

Minnesota Attorney General: Administrative Rules Proceedings

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STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : Arthur E. Noot
Commissioner of Public Welfare
Attn. Kenneth Kohnstamm

DATE: January 30, 1981

FROM : H. Theodore Grindal HTG
Special Assistant
Attorney General

PHONE: 6-1288

SUBJECT: In the Matter of the Proposed Adoption of Rule 16 (12 MCAR § 2.016), Formerly Proposed as Rule 20 of the Department of Public Welfare Governing the Administration of Specified Therapies to State Hospital Patients

Enclosed herewith are the rules you have submitted for approval. These rules have been approved by this office and filed with the Secretary of State. Please note that they have not been filed with the State Register; this must be done promptly by your agency.

Upon receipt and before transmittal to your agency, however, it is important that you recheck these rules as to:

1. Affixation of stamps of the Attorney General and Secretary of State to the last page of the rules;

2. Coverage by these stamps of all rules submitted; and

3. Inclusion of all pages to the rules in the approved set.

If you have any questions in this regard please contact me.

Our File No. 668

RULE REVIEW CHECKLIST

DATE RULE RECEIVED 1.16.81
DATE FOR REVIEW 1.26.81
DATE DUE 2.5.81

Adopted w/a hearing X
Adopted w/o a hearing _____
Temporary rule _____

Approved 1/26/81 Disapproved _____ Returned to Agency _____

Resubmitted _____ Due _____
Approved _____ Disapproved _____ Returned to Agency _____

Date filed w/Secretary of State _____

✓ Rule as Adopted

✓ Rule as Proposed

✓ Order Adopting

✓ Notice of Intent to Solicit Outside Opinion

✓ Order for rulemaking
9.20.79 Date of Hearing

N/A Certificate of Board's Authorizing Resolution

✓ Notice of rulemaking
? Sufficiency See HE 13 re statutory authority

✓ Affidavit of Mailing Notice of rulemaking
✓ 8.15.79 At least 30 days prior to hearing/adoption
Affidavit of Additional Mailing

✓ ~~Mailing list~~ Certificate of Secy State, Receipt of List

✓ Publication in State Register
8.13.79 At least 30/~~20~~ days prior to hearing/~~adoption~~

✓ Hearing Examiner's Report

✓ Chief Hearing Examiner's Report(s) (dated 1.16.81 but uses pre-Minn Laws 80, Ch. 615 form of approval memo.
~~Approving H.E.'s Report~~
~~Approving agency action~~

✓ Agency's Findings of Fact combined with Order Adopting

N/A LCRAR Report or agency Affidavit

N/A Certificate of Board's Resolution Adopting Rules

✓ Order Approving Incorporation by Reference

✓ Statement of Need and Reasonableness

N/A Petition for Adoption of a Rule

✓ Record (includes transcript or tape, exhibits, comments received by agency, requests for a hearing, and other relevant materials)

✓ Certificate of Compliance w/Rulemaking Procedures

___ Affidavit of Mailing Notice of Submission to Attorney General

___ Notice of Submission to the Attorney General

AG copy

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE ARTHUR E. NOOT

COMMISSIONER OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF RULE 16 (12 MCAR § 2.016), FORMERLY PROPOSED AS RULE 20, OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE ADMINISTRATION OF SPECIFIED THERAPIES TO STATE HOSPITAL PATIENTS

ORDER ADOPTING THE RULE

The above-entitled matter came on for hearing before Hearing Examiner Natalie L. Gaull on September 20, 1979, in the Auditorium Chapel of the Minnesota Veterans Home, Minneapolis, Minnesota, after proper notice was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose.

At said hearing, the proposed rule, as published at 4 State Register 140 (August 13, 1979) was considered. The following persons testified for the Department of Public Welfare: Ronald C. Young, M.D., Medical Director, Department of Public Welfare; Glen Duncan, M.D., Medical Director, Rochester State Hospital; John Fordice, Ph.D., Clinical Pharmacist, Anoka State Hospital; and Peter Fransway, Hennepin County Attorney's Office. The hearing continued until all interested groups and persons had an opportunity to be heard. Seven persons were present at the hearing, six spoke at the hearing, and approximately seven written comments were received by the Hearing Examiner prior to the close of the record.

Based upon all the records and proceedings, the Hearing Examiner made Findings of Fact, Conclusions and a Recommendation which are contained in the Report of the Hearing Examiner dated November 1, 1979. A copy of the Report accompanies this Order. Pursuant to Minn. Stat. § 15.0412, subd. 4 (1978) said Report was available to all affected persons for at least five days.

NOW THEREFORE, IT IS ORDERED, that the Findings, Conclusions and Recommendation of the Hearing Examiner are hereby adopted and incorporated herein. In addition, the Commissioner makes the following findings of fact. Numbers in parentheses refer to the paragraph of the Hearing Examiner's Report to which the Commissioner's finding relates.

FINDINGS OF FACT

1. (18) This rule pertaining to state hospital administration of specific therapies has been renumbered as Rule 16. A participant at the hearing indicated that the state hospitals also render treatment under the Minnesota Rules of Criminal Procedure §§ 20.01 and 20.02. The potential for confusing two "rule 20" procedures is averted by renumbering this rule. This does not constitute a substantial change.

2. (14,n.2) Paragraphs B through E of the rule as proposed had sections numbered, "1" but not "2." Paragraphs so numbered have been made introductory and subparagraphs have been renumbered accordingly. Bracketed citations are to the renumbered provisions.

3. (14) The Examiner urged the Department to make the rule as understandable as possible. Accordingly, the term "modalities" has been replaced by the term "methods." A definitional section, G, has been added. It defines, "functional neurosurgery (psychosurgery)", "convulsive therapy", "coma therapy", "aversive therapy", and "schedule II drugs." The definition of functional neurosurgery clarifies that a lobotomy is one such procedure.

4. (15) Paragraph C.1.a[C.1] was intended to refer to court orders. The modifier "court" has been added, as the Examiner recommended, to eliminate any potential confusion.

5. (15) The Commissioner has rejected the recommendation that he adopt the consent form developed by the American Psychiatric Association. This form was designed for different circumstances, namely the administration of one specific therapy (ECT) to persons not civilly committed. The Commissioner has also declined to append a consent form to the proposed rule. This would inhibit the Department from changing the form to reflect its experience and future medical developments.

The Commissioner also declines to adopt the recommendation that the Department pay for a second medical opinion as to the proposed treatment.[1/] The Department does not have the funds to pay for second opinions. The cost of second opinions will frequently exceed the cost of returning to court for authorization of treatment if the merits of the procedure are in doubt.

6. (15) The Commissioner adopts several of the Examiner's suggestions pertaining to informed consent. C.1.b-c[C.2-3]. Both provisions have been amended to make the signed consent accessible to the patient and the patient's representative. The representatives of mentally retarded patients will be informed in writing of their right to consult with others regarding the proposed medical procedure. This practice will insure that persons asked to give informal consent are encouraged to consult widely before making a decision.

A fifth section has been added to section C. to incorporate the Examiner's recommendation that minor patients be specifically addressed. The provision specifies that the regulated medical procedures cannot be administered to any minors, mentally retarded or otherwise, without judicial authorization. The Department, as a matter of policy, no longer permits parents or next of kin to commit minors without a hearing. This amendment is consistent with that policy and insures court review before the regulated procedures can be administered to a child.

7. (16) Section D of the proposed rule addresses the factors to be considered in determining the medical need for any of the regulated procedures. The sixth factor cited in Price has been added as recommended by the Examiner. [D.6.] Three of the factors have been amended to incorporate improvements suggested by the MCLU. These specify that the medical staff shall consider the predicted

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1/ The Examiner recommended second opinions, but did not find them to be prerequisite to the rule's reasonableness. Her report initially states, ". . .the Examiner finds that receipt of a second opinion is not. . . unreasonable. . ." (p. 6) Subsequently the necessity for a second opinion is referred to twice as a "suggestion". pp. 6, 9.

changes in the patient's behavior [D.1], the risks of the adverse side effects as compared with the potential benefits [D.2.], and whether less intrusive methods would secure the same benefits. [D.4]. The added specifity in these factors encourages a critical review of the proposed treatment and should further reduce any chance of a regulated procedure being administered unnecessarily.

8. (17) Section E. concerns the procedure used to apply to court for authorization to administer one of the regulated procedures. The proposed rule adopts the Examiner's recommendation that the petition for treatment request that the court appoint an attorney as guardian ad litem if legal counsel is not otherwise available to the patient. The practice in this regard varies between jurisdictions. Since the court will be appointing a representative of the patient, it is appropriate for the petition to recommend the specific kind of appointment to be made. However, the Commissioner rejects the Examiner's suggestion that he, "add permissive language which would allow the authorizing court to also appoint a separate attorney" in addition to a guardian ad litem. p. 9. It is beyond the scope of the proposed rule and the Department's authority to petition courts to make appointments that are not mandated by local court rules.

The financial responsibility for court hearings mandated by section E. has been clarified by tying it directly to Minn. Stat. § 256D.18, subd. 2 (1978).

In response to public comment two additional changes were made to section E. As requested by the Developmental Disabilities (D.D.) Council, the court petition may recite the findings of the hospital medical director in addition to those of the treating physician. The optional submission of additional medical findings is reasonable and not burdensome. As requested by Winona County, local welfare departments are referred to alternatively as the "designated agency". This reflects the restructuring of county government under recent statutory changes.

A copy of proposed Rule 16, (12 MCAR § 2.016) as amended and hereby adopted is attached.

Dated: January 5, 1981

ARTHUR E. NOOT
COMMISSIONER
DEPARTMENT OF PUBLIC WELFARE

Adopted Rule - AG copy

MINNESOTA DPW RULE 16 (12 MCAR § 2.016): Procedures Governing the Administration of Specified Therapies to State Hospital Patients.

A. Introduction

This rule governs the administration of the treatment methods specified in part B of this rule to committed patients residing at state hospitals.

B. Regulated Treatments

The following treatments must be administered pursuant to the provisions of parts C through E of this rule:

1. functional neurosurgery (psychosurgery)

2. electroconvulsive therapy, or any other convulsive therapy;

3. coma therapy (including insulin);

4. injection of any chemical substance as an aversive therapy;

5. medically prescribed maintenance therapy using substances set forth in Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. Section 812. Provided, however, that this rule shall not apply to the prescription of any substance set forth in Schedule II when:

(a) such prescription is made for the treatment of Parkinsonism, epilepsy, hyperperistalsis, narcolepsy, or hyperkinesia, or

(b) such prescription is necessary for the preoperative or postoperative care of the patient.

C. Procedures

None of the treatment methods listed in Part B shall be administered to a patient committed to a state hospital unless the medical director of the state hospital, on the basis of consultation with the patient's treating physician, has determined in accordance with the provisions of part D of this rule that the treatment method is medically indicated for the committed patient; and

1. the court order committing the patient to the state hospital authorizes administration of the proposed treatment method; or

2. in the case of committed adult patients, written consent is obtained on a form which specifies the nature, purpose, risks and effects of the proposed treatment and advises the patient of the right to consult with any other persons regarding this decision and to withdraw consent at any time. The signed consent shall be accessible to the patient and must include a certification by the medical director of the state hospital or the patient's treating physician that the patient has read and understands the terms of the document and that the patient is competent to give an informed consent to the proposed treatment; or

3. in the case of a committed mentally retarded resident, written consent is obtained from the closest responsible relative on a form which specifies the nature, purpose, risks and effects of the proposed treatment and advises the relative of the right to consult with any other persons regarding the decision and to withdraw

consent at any time. The signed consent shall be accessible to the resident's responsible relative and must include a certification by the medical director of the state hospital or the resident's treating physician that the relative has read and understands the terms of the document. If the retarded resident also is under guardianship or conservatorship of the Commissioner, Department of Public Welfare, Minnesota Statutes, Section 252A.11 the Commissioner must give the above consent as provided in Subdivision 1 (a) or (g) in addition to the relative's consent. A certification shall be made by the medical director of the state hospital or the resident's treating physician that the retarded resident has received an explanation of the proposed treatment to the extent of the retarded resident's understanding; or

4. judicial authorization for the administration of the proposed treatment is granted by a court of competent jurisdiction pursuant to the provisions of part E of this rule; or

5. in the case of committed minors, including mentally retarded minors, treatments regulated by this rule may not be administered without prior judicial authorization pursuant to part E of this rule.

