SUBJECT: ABILITY OF CHIROPRACTORS TO PERFORM EXAMINATIONS

The following is an opinion written by Assistant Attorney General Robert Holley, in answer to the question of the breadth of examinations permitted by the scope of practice for Doctors of Chiropractic. The opinion is dated February 21, 1995

STATE OF MINNESOTA

Office of the Attorney General

ATTORNEY-CLIENT PRIVILEGE

THIS MEMORANDUM IS SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE AND PROTECTED FROM DISCLOSURE. THE BOARD OF CHIROPRACTIC EXAMINERS MAY WAIVE THE PRIVILEGE BY THE VOTE OF A MAJORITY OF A QUORUM. TO PREVENT UNINTENTIONAL WAIVER OF THE PRIVILEGE, BOARD MEMBERS AND STAFF SHOULD NOT DISTRIBUTE COPIES TO OTHERS.

TO : LARRY A. SPICER, D.C.
Executive Director
Board of Chiropractic Examiners

DATE : February 21, 1995

FROM : ROBERT T. HOLLEY RTH
Assistant Attorney General

PHONE : 297-5938 (Voice)
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SUBJECT : **Authority of Chiropractors to Perform Minnesota Department of Transportation (MnDot) Physical Examinations**

On December 8, 1994, the Board requested an opinion regarding the authority of chiropractors licensed to practice in Minnesota to sign the physical examination certificate required by MnDot for the operation of commercial motor vehicles. In a memorandum, dated December 20, 1994, you confirmed the Board's request and asked that my response take various materials and information into consideration.

ISSUE

The physical examination required by MnDot to operate a commercial motor vehicle is prescribed by the Federal Highway Administration (FHWA). See Minn. R. 8850.7100

(1993). FHWA regulations provide that "a person shall not drive a motor vehicle unless he is physically qualified to do so and. . . has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a motor vehicle." 49 C.F.R. § 391.41 (1993). The required examination must be performed by a licensed "health care professional." Id. at section 391.43(a)(1). FHWA regulations define health care professional as:

> [A] person who is licensed, certified and/or registered, in accordance with applicable State laws and regulations, to perform physical examinations. The term includes, but is not limited to, doctors of medicine, doctors of osteopathy, physician assistants, advanced practice nurses, and doctors of chiropractic.

(Emphasis added.) Id. section 390.5. Based on the foregoing, the sole question presented is whether chiropractors licensed to practice in Minnesota are authorized by state law to perform the MnDot physical examination.

ANALYSIS

Minn. Stat. Section 148.08, Subd. 2

In most relevant part, the chiropractic practice act provides as follows:

> Chiropractors shall be subject to the same rules and regulations, both municipal and state, that govern other licensed doctors or physicians in the control of contagious and infectious diseases, and shall be entitled to sign health and death certificates, and to all rights and privileges of other doctors or physicians in all matters pertaining to the public health, except prescribing internal drugs or the practice of medicine, physical therapy, surgery and obstetrics.

(Emphasis added.) Minn. Stat. §148.08, subd. 2 (1994).

The term health certificate is not defined in the act. Absent a special meaning, statutory words and phrases are to be construed according to their common and approved usage. Minn. Stat. § 645.08(1) (1994). Random House Webster's College Dictionary, 1992, p. 617, defines "health" as "the general condition of the body or mind with reference to soundness or vigor . . . [and] freedom from disease or ailment." A "certificate" is "a

document providing evidence of status or qualifications, as one attesting to the. . . truth of facts stated." Id. p. 222.

The MnDot physical examination form is designed to record the physical condition or health of a commercial motor vehicle driver. 49 C.F.R. § 391.43(e). The form includes a "Medical Examiners Certificate" section to be signed by the examining health care professional to verify the findings of the physical examination. Id. That the MnDot examination form may reasonably be regarded as a health certificate within the meaning of Minn. Stat. § 148.08, subd. 2, is evident.

An elementary tenet of statutory construction is that when the words of a law are clear and unambiguous, effect must be given to the plain meaning of the language. Minn. Stat. § 645.16 (1994). Likewise, the Minnesota Supreme Court has held that "a statute must be enforced literally if its language embodies a definite meaning which involves no absurdity or contradiction, the statute being its own best expositor." City of St. Louis Park v. King, 246 Minn. 422, 75 N.W.2d 487, 492 (1956). In the present case, the language in question conveys a definite meaning and presents no apparent absurdity or contradiction. Thus, on its face, section 148.08, subd. 2, authorizes chiropractors to sign health certificates, including the MnDot physical examination form.[1] Such authority clearly indicates an intent on the part of the Legislature to permit chiropractors to conduct the physical examination that underlies execution of the health certificate.

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1. The available history of section 148.08, subd. 2, appears to support a literal interpretation. The language authorizing chiropractors to sign health and death certificates was adopted in 1927 as an amendment to section 8 of the original chiropractic practice act of 1919. Minn. Laws, ch. 230, sec. 1. The amendment was seemingly adopted, at least in part, as a response to the Minnesota Supreme Court's decision in Wentworth v. Fahey, 152 Minn. 220, 188 N.W. 260 (1922), which denied chiropractors the right to sign death certificates. Committee records indicate that the 1927 enactment was supported by the Board, but opposed by the State Board of Health and the Mayo Clinic. Legislative House Committee, Committee on Public Health and Hospitals, pp. 23, 24. The underlying bill, H.F. 464, was passed out of Committee on a 4-3 vote following unsuccessful motions to eliminate certificate authority for chiropractors and to indefinitely postpone the bill. Id. at p. 24.

Scope of Practice

Notwithstanding the preceding evidence that the facial meaning of section 148.08, subd. 2, provides broad health certificate authority, 1969 and 1975 Minnesota Attorney General's opinions and a 1975 judicial decision raised doubts with regard to chiropractors' general authority to diagnose and to use certain instrumentalities. Absent the authority to diagnose conditions in addition to those treatable by chiropractic, it is arguable that certain tests required to complete standard physical examination forms cannot be conducted by Minnesota chiropractors. It follows that if the use of certain diagnostic procedures required to conduct a physical examination is denied, the breadth of a chiropractor's authority to sign health certificates may be restricted.

