled procedure is incorporated into the service plan. The members of the expanded interdisciplinary team have the information and knowledge regarding the period of review that will best meet the person's needs while assuring adequate protection.

Subpart 3. **Review and authorization by the interdisciplinary team.** It is necessary to repeal this subpart since the requirement described in this subpart has been moved to subpart 1a of this part. The need and reasonableness of this requirement is stated further in subpart 1a above.

Subpart 4. **Submission of individual program plan to regional review committee.** Amendment of the subtitle is necessary and reasonable because it more accurately represents the action required under this subpart. Amendment of this subpart is necessary to protect the best interests of the person by assuring that the regional review committee has notice of the authorization of a controlled procedure as well as any substantial change to an existing controlled procedure. This language is reasonable because it establishes the requirement that the case manager must ensure a copy of the plan is sent to the regional review committee by the license holder, when a plan is proposed which incorporates manual restraint, mechanical restraint, time out or faradic shock, or when a substantial change in the use of a controlled procedure is made to the individual program plan.

County case managers, license holders and parents have reported to the regional review committee that it is more efficient for the license holder to send copies of the individual program plan or substantial changes to the review committee. This is due to the fact that the QMRP is typically the author of the individual program plan and has better direct access to information to be incorporated into the plan. This change in responsibility by the license holder will save time and ensure consistency of mailings. A case manager's time is better spent in ensuring that this overall process is followed rather than being directly responsible for the distribution of the paperwork.

It is reasonable to require the regional review committee to review substantial changes as well as new procedures because a substantial change (as defined in 9525.2710, subpart 33a) may place the person at risk and therefore, must be subject to the same review procedures as a new procedure.

Ten calendar days is a reasonable period of time because it provides for timely notice to the regional review committee while also providing adequate time for the case manager to assure that a copy of the individual program or relevant portion of the program is sent to the regional review committee by the license holder. It is reasonable to require the license holder to provide only that portion of the individual program plan which relates to the substantial change in the controlled procedure because there may be a number of individual programs and/or lengthy plans that are not directly related to the use of a controlled procedure. Only that portion of the individual program plan which addresses the use of a controlled procedure is necessary since the regional review committee's review will be limited in scope to the use of aversive and deprivation procedures. The case manager duties identified in this subpart have been deleted because they are identified in both subparts 2 and 4.

PART 9525.2760 REQUIREMENTS FOR INDIVIDUAL PROGRAM PLANS PROPOSING USE OF A CONTROLLED PROCEDURE.

Subpart 2. **Assessment information.**

Item C. Amendment of item C of this subpart is necessary to clarify that assessment is required before and after the determination to include provisions for the use of a controlled procedure in an individual program plan. Under the current rule language, a number of persons requesting clarification in this area have interpreted this subpart as requiring only data collection prior to the implementation of the procedure. It is reasonable to require that the assessment be conducted on a more regular basis in order to provide a measurement of the effectiveness of procedures being used. It is reasonable to amend rules to clarify areas of confusion in order to facilitate compliance with the requirements.

It is necessary and reasonable to require a baseline measurement of the target behavior for increase and decrease or elimination due to the need to have an understanding of the person's target behavior which you wish to treat. For example, it would be helpful to know what the rates of a person's expressive language are prior to implementation of a treatment which proposes to ignore other expressive language (i.e., verbal abuse and swearing). As the example above illustrates, you want to be in a position of having information available which provides you with

as much certainty as possible that your treatment is not serving to decrease appropriate expressive language. Without this baseline information of the target behavior for increase you will not know what effect your treatment is having. It is very difficult to predict treatment outcome without measurable and observable data collected prior to treatment which must include target behaviors for increase, decrease or elimination.

Subpart 3. **Review of service plan.** It is necessary to delete this subpart because this provision has been incorporated into part 9525.2750, subpart 1 as amended. It is reasonable to move and delete rule provisions to improve the readability of the rule as a whole.

Subpart 4. **Review and content standards.**

Item A. It is necessary to add item A to assure consistency with federal regulations. The Code of Federal Regulations, title 42, section 483.440 (c)(5)(vi) requires that the individual program plan must include provision for the appropriate expression of behavior and the replacement of inappropriate behavior, if applicable, with behavior that is adaptive. Further, requiring identification of objectives designed to develop or enhance the adaptive behavior is necessary and reasonable because it is consistent with the state of the art philosophy of behavior management. In a 1990 article addressing the use of a nonaversive approach to behavior management, Horner et al. characterize nonaversive behavior management as emphasizing "...positive procedures that educate and promote the development of adaptive repertoires." *Toward a Technology of "Nonaversive" Behavioral Support*, Journal of the Association for Persons with Severe Handicaps, 1990, vol. 15, No. 3, page 125.