D. Factors to be Considered in Determining Medical Indications

In assessing whether any of the treatment methods listed in part B are medically indicated for a committed patient, the medical director and the patient's physician shall consider the following factors in relation to such patient:

1. the predicted extent and duration of changes in mental activity and behavior patterns effected by the treatment;

2. the risks of adverse side effects compared with potential benefits to the patient;

3. the experimental nature of the treatment;

4. its acceptance by the medical community of this state and whether less intrusive methods would secure the same benefits;

5. the extent of intrusion into the patient's body and the pain connected with the treatment; and

6. the patient's ability to competently determine for himself whether the treatment is desirable.

E. Hearings

In cases where the provisions of part C.4 of this rule apply, none of the treatment methods specified in part B of this rule shall be administered absent judicial authorization. The state hospital medical director or his designee shall petition the probate or the county court of the county financially responsible for the patient as specified by Minnesota Statutes, Section 256D.18, subd. 2 Where necessary and appropriate, this court may arrange to have the matter heard in the county of the patient's presence.

1. The petition shall state the nature of the proposed treatment, describe its purpose, recite the risks and effects of the procedure and recite the findings of the medical director and/or treating physician as provided in parts C and D of this rule.

2. The petition shall request the appointment of a guardian ad litem to represent the patient and that this person be an attorney if legal counsel is not otherwise available to the patient.

3. A copy of the petition shall be supplied to the welfare department or other designated agency in the county of financial responsibility in advance of the hearing.

4. The medical director shall seek representation from the county attorney of the county in which the hearing is held. In the event the county attorney is unable to provide such representation, the medical director shall seek legal representation through the Department of Public Welfare.

5. The cost of such hearings shall be met by the county financially responsible for the patient as specified by Minnesota Statutes, Section 256D.18, subd. 2

F. Exception

This rule does not affect the administration of generally recognized treatment methods not specified in part B.

G. Definitions

1. Functional neurosurgery (psychosurgery) - a general term used to describe brain operations done to relieve the symptoms of mental illness, and includes the ablation or destruction of histologically normal brain cells by any medical or surgical procedure. This term includes, but is not limited to, a lobotomy.

2. Convulsive therapy - a type of psychiatric treatment where central nervous system seizures are induced by electrical, chemical, or other means.

3. Coma therapy - any type of psychiatric treatment where loss of consciousness occurs as a part of the regular treatment process.

4. Aversive therapy - a treatment procedure where noxious substances (or other unpleasant stimuli) are used to produce a change in behavior.

5. Schedule II drugs - a general category of drugs controlled by federal law because of increased risk of abuse and/or addiction.

APPROVED AS TO FORM AND LEGALITY

Jan 26 19 81

WARREN SPANNAUS, ATTORNEY GENERAL

BY [signature]

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
JAN 27 1981
[signature]
Secretary of State

3:37 PM

STATE OF MINNESOTA

DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF RULE 16 (12 MCAR § 2.016), FORMERLY PROPOSED AS RULE 20, OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE ADMINISTRATION OF SPECIFIED THEREAPIES TO STATE HOSPITAL PATIENTS

NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, section 15.0412:

PLEASE TAKE NOTICE that the above-captioned rules have been submitted to the Office of the Attorney General on this date, January 16, 1981, for review as to form and legality. Pursuant to 1 MCAR § 1.206 B., the Attorney General will not approve the rules for at least ten calendar days after receipt to allow any person or association time to comment on the legality of the rules, after which that Office will complete its review. If you desire to comment on the legality of the above-captioned rules, you should direct your comments to the Office of the Attorney General, G-25 State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155, telephone (612) 296-7030. It is preferred that a copy of any written comments submitted to the Attorney General be submitted simultaneously to this agency.

If you are interested in determining what changes, if any, were made in the proposed rule after the hearing and before submission to the Attorney General, you may contact Dr. Ronald C. Young, Assistant Commissioner for Mental Health.

Mary C. Bremer

MARY C. BREMER
Public Information Officer

STATE OF MINNESOTA)
)ss
COUNTY OF RAMSEY)

P. Kenneth Kohnstamm, being first duly sworn upon oath, deposes and says:

That at the City of St. Paul, County and State aforementioned, on the 16th day of January, 1981, he served the attached Notice of Submission to the Attorney General by depositing in the United States mail at said city, a true and a correct copy thereof, properly enveloped, with first class postage prepaid, and addressed to:

Glen Duncan, M.D., Rochester State Hospital, Rochester, Mn 55901

Mary Howey, Mental Health Association of Minnesota, 6715 Minnetonka Boulevard, Room 209-210, Minneapolis, Mn 55426

Peter Fransway, Hennepin County Attorney, Government Center, Minneapolis, Mn 55487

Dr. John Fordice, Anoka State Hospital, Anoka, Mn 55303

Clarks Wiger, Minnesota Medical Association, 900 American National Bank Building, St. Paul, Mn 55101

P Kenneth Kohnstamm

Subscribed and sworn to before me

this 21st day of January, 1981

Margaret M Hansen

MARGARET M. HANSEN
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
My Commission Expires April 15, 1985

Willa Mae PRICE, Individually, and as Mother and Natural Guardian of Dwight Price, Appellant,

v.

Charles G. SHEPPARD, et al., Respondents.

No. 45588.

Supreme Court of Minnesota.

Feb. 20, 1976.

Mother of minor under involuntary commitment at state mental hospital brought action against medical director of hospital for assault and battery, and for violation of minor's civil rights resulting from director's administration of series of electroshock treatments. The District Court, Ramsey County, E. Thomas Brennan, J., entered summary judgment for defendant, and plaintiff appealed. The Supreme Court, Yetka, J., held that electroshock therapy prescribed for patient who had failed to respond to other forms of treatment was not cruel or unusual punishment; that director who acted in good faith and without knowledge that he was possibly violating clearly established constitutional right was immune from liability under federal Civil Rights Act and was immune from tort liability; and that in future cases state must adopt procedure requiring appointment of legal guardian before appropriate county court and gain consent of that court to apply intrusive forms of treatment.

Affirmed.

1. Criminal Law ⇐1213

While characterization of electroshock therapy of involuntarily committed mental patient as "treatment" does not insulate it from Eighth Amendment scrutiny, that alone does not establish that treatments were punishment. U.S.C.A.Const. Amend. 8.

2. Criminal Law ⇐1213

If electroshock treatments given involuntarily committed minor mental patient served legitimate purpose rather than deterrence or reprimand, Eighth Amendment claim that such treatments were cruel and inhuman punishment would fail. U.S.C.A. Const. Amend. 8.

3. Criminal Law ⇐1213

Where electroshock therapy involving multiple treatments over substantial period of time was prescribed for involuntarily committed minor patient of state mental hospital who had failed to respond to other forms of treatment, administration of such electroshock treatments, absent effective consent of patient or his guardian, was not cruel or unusual punishment. U.S.C.A. Const. Amend. 8.

4. Constitutional Law ⇐82

At core of right to privacy is concept of personal autonomy, the notion that the constitution reserves to individual, free of governmental intrusion, certain fundamental decisions about how he or she will conduct his or her life.

5. Constitutional Law ⇐82

Like other constitutional rights, right to privacy is not absolute one and must give way to certain interests of state, balance turning on impact of decision on life of individual; as impact increases, so must importance of state's interest.

6. Constitutional Law ⇐82

Once justified, extent of state's intrusion into individual's right to privacy is not unlimited; it must also appear that means utilized to serve state's interest are necessary and reasonable.

7. Constitutional Law ⇐82

Where state proposes to intrude into fundamental decision affecting conduct of individual's life, in order to justify that intrusion it must first demonstrate legiti-

Exam Exhibit No. 2
File No. DPW 80 0017
Date 9-20-77

mate and important state interest; sufficiency of interest will be directly dependent on impact of decision on individual's life.

8. Constitutional Law ⇐82

The means state intends to utilize in serving legitimate and important state interest which infringes on individual's right to privacy must, in light of alternatives, be the least intrusive.

9. Mental Health ⇐51

State by reason of the mental commitment itself has certain rights under parens patriae doctrine.

10. Mental Health ⇐51

Where interest of state is sufficiently important to deprive individual of his physical liberties by involuntarily committing him to mental hospital, interest would also be sufficiently important for state to assume treatment decision. M.S.A. §§ 253A.07, subd. 17(a), 253A.18, subd. 1.

11. Assault and Battery ⇐2

Medical director of state mental hospital was privileged to administer electroshock therapy to involuntarily committed minor patient without consent of minor's guardian where therapy was administered in good faith in conformance with existing procedures authorizing treatment, and thus was protected from tort liability for assault and battery. M.S.A. § 253A.02, subd. 9.

12. Mental Health ⇐51

Institutional doctors must comply with new procedures set forth for authorizing more severe forms of therapy in order to remain protected by privilege from tort liability. M.S.A. § 253A.02, subd. 9.

13. States ⇐79

Qualified immunity protects state official from liability for damages unless that official knew or should have known that action he took within sphere of official responsibility would violate constitutional rights of another, or unless he took action with malicious intent to cause deprivation of constitutional rights or injury to another.

14. Civil Rights ⇐13.8(2)

Where medical director of state mental hospital could not reasonably have known that administration of electroshock treatment to minor who was involuntarily committed violated clearly established constitutional right, and where director acted without malice and in good faith, director's actions were proper and he was immune from liability under federal Civil Rights Act. 42 U.S.C.A. § 1983.

15. Mental Health ⇐51, 488

In future cases, state must adopt procedure requiring appointment of legal guardian before appropriate county court and gain consent of that court to apply intrusive forms of treatment to involuntarily committed which, though not clearly defined, shall include electroshock therapy.

16. Mental Health ⇐492

Those considered for appointment as guardian ad litem for involuntarily committed mental patient who is contesting necessity and reasonableness of prescribed treatment should not include those responsible for patient's commitment. M.S.A. §§ 253A.07, subd. 17(a), 253A.18, subd. 1.

17. Mental Health ⇐51

Factors which court should consider in making determination as to necessity and reasonableness of prescribed treatment for involuntarily committed mental patient include extent and duration of changes in behavior patterns and mental activity effected by treatment, risks of adverse side effects, experimental nature of treatment, treatment's acceptance by medical community of state, extended intrusion into patient's body and pain connected with treatment, and patient's ability to competently determine for himself whether treatment is desirable.

Syllabus by the Court

1. The administration of electroshock therapy to an involuntarily committed mi-

patient in a state mental hospital with- the consent of the minor's guardian is cruel and unusual punishment or a con- tutional invasion of the right to privacy.

2. The state by reason of the commit- ent itself has certain rights under the rens patriae doctrine.

3. Qualified immunity protects a state fficial from liability for damages unless at official knew or should have known at the action he took within the sphere of fficial responsibility would violate the con- titutional rights of another or unless he ook the action with malicious intent to ause a deprivation of constitutional rights r other injury to another.

4. In future cases the state must adopt a procedure requiring the appoint- ment of a legal guardian before the appro- priate county court and gain consent of that court to apply intrusive forms of treatment which, though not clearly defined, shall in- clude electroshock therapy.

Berde, Leonard & Weinblatt, and Alan W. Weinblatt, St. Paul, for appellant.

Warren Spannaus, Atty. Gen., Peter W. Sipkins, Sol. Gen., Thomas L. Fabel, Deputy Atty. Gen., Thomas H. Jensen, Sp. Asst. Atty. Gen., St. Paul, for respondents.

Randall D. B. Tigue, Benjamin S. Houge and Willard B. Crowley, Jr., Minn. Civ. Lib- erties Union, seeking rev., for amicus curi- ae.

Considered and decided by the court en banc.

YETKA, Justice.

This appeal from a summary judgment entered in the Ramsey County District Court involves an action against the medi- cal director of the Minnesota Security Hos- pital at St. Peter, Dr. Charles G. Sheppard, for (1) assault and battery, and (2) violation of plaintiff Dwight Price's civil rights un- der 42 U.S.C.A. § 1983.[1] The claims arise out of the administration of a series of 20 electroshock treatments, given against the express wishes of plaintiff Willa Mae Price, Dwight's mother and natural guardian, while Dwight, a minor, was under involun- tary commitment in the Minnesota Security Hospital at St. Peter.

Defendant's motion for summary judg- ment on Count I, alleging assault and bat- tery, was granted March 22, 1974, based on the court's ruling that the defendant, acting in his official capacity, was immune from suit. Summary judgment was also granted on Count IV, alleging violation of Dwight's civil rights, on November 29, 1974. The court ruled that the electroshock treat- ments were neither cruel and unusual pun- ishment under the Eighth Amendment of the United States Constitution, nor a viola- tion of Dwight's right to privacy. We af- firm.

Dwight Price was committed to the Has- tings State Hospital September 8, 1971, by order of the Ramsey County Probate Court, which found Dwight to be "mentally ill-ine- briate." The commitment petition was brought by Dwight's mother, Willa Mae Price, apparently in order to secure treat- ment for Dwight for a developing drug and alcohol problem. Several attempts at vol- untary treatment, prior to the commitment proceedings, had proved unsuccessful.