The 1969 attorney general's opinion was issued in response to a number of questions posed by the Board of Medical Examiners concerning the scope of chiropractic practice. Op. Atty. Gen. 303c-2 (Oct. 21, 1969).[2] Pertinent to the present inquiry was whether a Minnesota licensed chiropractor could use urological and hematological analysis or blood pressure tests for diagnostic purposes. The Attorney General concluded that chiropractors are trained to administer such tests, but that they may be used only to diagnose "abnormal articulations" treatable in accordance with the scope of practice provisions of Minn. Stat. § 148.01, subd. 1.

A second significant legal development which raised questions about the permissible scope of chiropractic practice arose from the case of State Board of Medical Examiners v. Richard E. Olson, Court File No. 38217, 7th Judicial District (Jan. 28, 1975); Audio tape, House Health and Welfare Committee Meeting, April 18, 1975. Dr. Olson, a chiropractor, was sued for allegedly engaging in the unauthorized practice of medicine by reason of his use of muscle stimulator devices, ultrasound, and a short-wave diathermy machine. On remand from the Minnesota Supreme Court on procedural grounds (295 Minn. 379, 206 N.W.2d 12

2. The Board of Medical Examiners was renamed the Board of Medical Practice in 1991. Minn. Laws 1991, ch. 106, § 6.

(1973), Stearns County District Court Judge Paul Hoffman interpreted the original chiropractic practice act of 1919 as not providing authority for use of the devices in question by chiropractors. He further found that use of the devices should be preceded by a careful medical diagnosis.[3]

In a 1975 opinion issued in response to questions by the Board of Medical Examiners concerning the practice of acupuncture, the Attorney General referenced his 1969 opinion on chiropractic by reaffirming that the circumstances under which a chiropractor could perform blood, urine and blood pressure tests were limited. Op. Atty. Gen. 303c-2 (March 10, 1975).

Finally, later in 1975, interested organizations sought legislation to clarify the scope of chiropractic practice, which some viewed as having become increasingly uncertain or restricted. Committee tapes reveal that an extensive legislative proceeding regarding the parameters of diagnosis focused on whether chiropractors should be permitted to diagnose only those conditions which are treatable by chiropractic means or whether a considerably broader authority, possibly including unlimited differential diagnosis, is appropriate. Following more than four hours of testimony and debate on two separate days in the House Subcommittee on Health Care, the final version of a bill, H.F. 534, was recommended to pass. Minutes, House Subcommittee on Health Care Meeting, April 10, 1975. It was enacted without significant modifications and, in most relevant part, codified as Minn. Stat. § 148.01, subd. 3. That portion of the 1975 legislation which relates most directly to diagnosis has not been altered since its adoption. It provides as follows:

> Chiropractic practice includes those non-invasive means of clinical, physical, and laboratory measures and analytical x-ray of the bones of the skeleton which are necessary to make a determination of the presence or absence of a chiropractic condition.

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3. It is understood that the lower court's final decision in 1975 was appealed, but by stipulation of the parties, the appeal was dismissed by the Minnesota Supreme Court on October 3, 1975.

Legislative History of Section 148.01, subd. 3

Section 148.01, subd. 3, may be subject to varying interpretations relative to whether the diagnostic procedures authorized under the section are limited to the detection of chiropractic conditions or have a broader application. Legislative records are instructive regarding the development and meaning of the statutory language.[4] Representative Bruce Vento, the chief sponsor of H.F. 534, explained its general purpose as follows:

> Mr. Chairman and members of the Committee, for the past seven years the Minnesota courts and legislature have been facing a controversy surrounding the definition of chiropractic in the state. Because of the direction that the court had attempted to provide us with regard to the scope of chiropractic, as a result of the more recent decision, it did limit it very severely and obviously not consistent with the way that chiropractic has evolved to serve the needs of the constituents that we represent. In quoting from one of the decisions by Judge Hoffman:
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>> "The basic problem in the interpretation of an old statute is that it was enacted before the devices in question were known or used. The court feels the statute was restrictive and has so interpreted it. If it is to be broadened in its scope or application, it appears that this should be done by the legislature."
>
> That's the reason we brought the bill before you, because the way chiropractic is practiced today is not the same as it was in 1919 when the pages of the books with regard to the scope of chiropractic practice took place. . . . This amendment will help the patient who seeks a chiropractor for treatment, and he is entitled to the best care he can receive. The amendment will permit the profession and art of chiropractic to continue as it has in the past.

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4. When the words of a statute are not explicit, legislative intent may be determined by considering contemporaneous legislative history. Minn. Stat. § 645.16(7) (1994). The Minnesota Supreme Court has also observed that selective use of statements made in the give and take of the legislative process is risky and that statements made in committee discussion are to be treated with caution. Handle With Care, Inc. v. Department of Human Services, 406 N.W.2d 518, 522 (1987). Nevertheless, consideration of the tapes of committee and floor sessions is authorized to determine legislative intent by the examination of contemporaneous legislative history and, in the Court's view, should not be ignored if helpful to an understanding of legislative intent. See id.

Audio tape, House Health and Welfare Committee Meeting, April 18, 1975. Representative Byrne, a member of the House Subcommittee on Health Care, expressed a similar understanding of the overall purpose of the legislation:

> What we're trying to do is set up language here that will not take away any of the present powers that the chiropractors have now. Right? We're just trying to give them what they're doing now.

Audio tape, House Subcommittee on Health Care Meeting, April 10, 1975.

The original version of Rep. Vento's bill stated that "[c]hiropractic diagnosis may include clinical, physical, x-ray, and routine laboratory measures necessary to make a differential diagnosis." Minutes, House Subcommittee on Health Care Meeting, April 8, 1975. H.F. 870, a competing measure introduced by Representative Enebo, would seemingly have limited chiropractic diagnosis to "examining and locating misaligned articulations or displaced vertebrae of the human spine . . . ." Id. The Vento bill was amended during the first day of Subcommittee hearings to read as follows relative to diagnosis:

> "Chiropractic diagnosis may include clinical, physical, x-ray and routine laboratory measures necessary to make a chiropractic diagnosis to determine the necessity for chiropractic care or referral to another health care provider. Id.