Further, according to Horner et al., the teaching of adaptive behavior "...focuses on defining the behavioral "function" of challenging behaviors and teaching the individual socially acceptable ways of achieving that function." Id. at 127.

In a recent article, Fredda Brown points out that:

> Recent efforts to reduce challenging behaviors have focused on assessment of the variables that functionally control behavior and the development of interventions designed to gain outcomes that are functionally equivalent to the problem behaviors.

Creative Daily Scheduling: A Nonintrusive Approach to Challenging Behaviors in Community Residences, Journal of the Association for Persons with Severe Handicaps, 1991, Vol. 6, No. 2, page 76.

Based on the foregoing literature published by experts in the field of behavior management, it is reasonable to require that the individual program plan address the development of adaptive behaviors.

During their review of plans, regional review committee members have found that the plans do not focus on alternative skill enhancement. During the past decade, the emphasis on behavior reduction has overshadowed skill acquisition.

In another recent article, Carr, Robinson, Taylor, and Carlson, recommended that attention must be given to replacement of behavior with the emphasis on adaptive skill acquisition See, *Positive Approaches to the Treatment of Severe Behavior Problems in Persons with Developmental Disabilities: A Review and Analysis of Reinforcement and Stimulus-Based Procedures*, TASH, Monograph No. 4, 1991. In addition, the Council for Children with Behavioral Disorders recommended that in cases where behavior is to be reduced, competing or alternative behaviors to be strengthened should be selected which may serve as a replacement for the inappropriate behavior. *Policy Statement on Behaviorally Disordered Children's Rights to Appropriate and Effective Behavior Reduction Procedures*.

In the review of state regulations by Morgan, et al.,(supra), it was found that comprehensive standards included an emphasis on the use of positive reinforcement for specific and functional behaviors when other behaviors are targeted to be decreased.

As stated above in the need and reasonableness for part 9525.2710, subpart 16, the definition of "individual program plan" is consistent with the plan requirements under Code of Federal Regulations, title 42, section 483.440 (c). It is reasonable to include the provision contained in item A in this subpart rather than in the general definition of "individual program plan" in part 9525.2710, subpart 16 because this subpart specifically pertains to individual program plans which address target behaviors and the proposed use of a controlled procedure. The addition of item A necessitates the relettering of items B to I.

Item B. It is both necessary and reasonable to specify that objectives designed to reduce or eliminate the target behavior of the person be included into the individual program plan for clarification. Numerous questions have been asked by interdisciplinary team members regarding the need to include objectives into the individual program plan. Separating the objectives into two distinct requirements should eliminate past confusion. Further, this change is consistent with part 9525.2760, subpart 2, (Assessment Information) which also requires both target behaviors for increase and decrease/elimination be measured prior to treatment.

Item C. It is both necessary and reasonable to specify that strategies must included into the individual program plan which serve to increase functional, adaptive replacement behavior to facilitate increased compliance. As stated earlier, this lack of attention on the part of the interdisciplinary team represents the most problematic part of compliance with parts 9525.2700 to 9525.2810. Regional review committee members have identified numerous individual program plans which have failed to promote the enhancement or acquisition of functional behavior which will serve to replace challenging behavior. Individual program plans often appear to include the strategy for skill acquisition as a afterthought. This amendment is reasonable because it assures that adaptive skill acquisition is an integral part of planning for the person.

Item D. It is both necessary and reasonable to delineate those strategies which must be included into the individual program plan which serve to decrease target behavior to distinguish this component from item C above. The identification of strategies to decrease certain aspects of the person's behavior is a separate component from the skill enhancement strategy because the approach will be different.

Item E. It is both necessary and reasonable to determine the dates when the plan will begin and the projected dates when targets will be met to facilitate coordination of the behavioral component of the individual program plan. This information will be extremely helpful to the interdisciplinary team in planning for implementation, monitoring, review and in obtaining reauthorization.

Item F. This amendment is necessary to reorder the items in this subpart. It is reasonable to reorganize rule provisions to maximize understanding of the rule.

Item G. This amendment is necessary and reasonable for the reasons specified in item F above.

Item H. This amendment represents a reordering of the rule. It is reasonable to add the word "unexpected" in order to require the documentation of those side effects which are unforeseen. This amendment is reasonable because it affords increased protection of the person's health and safety.

Item I. It is necessary to delete the current language in item I since Minnesota Statutes, section 256B.092 no longer requires an individual habilitation plan. It is reasonable to update rules as necessary to delete language which is obsolete. The requirements contained in item I is the same as that previously found in item B of this part. The items have been renumbered to accomplish the reformatting of this part.