1. 42 U.S.C.A. § 1983, provides as follows: "Every person who, under color of any stat- ute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdic- tion thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for re- dress."

Plaintiffs' complaint included two other claims, one for negligence in administering the electroshock treatments and one for the intentional infliction of mental distress to Mrs. Price; however, that part of the lower court's order relating to those claims is not challenged on appeal.

Shortly after being admitted to Hastings, Dwight allegedly attempted to strangle one of the hospital staff. Because Hastings was not equipped to handle dangerous patients, Dwight was transferred to the Security Hospital at St. Peter on September 11, 1971.[2]

Dwight's condition, upon his admission at St. Peter was diagnosed as simple schizophrenia. He was treated with tranquilizing and antidepressant medications, but apparently failed to respond and continued to be aggressive and assaultive to the staff and other patients. For this reason, Dr. Sheppard prescribed electroshock therapy.

He sought Mrs. Price's consent to administer the electroshock treatments. Through her attorney Mrs. Price arranged for an independent medical examination by Dr. William Chalgren,[3] a Mankato psychiatrist, for the purpose of determining the advisability of the proposed treatment. Dr. Chalgren examined Dwight November 27, 1971, and recommended that drug treatment continue but that if Dwight did not respond favorably, electroshock treatment be given.

Dr. Chalgren's recommendations were followed by the staff at St. Peter, but Dwight's condition did not improve. Accordingly, on December 22, 1971, without the consent of Mrs. Price, electroshock therapy began and was continued to February 11, 1972. Dwight was released from St. Peter June 19, 1972.

The issues raised on this appeal are:

(1) Does the administration of electroshock therapy to an involuntarily committed minor patient of a state mental hospital, without the consent of the minor's guardian, violate his rights (a) to be free from cruel and unusual punishment, and (b) of privacy?

(2) Is a state official entitled to immunity from an action for damages for acts performed by him in good faith and which he could not reasonably have known would violate the constitutional rights of another?

[1] 1. We do not agree with the claim that the electroshock therapy was cruel and unusual punishment for the reason that the record does not suggest, nor have plaintiffs demonstrated, how those treatments, under the circumstances of this case, can be regarded as "punishment." While plaintiffs are certainly correct in the statement that the characterization of electroshock therapy by defendant as "treatment" does not insulate it from Eighth Amendment scrutiny,[4] that alone does not establish that the treatments were "punishment."

[2] The Supreme Court's decision in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), involving the question of whether a law which provided for loss of United States citizenship upon conviction of desertion from the military violated the Eighth Amendment, is instructive.

> "* * * In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a

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2. While the removal of the minor plaintiff from Hastings to St. Peter was later determined to be invalid by a review board at Hastings, that fact seems to be without any particular significance to the issues on appeal, and none is demonstrated by plaintiffs.

3. Plaintiffs imply that Dr. Chalgren was less than candid with Mrs. Price in failing to disclose that he was, on occasion, a consultant to the St. Peter Security Hospital. Plaintiffs imply in their brief that her consultation with Dr. Chalgren was tainted, a conclusion we are not willing to draw. Beyond the bare fact that Dr. Chalgren was an occasional consultant to the Security Hospital, there is nothing to suggest collusiveness with hospital staff. On the contrary, the opposite is suggested from the fact that Dr. Chalgren recommended treatment which differed from that prescribed by the hospital, specifically that electroshock therapy be postponed, and that it be resorted to if other less serious forms of treatment failed.

4. *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958); *Knecht v. Gillman*, 488 F.2d 1136 (8 Cir. 1973); *Vann v. Scott*, 467 F.2d 1235 (7 Cir. 1972); *Inmates of Boys' Training School v. Affleck*, 346 F.Supp. 1354 (D.R.I.1972).

disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise." 356 U.S. 96, 78 S.Ct. 595, 2 L.Ed.2d 639.

Applying the *Trop* rationale, if the electroshock treatments given the minor plaintiff served legitimate purpose rather than deterrence or reprimand, the Eighth Amendment claim must fail. Cf. *Knecht v. Gillman*, 488 F.2d 1136, 1138 (8 Cir. 1973).

It is difficult to perceive, on the record before the court, how the electroshock therapy administered to the plaintiff could be regarded as anything but treatment. The purpose of Dwight's presence in the state's mental hospital system was not to reprimand him or deter him from certain behavior but rather for the treatment of his mental problems and developing chemical dependency. Moreover, the decision to administer electroshock therapy was not triggered by any single incident nor did it involve an isolated treatment, both of which would be more characteristic of punishment. Rather, the decision to administer a series of 20 treatments over a substantial period of time was made after other forms of treatment failed to show any curative effect on Dwight's condition, diagnosed as schizophrenia.

The circumstances of this case are simply unlike those presented in *Knecht v. Gillman, supra.* Inmates of the Iowa Security Medical Facility, confined there for examination, diagnosis, and treatment of mental disorders, for minor violations of hospital protocol, were given injections of a drug which caused the inmate to vomit for 15 minutes to an hour. Although characterized as aversive therapy, the apparent purpose of administering the drug in response to a violation of protocol was to reprimand the inmate.

In *Inmates of Boys' Training School v. Affleck,* 346 F.Supp. 1354 (D.R.I.1972), also cited by plaintiffs in support of their claim, the retributive nature of the challenged conduct is even more clear. For committing infractions of the institution's rules, inmates of a juvenile corrections institution were isolated in cold, dark cells containing only a toilet and mattress. Finally, in *Vann v. Scott,* 467 F.2d 1235 (7 Cir. 1972), cited by plaintiffs, the court did not decide whether the incarceration of runaway juveniles was punishment but on the contrary indicated that under some circumstances, where it served the purpose of safeguarding the lives and welfare of juveniles, it would not be. Cf. *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

[3] Under the circumstances of this case, where electroshock therapy involving multiple treatments over a substantial period of time was prescribed for an involuntarily committed patient of a state mental hospital who had failed to respond to other forms of treatment, we hold that the administration of such electroshock treatments, absent the effective consent of the patient or his guardian, is not cruel or unusual punishment.

2. Plaintiffs second claimed violation of the minor's civil rights—the right of privacy—is more troublesome, primarily because that emerging right is currently so ill-defined. While its origins are said to date back to the late nineteenth century, its birth as an independent constitutional right, clearly denominated as such, is generally regarded as coming in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), where the court overturned a statute prohibiting the use of contraceptives by married couples.

The right has since served as the basis of decisions striking down a Georgia statute prohibiting possession of obscene materials in one's home, *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); extending the *Griswold* ruling to include unmarried individuals, *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); and overturning a Texas statute prohibiting abortions, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The right remains, however, an extremely amorphous one.

We recognize that it is far too early in the evolution of the right of privacy to offer any single definition or rule of what the right entails. Only its broadest contours have been sketched. We do feel, however, because of the importance of that emerging right, it is appropriate for us, at this time, to set forth more than our bare conclusion that the right of privacy is or is not involved.

[4, 5] At the core of the privacy decisions, in our judgment, is the concept of personal autonomy—the notion that the Constitution reserves to the individual, free of governmental intrusion, certain fundamental decisions about how he or she will conduct his or her life.[5] Like other constitutional rights, however, this right is not an absolute one and must give way to certain interests of the state, the balance turning on the impact of the decision on the life of the individual. As the impact increases, so must the importance of the state's interest. Some decisions, we assume, will be of little consequence to the individual and a showing of a legitimate state interest will justify its intrusion; other decisions, on the other hand, will be of such major consequence that only the most compelling state interest will justify the intrusion.

[6] But once justified, the extent of the state's intrusion is not unlimited. It must also appear that the means utilized to serve the state's interest are necessary and reasonable, or, in other words, in light of alternative means, the least intrusive.[6]

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5. See, Henkin, *Privacy and Autonomy*, 74 Col.L.Rev. 1410; Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U.L.Rev. 670; Tribe, *The Supreme Court 1972 Term*, 87 Harv.L.Rev. 1.

6. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), aptly illustrates the balancing process. The decision involved was whether to terminate a pregnancy, a decision the state had completely assumed by prohibiting abortion. Step one for the court was assessing the impact of the decision on the life of the individual.

"* * * The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved." *Roe v. Wade*, 410 U.S. 153, 93 S.Ct. 727, 35 L.Ed.2d 177. The court concluded that the decision was of such fundamental importance and impact that only a compelling state interest could justify the state's intrusion.

The state advanced two interests: (1) the preservation and protection of the health of the pregnant woman, and (2) the protection of prenatal life. Recognizing both as legitimate state interests, the court nevertheless concluded that in the early stages of pregnancy neither one was "compelling." However, as the pregnancy progressed those interests became compelling, the first at the stage when the mortality rate in abortion

[7, 8] To summarize, our understanding of at least one aspect of the privacy decisions to date is that where the state proposes to intrude into a fundamental decision affecting the conduct of an individual's life, in order to justify that intrusion, it must first demonstrate a legitimate and important state interest. The sufficiency of the interest will be directly dependent on the impact of the decision on the individual's life. And secondly, the means it intends to utilize in serving that interest must, in light of the alternatives, be the least intrusive.

The question in the case before us is whether the state, consistent with Dwight Price's right of privacy, can assume the decision of whether Dwight, an involuntarily committed mental patient, will undergo psychiatric treatment. We observe that the more fundamental decision, whether he was to undergo hospitalization, was assumed by the state at the commitment proceeding, the validity of which is not contested.

[9, 10] The impact of the decision on the individual is unquestionably great, for the result is the alteration of the patient's personality. The state's interest in assuming the decision is in acting as *parens patriae*, fulfilling its duty to protect the well-being of its citizens who are incapable of so acting for themselves. Under the circumstances of this case, that interest can be articulated as the need for the state to assume the decision-making role regarding the psychiatric treatment for one who, presumptively, based on the fact of commitment on the ground of mental illness,[7] is unable to *rationally* do so for himself. If that interest of the state is sufficiently important to deprive an individual of his physical liberty, it would seem to follow that it would be sufficiently important for the state to assume the treatment decision. We hold that it is.

> "Under the *parens patriae* rationale, an individual may be committed when he lacks capacity to make a rational decision concerning hospitalization, and the treatment or custodial care available would be beneficial enough to outweigh the deprivations which commitment would impose on him. Inherent in an adjudication that an individual should be committed under the state's *parens patriae* power is the decision that he can be forced to accept the treatments found to be in his best interest; it would be incongruous if an individual who lacks capacity to make a treatment decision could frustrate the very justification for the state's action by refusing such treatments." Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv.L.Rev. 1190, 1344 (1974).

The more important question, we believe, involved in the state's assumption of the treatment decision is the necessity and reasonableness of the means utilized by the state in treating an involuntarily committed patient. The techniques generally available to treat psychological disorders range in degree of severity and coerciveness from the least intrusive forms such as milieu therapy (behavior changes produced by manipulation of the patient's environment) and psychoanalysis, to drug, aversion, or electroconvulsive therapy, and ultimately to psychosurgery. Some of these techniques require the voluntary participation of the

surpassed that in childbirth, and the second when the fetus became viable.

In determining the necessity and reasonableness of the alternative means of serving the state's interest in the health of the mother—regulation of the abortion procedure or prohibition of abortion—the court settled on the former being the least intrusive means that adequately served the state's interest. Obviously there were no alternatives to protect prenatal life.

7. While Minn.St. 253A.18, subd. 1, provides that "[c]ommitment * * * is not a judicial determination of legal incompetency," a finding that a person is mentally ill, one of the grounds for commitment, requires evidence that "clearly shows that his customary self-control, judgment, and discretion in the conduct of his affairs [including medical care] is lessened to such an extent that hospitalization is necessary for his own welfare or the protection of society * * *." Minn.St. 253A.07, subd. 17(a).

patient in order to be effective, while others can be effective when involuntarily imposed. As the techniques increase in severity, so do the risks of serious and long-lasting psychological or neurological damage.[8]

[11, 12] Whether the administration of electroshock treatments, one of the most intrusive forms of treatment, was necessary and reasonable in the treatment of Dwight Price is a question we cannot reach. We believe, and so hold, that whatever the answer to that question may be, on the record before us the defendant is immune from liability under 42 U.S.C.A. § 1983.[9]

[13] The Supreme Court has recently considered the qualified immunity possessed by state officials acting in their official capacity, *O'Connor v. Donaldson,* 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). In *O'Connor,* the court summarized the nature of that immunity:

> "* * * [T]he relevant question for the jury is whether [the state official] 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [the plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [the plaintiff].' * * * [*Wood v. Strickland,* 420 U.S. 322, 95 S.Ct. 1001, 43 L.Ed.2d 225.] For purposes of this question, an official has, of course, no duty to anticipate unforeseeable constitutional developments." [Citations omitted.]