Representative Vento explained his amended proposal as follows:

> Clarifying that a chiropractor can use diagnostic procedures simply means that if he sees that there's something wrong with a person, that he cannot provide a service for that patient, that he can direct that person to see a physician. That's what we mean by "diagnosis." I think that that's important. I don't think that we want a chiropractor not to be able to diagnose, to suggest that someone see a doctor about a particular problem. I think that this would permit them to do that.

Audio tape, House Subcommittee on Health Care Meeting, April 8, 1975. Dr. John F. Allenburg, the Dean of Clinics at Northwestern College of Chiropractic in St. Paul,[5]

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5. Dr. Allenburg is the current president of Northwestern College of Chiropractic, which is now located in Bloomington, Minnesota.

elaborated on the importance of a diagnosis which may uncover conditions which are not necessarily treatable by chiropractic:

> An intelligent diagnosis is the foundation of all rational treatment. He [the chiropractic student] learns that only accurate diagnosis can insure the patient will receive the proper type of treatment administered by the type of doctor most qualified to care for his or her ailment and that valuable time and expense will not be wasted with incorrect therapies when referral may have been indicated.
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> Furthermore, the student learns that he or she is required to state a correct diagnosis for insurance companies in order that patients may be properly reimbursed, by attorneys representing client-patients, and by the courts when called upon to testify regarding injured patients. The student understands that he or she could be guilty of malpractice or negligence if a patient were to suffer because of diagnostic error on his or her part.
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> Physical, laboratory and x-ray diagnostic procedures are especially necessary to distinguish those cases which may be treated by doctors of chiropractic from those which should be referred to other health providers. For example, many internal organ diseases may lead to musculoskeletal pain through irritated neuromechanisms. Heart diseases may cause shoulder and arm pain. Gallbladder disorders may cause pain over the spine between the shoulder blades. Pancreas disorders may cause back pain while lying down. Back pain may also be caused by bone marrow disease, kidney disease and prostate disease. Only by utilizing the appropriate blood and urine tests, physical findings and radiographs can the above disorders be distinguished from pain due to abnormal articulations so that appropriate referrals may be made. Spinal joint malalignments themselves can only be positively identified and classified through radiographic examination.

Id.

Opposition was voiced on behalf of the State Board of Medical Examiners by Sidney Berde, who served as legal counsel for that agency in the Olson case:

> The bill which is now before the Subcommittee would expand the practice of chiropractic to include every diagnostic procedure known to the medical profession. If carefully read, that's what it does. So long as some chiropractor determines that such diagnostic procedure is "necessary to make a diagnosis to

> determine the necessity of chiropractic care or referral to another health care provider" that chiropractor, if he can make that determination, would be free under this bill to pursue that clinical or laboratory diagnosis. The bill would permit chiropractors to engage in diagnostic procedures that many medical specialists would hesitate to perform. The amended language is broader than anything that has heretofore been brought before this Committee. It should be rejected out of hand, because if adopted, it would place no limits whatsoever on the scope of clinical diagnosis, so-called, available to chiropractors.

Id. Likewise, Chester A. Anderson, M.D., spoke in opposition to H.F. 534 on behalf of the Minnesota Medical Association:

> What then is necessary for a chiropractor to make his diagnosis? Frankly, two things: A physical examination and an x-ray of the spinal column. I am sure every orthodox chiropractor would say this was sufficient. They are trained to make this kind of diagnosis, then to follow up with chiropractic adjustment. This privilege they already have under statutes.
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> Now we have a bill, H.F. 534, which would allow the chiropractors to literally slip into the practice of medicine to the differential diagnosis. And I quote, "Chiropractic diagnosis may involve medical, physical, x-ray and routine laboratory measures necessary to make a differential diagnosis." The amendment offered is rephrased as the same statement. This could be interpreted then to mean skull x-rays, extremity x-rays, mammography, soft tissue x-rays using barium contrast for colon studies, stomach studies, contrast dyes for kidney studies, arteriogram studies, pneumoencephalogram, nuclear x-ray studies, including brain scans. . . . You could go on and on. . . .
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> Routine laboratory measures. What are these? Are they just (inaudible) hemoglobins and blood sugars? Or are they liver profiles or enzyme profiles, thyroid function tests, electrolyte balances, blood chemistries, which are used normally in certain medical examinations to rule in or out a medical disease that can be treated medically. . . . In conclusion, gentlemen, the present statutes are adequate to allow these people to practice their profession with dignity and honesty. We particularly see no reason for the passage of the present bill under consideration.

Id.

Subcommittee hearings on April 10, 1975, resulted in another amendment of the bill's diagnostic provision. The new language provided as follows:

> Chiropractic practice includes those routine, clinical, physical, analytical x-ray, and laboratory measures which are necessary to make a determination of the presence or absence of a chiropractic condition.

Minutes, House Subcommittee on Health Care Meeting, April 10, 1975. Representative Vento indicated that he did not regard the new language as conveying a meaning any different from that set forth in the previous version or the language he originally introduced. Audio tape, House Subcommittee on Health Care Meeting, April 10, 1975. Curtis Forsland, an attorney representing the Board of Medical Examiners, offered similar observations:

> Basically, I agree with Representative Vento that the bill is not different except in semantics from the one that was offered originally. For example, the word "diagnosis," to which there was apparently substantial objection, has been stricken from the original bill and the substantive word that's used is the word "determination." I think we are playing there with semantics. To make a determination is to make a diagnosis as I understand it.

Id. Representative Linda Berglin also commented on the amendment:

> It seems to me that the first part of this amendment leaves out a couple of words that we have in the other amendment but basically allows the same kinds of things to happen in the area of clinical, physical, analytic x-ray and laboratory measures. We're not talking about "diagnosis" now but we're still allowing all of the things to happen. . . The only thing we're not allowing in here as I see it is those things which are not routine. I'm not sure what those things are.

Id.

