11/17/95

STATE OF MINNESOTA

DEPARTMENT OF HUMAN SERVICES

IN THE MATTER OF THE PROPOSED AMENDMENT OF DEPARTMENT OF HUMAN SERVICES RULE PARTS 9560.0210-9560.0234, GOVERNING PROTECTIVE SERVICES FOR CHILDREN

STATEMENT OF NEED AND REASONABLENESS

Minnesota Rules, parts 9560.0210-9560.0234 govern Minnesota's local human service agencies in providing protective services to children. The primary reason for revision of this rule is the Legislature's statutory directive ordering the Department of Human Services ("Department") to promulgate criteria for removal of children from their homes. See Minnesota Statutes, section 257.072, subdivision 9.

The department convened an advisory committee of 51 persons, six alternates, and six other "interested persons" (see attached list) to work on criteria for removal of children and also on standards for conducting searches for relatives and standards for approval of relatives providing foster care. The standards for search for relatives are in a separate draft amendment of Minnesota Rules, parts 9560.0500-9560.0670. The committee met monthly from October 1993 - January 1995. The subcommittees met monthly from June 1994 - December 1994.

A subcommittee was formed to work exclusively on criteria for removal and return of children from their homes. The criteria have been placed in a new part, Minnesota Rules, part 9560.0221.

Subpart 1

Consensus was achieved fairly quickly on subpart 1. The committee agreed that the local agency first must try solutions other than removal of a child from the home. Removing a child from the home is often traumatic to the child, even to a child in an abusive home. This subpart requires the local agency to try solutions less drastic than removing the child in order to mitigate threats to the safety or well-being of the child.

Item A requires the local agency to follow both the procedures in subpart 1 and the procedures in subpart 3. The Department has received complaints that local agencies sometimes fail to follow the federal Indian Child Welfare Act and the Minnesota Indian Family Preservation Act. The Department is committed to ensuring that the law governing Indian children is followed.

Item B is from Minnesota Statutes, section 260.012(a) and (c).

Item C requires local agencies to evaluate whether removal of an alleged perpetrator is possible. This is consistent with existing requirements and removal of the alleged perpetrator is preferred because removal is more traumatic for children, who perceive their removal from a familiar home as punishment for being "bad."

Item D requires local agencies to consider whether a child might be safe at home even if an alleged perpetrator cannot be removed. The department believes that, as long as the child's safety can be assured, it is in the child's best interest to remain in the home.

Item E requires the local agency to inform the child and the child's caregiver of services to prevent removal of the child. These services include a continuum of family preservation services (Minnesota Statutes, chapter 256F), crisis intervention, respite care, crisis nurseries, counseling, parenting classes, and numerous other services.

Subpart 2 was the source of some disagreement among committee members.

The subcommittee and committee agreed to draft language stating that an emergency would exist if the actions in subpart 1 did not ensure the child's safety and if the child was not receiving a minimum level of care. There was much discussion about defining the minimum level of care. Committee members agreed that "minimum level of care" would require, at the least, food, clothing, shelter, and physical safety. Some committee members argued for inclusion of emotional support but most agreed that while a threat to emotional well-being might well require non-emergency removal, it may not constitute an emergency consistent with statutory provisions regarding imminent harm.

The committee then agreed to adopt language from Minnesota Statutes, section 260.015, subdivision 2a(3), so that the minimum level of care would mean necessary food, clothing, shelter, education, or other required care for the child's physical or mental health or morals.

Upon further review, however, department personnel felt that lack of education or a threat to the child's "morals" may not constitute an emergency placing the child in imminent danger. The department deleted the reference to "minimum level of care" so that now, under item A, an emergency exists if the actions in subpart 1 do not ensure the child's safety and the child is in imminent danger, which is consistent with Minnesota Statutes, section 260.172.

There was also much debate as to whether, if an emergency existed and the actions in subpart 1 did not ensure the child's safety,

the agencies must or may remove the child. The committee was evenly divided on the issue and agreed to let the department decide. Department personnel believe that if services in subpart 1 have been offered and the child is still in danger, then removal is the only solution. Therefore, removal is mandatory in an emergency but only if the services in subpart 1 have been offered.