It seems abundantly clear, given the vagueness of the constitutional right of privacy, that the defendant could not reasonably have known that the administration of electroshock treatments to Dwight Price violated a "clearly established" constitutional right. *Wood v. Strickland,* 420 U.S. 322, 95 S.Ct. 1001, 43 L.Ed.2d 225.

[14] Moreover, it is evident from the record that the defendant acted without malice and in good faith. Less intrusive means of treatment were employed by the defendant for a period of 3 months without success. Dwight continued to be assaultive and for that reason required confinement to his room most of the time, a circumstance which the defendant believed was a substantial obstacle to recovery and which could be corrected by electroshock. He followed the recommendation of the plaintiff's own doctor and continued the less intrusive forms of treatment for a further period before commencing the electroshock treatments. Proper medical procedures were followed in administering the treatments, and their administration did not contravene any state statute or regulation. In short, measured by accepted conduct at that time, the defendant's actions were proper.

[15, 16] Because the potential impact of the more intrusive forms of treatment is so great, we are reluctant in those cases where

8. Note, 45 So.Cal.L.Rev. 616, 621 to 633.

9. We also believe that defendant is protected from liability for assault and battery because, while the electroshock therapy here was performed without the consent of the minor patient's guardian, defendant was privileged to institute such therapy as part of his duty to provide care to an involuntarily committed, mentally ill patient. See, Minn.St. 253A.02, subd. 9. In *Campbell v. Glenwood Hills Hospitals, Inc.,* 273 Minn. 525, 536, 142 N.W.2d 255, 262 (1966), we alluded to the duty of care owed involuntarily committed patients by the state and refused there to find the defendant doctors liable for a battery arising out of a course of treatment "determined and effected by competent institutional doctors who would have been at fault if they had not attempted to help plaintiff." Similarly, the institutional doctor's privilege to pursue reasonable lines of therapy in good faith in conformance with existing procedures authorizing treatment after a commitment order protects the defendant doctor from tort liability in the instant case. In the future, of course, institutional doctors must comply with the new procedures set forth in this opinion for authorizing more severe forms of therapy, e. g., electroshock therapy, in order to remain protected by this privilege from tort liability.

e patient or guardian refuse their con-
nt, to leave the imposition of the more
trusive forms of treatment solely within
e discretion of medical personnel at our
ate hospitals. For that reason, we adopt
e following procedure for future cases:

(1) If the patient is incompetent to give
nsent or refuses consent or his guardian
her than persons responsible for his com-
itment also refuses his consent, before
ore intrusive forms of treatment may be
tilized, the medical director of the state
ospital must petition the probate division
f the county court in the county in which
he hospital is located for an order authoriz-
ig the prescribed treatment; [10]

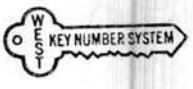
(2) the court shall appoint a guardian ad
item to represent the interests of the pa-
ient; [11]

(3) in an adversary proceeding, pursuant
o the petition, the court shall determine
he necessity and reasonableness of the pre-
scribed treatment.

[17] In making that determination the
court should balance the patient's need
for treatment against the intrusiveness of
the prescribed treatment. Factors which
should be considered are (1) the extent and
duration of changes in behavior patterns
and mental activity effected by the treat-
ment, (2) the risks of adverse side effects,
(3) the experimental nature of the treat-
ment, (4) its acceptance by the medical com-
munity of this state, (5) the extent of intru-
sion into the patient's body and the pain
connected with the treatment, and (6) the
patient's ability to competently determine
for himself whether the treatment is desira-
ble.[12]

We cannot draw a clear line between the more intrusive forms of treatment requiring this procedural hearing and those which do not. Certainly this procedure is not intended to apply to the use of mild tranquilizers or those therapies requiring the cooperation of the patient. On the other hand, given current medical practice, this procedure must be followed where psychosurgery or electroshock therapy is proposed.

Affirmed.



In re Application of Michael DEDERING for a Permit for a Single Family Dwelling on Lot 12, Edgewood Shores, Isanti County, Minnesota, Appellant,

v.

Margaret R. JOHNSON, Respondent.

No. 45739.

Supreme Court of Minnesota.

Feb. 27, 1976.

Owner of substandard shoreline lot appealed from a resolution of the county board of commissioners denying application for variance and conditional use permit to allow construction of single-family dwelling on lot. The District Court, Isanti County, Thomas G. Forsberg, J., entered judgment

10. It is recommended, for purposes of economy, that the necessity and reasonableness of more intrusive forms of treatment be considered at the commitment hearing. This would, of course, depend on a sufficiently extensive diagnosis and history of the patient's disorder, and should not become merely a matter of form. Also, for economy, if the committing court is reasonably convenient to the state hospital, it would be desirable to return to it since it would be already familiar with the case, having previously appointed a guardian ad litem for the patient.

11. Those considered for appointment as guardian ad litem should not include those responsible for the patient's commitment.

12. Note, 45 So.Cal.L.Rev. 616, 658; Note, Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv.L.Rev. 1190, 1347; *Kaimowitz v. Michigan Dept. of Mental Health* (summarized in 42 U.S.L.W. 2063, July 31, 1973).

STATE OF MINNESOTA

COUNTY OF RAMSEY

BEFORE ARTHUR E. NOOT

COMMISSIONER OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF RULE 16 (12 MCAR § 2.016), FORMERLY PROPOSED AS RULE 20, OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE ADMINISTRATION OF SPECIFIED THERAPIES TO STATE HOSPITAL PATIENTS

STATEMENT OF COMPLIANCE WITH MANUAL OF RULE MAKING PROCEDURES

I, Special Assistant Attorney General P. Kenneth Kohnstamm, do hereby declare that I have examined the proposed rule and all related documents and that, based on them and my personal familiarity with the applicable procedures, the Manual of Rule Making Procedures has been followed.

P Kenneth Kohnstamm

Special Assistant Attorney General

Dated: January 16, 1981

DPW-80-007-NG

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF PUBLIC WELFARE

In the Matter of the Proposed Adoption of Rule 20 of the Department of Public Welfare Governing the Administration of Specified Therapies to State Hospital Patients.

ORDER OF THE CHIEF HEARING EXAMINER

WHEREAS, a hearing was held on September 20, 1979, before Natalie L. Gaull, a Hearing Examiner of the State Office of Administrative Hearings, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, subd. 3, was issued to the Department of Public Welfare and;

WHEREAS, the Department has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Department has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, subd. 4, and 9 MCAR § 2.110; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Department has met all requirements of Minn. Stat. § 15.0412, subd. 4.

NOW, THEREFORE, upon receipt of this Order, the Department of Public Welfare has the responsibility of submitting the complete hearing record and the rules as adopted by the Department to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. § 15.0412, subd. 4.

Dated this 16th day of January, 1981.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF PUBLIC WELFARE

RECEIVED
JUL 31 1979
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION OF RULE 20 OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE ADMINISTRATION OF SPECIFIED THERAPIES TO STATE HOSPITAL PATIENTS.

ORDER OF THE CHIEF HEARING EXAMINER

WHEREAS, on July 30, 1979, the Minnesota Department of Public Welfare submitted a request to the Chief Hearing Examiner for approval of the incorporation by reference of a certain document in proposed DPW Rule 20; and

WHEREAS, pursuant to Minnesota Statutes, 1978, Section 15.0412, subdivision 4, agencies may incorporate by reference provisions of federal law or rule or other material from sources which the Chief Hearing Examiner determines are conveniently available for viewing, copying and acquisition by interested persons; and

WHEREAS, the Chief Hearing Examiner has reviewed Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 United States Code Annotated, (U.S.C.A.) Section 812, and has found it to be in excess of 3,000 words and has determined that it would exceed five pages of publication in the State Register; and

WHEREAS, the Department has indicated and the Chief Hearing Examiner finds that the document is readily available for viewing, copying and acquisition by interested persons at the Department and otherwise.

NOW, THEREFORE, it is ordered, that the Department shall have the approval of the Chief Hearing Examiner to incorporate by reference in proposed DPW Rule 20 the above-referenced document.

Dated this 31st day of July, 1979.

DUANE R. HARVES
Chief Hearing Examiner

Exhibit No. 9
File No. DPW 80 007
Date 9-20-79

ADMIN 1000

STATE OF MINNESOTA

DEPARTMENT of Public Welfare

Office Memorandum

TO : Duane Harves,
Chief Hearing Examiner

RECEIVED
JUL 30 1979
OFFICE OF HEARING EXAMINERS

DATE: July 30, 1979

FROM : Bob Hamper BH

PHONE:

SUBJECT: Incorporation by Reference, DPW Rule 20 (12 MCAR 2.020)

The Department of Public Welfare is proposing to incorporate by reference Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 United States Code Annotated, (U.S.C.A.) Section 812 into Section B.1 e of DPW Rule 20.

The State Register has informed me that Section 812 (above) would take nine pages in the State Register. Their policy is to photocopy such materials rather than to typeset it.

Section 812 of 21 U.S.C.A. is readily available for viewing, copying and acquisition by interested parties from:

Minnesota Department of Public Welfare
Attorney General's Section
4th Floor Centennial Office Building
St. Paul, MN 55155

William Mitchell, College of Law
875 Summit
St. Paul, MN

University of Minnesota Law School
229 19th Avenue South
Mpls, MN 55455

Hamline Law School
Hewitt Avenue and Snelling Ave. N.
St. Paul, MN

We are requesting your approval for this incorporation by reference. Thank you for your consideration of this matter.

DPW-80-007-NG

RECEIVED
NOV 2 1979
ATTORNEY GENERALS OFFICE
WELFARE DIVISION

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF PUBLIC WELFARE

In the Matter of the Proposed Adoption of Rule 20 of the Department of Public Welfare Governing the Administration of Specified Therapies to State Hospital Patients.

REPORT OF HEARING EXAMINER

The above-entitled matter came on for hearing before Natalie L. Gaull, duly appointed as Hearing Examiner, on September 20, 1979, in the Auditorium Chapel of the Minnesota Veterans Home, Minneapolis, Minnesota at 9:00 a.m.

This proceeding is a rules hearing held pursuant to Minn. Stat. Ch. 15, to determine whether the proposed rule should be adopted. Copies of this Report are available for review from the Department of Public Welfare (hereinafter "Department") and from the Office of Hearing Examiners.

Members of the agency panel included: Ronald C. Young, M.D. and P. Kenneth Kohnstamm, Special Assistant Attorney General. During their presentation, the Department also called as witnesses the following: Glen Duncan, M.D., Medical Director of Rochester State Hospital; John Fordice, Ph.D., Clinical Pharmacist, Anoka State Hospital; and Peter Fransway, Hennepin County Attorney's Office. Seven persons were present at the hearing and signed the register. Six persons spoke at the hearing. Approximately seven written comments were received by the Examiner subsequent to the issuance of the Order for Hearing and prior to the close of the record.

Pursuant to Minn. Stat. § 15.0412, subd. 4 (1978), this Report shall be available for review to all affected individuals upon request for at least five days. Thereafter, the Department shall, if it proposes to adopt the rules as originally proposed or amended, submit a copy of the Order Adopting Rules, a copy of any additional agency findings, a copy of the rules as originally proposed, and a copy of the rules as adopted to the Chief Hearing Examiner for review pursuant to Minn. Stat. § 15.052, subd. 4 (1978). The submission to the Chief Hearing Examiner shall precede review by the Attorney General. The Chief Hearing Examiner shall complete his review and submit his report to the Department on the issues of substantial changes in the rule and compliance with Minn. Stat. § 15.0412 (1978) within ten calendar days. The Department will be responsible for filing the rules with the Attorney General and for notifying persons who have indicated that they wish to be notified of such filing.

Based upon all the records and proceedings herein, the Examiner makes the following:

FINDINGS OF FACT

1. On July 26, 1979, the Department filed with the Chief Hearing Examiner the following documents:

(a) A copy of the proposed rules.
(b) The Order for Hearing proposed to be issued.
(c) The Notice of Hearing proposed to be issued.

2. On July 30, 1979, the Department sought approval to have Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. 812 incorporated by reference into Section B.1.e. of the proposed Rule 20.

3. On July 31, 1979, the Chief Hearing Examiner, by written order (see Agency Ex. 9), approved the requested incorporation.

4. On August 13, 1979, a Notice of Hearing and a copy of the proposed rule were published at 4 State Register 140.

5. On August 15, 1979, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Secretary of State and to all persons listed on the supplementary list.