Final amendments to H.F. 534 were adopted during the Subcommittee hearing on April 10, 1975, based largely on the testimony of physiologist Dr. William Kubicek, of the University of Minnesota Hospitals. The Subcommittee substituted "non-invasive" for "routine" relative to permissible clinical, physical and laboratory diagnostic procedures and

limited diagnosis by x-ray to "the bones of the skeleton." Id.; Minutes, House Subcommittee on Health Care Meeting, April 10, 1975. Dr. Kubicek specifically advised the Subcommittee that the inclusion of "non-invasive" would prohibit spinal taps by chiropractors and that the x-ray restriction would prohibit chiropractors from x-raying abdominal content. As has been noted, H.F. 534 was enacted without significant change concerning diagnostic authority in the same form in which the Subcommittee approved the bill on April 10, 1975. No action was taken on H.F. 870, the proposal which would have limited diagnoses to procedures used to detect only conditions treatable by chiropractic. Minutes, House Subcommittee on Health Care Meeting, April 10, 1975. The current scope of chiropractic diagnosis continues to be defined by H.F. 534, codified as Minn. Stat. § 148.01, subd. 3.

Thus, a review of all available tapes discloses that the appropriate scope of chiropractic diagnosis was fully aired in 1975, including lengthy testimony regarding the extent and nature of chiropractic education and license examination requirements.[6] The Legislature was presented with radically divergent options, namely, to restrict diagnosis under H.F. 870 to those procedures designed to detect only conditions treatable by chiropractic or to permit an unlimited differential diagnosis like that available to medical doctors. The restricted diagnosis option was not enacted. At the same time, certain specific limitations were imposed to deny chiropractors the right to engage in unrestricted differential diagnosis. Those limitations are defined by Dr. Kubicek's proposals concerning the use of only non-invasive procedures and the limitation of x-ray analysis to the bones of the skeleton. The history of section 148.01, subd. 3, supports a conclusion that the Legislature intended to impose no other limitations.

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6. Dr. John F. Allenburg, among others, provided extensive detail regarding chiropractic college accreditation standards and the education of chiropractic students, including the training provided in diagnosis. Audio tape, House Subcommittee on Health Care Meeting, April 8, 1975. Similarly, Dr. August Schaub, a member of the Board in 1975, provided details regarding the subjects covered in the National Chiropractic Board Examination and the state licensing examination. Id.

The basic MnDot physical examination does not appear to require the use of invasive diagnostic procedures or analytical x-rays not involving the bones of the skeleton. MnDot examination requirements specifically include the taking of a health history, an evaluation of the patient's general appearance and development, vision testing, a hearing test, an examination of the throat and thorax, blood pressure and pulse readings, an examination of the lungs, abdomen and gastrointestinal system, urinalysis, reflex tests, including knee jerks, an examination of the extremities and any additional indicated laboratory tests. Id. at 49 C.F.R. § 391.43.[7] None of these procedures is seemingly beyond the scope of practice under section 148.01, subd. 3. In addition, all appear to be well within the training of doctors of chiropractic.[8] Similarly, the examination for licensure in Minnesota evidently requires mastery of the several procedures necessary to perform a MnDot physical examination.[9]

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7. Where indicated by the patient's history, a more stringent examination might be necessary. 49 C.F.R. § 391.43.

8. Materials and information provided in conjunction with the Board's opinion request show that chiropractors are trained to perform each of the MnDot examination procedures and tests. It is noted, for example, that Northwestern College of Chiropractic, which meets national accreditation standards and from which the great majority of Minnesota's licensees has graduated, offers the following diagnostic courses, among others: the examination, diagnosis, and pathophysiology of the eyes, ears, nose and throat; the use of traditional diagnostic instruments, including the stethoscope, sphygmomanometer, otoscope and ophthalmoscope; the conduct of the complete nonneuromusculoskeletal physical examination, including history, inspection, palpation, auscultation and mensuration; differential diagnosis of central nervous system disorders; diagnoses of the clinical conditions associated with the gastrointestinal tract; differential diagnoses of endocrinopathies; diagnoses of the clinical conditions associated with the urinary tract; diagnoses of musculoskeletal conditions of the upper and lower extremities; basic diagnostic approaches to common respiratory disorders; radiographic technology and positioning; clinical hematology and urinalysis; dermatology; management of hypertension, diabetes, asthma and cardiovascular disease; and assessment and early care of emergencies, including wounds, fractures, hemorrhages, shock, apoplexy, cardiopulmonary crisis and diabetic reactions.

Memorandum, December 20, 1994.

9. Minnesota licensure requires passage of Parts II and III of the National Board of Chiropractic Examiners examination. Minn. R. 2500.0720. Parts II and III include extensive testing in the following and numerous other subjects: case history; vital signs; head and neck examination; thorax and lung examination; cardiovascular examination;

(Footnote 9 continued on next page)

If the circumstances presented by an individual applicant indicate the need for a more stringent examination, FHWA regulations permit referral to a specialist. See id. A discussion of the referral process published by the FHWA in conjunction with its adoption of the regulations states in most relevant part as follows:

> These health care professionals [chiropractors] are licensed, registered, and/or certified under their State statutes to perform physical examinations. Chiropractors are also required to refer any patient, with any condition(s) outside the scope of their practice, to MDs, DOs and/or other medical specialists. This is consistent with what other medical practitioners do in this age of specialization. . . .
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> The physical examination does not require sophisticated diagnosis or treatment. In the event that such diagnostic analysis is required, the FHWA would expect the health care professional, consistent with sound medical practices, to promptly refer the patient to the appropriate health care specialist.

57 Fed. Reg. p. 33277 (July 28, 1992). The referral process authorized by the FHWA would appear to be consistent with testimony regarding modern chiropractic practices in Minnesota which preceded the adoption of section 148.01, subd. 3. See supra at pp. 7-8. It is also noted that FHWA regulations specifically allow the examining health care professional to order studies pertaining to laboratory and other special findings. 49 C.F.R. § 391.43. If dictated by the requirements of a particular case, such studies seemingly could include invasive procedures or special x-ray studies. See id.