Item J. It is both necessary and reasonable to ensure that implementation of individual program plans which include controlled procedures will be coordinated with other service agencies. Persons with mental retardation or related conditions do not just exhibit behavior in any one environment, thus it is necessary to coordinate implementation between those providing services. It is extremely important that service providers discuss implementation and describe how implementation will occur in different environments. This provision does not require that individual program plans be alike in different agencies, however it is expected that differences in plans will be recognized and documented so providers will be consistent with their approaches and be knowledgeable with respect to what one another is doing in terms of programming for the person.

Item K. It is both necessary and reasonable to ensure that implementation of the individual plan incorporates the family and friends. This is based on the fact that family members and friends significantly impact service delivery. As stated before, consistency is necessary to ensure a coordinated approach that is also integrated. This amendment is reasonable because integration includes implementation when people visit family and friends.

Item L. The requirements contained in item L as amended, are necessary to specify a mandatory termination date and standards for reauthorization of controlled procedures. It is reasonable to establish such standards due to the highly intrusive nature of controlled procedures.

It is reasonable to change the limitation on the termination date from 90 days to 365 days to be consistent with amendments made to part 9525.2780, subpart 2. During the process of obtaining input from the Regional Review Committees regarding proposed amendments to parts 9525.2700 to 9525.2810, members indicated that while 90 days is philosophically more desirable in terms of ensuring support for program continuance by the person or the person's legal representative, there was a general recognition that greater flexibility is needed when considering termination and reauthorization dates. Members have listened to complaints from case managers, parents and providers who have indicated that the current 90-day authorization period may, in some cases, be too short and is unworkable, and in others too long. A number of committee members were concerned that the current rule provision is not being complied with or only marginally attended to due to unrealistic timelines which do not reflect individualization. As alternative for more feasible reauthorization periods, the consensus among members was a recommendation that the periods be individualized, but should never exceed 365 days.

Tailoring the time to the individual needs of the person was viewed by the committee as being the primary objective of the

amendment. It is important to note that parents or guardians can still withdraw consent at will and can request reauthorization in intervals they feel warranted. Continued protection to the person is assured through this amendment which requires that reauthorization shall be obtained at intervals as identified in the individual service plan and eliminates the current 90-day reauthorization period. Allowing the person or the person's legal representative to determine and identify the appropriate reauthorization period in the person's individual program plan, results in a reauthorization period which is based on the individual needs of the person as well as the consideration of other factors which are unique to this person.

It is important to note that not one program has been submitted to the Regional Review Committee which utilized controlled procedures terminated before 90 days. This may illustrate that legally authorized representatives and other interdisciplinary team members do not take into consideration more frequent termination and reauthorization time periods.

Amendment of this item is further necessary and reasonable to assure consistency with other provisions of parts 9525.2700 to 9525.2810.

Subpart 5. **Monitoring the individual program plan.** It is necessary to amend this subpart to implement statutory requirements. As stated earlier in this statement of need and reasonableness, an individual habilitation plan is no longer required pursuant to 1990 and 1991 amendments to Minnesota Statutes, section 256B.092. Section 256B.092 now requires that the individual service plan must identify the need for an individual program plan and that if a need for individual program plans is identified, the case manager shall assure that the individual program plans are developed by the providers. It is reasonable to delete reference to the obsolete rule part and to substitute reference to the current statutory requirement to assure this subpart is consistent with statute.

Subpart 6. **Documenting informed consent.** It is necessary to amend this subpart by deleting the reference to part 9525.2780, subpart 6 because the language to which the cite is referring has been deleted from the rule. The need and reasonableness of this amendment is stated further in part 9525.2780, subpart 6 of this statement of need and reasonableness.

PART 9525.2770 EMERGENCY USE OF CONTROLLED PROCEDURES

Subpart 1. **General requirement.** Amendment of this subpart is necessary to clarify that controlled procedures must meet the general requirements governing their use unless they are identified as permitted as emergency use under this part. It is reasonable to add the phrase emergency use to make it clear that

the requirements under subparts 2 through 6 must be met for the procedure to be deemed an emergency.

Subpart 2. **Criteria for emergency use.**

Item D. It is necessary to delete this item due to its restrictiveness and harmful potential. If a person exhibits a behavior which requires an emergency controlled procedure to be implemented, the current language would not allow a second emergency controlled procedure to be implemented within 90 days of the first, even if there is a threat of injury to the person or others. Elimination of this language is reasonable since it will serve to protect persons from harm by allowing use of procedures which may be necessary without respect to timing. Since the other requirements for use of emergency controlled procedures must still be met, no increased risk of excessive use of these procedures exists.