6. On August 24, 1979, the Department filed the following documents with the Hearing Examiner:

(a) The Order for Hearing;
(b) The Notice of Hearing as mailed;
(c) The proposed rule;
(d) The Statement of Need and Reasonableness;
(e) Affidavit of Receipt of the Secretary of State's list;
(f) Certificate of Delivery of the Secretary of State's list;
(g) Affidavit of Mailing; and
(h) Affidavit of Additional Mailing.

7. The documents were available for inspection at the Office of Hearing Examiners from the date of filing to the date of the hearing.

8. The record remained open through October 3, 1979, for the receipt of written comments and statements. Any comments received after that date were not considered by the Examiner.

Statutory Authority

9. The Department has cited as authority for the proposed rule Minn. Stat. § 246.01 and the Minnesota Supreme Court's decision in Price v. Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976), (hereinafter "Price" or 'the Price case").

10. Minn. Stat. § 246.01 provides the general authority for the Commissioner of the Department of Public Welfare (hereinafter "the Commissioner") to supervise the operations of the Minnesota State Hospital System. Minn. Stat. § 246.01 specifically provides:

> . . . he [the Commissioner] is hereby charged and shall have exclusive power of administration and management of all the following state institutions: The schools and hospitals for the mentally retarded and epileptic, state hospitals for the mentally ill and the state hospital for inebriates. He shall have the power and authority to determine all matters relating to the unified and continuous development of all of the foregoing institutions, ...

The statute does not give the Commissioner the specific authority to promulgate rules concerning the state hospital system. However, the Department

apparently believes that authority to promulgate rules may be implied from the authority to administer and manage state institutions. The Examiner has reviewed the remainder of Minn. Stat. Ch. 246 and related statutes and finds no specific grant of authority to adopt this rule or any rule regarding state hospital patients.

11. The Department also cites the Price case as authority for promulgation of this rule. The Price case mandates the development of a procedure which balances the committed patient's right to privacy against the state's interest in assuring that committed patients receive proper treatment. (See, Price, 239 N.W.2d at 913) The Price case does not constitute statutory authority for adoption of the proposed rule. It establishes need for the proposed rule and also establishes implied authority to adopt the rule.

12. The Examiner finds that Minn. Stat. § 246.01 and the Price case establish sufficient authority to adopt the proposed rule. However, in the absence of the court's mandate in the Price case, there would not be statutory authority to adopt the proposed rule pursuant to Minnesota-Dakota Retail Hardware Association v. State, 279 N.W.2d 300 (Minn. 1979) which indicates that specific statutory authority is necessary in order to adopt legislative rules.

Legal Discussion

13. 12 MCAR § 2.020 A.[1], Introduction, limits the application of the rule to certain specified treatments, hereinafter "regulated treatments" and to committed patients residing in state hospitals. In prehearing comment, the Winona County Department of Social Services (hereinafter "Winona County") contended that the rule ought to be applied to all committed patients regardless of their hospital of residence. Winona County cited Minn. Stat. § 253A.17, subd. 9, in support of its contention. The cited statute does not confer any authority on the Commissioner of Public Welfare to promulgate rules binding on private hospitals. The Price case contains no directive regarding private hospitals. The Examiner finds that the proposed rule can only apply to committed patients in state operated hospitals. (See, Price, 239 N.W.2d at 913)

The Minnesota Governor's Planning Council on Developmental Disabilities (hereinafter "DD Council") submitted written comment asking whether the procedures contemplated in the proposed rule would be used for treating voluntary residents of state hospitals. The Department's response was that voluntary residents can refuse any treatment. Therefore, the proposed rule would not apply to voluntary patients.

The Examiner finds that Section A. of the rule as proposed is reasonable and necessary.

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1 The Examiner notes that the proposed rules as submitted are not in proper form. However, the rules as published in the State Register are in proper form and reference will be made to them as published.

.14. 12 MCAR § 2.020 B.1.[2] identifies those types of treatment that will be regulated by the rule. The Minnesota Supreme Court specifically directed use of the procedure established by the Price case in the involuntary administration of both electroshock and psychosurgery treatments. The Court left open the question of what other types of treatment are sufficiently intrusive so that they ought to be regulated. This section of the proposed rule identifies those other types of treatment.

Comment by the DD Council asks that the entire rule be written in terminology readily understandable to the public. The DD Council suggested that the Department add a definitional section to define several medical terms. The Department responded that such terms are understandable to the medical and court personnel who are regulated by the rule. However, much of the impact of this rule falls on committed residents of state hospitals. Therefore, the rule should be made as understandable to those persons as it is to medical and legal personnel. Therefore, the Examiner urges the Department to change such terms such as "modalities" to a more understandable term such as "methods" and to define the various medical terms so that the rule will be more readily understandable to the general public.

12 MCAR § 2.020 B.1.a. identifies psychosurgery as one of the treatments covered by the rule. The Examiner finds that this is clearly required by the Price case. In testimony on behalf of the Department, Dr. Duncan suggested that psychosurgery could be described more clearly as lobotomy. The Examiner commends that suggestion to the Department.

12 MCAR § 2.020 B.1.b. identifies electro-convulsive therapy as another form of treatment to be regulated. The Price case requires such treatment to be regulated by the rule. Although no comment was made on this section, the Examiner recommends that the Department consider defining the phrase "or any other convulsive therapy" which is used in this section.

12 MCAR § 2.020 B.1.c. identifies any type of coma therapy, including insulin therapy, as a type of treatment to be regulated. In its Statement of Need, the Department indicated that this form of treatment is no longer used, but that it is sufficiently intrusive so that it ought to be regulated if it were to be used again.

12 MCAR § 2.020 B.1.d. identifies "injection of any chemical substance as an aversive therapy" as a treatment to be regulated. In response to an inquiry by the Examiner at the hearing, Dr. Duncan defined aversive therapy as a treatment that is unpleasant or noxious to the patient. The Department may wish to add this explanation to the rule to clarify the medical terminology. In response to another question by the Examiner as to why oral administration of aversive therapies are excluded from the rule, Dr. Young stated that it is a practical impossibility to force a patient to take such treatment.

12 MCAR § 2.020 B.1.e. identifies the administration of Schedule II substances listed in 21 U.S.C.A. 812, when used in prescribed maintenance

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[2] The Examiner notes that there is a Section B.1. without a Section B.2., which is not proper form.

therapy, as a treatment be regulated. Dr. Fordice testified that treatment using these substances constitutes an intrusion into the patient's privacy because these substances are all potentially addictive. Use of these substances in treatment of certain specified physical disorders and for preoperative or postoperative care of a patient is expressly excluded from regulation by the procedure.

The Examiner finds that 12 MCAR § 2.020 B. as proposed is reasonable and necessary.

15. 12 MCAR § 2.020 C. is entitled" Procedures" and provides that the types of treatment specified in Section B. will not be used on committed residents of state hospitals unless the procedures contained in Section C. are followed. That section of the rule requires that the use of the Section B. treatments be "medically indicated" as determined by 12 MCAR § 2.020 D. (See, ¶16 of the Findings) In addition to the treatment being medically indicated, the rule requires the presence of one of four factors before the regulated treatment can be administered to the patient. These factors are: order for the treatment by the committing court or; consent by the committed adult patient or; consent by a relative for committed mentally retarded residents or; judicial authorization by a court of competent jurisdiction.

12 MCAR § 2.020 C.1.a. deals with the situation where the court which committed the patient orders one of the intrusive types of treatment at the time of the commitment. The DD Council asked if the word "order" in this section means court order. It is clear from the Department's response that it intends the term to mean court order. The Examiner recommends that this language be clarified . The Examiner has reviewed the provisions of the Minnesota Hospitalization and Commitment Act, Minn. Stat. Ch. 253A. Although the Examiner does not find any express authority for committing courts to order types of treatment, it appears from the Department's inclusion of this possibility and from other comments that committing courts do order such treatments. Winona County submitted written comment asking the Department to establish rules to regulate such commitment orders. The Department responded that it would be beyond the scope of the rule and would require legislative action. The Department does not have the authority to regulate commitment proceedings with this rule. The DD Council asked that the words "and evaluation by hospital personnel are taken together in determining the method of treatment" be added to this part of the rule. The Department rejected this suggestion and contended that when a commitment order specifies certain treatment that those specifications are developed in consultation with medical personnel under the applicable provisions of Chapter 253A.

12 MCAR § 2.020 C.1.b. deals with written consent by a committed adult patient to receive the type of regulated treatments. As proposed by the Department, the consent must specify the nature, purpose, risks and effects of the proposed treatment; inform the patient of his right to consult other persons concerning the decision; and inform the patient that consent can be withdrawn at any time. The consent must also include a certification by medical personnel at the hospital that the patient is sufficiently competent to give consent and that the patient has read and understood the consent document. A

number of persons commented on this section. The Mental Health Association of Minnesota, Inc., (hereinafter "MHAM") suggested that the consent form follow the guidelines developed by the American Psychiatric Association. The consent language proposed by the Department is general and the Examiner suggests that the Department adopt the detailed language proposed by the MHAM. The rule should be amended to include the actual form of the consent document for proper guidance to state hospital personnel. Both the MHAM and the DD Council also suggested that consent terminology be in simple language. The Examiner agrees with that suggestion. In response to the DD Council's suggestion that patients be provided with copies of consent forms, the Department replied that it is current practice to place consent forms in the patient's medical record which is accessible to the patient. If it is current practice then this rule could easily reflect that practice, by adding language which would make it a requirement that consent forms be accessible to the patient.

The MHAM also recommended that informed consent would be far more informed if the patient were given the right to gain a second medical opinion concerning the proposed treatment. The Department agreed that a second opinion could be valuable, but stated opposition to making such a provision mandatory. The Examiner suggests that a reasonable compromise might be reached by adding the following language to the section:

> . . . and advises the patient of the right to consult with other persons <u>including medical personnel outside the state hospital system</u> regarding this decision.

In the Price case, the Court assigned some importance to the fact that a second independent medical opinion was given to the parent of the patient. (See, Price, 239 N.W.2d at 912) The Department's opposition to requiring a second opinion is based on cost considerations. Although this is a valid concern, the Examiner finds that receipt of a second opinion is not an unreasonable price to pay in order to assure that the patient's decision is a fully informed one. It is not unlikely that the ability to get a second opinion will increase the number of consents to treatment and thereby avoid the costs involved with seeking a judicial authorization.

In a written comment, Dr. John Bonde of Brainerd State Hospital asked for a legal definition of the term "sufficiently competent" as used in this section. The Department commented that this was beyond the scope of the rule. Furthermore, the Department stated that if there was a doubt as to the patient's competence, the Department would seek judicial authorization for use of the treatment. The Department may wish to expressly state the latter position of "when in doubt, go to court" in this section. Such an addition would give clearer direction to individuals such as Dr. Bonde who will be required to implement this rule.

12 MCAR § 2.020 C.1.c. deals with gaining consent for use of regulated treatments from relatives of mentally retarded residents of state hospitals. Its provisions parallel those of 12 MCAR § 2.020 C.1.b., except that the informed consent must be given by the relative and, in those instances where the Commissioner of Public Welfare is the guardian or conservator of the resident,

the Commissioner must also consent. The DD Council asked that the term "mentally retarded resident" be changed to "mentally retarded persons". The Examiner agrees with the Department's position that such a change would be confusing in that the rule only applies to state hospital residents. The MCLU commented that the section incorrectly assumes that all mentally retarded residents are incapable of giving consent. The Department responded that almost all state hospital residents are severely retarded so as to not be competent to give consent. The Department further commented that the rule does provide for involvement of the mentally retarded resident in the decision making process in that the proposed treatment will be explained to the resident. The Department may wish to modify this part of the rule to deal with consent by mentally retarded residents where such persons may be able to meaningfully participate in the decision process. The comments above which relate to the form of the informed consent and the seeking of a second medical opinion have equal validity when the consent is given by a relative. The Department should give consideration to those suggestions in this section of the rule.

12 MCAR § 2.020 C.1.d. deals with judicial authorization as the alternative to be used if consent is not given or the commitment order has not provided for utilization of the regulated treatment. This section requires judicial authorization pursuant to 12 MCAR § 2.020 E. of the rule. No comments were made specifically pertaining to this section.

In general comments pertaining to Section C., the DD Council suggested that the Department develop general timelines to regulate the utilization of the various alternatives and questioned what procedures would be used in emergency situations. In response, the Department stated that it does not intend to apply these procedures to emergency situations. The Department addressed itself to the DD Council timeline comment by stating that other treatment methods, not regulated by ths rule, could be continued. Given the Department's general responsibility to assure care for and treatment of state hospital residents, the Department's position is reasonable.