Analogous Health Certificate Authority

The authority of Minnesota chiropractors to sign MnDot health certificates under sections 148.01, subd. 3 and 148.08, subd. 2, is also supported by analogous legislation

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(footnote 9 continued)
abdominal examination; rectal and urogenital examination; clinical diagnosis, including head, eyes, ears, nose and throat; respiratory diseases; cardiovascular diseases; gastrointestinal diseases; genitourinary diseases; infectious diseases; laboratory interpretation, including urinalysis, hematology and serology; orthopedic examination, including the extremities; neurologic examination, including sensory function and reflexes, and sexually transmitted diseases. Id.

relating to physical examinations for parking privileges for the physically disabled. The Legislature has expressly authorized doctors of chiropractic to perform physical examinations and sign health certificates in conjunction with parking privileges for physically disabled persons. Minn. Stat. § 169.345 (1994) in pertinent parts provides as follows:

> The commissioner shall develop a form for the physician's or chiropractor's statement. The statement must be signed by a licensed physician or chiropractor who certifies that the applicant is a physically disabled person as defined in subdivision 2. The commissioner may request additional information from the physician or chiropractor if needed to verify the applicant's eligibility. The statement that the applicant is a physically disabled person must specify whether the disability is permanent or temporary, and if temporary, the opinion of the physician or chiropractor as to the duration of the disability.

Subd. 2a. (Emphasis added.) The foregoing provisions relating to chiropractors have been in effect since 1988. Minn. Laws 1988, ch. 642, § § 7, 8.

A disability parking certificate requires an examination and diagnosis relating to the heart, lungs and other systems. Minn. Stat. § 169.345, subd. 2 (1994); Department of Public Safety form PS-2005-16. Neither the underlying statute nor any discovered administrative rule restricts the required examination and diagnosis to conditions treatable by chiropractic when the examinations are performed by a chiropractor. See id.

Statutes which relate to the same general subject are referred to as being in pari materia ("upon the same matter or subject"). Black's Law Dictionary, 6th Ed., Continental Ed. (1891-1991), p. 791. A fundamental rule of statutory construction provides that when a particular statute is ambiguous, statutes which are in pari materia should be read, construed and applied together so that the Legislature's intent can be ascertained from the whole of its enactments. Id.; Minn. Stat. § 645.16(5) (1994); see e.g., Hahn v. City of Ortonville, 238 Minn. 428, 57 N.W.2d 254, 261 (1953). Minnesota Statutes § § 148.01, subd. 3, 148.08, subd. 2, and 169.345 all relate to a chiropractor's authority to conduct examinations and to sign related health certificates. Accordingly, the statutes seemingly are in pari materia.

Under the circumstances, if section 148.01, subd. 3 or section 148.08, subd. 2, is ambiguous relative to the extent of a chiropractor's authority to diagnose for purposes of signing health certificates, it is appropriate to consider related laws to determine the Legislature's intent. Once again, there is no indication under section 169.345 that the Legislature intended to limit chiropractic diagnosis to conditions treatable only by chiropractic means. This conclusion is consistent with the facial absence of any such limitation under section 148.08, subd. 2.[10]

Administrative Construction

An additional basis for the conclusion that doctors of chiropractic licensed in Minnesota may perform the MnDot physical examination is found in the longstanding administrative construction of the Board. When the words of a statute are not explicit, legislative intent may be determined by considering, among other things, administrative interpretations of the law. Minn. Stat. § 645.16(8) (1994). The weight to be given such interpretations increases when the agency is construing a statute which it is charged to administer and the construction is longstanding. E.g., McAfee v. Department of Revenue, 514 N.W.2d 301 (Minn. Ct. App. 1994) rev. den..

On a number of occasions the Board has enforced the disciplinary provisions of chapter 148 or taken corrective action[11] to require licensees to utilize standard (non-invasive)

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10. It should also be noted that workers' compensation legislation recognizes a chiropractor's authority to perform examinations, diagnose and submit reports relative to injured employees for purposes of compensation. See Minn. Stat. § § 176.011, subd. 24, 176.135, 176.55, subd. 5, 176.231, subd. 3 (1994). Among other things, rules of the Department of Labor and Industry expressly authorize the payment of fees for a chiropractor's "review of diagnostic tests to diagnose disease" and for the "examination of multiple body systems." Id. at Minn. R. 5221.2900, subp. 1a.A. Rules first adopted in 1984 authorize the payment of specific fees for chiropractic services which include muscle stimulation, ultrasound, diathermy and acupuncture. Id. subps. 2, 4; 9 SR 601 (Sept. 17, 1984). Prior to the enactment of Minn. Stat. § 148.01, subd. 3, in 1975, each of the foregoing procedures had been declared to be beyond the scope of chiropractic practice under the Olson decision or under the previously discussed 1975 opinion of the Attorney General. See supra at pp. 4-5.

11. Non-disciplinary corrective action is authorized relative to all health-related licensing boards. Minn. Stat. § 214.103, subds. 1, 6 (1994). Corrective action agreements are public documents. See Minn. Stat. § 13.41, subd. 4 (1994).

laboratory and other diagnostic procedures and to make referrals to other health care providers as appropriate. Board orders and agreements concerning the diagnostic procedures to be used have not been conditioned upon whether chiropractic, medical or other treatment may ultimately be required. Examples include cases involving the diagnosis of colon and shoulder problems (The matter of P.G., D.C., Jan. 22, 1985), chemical sensitivities (The matter of C.N., D.C., July 12, 1990), (The matter of E.S., D.C., July 23, 1992), miscellaneous physical symptoms (The matter of A.F., D.C., Dec. 15, 1993), and heart conditions (The matter of C.L., D.C., May 10, 1994). No disciplinary orders or corrective action agreements evidencing a required use of tests to detect only conditions treatable chiropractically have been discovered.

Similarly, the Board has administered the provision under section 148.08, subd. 2, granting the authority to "sign health and death certificates" since its adoption in 1927. Although the Board has not promulgated rules concerning the subject, it has on occasion construed the provision in question by the adoption of resolutions recorded in the official minutes of public meetings of the Board. In all discovered instances, the Board has endorsed the authority of Minnesota chiropractors to sign health and death certificates. E.g., Minutes, Board meetings of August 31, 1931, September 4, 1946, and September 21, 1974.