Subpart 3. **Time limits on emergency use.** It is necessary to repeal subpart 3 because the requirements regarding time limits on emergency use of controlled procedures have been moved to subpart 6 as amended. This language defines time limits for emergency use of controlled procedures and moving this language to subpart 6 would place this language within the same subpart as other time limits for emergency use of controlled procedures referred to in these rule parts. It is reasonable to reorganize rules to provide clarification and easier reading.

Subpart 4. **Authorization of emergency use.** It is necessary and reasonable to repeal the language in this subpart since many service providers governed by parts 9525.2700 to 9525.2810 do not have authorized staff available 24 hours a day. It is often impossible to get authorization prior to implementation of an emergency controlled procedure, even for service providers with 24 hour on-duty authorized staff, due to the nature of emergency situations.

Regional Review Committee members have found by reviewing data obtained from Emergency Use Reports, that authorization prior to emergency use is not an effective means to ensure proper implementation of a controlled procedure. Comments made on forms suggest that in some cases, delays were made due to the need to obtain authorization prior to the use of a controlled procedure. These delays have placed persons as well as property in jeopardy of serious injury or damage. Comments made by parents, case managers, advocates, license holders, and consultants strongly suggest that authorization be deleted from the rule and that the emphasis be placed on training prior to implementation of emergency procedures. Findings by committee members support this and in addition propose under subparts 5 and 6 that the license holder's policies must reflect training and review by knowledgeable staff with experience in behavior management. It

is reasonable to delete this language so as not to hinder responses to emergencies.

Subpart 5. **Written policy.** It is necessary to amend this subpart by replacing the term "facility" with "license holder" to assure compliance with statute by extending applicability to licensed services as well as facilities. Minnesota Statutes, section 245.825, subdivision 1 requires that the rules governing the use of aversive and deprivation procedures apply to all licensed facilities and licensed services serving persons with mental retardation or related conditions (emphasis added). This change in terminology occurs in items A, C and D of this part. This amendment is further necessary and reasonable for the reasons set forth in part 9525.2710, subpart 21.

Items B and C (deletion of current language). It is necessary to delete the current language in these items because the requirements have been moved to subpart 6. It is necessary and reasonable to delete this language from this subpart to provide for more efficient organization of the rule requirements.

Item B (as amended). This language change is necessary to clarify that the facility's or service's written policy for emergency use must include the reporting and reviewing procedures listed in subpart 6 of this part. It is reasonable to require that the procedures in subpart 6 be written so that staff members are able to read these procedures and become aware of their responsibilities according to the procedures prior to the implementation of an emergency controlled procedure.

In the *Non-Aversive Treatment Manual*, distributed by Robert Horner, Ph.D., Rick Albin, Ph.D. and Rob O'Neill, Ph.D, which has been used by the Department as a reference for training purposes, emphasis is given to the development of emergency use policies which includes reporting and review procedures. Policies and resulting training regarding the emergency use of controlled procedures serve to educate staff on the use of non-aversive techniques first, as well as the use of more intrusive techniques and proper reporting and review. Treatment is often based on information gained from reports, thus it is imperative that data be correctly entered.

Item D. It is necessary and reasonable to replace the word "assigned" with "permitted" to clarify the license holder's responsibility to provide training. The term "permitted" better characterizes the responsibility of the license holder to provide training to a staff member before they can implement a controlled procedure. This provision is reasonable because it protects the client by assuring that in the event use of a controlled procedure is necessary, the staff person(s) implementing the procedure has received training in its use.
This amendment is further reasonable because it also provider

increased flexibility to license holders rather by not requiring prior authorization.

Subpart 6. **Reporting and reviewing emergency use**. This amendment is necessary to clarify the license holder's responsibilities. It is reasonable to specify that this provision applies to license holders governed by parts 9525.2700 to 9525.2810 to assure compliance with Minnesota Statutes, section 245.825 as discussed in subpart 5 above as well as to give notice to providers of the applicability of this subpart.

It is necessary to add the requirement that a license holder designate a staff member to review, document and report the use of controlled procedures to facilitate compliance with the requirements set forth in items A to D. The designation of a QMRP level staff person provides for monitoring of the license holder's emergency use of controlled procedures in a knowledgeable and consistent manner.