As currently drafted, Section C. does not provide for a consent alternative where the committed patient is a minor who is not mentally retarded. This was the factual situation present in the Price case. Dr. Young stated at the hearing that it was not the intent of the Department to exclude this type of situation from the rule. A consent option to deal with committed minors should be added to the rule in order to avoid a serious and unintentional gap.

The Examiner finds that 12 MCAR § 2.020 C. is reasonable and necessary as proposed.

16. 12 MCAR § 2.020 D. presents those factors that must be considered by state hospital personnel in their determination that any of the regulated treatments is "medically indicated" as required by 12 MCAR § 2.020 C. These five factors are taken verbatim from the Price case (see, Price, p. 913) Although the Court said these are the factors to be considered by an authorizing court, the Department has chosen to apply them to the medical decision. The Department also chose to omit the sixth factor from the Price case which is the "patient's ability to competently determine for himself whether the

treatment is desirable". Since the Department stated emphatically that these factors are the factors required by the Price decision and has not given a satisfactory explanation for deletion of the sixth factor and since findings as to each of the factors will be subsequently transmitted to a court for judicial authorization, the Department should add the sixth factor to Section D., if it wishes to be consistent with the Price decision. complied p. 4

The MHAM commented that these factors are far too general and that more specific factors ought to be examined depending on the type of regulated treatment to be administered. The Department commented that these are the factors to be considered because of the holding in the Price case which also requires an authorizing court to make specific findings on each of these factors before treatment can be authorized. The Department noted that since the factors will be applied on a case-by-case basis, the uniqueness requested by the MHAM will actually be present. In a similar comment, the Minnesota Civil Liberties Union, hereinafter MCLU, suggested a number of factors which ought to be added to make the section, in the words of the MCLU, "less vague". The MCLU specifically suggested that the Department add the following language:

> . . . that the patient would benefit in a demonstrable way from the proposed treatment; b) that the beneficial effects of the proposed treatment would not be outweighed by the adverse side effects; and c) that no alternative, less intrusive method is available which would secure the same benefits.

added p. 4

Review of the Price case makes it clear that the Supreme Court did not intend the six factors to be necessarily exclusive. In the words of the Court, these are the factors which "should" be considered. Addition of these factors would answer the concerns raised by the MCLU and the MHAM and would, if it is necessary to transmit findings on the factors to an authorizing court, be valuable to that court in rendering its decision. This section of the proposed rule, with its minimal factors which do comply with the Price decision, would be greatly improved by inclusion of the MCLU suggestions. However, the Examiner finds that this section of the rule as proposed is reasonable and necessary.

17. 12 MCAR § 2.020 E.l. states the procedure to be followed when authorization is to be sought for the administration of the regulated treatments from the county or probate court of the patient's county of settlement. The section states that none of the regulated treatments will be administered until such authorization is received. The section directs the hospital medical director or designee to petition the appropriate court. The section authorizes the court to hold the authorization hearing in the county of the patient's presence.

12 MCAR § 2.020 E.l.a. described the contents of the petition to be submitted to the authorizing court. Winona County commented that the state hospital should have to show in the petition the nature of the patient's behavior and why the proposed treatment would be effective in dealing with that behavior. This may fall within the requirement that the petition recite the findings relative to Sections C. and D. of this rule. The Department may also wish to consider for inclusion in the specifications for the petition the 11

factors introduced by Peter Fransway as Department's Exhibit 14. Inclusion of the factors suggested by both comments would provide a great deal of information to the authorizing court for use in its decision making process. If the Department adopts the suggestion that second medical opinions be allowed, then the Department should consider adding the results of that opinion to the petition's contents. The DD Council requested that the section be amended to read: ". . . the findings of the medical director and/or treating physician." The Department agreed that this would be an appropriate amendment.

12 MCAR § 2.020 E.1.b. states that the petition shall request the appointment of a guardian ad litem for the patient. None of the comments criticized this provision. Both the MCLU and the MHAM commented that the petition should also ask for the appointment of an attorney for the patient. The Department opposed the appointment of both an attorney and a guardian ad litem. During the hearing, Peter Fransway commented that the appointment of both a guardian ad litem and an attorney was the standard practice in Hennepin County. Although opposed to the separate attorney suggestion, the Department suggested that it could modify the section to state that the guardian ad litem should be an attorney. The concerns raised by the MCLU and the MHAM are legitimate and the Department should at least modify the rule to require that the guardian ad litem be an attorney. In addition, the Department should add permissive language which would allow the authorizing court to also appoint a separate attorney in suitable situations. This would leave to local courts the option of apppointing both a guardian ad litem and an attorney as is the practice in Hennepin County.

12 MCAR § 2.020 E.1.c. provides that a copy of the petition shall be provided to the welfare department of the patient's county of residence at time of commitment. Winona County commented that a 1979 amendment to Minn. Stat. § 253.02, subd. 23, would require that this section be amended by inserting the words "designated agency" in place of the words "welfare department". Evidently, this accommodates situations where the county welfare department is part of a human services agency. The Examiner suggests that the Department make this change.

12 MCAR § 2.020 E.1.d. provides for legal representation for the medical director for purposes of the authorization hearing. No comments were made on this section.

The MHAM suggested that a section be added to 12 MCAR § 2.020 E. to require that the authorizing court have the patient present during the hearing. The Department responded that it could not "dictate by rule the inclusion or exclusion of a patient in court". The Department then cited Minn. Stat. § 253A.07, subd. 10 and subd. 12 as dealing with that question. The Examiner agrees with the Department's position. Clearly, the patient's presence in court is solely within the discretion of the court.

Section E.1.e. provides that the costs of authorization hearings shall be billed to the county of the patient's settlement. Winona County criticized this section of the rule and stated that the costs should be billed to ". . . the jurisdiction requesting the special treatment. . . ." The Department commented that adoption of this change would be contrary to Minn. Stat. § 253A.30

and would put an undue financial burden on counties hosting state hospitals. The Examiner suggests that the term "county of settlement" should be defined in the rule.

The Examiner finds that 12 MCAR § 2.020 E. as proposed and amended is reasonable and necessary.

17. 12 MCAR § 2.020 provides that this rule is only to be applied to those types of treatment specified in 12 MCAR § 2.020 B. The MHAM commented that this procedure should be followed in any instance where a patient is being forced to take medication against his or her will. To support its position, the MHAM cited a not yet reported case from a United States District Court in New Jersey. In response, the Department cited the Minnesota Supreme Court case of In re Fussa, (Agency Ex. 15) which holds to the contrary. The Examiner finds that Section F. as proposed is necessary and reasonable.

18. As a general comment on the entire rule, the MCLU stated that any treatment without consent of a patient is a denial of that patient's rights under the Fourteenth Amendment to the United States Constitution. The Examiner finds that in light of the Price case that this is clearly not the present law in the State of Minnesota. Dr. Duncan also commented that the designation of the rule as Rule 20 would cause some confusion with another proceeding referred to as a Rule 20 hearing.

CONCLUSIONS

1. That the Department of Public Welfare gave proper notice of the promulgation of the proposed rule.

2. That the Department of Public Welfare has statutory and case law authority to take the action proposed, to wit, the promulgation of the proposed rule.

3. That the Department of Public Welfare has fulfilled all relevant, substantive and procedural requirements of law or rule.

4. That the Department of Public Welfare has demonstrated the need for and the reasonableness of the proposed rule by an affirmative presentation of facts in the record.

Based upon the foregoing Conclusions, the Hearing Examiner makes the following:

RECOMMENDATION

It is recommended that the proposed rule be adopted by the Department of Public Welfare with consideration given to the Findings of Fact herein.

Dated: November 1 , 1979.

Natalie L. Gaull

NATALIE L. GAULL
Hearing Examiner

STATE OF MINNESOTA

DEPARTMENT OF PUBLIC WELFARE

RECEIVED
AUG 24 1979
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION OF RULE 20 OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE ADMINISTRATION OF SPECIFIED THERAPIES TO STATE HOSPITAL PATIENTS. (12 MCAR 2.020)

STATEMENT OF NEED AND REASONABLENESS

In Price v. Sheppard, 307 Minn. 250, 239 N.W. 2d 905 (1976), the Minnesota Supreme Court established standards and procedures for administering "more intrusive forms of treatment" to committed patients residing in state hospitals. The court also indicated that these criteria would be used to adjudicate similar cases arising in the future. Therefore, it is necessary for the Minnesota Department of Public Welfare, as the state agency responsible for administering and supervising these hospitals, to promulgate a rule that will implement this decision and provide clear administrative direction to staff members who treat committed patients.

A rule is required under Minnesota Statutes 15.0412, Subdivision 3, in the following circumstances: "Each agency shall adopt rules setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public." The subject matter of this rule clearly falls within the scope of the foregoing statute.

The Supreme Court left open the question of precisely defining "more intrusive" treatment. "We cannot draw a clear line between the more intrusive forms of treatment requiring this procedural hearing and those which do not. Certainly this procedure is not intended to apply to the use of mild tranquilizers or those therapies requiring the cooperation of the patient. On the other hand, given current medical practice, this procedure must be followed where psychosurgery or electroshock therapy is proposed."[1] Proposed DPW Rule 20, in addition to establishing administrative procedures for assuring compliance with the court decision, provides a list of current psychiatric therapies to be included in the category of "more intrusive treatment."

Electroconvulsive therapy and psychosurgery are designated as "more intrusive" in accordance with the provisions of the Supreme Court decision. Coma therapy, although used extensively in the past, is no longer a generally accepted form of psychiatric treatment in Minnesota. Any proposed usage of coma therapy (including insulin) in the treatment of involuntary patients should therefore fall within the scope of this rule.

[1] Price v. Sheppard, 239 N.W. 2d at 913.

Agency Exhibit No. 11
File No. DPW 80-067
Date 9-20-79

The injection of chemical substances as aversive therapy, even when done with the committed patient's consent, is a drastic technique for modifying behavior. It exposes the patient to certain physiological risks as well as the possibility that the technique is being used for punishment rather than treatment. For these reasons, court approval is required before this type of aversive therapy can be prescribed for committed patients.

Schedule II substances of the Comprehensive Drug Abuse and Control Act of 1970, 21 U.S.C.A. Section 812 are controlled by federal law because of unusual pharmacological characteristics relating to the potential for abuse, addiction, etc. Because of these special risks, proposed DPW Rule 20 requires court approval for long term medical use of these substances on committed patients except for certain specific illnesses.

The Department will have available as expert witnesses the following individuals who will address the issues indicated: Glen Duncan, M.D., Rochester State Hospital - The impact of DPW Rule 20 on the care of committed patients in state hospitals; John Fordice, Pharm.D., Anoka State Hospital - The rationale for including Schedule II drugs in DPW Rule 20; Ronald C. Young, M.D., Medical Director, Department of Public Welfare - The Department of Public Welfare's use of procedures under the rule; and a Court Administrator yet to be selected - The impact of DPW Rule 20 on the court system.

Dated: August 23, 1979

Arthur E. Noot
Commissioner of Public Welfare

Agency Exhibit No. 12
File No. DPW 80 007
Date 9-20-79

Department of Public Welfare

Proposed Rule 20 Governing the Administration of Specified Therapies to State Hospital Patients

Notice of Hearing

Notice is hereby given that a public hearing in the above-entitled matter will be held pursuant to Minn. Stat. § 15.0412, subd. 4, in the Minnesota Veterans Home, Building 15, Auditorium Chapel, East 51st Street at Minnehaha, Minneapolis, Minnesota on September 20, 1979, commencing at 9:00 a.m.

All interested or affected persons will have an opportunity to participate concerning the proposed rule captioned above. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or material may be submitted to Steve Mihalchick, Office of Hearing Examiners, 1745 University Ave., St. Paul, Minnesota, 55104, (612) 296-8112, either before the hearing or within five (5) working days after the close of the hearing. The hearing examiner may keep the record open for a longer period not to exceed 20 calendar days. All such statements will be entered into and become part of the record.

The proposed rule will govern the administration of specified treatment modalities to committed patients residing in state hospitals. The proposed rule would require specific court authorization prior to administration of functional neurosurgery (psychosurgery), electroconvulsive therapy, coma therapy, aversive therapy utilizing the injection of any chemical substance, and medically prescribed maintenance therapy using drugs set forth in Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

The proposed rule goes on to provide procedures to be followed in the event it is determined that a certain treatment modality is medically indicated for the committed patient. Factors to be considered in determining medical indications are specified. In cases where judicial authorization is necessary, procedures to be followed to obtain such authorization are outlined. The proposed rule does not affect the administration of generally recognized treatment modalities not specified.

The authority for this proposed rule is based upon Minn. Stat. § 246.01 and the Minnesota Supreme Court decision on Price v. Sheppard, 307 Minn. 250, 239 N.W. 2 d 905 (1976).