In accordance with earlier discussion, section 148.08, subd. 2, is seemingly clear on its face regarding health certificate authority. Should there be doubt, the Board's public orders and agreements in disciplinary and corrective action proceedings relative to necessary diagnostic procedures to be employed in physical examinations conducted by chiropractors are entitled to great weight as an aid to accurately ascertain legislative intent. Also entitled to weight are Board resolutions adopted over many years confirming the authority of chiropractors to issue certificates in a variety of circumstances.

The Medical Practice Act

Finally, you have asked me to examine the medical practice act for possible relevance to the present inquiry. In most pertinent part, that statute provides as follows:

> Subd. 1. It is unlawful for any person not holding a valid license issued in accordance with this chapter to practice medicine as defined in subdivision 3 in this state.
>
> . . . .
>
> Subd. 3. For purposes of this chapter, a person not exempted under section 147.09 is "practicing medicine" or engaged in the "practice of medicine" if the person does any of the following: . . .
> (3) Offers or undertakes. . . to diagnose. . . in any manner or by any means, methods, devices or instrumentalities, any disease, illness, pain, wound, fracture, infirmity, deformity or defect of any person. . . .

Minn. Stat. § 147.081 (1994). Exemptions to the preceding under section 147.09 include the following:

> Section 147.081 does not apply to, control, prevent or restrict the practice, service, or activities of:
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> . . . .
>
> (9) Any person licensed by a health related licensing board, as defined in section 214.01, subd. 2. . .; provided that the person confines activities within the scope of the license.

The Board of Chiropractic Examiners is expressly identified as a health-related licensing board under section 214.01 (1994). Further, it is self-evident that physical examinations conducted by chiropractors in connection with the issuance of health certificates necessarily may involve the diagnosis of "disease, illness, pain, wound, fracture, infirmity, deformity or defect." Thus, the only question seemingly presented under the medical practice act in connection with this opinion is whether the activity is exempt under section 147.081(9) as being within the scope of a chiropractor's license.

The answer is dependent upon an interpretation of the scope of chiropractic defined under section 148.01 (1994). As has been addressed at some length above, it appears to have been the intent of the authors of section 148.01, subd. 3, to permit chiropractors to employ a

variety of diagnostic procedures commensurate with chiropractic education. That there may be a degree of overlap between the diagnostic procedures utilized by medicine and chiropractic is implicit in the exemption language of section 147.081(9). Whether a specific diagnostic procedure is exempt would depend upon facts of the particular case.[12]

CONCLUSION

Minn. Stat. § 148.08, subd. 2, provides plain, general authority for doctors of chiropractic licensed in this state to sign health certificates and to perform antecedent physical examinations. It is arguable that the permissible diagnostic procedures available relative to such examinations were once limited to the detection of conditions treatable by chiropractic.

However, in 1975, the Minnesota Legislature enacted section 148.01, subd. 3, to clarify the modern scope of practice which had evolved since the adoption of the chiropractic practice act in 1919. The section permits a differential diagnosis, with a prohibition respecting invasive procedures and a limitation concerning the use of analytic x-rays. The enactment codifies a chiropractor's role in diagnosing many physical conditions which the practitioner is not authorized or, perhaps, inclined to treat. Records from the 1975 legislative session confirm that in cases of the diagnosis of conditions not treatable chiropractically, it was intended that referrals to other health care providers occur.

The MnDot physical examination for commercial motor vehicle drivers is derived from FHWA regulations. Subject to state law, the regulations include doctors of chiropractic among those authorized to perform the required physical examinations. It is evident that no

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12. Although no reported Minnesota cases have been discovered regarding the breadth of chiropractic diagnostic authority under Minn. Stat. § 148.01, subd. 3, the concept of overlap between medical and permissible chiropractic diagnostic procedures has been addressed elsewhere. E.g., Rosenberg v. Cahill, 492 A.2d 371 (N.J. 1985). A number of cases also exist relative to the liability of chiropractors for failure to diagnose conditions not necessarily treatable by chiropractic or to refer patients to a medical practitioner. E.g., Roberson v. Counselman, 686 P.2d 149 (Kan. 1984) (acute heart disease); Higgins v. Johnson, 434 S.2d 976 (Fla. App. 1983) (prostate malignancy). See Anno: Liability of chiropractors and other drugless practitioners for medical malpractice, 77 ALR 4th 273 (1990).

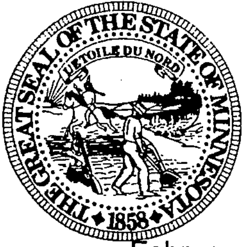
part of the basic MnDot examination would require a chiropractor to exceed the diagnostic authority granted under section 148.01, subd. 3 (1994). Moreover, any procedure that could exceed such authority is referable to a specialist. In fact, FHWA regulations specifically recognize the ability of the health care professional to order other tests as may be necessary. The education and training required of chiropractors, as evidenced by the materials provided by the Board, support the conclusion that chiropractors are authorized to sign the MnDot physical examination form. Indeed, it is evident that no element of the basic examination, which FHWA has described as not requiring sophisticated diagnosis, is beyond the training of a doctor of chiropractic licensed in this state.

Based on the foregoing, it is my opinion that under applicable state law doctors of chiropractic are authorized to execute the MnDot physical examination form. If clarification of any part of this opinion may be indicated, please let me know.

RTH:jg.aa3

SUBJECT: ABILITY OF CHIROPRACTORS TO PERFORM EXAMINATIONS

The following is the opinion by the Deputy Attorney General Lucinda Jesson, confirming the February 21, 1995 opinion of Assistant Attorney General Robert Holley. This confirmatory opinion is dated April 28, 1997.



Minnesota Board of Chiropractic Examiners

February 26, 1996

Lucinda E. Jesson, Deputy Attorney General
525 Park Ave. Su. 500
St. Paul, MN 55103-2106

Dear Ms. Jesson,

As you are aware, the Attorney General's office has provided conflicting opinions to different clients regarding the authority of doctors of chiropractic to perform examinations required of truck drivers providing services under the jurisdiction of the Minnesota Department of transportation (MNDOT), a subdivision of the Minnesota Department of Public Safety (MNDPS). The two opinions in question are those of Melissa L. Wright, Assistant Attorney General, of May 27, 1994, as well as the opinion of Robert Holley, Assistant Attorney General submitted on February 21, 1995. This causes a dilemma for the MBCE in appropriately performing its functions.