Item A. Amendment of this item is necessary to establish a better method for reporting the use of emergency controlled procedures. It is necessary and reasonable to require the staff member who implemented the procedure to write the report because they were involved in and directly observed the circumstances necessitating the use of a controlled procedure. The current language requires the staff member in charge to write the report, without required input from the staff member who actually implemented the procedure. It is reasonable to require that the staff member who implemented the procedure write the report since this person would have first hand knowledge of the incident and the steps taken.

It is reasonable to further require that the report then be reviewed by the designated staff member since that person's monitoring function requires that they be informed of all such actions and procedures which take place. It is necessary and reasonable to delete subitem 7 to reflect the change in procedure for reporting emergency controlled procedures which is explained in the above paragraph. Since the process explained above now requires that the person who implemented the procedure write the report, it is no longer necessary to require that the names of persons who authorized the procedure be listed on the report.

Item B. It is necessary and reasonable to require that a designated staff member review reports of emergency controlled procedures because this oversight is essential to safeguard the clients as well as to the adequate supervision and management of services. It is reasonable to require that the report be reviewed within 7 calendar days because a review must be conducted in a timely manner to allow for prompt evaluation of actions taken. It is reasonable to require that the report be submitted to the case manager and the expanded interdisciplinary

team so that they are provided with complete information upon which to base decisions regarding planning and programming for the person's behavioral needs, such as whether a controlled procedure should be included in an individual program plan. Due to the highly intrusive nature of these procedures, it is further reasonable to require that when the emergency use involved manual restraint, mechanical restraint or the use of exclusionary time-out as specified in this item, that the report be sent to the internal review committee rather than the regional review committee. As Morgan, et al., supra, found in their review of state standards, those standards considered to be comprehensive included components which required frequent and knowledgeable review of emergency procedures. Emergency procedure reports should be reviewed by internal review committees regularly rather than by a state-wide regional review committee which meets only quarterly. Internal review committees are in a position to direct license holder policy in addition to prompting reaction to individual cases. Distribution of emergency procedure reports should serve to keep members of both the expanded interdisciplinary team and the internal review committee informed and involved in the decision making process.

Item C. It is necessary and reasonable to increase the timeline in which the case manger is required to confer with the members of the expanded interdisciplinary team from five to seven calendar days to provide more feasible timelines while maintaining protection of the client. The criteria specified in subitems (1) and (2) are reasonable because emphasis will be placed on the analysis of the function the behavior served. By first spending the time needed to define the target behavior in observable and measurable terminology, identifying antecedent events and behavior functions controlled procedures may not be necessary. These actions serve to require the case manager and QMRP to both ask and answer questions which may provide clues to other less intrusive options including modification of the current individual program plan.

Item D. It is necessary to amend this item to provide more realistic timelines which can be met by license holders, expanded interdisciplinary teams and case managers. It is necessary and reasonable to expand the timeline in which the expanded interdisciplinary team is to meet from 15 to 30 days from the date of the emergency use of the controlled procedure in those cases where it has been determined that the behavior should be addressed in the individual service plan, to provide more feasible timelines. Service providers, case managers and parents are generally not available on such short notice to prepare assessments, meet to discuss procedures, obtain informed consents and receive authorizations. The Department currently finds that only four percent of individual program plans containing provision for the use of a controlled procedure meet the 15 day time limit. Expanding these time requirements will facilitate

increased compliance. Most significantly, there is no perceived increased risk to persons receiving services imposed by the extension of either time limit. It is a reasonable extension to allow interdisciplinary team members the opportunity to properly meet all requirements of parts 9525.2700 to 9525.2810.

Emphasis should be placed on proper functional assessment and analysis as described in item C. This amendment is reasonable because increasing the time to meet will afford those conducting the assessments with the opportunity to have the results available for the expanded interdisciplinary team meeting. The results can than be discussed based on objective information. Again, the goal should not be conducting an assessment which will meet timelines, but rather conducting assessments that will yield helpful information in reasonable timelines.

Item E. It is necessary and reasonable to require that the controlled procedure and any changes to the adaptive skill acquisition portion of the plan be incorporated into the individual program plan within 15 days after the expanded interdisciplinary team meeting under item D to be consistent with the additional time afforded the expanded interdisciplinary team meeting in conducting the meeting identified in item D. It is expected that the expanded interdisciplinary team shall have assessment information available at the meeting and will be discussing less intrusive modifications to the current plan including the option of including a controlled procedure.

It is necessary and reasonable that the designated staff person document attempts to use other less restrictive alternatives to assure protection of the person's health and safety and personal integrity. According to Horner, et al, supra, the following two professional criteria are often defined regarding determining the appropriateness of any behavioral intervention.