Copies of the proposed rule are now available and at least one free copy may be obtained by writing to Ronald C. Young, M.D., Medical Director, Department of Public Welfare, Centennial Building, St. Paul, MN 55155, Telephone: (612) 296-3058. Additional copies will be available at the door on the date of the hearing.

Notice is hereby given that 25 days prior to the hearing a Statement of Need and Reasonableness will be available for review at the agency and at the Office of Hearing Examiners. This Statement of Need and Reasonableness will include a summary of all of the evidence which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule/rules. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge.

Any person may request notification of the date on which the hearing examiner's report will be available, after which date the commissioner may not take any final action on the rules for a period of five (5) working days. Any person may request notification of the date on which the hearing record has been submitted to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the hearing examiner, in the case of the hearing examiner's report, or to the agency, in the case of the agency's submission or resubmission to the Attorney General.

In addition, please be advised that Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five (5) days after he commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, telephone (612) 296-5615.

July 25, 1979

Arthur E. Noot
Commissioner of Public Welfare

Rule as Proposed

12 MCAR § 2.020 Procedures governing the administration of specified therapies to state hospital patients.

A. Introduction. This rule governs the administration of

the treatment modalities specified in part B. of this rule to committed patients residing at state hospitals.

B. Regulated treatments.

1. The following treatments must be administered pursuant to the provisions of parts C. through E. of this rule:

a. functional neurosurgery (psychosurgery) including the ablation or destruction of histologically normal brain cells by any medical or surgical procedure;

b. electroconvulsive therapy, or any other convulsive therapy;

c. coma therapy (including insulin);

d. injection of any chemical substance as an aversive therapy;

e. medically prescribed maintenance therapy using substances set forth in Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. Section 812. Provided, however, that this rule shall not apply to the prescription of any substance set forth in Schedule II when:

(1) such prescription is made for the treatment of Parkinsonism, epilepsy, hyperperistalsis, narcolepsy, or hyperkinesia, or

(2) such prescription is necessary for the preoperative or postoperative care of the patient.

C. Procedures

1. None of the treatment modalities listed in part B. shall be administered to a patient committed to a state hospital unless the medical director of the state hospital, on the basis of consultation with the patient's treating physician, has determined in accordance with the provisions of part D. of this rule that the treatment modality is medically indicated for the committed patient; and

a. the order committing the patient to the state hospital authorizes administration of the proposed treatment modality; or

b. in the case of committed adult patients, written consent is obtained on a form which specifies the nature, purpose, risks and effects of the proposed treatment and advises the patient of the right to consult with any other persons regarding this decision and to withdraw consent at any time. The consent must include a certification by the medical director of the state hospital or the patient's treating physician that the patient has read and understands the terms of the document and that the patient is sufficiently competent to give an informed consent to the proposed treatment; or

c. in the case of a committed mentally retarded resident, written consent is obtained from the closest responsible relative on a form which specifies the nature, purpose, risks and effects of the proposed treatment and advises the relative of the right to withdraw consent at any time. The consent must include a certification by the medical director of the state hospital or the resident's treating physician that the relative has read and understands the terms of the document. If the retarded resident also is under guardianship or conservatorship of the Commissioner, Department of Public Welfare, Minn. Stat. § 252A.11 (1978), the Commissioner must give the above consent as provided in subd. 1(a) or (g) in addition to the relative's consent. A certification shall be made by the medical director of the state hospital or the resident's treating physician that the retarded resident has received an explanation of the proposed treatment to the extent of the retarded resident's understanding; or

d. judicial authorization for the administration of the proposed treatment is granted by a court of competent jurisdiction pursuant to the provisions of part E. of this rule.

D. Factors to be considered in determining medical indications.

1. In assessing whether any of the treatment modalities listed in part B. are medically indicated for a committed patient, the medical director and the patient's treating physician shall consider the following factors in relation to such patient:

a. the extent and duration of changes in mental activity and behavior patterns effected by the treatment;

b. the risks of adverse side effects;

c. the experimental nature of the treatment;

d. its acceptance by the medical community of this state; and

e. the extent of intrusion into the patient's body and the pain connected with the treatment.

E. Hearings.

1. In cases where the provisions of part C.1.d. of this rule apply, none of the treatment modalities specified in part B. of this rule shall be administered absent judicial authorization. The state hospital medical director or his designee shall petition the probate or the county court of the county of the patient's settlement for such authorization. Where necessary and appropriate, this court may arrange to have the matter heard in the county of the patient's presence.

a. The petition shall state the nature of the proposed treatment, describe its purpose, recite the risks and effects of the procedure and recite the findings of the medical director or treating physician as provided in parts C. and D. of this rule.

b. The petition shall request the appointment of a guardian ad litem to represent the patient.

c. A copy of the petition shall be supplied to the welfare department in the county of the patient's settlement in advance of the hearing.

KEY: RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language. PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material."

E46

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF RULE 20 OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE ADMINISTRATION OF SPECIFIED THERAPIES TO STATE HOSPITAL PATIENTS. (12 MCAR 2.020)

AFFIDAVIT OF MAILING

DIANE LYNN HIRTE, being first duly sworn, deposes and says:

That on the 15 day of August, 1979 at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Hearing by depositing in the United States mail at said City of St. Paul, a true and correct copy thereof, properly enveloped, with postage prepaid, to all persons and associations at the addresses listed on the attached Certificate of the Secretary of State.

Diane L Hirte

Subscribed and sworn to before me this

20 day of August 1979.

Margaret Holt

E 7

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF RULE 20 OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE ADMINISTRATION OF SPECIFIED THERAPIES TO STATE HOSPITAL PATIENTS. (12 MCAR 2.020)

AFFIDAVIT OF ADDITIONAL MAILING

DIANE LYNN HIRTE, being first duly sworn, deposes and says:

That on the 15 day of August, 1979, at the City of St. Paul, County of Ramsey, State of Minnesota, in addition to mailing the attached Notice of Hearing to all persons and associations listed on the Secretary of State's list, she also served the attached Notice of Hearing by depositing in the United States mail at said City of St. Paul, a true and correct copy thereof, properly enveloped, with postage prepaid to the following agencies:

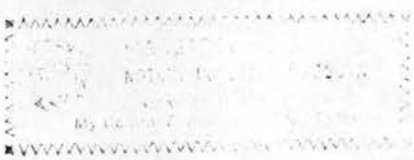
All Minnesota County Welfare Departments
All Minnesota Human Service Boards
All Minnesota Area Mental Health Boards
All Minnesota State Hospitals
All Names on Attached List

Diane L. Hirte

Subscribed and sworn to before me

this 20 day of August 1979.

Margaret Holt



RULE 20 Mailing List

M. I. Martin, M.D.
President,
Minnesota Psychiatric Assoc.
Mayo Clinic
Rochester, MN 55901

Mental Health Advocates Coalition
268 Marshall
St. Paul, MN 55102

Minnesota Mental Health Assoc.
4510 W. 77th, Room 100
Minneapolis, MN 55435

William Hausman, M.D.
Professor and Head,
Department of Psychiatry
Box 393 Mayo, U of M
Minneapolis, MN 55455

Irving Bernstein, M.D.
1011 Medical Arts Bldg.
Minneapolis, MN 55402

Minnesota State Medical Assoc.
American National Bank Building
101 E. Fifth St., Suite 900
St. Paul, MN 55101

Minn. Psychological Assoc.
Route 2 - Box 62
Lake Crystal, MN 56055

Minnesota Nurses Assoc.
1821 University Avenue
St. Paul, MN 55104

Hennepin County Probate Court
Government Center
Minneapolis 55401

Ramsey County Probate Court
Court House
St. Paul, MN 55102

Mr. Royce Lawson
Legal Assistance of Ramsey Co.
370 Selby
St. Paul, MN 55102

Jt. Religious Legis. Comm.
122 W. Franklin Avenue
Minneapolis, MN 55404

Ms. Reinard
Minn. Civil Liberties Union
628 Central Ave. S.E.
Minneapolis, MN 55414

Denny J. Clark
Chairman, MI Adv. Comm.
Willmar State Hospital
Willmar, MN 56201

Dr. Charles Austad
Edu-Art Building
Bemidji State University
Bemidji, MN 56601

Mr. Robert W. Johnson
Anoka County Attorney
Court House
Anoka, MN 55303

The Honorable Richard J. Ahles
Judge of County Court
Court House
St. Cloud 56301

Mr. Noel T. Koenigs
Soc. Serv. Supervisor
Swift Co. Welfare
Benson, MN 56215

Dr. Murray Rosenberg
College of Biological Sciences
250 Bio Science Center
1445 Gortner Avenue
St. Paul, MN 55108

Mr. John Malban
Program in Hosp. & Health
Care Administration
2829 Univ. Ave. S.E., Suite 336
Minneapolis 55414

Dr. Eunice Davis
Medical Director
Child Development Section
St. Paul-Ramsey Hospital
St. Paul, MN 55101

Freeman E. Wong, M.D.
Group Health Plan, Inc.
1533 Utica Ave. So.
St. Louis Park, MN 55416

Dr. Joseph J. Westermeyer
Dept. of Psychiatry
Box 393 Mayo, U of M
Minneapolis, MN 55455

E-5

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF RULE 20 OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE ADMINISTRATION OF SPECIFIED THERAPIES TO STATE HOSPITAL PATIENTS. (12 MCAR 2.020)

CERTIFICATE OF DELIVERY
SECRETARY OF STATE
LIST

I hereby certify that the attached 326 labels 3 sheets constitute the complete list of persons, associations, and other interested groups who as of 2:45 o'clock P.M. this 14th day of August, 1979, have requested pursuant to M.S. _____ the Secretary of State for the purpose of receiving notice of public hearing on proposed rules on the subject captioned above.

SECRETARY OF STATE

Joan Anderson Growe

BY Donna Scott

Ex 4

STATE OF MINNESOTA
DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF RULE 20 OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE ADMINISTRATION OF SPECIFIED THERAPIES TO STATE HOSPITAL PATIENTS. (12 MCAR 2.020)

AFFIDAVIT OF RECEIPT OF THE SECRETARY OF STATE'S LIST

DIANE LYNN HIRTE, being first duly sworn, deposes and says:

1) That she is an employee of the Special Services Division, Department of Public Welfare, State of Minnesota.

2) That on the 13 day of August, 1979, she went to the Secretary of State's office for the State of Minnesota and requested a current list of all representatives of associations or other interested groups or persons who have registered their names with the Secretary of State for the purpose of obtaining notices of public hearings relating to the promulgation of rules pursuant to M.S. 15.0412.

3) That on the 13 day of August, 1979, in response to the above request, the Secretary of State provided her with such a list, a copy of which is attached hereto and incorporated by reference.

Further affiant sayeth not.

Diane L. Hirte

Subscribed and sworn to before me

this 20 day of August

1979.

Margaret Holt

MARGARET HOLT
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
My Comm. Expires Sept. 22, 1984

STATE OF MINNESOTA

DEPARTMENT OF PUBLIC WELFARE

RECEIVED
AUG 16 1979
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION OF RULE 20 OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE ADMINISTRATION OF SPECIFIED THERAPIES TO STATE HOSPITAL PATIENTS. (12 MCAR 2.020)

NOTICE OF HEARING

Notice is hereby given that a public hearing in the above-entitled matter will be held pursuant to Minn. Stat. § 15.0412, subd. 4, in the Minnesota Veterans Home, Building 15, Auditorium Chapel, East 51st Street at Minnehaha, Minneapolis, Minnesota on September 20, 1979, commencing at 9:00 A.M.

All interested or affected persons will have an opportunity to participate concerning the proposed rule captioned above. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or material may be submitted to Steve Mihalchick, Office of the Hearing Examiners, 1745 University Ave., St. Paul, Minnesota, 55104, (612) 296-8112, either before the hearing or within five (5) working days after the close of the hearing. The hearing examiner may keep the record open for a longer period not to exceed 20 calendar days. All such statements will be entered into and become part of the record.

The proposed rule will govern the administration of specified treatment modalities to committed patients residing in state hospitals. The proposed rule would require specific court authorization prior to administration of functional neurosurgery (psychosurgery), electroconvulsive therapy, coma therapy, aversive therapy utilizing the injection of any chemical substance, and medically prescribed maintenance therapy using drugs set forth in Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

The proposed rule goes on to provide procedures to be followed in the event it is determined that a certain treatment modality is medically indicated for the committed patient. Factors to be considered in determining medical indications are specified. In cases where judicial authorization is necessary, procedures to be followed to obtain such authorization are outlined. The proposed rule does not affect the administration of generally recognized treatment modalities not specified.