Item B, non-emergency removal, caused the most controversy at committee meetings. The subcommittee agreed that rather than enumerate criteria describing nonemergency situations, it would be best to refer to the statute governing protection of children, Minnesota Statutes, section 260.015. The statute itself enumerates quite detailed and lengthy criteria, and therefore, the subcommittee felt, it was unnecessary to come up with new criteria for the rule.

Several members on the large committee, however, disagreed. The issue of lack of emotional support as a reason for nonemergency removal of children again came up and the committee did not come to a consensus on this issue. Committee members voted to adopt a draft submitted by a staff person at the University of Minnesota's Institute of Child Development.

Upon review, however, department personnel concluded that the University of Minnesota draft is broader and less prescriptive than the governing statute, Minnesota Statutes, section 260.015. A rule that is less prescriptive than the statute would be in conflict with the statute. Therefore, the department decided not to incorporate the University of Minnesota draft into the rule. The department also concluded that citing the statutory criteria word-for-word would be unnecessarily duplicative. The department therefore decided that the rule should contain a simple reference to the governing statute, Minnesota Statutes, section 260.015, subdivision 2a.

This statute lists 13 grounds on which a child could be found to be in need of protection and services, and therefore, by extension, possibly in need of placement in a foster home.

Subpart 3 governs the removal of Indian children. Most of this subpart is taken directly from the governing federal statute, the Indian Child Welfare Act, and from the Minnesota Indian Family Preservation Act, Minnesota Statutes, sections 257.35-257.3579. This draft subpart is based on a draft put together by Jan Werness, an attorney with Southern Minnesota Regional Legal Services (SMRLS). This subpart was closely reviewed by Ann Ahlstrom, Assistant Hennepin County Attorney, and by Mark D. Fiddler, attorney, Indian Child Welfare Law Center.

Item A is from 25 U.S.C. 1922, which permits emergency removal of Indian children temporarily or permanently located off the

reservation. That statute also requires return of the child when removal is no longer necessary "to prevent imminent physical damage or harm to the child."

Item B is from Minnesota Statutes, section 257.352, subdivision 2, which requires notice to the tribe if the agency foresees continued involvement with the child for more than 30 days. The SMRLS draft would have required notification when there is "any involvement" with an Indian child. This requirement, both broader and more restrictive than the statute, is not consistent with state and federal law, and, therefore, the department decided to stay with the wording of the state statute.

Item C is based on 25 U.S.C. 1911, which gives Indian tribes exclusive jurisdiction over any child custody proceedings involving an Indian child who resides or is domiciled on an Indian reservation, and on 25 U.S.C. 1922, which requires transfer of the child to the parent or to the Indian tribe when an emergency no longer exists.

The department's interpretation of the federal law is that the tribes have exclusive jurisdiction over nonemergency removals of Indian children, and therefore the proposed rule requires agencies to refer nonemergency situations involving Indian children to the tribe.

Item D governs the foster care placement of Indian children who do not reside on or are not domiciled within an Indian reservation. The requirement of "clear and convincing evidence" and a showing of "serious emotional or physical damage" are from 25 U.S.C. 1912(e). The SMRLS draft required such evidence for all Indian children, whereas the federal statute seems to require such evidence only for Indian children not residing on or domiciled within an Indian reservation. Therefore, on this point, the department did not accept the SMRLS version but instead tracked the wording of the statute.

Item E requires the testimony of "qualified expert witnesses" as provided in 25 U.S.c. 1913(e). The description of qualified expert witnesses is from guidelines issued by the Bureau of Indian Affairs, in the Federal Register, Vol. 44, No. 228, D4, p. 67593, Nov. 26, 1979. The draft rule tracks the federal guidelines a little more closely than the SMRLS draft.

In the event of a hearing, the department will not present expert witnesses from outside the department.

In preparing the proposed repeals, the department considered the requirements of Minnesota Statutes, section 14.115, but believes that any impact on small business falls within the exemptions in Minnesota Statutes, section 14.115, subdivision 7(2), (3).

Because the proposed rule does not have a direct and substantial adverse impact on agricultural land in Minnesota, Minnesota Statutes, section 14.11, subdivision 2, is not applicable.

11/22/95
Date

MARIA R. GOMEZ
Commissioner