For example, the MBCE has received at least one complaint against a doctor of chiropractic for performing the examination required of truck drivers operating under the authority of MNDOT. As you may well imagine, acting on such a complaint can be problematic when faced with conflicting opinions. Additionally, the MBCE was recently asked to testify before the Office of Administrative Hearings at a hearing regarding rules initiated by the MNDPS . The subject matter at the hearing was related to the authority of doctors of chiropractic to perform examinations of school bus drivers, which are very much the same as the examinations for interstate truck drivers.

In order to resolve these issues, the MBCE is hereby requesting clarification as to which of the two Attorney's General opinions will control the question of the authority of doctors of chiropractic to sign the required health certificates as well as performing the required underlying examinations of truck drivers or bus drivers operating under the requirements of MNDOT or MNDPS. Such clarification will be necessary for the MBCE to appropriately carry out its functions with respect to doctors of chiropractic performing such examinations, and who may be the subject of a complaint for doing so.

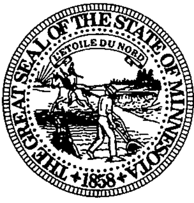
The MBCE thanks you in advance for your time, and looks forward to your response in this matter.

Sincerely,

Larry Spicer D.C.

Larry A. Spicer, D.C.
Executive Director

cc Robert Holley, Akiba Ibura D.C.



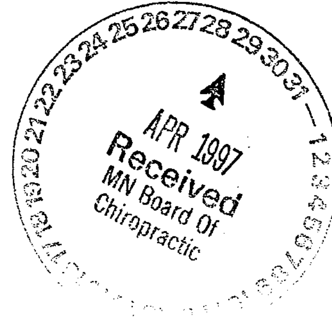
STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

GOVERNMENT SERVICES SECTION
525 PARK STREET
SUITE 500
ST. PAUL, MN 55103-2106
TELEPHONE: (612) 297-2040

April 28, 1997



Larry A. Spicer, D.C.
Executive Director
Board of Chiropractic Examiners
University Park Plaza, Suite 300
2829 University Avenue SE
Minneapolis, Minnesota 55414

Dear Dr. Spicer:

Thank you for your letter of February 26, 1997, concerning two seemingly inconsistent memoranda issued by this office on the authority of doctors of chiropractic to sign health certificates. As you know, it is common for staff attorneys to provide advice memoranda to client agencies who, in the first instance, are responsible for the exercise of discretion within their areas of policy prerogative and expertise. On occasion, such memoranda have been cited to support competing policy interests, particularly when a range of options is identified. Advice memoranda are advisory only and do not constitute official opinions of the Attorney General. Normally they do not require comment and any inconsistencies are best dealt with in the legislative forum. Under the circumstances presented, including the lack of legislative action since this conflict arose, apparent confusion over the proper disposition of complaints against chiropractors who sign health certificates and the ongoing uncertainty which arose in a recent rulemaking proceeding regarding school bus driver physical examinations, we recognize the need for clarification.

Federal law explicitly states that doctors of chiropractic, like physician assistants, advanced practice nurses and doctors of medicine, qualify as "health care professionals" under Federal Highway Administration (FHWA) regulations. It is these FHWA regulations that require a physical examination *by a licensed health care professional* to operate commercial motor vehicles. 49 C.F.R. § 391.41, 43(a)(1) (1993) (emphasis added). FHWA statements in Federal Register, vol. 57, no. 143, conclude that "other health care professionals, including doctors of chiropractic, should be permitted to perform driver physical examination, if they are authorized under State law to conduct such examination" and are proficient in the necessary medical protocols. The question, then, is of the scope of chiropractic practice under Minnesota law.

The May 27, 1994, memorandum to the Minnesota Department of Transportation (MnDOT) was designed to address whether the Office of Motor Carrier Services of MnDOT had a reasonable basis to reject motor vehicle driver medical certificates signed by chiropractors. The advice memorandum was publicly disclosed by MnDOT. The memorandum construed

Minn. Stat. § 148.01, subd. 3, as limiting chiropractors to the use of procedures to prepare a patient for a chiropractic adjustment or to detect only chiropractic conditions. Since completion of a driver's medical certificate requires a number of tests and the possible diagnosis of conditions unrelated to chiropractic conditions, the MnDOT memorandum concluded that doctors of chiropractic lacked the authority under state law to perform all of the necessary tests and, therefore, to sign the corresponding certificate. The memorandum suggested that while chiropractors are expressly authorized to sign health certificates, the pertinent statute should be read to mean that the authority depends on the type of examination conducted.

This view of chiropractors' scope of practice is narrower than that contained in the advice memorandum to the Board of Chiropractic Examiners on the same subject. We attach a copy of the February 21, 1995 memorandum to this Board. This opinion contained a detailed analysis of the authority of doctors of chiropractic to sign health certificates under Minn. Stat. § 148.08. The opinion applied accepted principles of statutory construction to conclude that the authority extends to the execution of the MnDOT commercial motor vehicle driver physical examination form. As the memorandum explains, chiropractic health certificate authority is analogous to the authority granted under sections 148.01, subd. 3, and 148.08, subd. 2, which substantiates the conclusion that the legislature did not intend to limit chiropractic diagnosis to the detection of only chiropractic conditions or prohibit chiropractors from conducting physical examinations for a variety of purposes. See, e.g., Minn. Stat. § 169.345.

The memorandum provides a detailed analysis of the legislative history of section 148.01, subd. 3, relative to chiropractors' diagnostic authority. Subdivision 3 was adopted in 1975 in its present form following extensive hearings. Transcripts of committee tapes reveal that a significant debate occurred relative to whether diagnosis by doctors of chiropractic should be limited to conditions treatable chiropractically, coextensive with the unrestricted differential diagnosis available to medical doctors, or otherwise defined. The restricted diagnosis option, advanced in the two previous Attorney General's opinions which the MnDOT memorandum referenced, was not enacted. Instead, chiropractors were granted broad diagnostic authority, limited only by prohibitions against the use of invasive procedures and analytical x-rays not involving bones of the skeleton. We find this legislative history, which was not addressed in the MnDOT legal memorandum, very persuasive regarding the breadth of diagnostic authority provided chiropractors and endorse the broader scope of practice definition contained in the February 21, 1995 memorandum to this Board.