The authority for this proposed rule is based upon Minn. Stat. 246.01 and the Minnesota Supreme Court decision on Price v. Sheppard, 307 Minn. 250, 239 N.W. 2 d 905 (1976).

Copies of the proposed rule are now available and at least one free copy may be obtained by writing to, Ronald C. Young, M.D., Medical Director, Department of Public Welfare, Centennial Building, St. Paul, MN 55155, Telephone: 612/296-3058. Additional copies will be available at the door on the date of the hearing.

Notice is hereby given that 25 days prior to the hearing a statement of need and reasonableness will be available for review at the agency and at the Office of Hearing Examiners. This statement of need and reasonableness will include a summary of all of the evidence which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule. Copies of the statement of need and reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge. 7

Any person may request notification of the date on which the hearing examiner's report will be available, after which date the commissioner may not take any final action on the rules for a period of five (5) working days. Any person may request notification of the date on which the hearing record has been submitted to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the hearing examiner, in the case of the hearing examiner's report, or to the agency, in the case of the agency's submission or resubmission to the Attorney General. 8

In addition, please be advised that Minn. Stat. Ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five (5) days after he commences lobbying. A lobbyist is defined in Minn. Stat. Section 10A.01, Subd. 11 as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or 6

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, telephone (612) 296-5615.

Dated: July 31, 1979

Arthur E. Noot
Commissioner of Public Welfare

RECEIVED
JUL 26 1979
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA

DEPARTMENT OF PUBLIC WELFARE

IN THE MATTER OF THE PROPOSED ADOPTION OF RULES OF THE DEPARTMENT OF PUBLIC WELFARE GOVERNING THE ADMINISTRATION OF SPECIFIED THERAPIES TO STATE HOSPITAL PATIENTS, RULE 20.

ORDER OF HEARING

IT IS HEREBY ORDERED that a public hearing on the above-captioned rule will be held in the Minnesota Veterans Home, Building 15, Auditorium Chapel, East 51st Street, at Minnehaha, Minneapolis, Minnesota on September 20, 1979, commencing at 9:00 A.M. and continuing until all persons have had an opportunity to be heard.

IT IS FURTHER ORDERED that a Notice of Hearing be mailed to all persons or representatives of associations or other interested groups who have registered their names with the Secretary of State for that purpose.

IT IS FURTHER ORDERED that a Notice of Hearing be published in the State Register.

Arthur E. Noot, Commissioner

Date: July 25, 1979

sentative of their choice throughout the proceeding. The hearing will be conducted pursuant to the contested case procedures set out in Minn. Stat. § 15.0411 through Minn. Stat. § 15.052 (1976) and Minn. Rule HE 201 through HE 222 (the Rules of the Office of Hearing Examiners) and to the extent they do not conflict, Minn. Rule MPCA 1-13 (the Agency's rules of procedure). Questions concerning discovery or other matters concerning this proceeding may be directed to Special Assistant Attorney General, Marlene E. Senechal, Minnesota Pollution Control Agency,, 1935 W. County Road B2, Roseville, Minnesota 55113, (612) 296-7708.

The purpose of this hearing will be to consider testimony and evidence bearing upon the application of the City of Rochester for a variance from Minn. Rule WPC 14 (c) (6), which establishes an effluent phosphorus concentration of 1 milligram per liter where the discharge of effluent is directly to or affects a lake or reservoir, for the operation of its existing and proposed wastewater treatment facility. The existing facility is located in the south half of Section 14 and the north half of Section 23, Township 107 North (Cascade Township), Range 14 West, Olmstead County, Minnesota. The proposed facility will be located at the same site as the existing facility. The receiving water of the facility's discharge is the South Fork of the Zumbro River. The City of Rochester seeks the variance for an indefinite period of time.

The Minnesota Pollution Control Agency is authorized to hold such hearing and grant such a variance by Minn. Stat. § 116.07, subd. 5 (1976) and pursuant to its regulation, Minn. Rule MPCA 6.

A party to a case has the right to present evidence and argument with respect to the issues and to cross-examine witnesses as well as other rights which are set out in the above-cited procedural rules. Interested persons may present oral or written statements at the hearing without becoming parties.

Any person desiring to intervene as a party must submit to the Hearing Examiner and serve upon all existing parties a Petition to Intervene by March 17, 1978. Pursuant to Minn. Rule HE 210, this petition must show how that person's legal rights, duties, or privileges may be affected by the decision in this case. The petition must also set forth the grounds and purpose for which intervention is sought. At the present time the representatives of parties to this proceeding who should be served with such Petition to Intervene are:

Mr. Gerald Swanson
City Attorney
Room 1, City Hall
Rochester, Minnesota 55901

Ms. Marlene E. Senechal
Attorney for MPCA Staff
Minnesota Pollution Control Agency
1935 W. County Road B2
Roseville, Minnesota 55113

A Notice of Appearance form, enclosed with this order, is to be completed and returned to the Hearing Examiner at least ten days before the hearing date by each person admitted as a party. In addition, the Agency requests that the Notice of Appearance be served upon the existing parties to the hearing.

The procedural rules Minn. Rule HE 201 through HE 222 are available for inspection at the Office of Hearing Examiners or may be purchased from the Documents Section of the Department of Administration, 140 Centennial Building, St. Paul, Minnesota 55155 (612) 296-2874. Copies of Minnesota Pollution Control Agency regulations and other documents pertinent to the proposed variance and application therefor are available for review by all interested persons during normal business hours at the Minnesota Pollution Control Agency, 1935 W. County Road B2, Roseville, Minnesota 55113.

If persons have good reason for requesting a delay of the hearing, the request must be made in writing to the Hearing Examiner at least 5 days prior to the hearing. A copy of the request must be served on all parties.

Dated: February 16, 1978

Minnesota Pollution Control Agency
Sandra S. Gardebring
Executive Director

Department of Public Welfare

Notice of Intent to Solicit Outside Opinion Regarding a Proposed Rule Governing Procedures for the Administration of Specified Therapies to State Hospital Patients

Notice is hereby given that the Minnesota Department of Public Welfare is considering a proposed new DPW Rule 20, "Procedures Governing the Administration of Specified Therapies to State Hospital Patients"

This rule will govern the administration of certain treatment modalities to committed patients residing at state hospitals. The proposed rule would require specific court au-

Agency Exhibit No. 8
File No. DPW 80 007
Date 5-20-79

thorization prior to administration of functional neurosurgery (psychosurgery), electroconvulsive therapy, coma or insulin therapy, aversive therapies utilizing the injection of any chemical substance, and medically prescribed maintenance therapy using Schedule II drugs as defined by the Comprehensive Drug Abuse Prevention and Control Act of 1970.

All interested or affected persons or groups are requested to participate. Statements of information and comment may be made orally or in writing. Written statements of information and comment may be addressed to:

Ronald C. Young, M.D.
Medical Director
Department of Public Welfare
Centennial Building
St. Paul, MN 55155

Oral statements of information and comment will be received during regular business hours over the telephone at (612) 296-3058.

All statements of information and comment must be received by March 20, 1978.

Any written material received by the Department shall become part of the hearing record.

Errata

1. 2 S.R. 187: Change "advisory" to "Advisory" at FEA 8.

2. 2 S.R. 1290: Add "to others is engaged in the business of renting or leasing equipment" after "leasing the equipment" and before "." at Tax S&U 104 C.

3. 2 S.R. 1494: Change "1 S.R. 92" to "2 S.R. 92" at introductory paragraph.

PROPOSED

MINNESOTA DPW RULE 20: Procedures Governing the Administration of Specified Therapies to State Hospital Patients.

A. Introduction

This rule governs the administration of the treatment modalities specified in part B of this rule to committed patients residing at state hospitals.

B. Regulated Treatments

1. The following treatments must be administered pursuant to the provisions of parts C through E of this rule:

a. functional neurosurgery (psychosurgery) including the ablation or destruction of histologically normal brain cells by any medical or surgical procedure;

b. electroconvulsive therapy, or any other convulsive therapy;

c. coma therapy (including insulin);

d. injection of any chemical substance as an aversive therapy;

e. medically prescribed maintenance therapy using substances set forth in Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. Section 812. Provided, however, that this rule shall not apply to the prescription of any substance set forth in Schedule II when:

(1) such prescription is made for the treatment of Parkinsonism, epilepsy, hyperperistalsis, narcolepsy, or hyperkinesia, or

(2) such prescription is necessary for the preoperative or postoperative care of the patient.

Agency Exhibit No. 3
File No. DPW 80 009
Date 9-20-79

C. Procedures

1. None of the treatment modalities listed in part B shall be administered to a patient committed to a state hospital unless the medical director of the state hospital, on the basis of consultation with the patient's treating physician, has determined in accordance with the provisions of part D of this rule that the treatment modality is medically indicated for the committed patient; and

a. the order committing the patient to the state hospital authorizes administration of the proposed treatment modality; or

b. in the case of committed adult patients, written consent is obtained on a form which specifies the nature, purpose, risks and effects of the proposed treatment and advises the patient of the right to consult with any other persons regarding this decision and to withdraw consent at any time. The consent must include a certification by the medical director of the state hospital or the patient's treating physician that the patient has read and understands the terms of the document and that the patient is sufficiently competent to give an informed consent to the proposed treatment; or

c. in the case of a committed mentally retarded resident, written consent is obtained from the closest responsible relative on a form which specifies the nature, purpose, risks and effects of the proposed treatment and advises the relative of the right to withdraw consent at any time. The consent must include a certification by the medical director of the state hospital or the resident's treating physician that the relative has read and understands the terms of the document. If the retarded resident also is under

guardianship or conservatorship of the Commissioner, Department of Public Welfare, Minnesota Statutes, Section 252A.11 (1978), the Commissioner must give the above consent as provided in Subdivision 1 (a) or (g) in addition to the relative's consent. A certification shall be made by the medical director of the state hospital or the resident's treating physician that the retarded resident has received an explanation of the proposed treatment to the extent of the retarded resident's understanding; or

d. judicial authorization for the administration of the proposed treatment is granted by a court of competent jurisdiction pursuant to the provisions of part E of this rule.

D. Factors to be Considered in Determining Medical Indications

1. In assessing whether any of the treatment modalities listed in part B are medically indicated for a committed patient, the medical director and the patient's treating physician shall consider the following factors in relation to such patient:

a. the extent and duration of changes in mental activity and behavior patterns effected by the treatment;

b. the risks of adverse side effects;

c. the experimental nature of the treatment;

d. its acceptance by the medical community of this state; and

e. the extent of intrusion into the patient's body and the pain connected with the treatment.

E. Hearings

1. In cases where the provisions of part C.1.d. of this rule apply, none of the treatment modalities specified in part B of this

rule shall be administered absent judicial authorization. The state hospital medical director or his designee shall petition the probate or the county court of the county of the patient's settlement for such authorization. Where necessary and appropriate, this court may arrange to have the matter heard in the county of the patient's presence.

a. The petition shall state the nature of the proposed treatment, describe its purpose, recite the risks and effects of the procedure and recite the findings of the medical director or treating physician as provided in parts C and D of this rule.

b. The petition shall request the appointment of a guardian ad litem to represent the patient.

c. A copy of the petition shall be supplied to the welfare department in the county of the patient's settlement in advance of the hearing.

d. The medical director shall seek representation from the county attorney of the county in which the hearing is held. In the event the county attorney is unable to provide such representation, the medical director shall seek legal representation through the Department of Public Welfare.

e. The cost of such hearings shall be met by the patient's county of settlement, as specified by Minnesota Statutes, Section 253A.20 (1978).

F. Exception

This rule does not affect the administration of generally recognized treatment modalities not specified in part B.

SF-00006-01

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT ATTORNEY GENERAL--Public Welfare
515 Transportation Building

TO : Carol Porter
State Register
506 Rice Street

DATE: January 23, 1981

FROM : P. Kenneth Kohnstamm
Special Assistant
Attorney General

PHONE: 296-6673

SUBJECT: 12 MCAR § 2.016

This is to confirm that on January 21, 1981 I authorized you to make the following changes to 12 MCAR § 2.016 which is scheduled for printing February 2, 1981:

1. Section C.3. Omit "(1978)",

2. Section E. Remove "(1978)",

3. Section E.5. Omit "(1978)",

4. Section E.3. Omit the phrase "the patient's settlement" and replace it with "financial responsibility". Thus E.3. shall read "a copy of the petition shall be supplied to the Welfare Department or other designated agency in the county of financial responsibility in advance of the hearing."

Thank you for your assistance.

PKK/aa

cc: Judith Wehrwein
bps: Please consider this authorization to the Attorney General, Administrative Division, to make the changes noted above.

PKK