> The first is than any behavioral intervention must be justified in balance with the benefit anticipated for the persons with disabilities. The level of intrusiveness should be in proportion to the magnitude of the anticipated gain. The second standard is that clinicians should use the least intrusive intervention option that can be logically be expected to be successful in a reasonable time period.

Non-Aversive Treatment Manual, 1990, page 129.

Horner, et al. go on to note the following two points:

> 1) This second standard often has led to guidelines requiring that less intrusive interventions be documented as ineffective before implementing significantly intrusive actions.

2) An important nuance of this standard is that the demand is *not* that all less intrusive interventions be tried, but that all less intrusive strategies that logic and current research indicate *may have an effect* should be attempted.

Id.

Feedback received from persons who attended the statewide informational sessions revealed that the use of emergency controlled procedures may become unnecessary by incorporating minor modifications into the current individual program plan including environmental manipulation.

Item F. It is necessary and reasonable to require that a summary of the expanded interdisciplinary team's determinations be added to the person's permanent record to ensure maintenance of an accurate record of the person's treatment. This requirement is further reasonable because it is consistent with federal and state regulations under the Code of Federal Regulations, title 42, section 483.410(c) and Minnesota Rules, parts 9525.0215 to 9525.0355, which establish standards for the maintenance of resident records for providers of residential services to persons with mental retardation or related conditions.

PART 9525.2780 REQUIREMENTS FOR OBTAINING INFORMED CONSENT

Subpart 1. **Definition.** It is necessary and reasonable to repeal this subpart since the definition of "substantial change" is now contained in the definitions part 9525.2710, subpart 33a.

Subpart 2. **When informed consent is required**. It is necessary and reasonable to delete the references to subpart 6 in this subpart because subpart 6 is being deleted from part 9525.2780. The need and reasonableness of this deletion is further specified in subpart 6 below.

It is necessary and reasonable to change the time period for obtaining informed consent from every 90 days to as frequently as requested by the legally authorized representative not to exceed 365 days in order to best meet the individual needs of the person with whom controlled procedures are being proposed.

Regional Review Committee members, case manager, parents, and a number of license holders have indicated to the Department that the current requirement of obtaining informed consent every 90 days does not provide for flexibility for obtaining informed consent based on the individual needs of the person. County case managers have frequently reported that the legally authorized representatives prefer that they have an opportunity to meet with team members and then make decisions regarding program continuation, rather than signing a form that comes every 90

days. The current practice of sending a form every 90 days may, in fact, diminish the opportunity to plan for information sharing between team members. Legally authorized representatives have stated that they would prefer to have pre-selected times set in the individual program plan which would service as a forum for discussion and an opportunity to voice concerns as well as praise, which could lead to consent.

By requiring that in no case shall informed consent exceed one year, the impractical burden will be alleviated while at the same time providing the protection and flexibility that is needed to meet the person's individual needs. Protection is afforded to the person by virtue of the limitation that the informed consent can not exceed one year. The flexibility is inherent in the provision that the legally authorized representative retains the authority to designate an alternative, shorter time period for obtaining informed consent in those situations where a shorter period appears to be in the best interest of the client based on their unique behavioral history and needs.

Individualization is required for treatment, support and supervision of services. Therefore, it is reasonable that consent be individualized. Parents and case managers reported to regional review committee members that, in some cases, they would favor consent requirements as frequent as every 30 days for controlled procedures that are very intrusive (i.e. four point mechanical restraint) and in other cases every year (i.e. exclusionary time out). Parents and case managers have expressed concern that the rule as currently written does not promote flexibility and that they should be in a position to make the final decision regarding the frequency in obtaining informed consent.

This process is described by Reed Martin in *Legal Challenges to Behavior Modification*, Research Press, 1980. In Chapter 3, Martin proposes that parents should be present with the persons with developmental disabilities as part of the concurrent or substitute consent process. Martin suggests that the process of consent be more formalized and that proper planning is essential for this important step.

Minnesota Rules, part 9525.0115 (Rule 185), also requires the case manager to determine the level of monitoring based on the level of need and other factors which might affect the type, amount, or frequency of services. This determination together with the development of the individual program plan with the full participation of the expanded interdisciplinary team would be the appropriate time to make a judgement regarding the frequency to be followed in obtaining informed consent. Reauthorization would be determined as a part of the pre-planned process which would include decisions based on data collection as part of the ongoing evaluation/assessment process.

Some advocates have felt that persons under public guardianship do not receive the same level of advocacy as persons under private guardianship. Data obtained by the Department dating back to 1987 does not provide evidence that the type of guardianship (i.e., public versus private) correlates with the number of controlled procedures, revisions or discontinuation of controlled procedures for wards or non-wards. unfortunately, the data does illustrate that interdisciplinary teams appear to be resistive in both revising and discontinuing controlled procedures. Informed consent appears to be a routine function which is lacking in importance. Therefore, it is reasonable to individualize the frequency in obtaining informed consent so as to provide specific pre-planned opportunities for information gathering, discussion and choice.

It is necessary and reasonable to specify the circumstances under which informed consent is required in order to clearly identify to those to whom the rule applies when informed consent must be obtained. Further amendment of this subpart is necessary and reasonable to assure consistency with other amendments made throughout parts 9525.2700 to 9525.2810, particularly part 9525.2760, subpart 6.

Subpart 3. **Authority to give consent.**

Item C. It is necessary and reasonable to amend item C by substituting the word "approved" for "authorized" to provide a more accurate statement. This provision is referring to the use of controlled procedures that have already been "authorized" by the rule. Accordingly, the term "approved" is more consistent with the action required under this subpart.

Subpart 4. **Information required to obtain informed consent.**

It is necessary to add item K in the reference of the first paragraph to be consistent with the amended rule organization. It is reasonable to update rules to reflect changes in lettering of items to assure accuracy.

Item I. It is necessary to delete the reference to subpart 6 because subpart 6 has been deleted from this part. The need and reasonableness for this deletion is stated in subpart 6 below.

Item J. Addition of item J is necessary to assure that adequate information is provided regarding the criteria that is used to determine whether continuation, modification, or termination of a controlled procedure is warranted. Requiring such criteria is reasonable because it protects the person by assuring that criteria exists upon which to base a determination of whether to continue, modify or terminate a procedure. Such a determination made without the consideration of adequate information may, in some instances, be contrary to the needs and well-being of the

person with whom the controlled procedure is being implemented.

Item K. It is necessary and reasonable to amend this item to be consistent with the time requirement of 365 days under subpart 2. This amendment is further reasonable because it incorporates the same type of flexibility that allows for an alternative time period as provided under subpart 2. It is necessary and reasonable to add provision for the legal representative to request and receive information regarding the use of a controlled procedure to assure that the legal representative has adequate information upon which to base their decision of whether to grant consent to a procedure. The provision of adequate information empowers the legal representative and facilitates a more truly informed decision.

It is also reasonable to send a copy of the most recently signed informed consent form at least quarterly to the legally authorized representative so as to insure awareness of the currently implemented controlled procedure(s). It is also reasonable that the county case manager continue to be responsible for obtaining informed consent and sending information including copies of signed consent forms to the legally authorized representative in order to ensure voluntariness.

Subpart 5. **Consent for a substantial change in procedures.** It is necessary and reasonable to replace the word "authorizes" with the phrase "has approved" because this is a more accurate statement of the interdisciplinary team's role.

Subpart 6. **Conditions governing implementation when consent is refused.** It is necessary to repeal subpart 6 because the current language is contrary to statute. Minnesota Statutes, section 253B.03, subdivision 6 as amended states that:

> A patient with mental retardation or the patient's guardian has the right to give or withhold consent before: (1) the implementation of any aversive or deprivation procedure except for emergency procedures permitted in rules of the commissioner under section 245.825.

Subpart 6 of this part as adopted provides a method for use of aversive and deprivation procedures after consent is refused or withdrawn. It is reasonable to delete rule provisions that are contrary to current statutory requirements to facilitate compliance with state law.

Subpart 7. **Appeals.** It is necessary to amend this subpart to clarify the appeals provisions applicable to the use of controlled procedures under parts 9525.2700 to 9525.2810. The amendments clarify the circumstances under which the use of a controlled procedure may be appealed under Minnesota Statutes,

section 256.045. The basis for bringing an appeal under section 256.045, subdivision 4 for the use of a controlled procedure, would be in the context of case management services provided under parts 9525.0015 to 9525.0165.

An individual service plan is required for each person receiving case management services under Minnesota Statutes, section 256B.092. Minnesota Statutes 1991, section 256B.092, subdivision 1b sets forth the requirements of the individual services plan. The person's service needs, including behavioral needs, must be identified in the individual service plan. Further, an individual program plan is required under Minnesota Statutes, section 256B.092, subdivision 1c, if the individual service plan identifies the need for individual program plans. Case management services, including the requirements for the individual service plan are governed by parts 9525.0015 to 9525.0165. The Department is currently amending Rule 185 to implement the statutory changes made during the 1990 and 1991 sessions, including amendments regarding the individual service plan and the individual program plan as discussed above. Accordingly, where the use of controlled procedures under parts 9525.2700 to 9525.2810 is included in the individual program plan, this use is directly related to the provision of case management services under parts 9525.2700 to 9525.2810 and thus, is appealable as a case management service issue under Minnesota Statutes, section 256.045.

PART 9525.2790 REGIONAL REVIEW COMMITTEES

Subpart 2. **Membership.** Amendments in this subpart are necessary to incorporate licensed services into this subpart along with licensed facilities, as required by Minnesota Statutes, section 245.825, subdivision 1. The need and reasonableness of these amendments are discussed further in the definition of "license holder" under part 9525.2710, subpart 21.

PART 9525.2800 REPORTING NONCOMPLIANCE

The introductory language for this part is being deleted and appropriately titled subparts are being added for clarification and better organization to make it easier for readers to follow.

Subpart 1. **Required reporting.** It is necessary to amend part 9525.2800 by adding subpart 1 to facilitate compliance with statute. Minnesota Statutes, section 626.556 governs the reporting of maltreatment of minors and Minnesota Statutes, section 626.557 governs the reporting of maltreatment of vulnerable adults. The amendments in this subpart are reasonable because they clarify who must report unauthorized use of aversive and deprivation procedures by virtue of their status as a

mandated reporter under statute.

It is necessary to define the term "unauthorized use of an aversive or deprivation procedure" in order to inform mandated reporters about those circumstances which constitute an unauthorized use. The definition given is reasonable because it refers to all those actions which are specifically identified throughout parts 9525.2700 to 9525.2810 as being unauthorized.

Subpart 2. **Voluntary reporting**. It is necessary to add this language to clarify what is meant by "voluntary reporting". It is reasonable to define voluntary reporting as that reporting which is not mandatory according to statute. This provision notifies the reader that persons other than mandated reports also may reported suspected noncompliance with parts 9525.2700 to 9525.2810. It is reasonable to include a provision for voluntary reporting in addition to mandated reporting to further protect vulnerable adults and minors.

Items A and B: The amendments made to these items are necessary and reasonable to clarify what types of complaints should be reported, to whom complaints should be reported and to distinguish license holder complaints under item A from nursing home complaints under item B. It is necessary to distinguish complaints regarding license holders from those regarding nursing homes because license holders are governed by rule of the Department of Human Services, while nursing homes are under the jurisdiction of the Department of Health. This distinction is further important because parts 9525.2700 to 9525.2810 are not applicable to nursing homes since they are not licensed by the Commissioner of Human Services.

The revisions made to the addresses are necessary and reasonable to identify the correct mailing addresses for the Department of Human Services and the Department of Health respectively since these addresses have changed since the original promulgation of this rule.

PART 9525.2810 PENALTY FOR NONCOMPLIANCE

It is necessary to amend this part to provide notice to those governed by parts 9525.2700 to 9525.2810 of the statutory penalties for failure to comply. Minnesota Statutes, section 245A.06, subdivision 1 provides that:

> (a) If the commissioner finds that the applicant or license holder has failed to comply with an applicable law or rule and this failure does not imminently endanger the health, safety, or rights of the persons served by the program, the commissioner may issue a correction order to the applicant or license holder.

Minnesota Statutes, section 245A.07 further provides that:

> In addition to ordering forfeiture of fines, the commissioner may propose to suspend, revoke, or make probationary the license or secure an injunction against the continuing operation of the program of a license holder who does not comply with applicable law or rule.

It is reasonable to reference chapter 245A because this gives notice to the license holders governed by parts 9525.2700 to 9525.2810 of the ramifications of noncompliance while at the same time contributes to the brevity of the rule by simply citing the statutory reference.

EXPERT WITNESSES

If this rule is heard in a public hearing, the Department does not intend to have outside expert witnesses testify on its behalf.

SMALL BUSINESSES

The Department has considered the small business consideration requirements under Minnesota Statutes, section 14.115. The proposed amendments implement the requirements under Minnesota Statutes, section 245.825. Adoption of less stringent requirements for small businesses would be contrary to the statutory objectives that are the basis for the proposed amendments. In addition, the agency believes that Minnesota Statutes, section 14.115 does not apply to these rules under the exclusion in Minnesota Statutes, section 14.115, subdivision 7, clause (2).

AGRICULTURAL LAND

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

CONCLUSIONS

The foregoing statements address the need and reasonableness of the proposed amendments to parts 9525.2700 to 9525.2810. The necessity and reasonableness of the proposed rule amendments are supported by requirements of Minnesota Statutes and rule, by the Code of Federal Regulations, and by the research cited in this Statement of Need and Reasonableness.

Dated: 1-29-93

Natalie Hass Steffen, COMMISSIONER
for Department of Human Services

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