Application of this broad diagnostic authority to the content of the MnDOT physical examination appears to indicate that no part of the examination requires the use of prohibited procedures and that the licensure examination requires mastery of the procedures necessary to

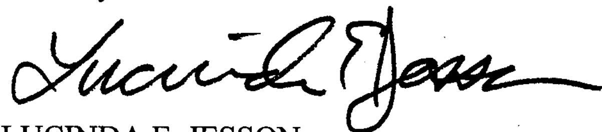
perform the physical exam.[1] Based on our review, the examination's elements appear to be both within the training of doctors of chiropractic and covered under Minnesota license examination requirements. It is our legal opinion, based on this analysis, that doctors of chiropractic have the authority to perform the necessary tests required by the MnDOT physical examination form and sign the corresponding certificate.

We will provide a copy of this letter to MnDOT. It is in MnDOT's discretion, of course, to further review the physical examination requirements with the broader scope of practice outlined in this letter in mind. The agency also may seek legislative change or a change in the underlying federal rule.

According to our research, doctors of chiropractic conduct the physical examinations required by FHWA regulations in over 45 states. Federal Register, vol. 57, no. 145. I understand that these numbers are consistent with your recent survey of states. As the FHWA comments note, this physical examination does not require sophisticated diagnosis or treatment. Id. Now that we have clarified a chiropractors' scope of practice under Minnesota law we are hopeful that this matter can be amicably resolved.

Very truly yours,

HUBERT H. HUMPHREY III
Attorney General



LUCINDA E. JESSON
Deputy Attorney General

AG:23920 v1

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[1] Minnesota licensure requires passage of Parts II and III of the National Board of Chiropractic Examiners examination. Minn. R. 2500.0720. Parts II and III include extensive testing in the following and numerous other subjects: case history, vital signs; head and neck examinations; thorax and lung examination; cardiovascular examination; abdominal examination; rectal and urogenital examination; clinical diagnosis, including head, eyes, ears, nose and throat; respiratory diseases; cardiovascular diseases; gastrointestinal diseases; genitourinary diseases; infectious diseases; laboratory interpretation, including urinalysis, hematology and serology; orthopedic examination, including the extremities; neurologic examination, including sensory function and reflexes, and sexually transmitted diseases. Id.

SUBJECT: ABILITY OF CHIROPRACTORS TO PERFORM EXAMINATIONS

The following is the opinion of the Administrative Law Judge Alan W. Klein, and confirmed by the Chief Administrative Law Judge Kenneth Nickolai, regarding the breadth of examinations permitted by the scope of practice for Doctors of Chiropractic. While this related to a rules promulgation process pertaining to bus drivers physical exams, the issues are essentially the same. This opinion was executed on January 2, 1998.

6-2400-11311-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY
DRIVER AND VEHICLE SERVICES DIVISION

In the Matter of the Proposed Rules of the Department of Public Safety Governing School Bus Drivers, Minnesota Rules, Chapter 7414

REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for review by the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subd. 3. Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves the Report of the Administrative Law Judge in all respects.

In order to correct the defect enumerated by the Administrative Law Judge, the agency shall either not adopt the portion of the proposed amendment which conflicts with existing statutes or modify the rule and follow the procedure for adopting substantially different rules. The procedure for adopting substantially different rules is set out in Minn. Rule 1400.2110.

If the agency chooses to take the action recommended by the Administrative Law Judge, it shall submit to the Chief Administrative Law Judge a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Order Adopting Rules. The Chief Administrative Law Judge will then make a determination as to whether the defects have been corrected and whether the modifications in the rules are substantially different.

Should the agency make changes in the rules other than those recommended by the Administrative Law Judge, it shall also submit the complete record to the Chief Administrative Law Judge for a review on the issue of substantial change.

Dated this 12th day of January, 1998.

KENNETH A. NICKOLAI
Acting Chief Administrative Law Judge

6-2400-11311-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF PUBLIC SAFETY
DRIVER AND VEHICLE SERVICES DIVISION

In the Matter of the Proposed Rules of the Department of Public Safety Governing School Bus Drivers, Minnesota Rules, Chapter 7414	REPORT OF ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on November 5, 1997 in St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.05 to 14.20 (1996) to hear public comment, to determine whether the Department of Public Safety (hereinafter DPS or Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the proposed rules, whether the proposed rules are needed and reasonable, and whether or not modifications to the rules proposed by the Department after initial publication are impermissible, substantial changes.

The Department's hearing panel consisted of Jane Nelson, Valerie Jensen and Wayne Jerrow.

The record remained open for the submission of initial written comments until November 25. Following a response period, the rulemaking record closed for all purposes on December 4.

This Report must be available for review to all interested persons upon request for at least five working days before the Department takes any further action on the proposed amendments. The Department may then adopt a final rule, or modify or withdraw its proposed amendments.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3, this Report has been submitted to the Chief Administrative Law Judge for his approval of an adverse Finding. If the Chief Administrative Law Judge approves the adverse Finding of this Report, he will advise the Department of actions which will correct the defect and the Department may not adopt the rule until the Chief Administrative Law Judge determines that the defect has been corrected.

If the Department elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Department may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Department makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

If the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all of the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On August 27, 1997, the Department requested the scheduling of a hearing and filed the following documents with the Chief Administrative Law Judge:

   A. A copy of the proposed rules certified by the Revisor of Statutes.

   B. The Dual Notice of Hearing proposed to be issued.

   C. A draft Statement of Need and Reasonableness (SONAR).

   D. A Notice Plan, and a request for prior approval of the Plan.

2. On August 28, the undersigned Administrative Law Judge approved the Notice Plan.

3. On September 18, 1997, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the it for the purpose of receiving such notice. On that date, it also mailed a copy of the Notice, the Rules, and the SONAR to all members of the School Bus Safety Advisory Committee. Copies of the Notice and the Rules were also mailed on that date to an extensive list of persons and organizations who had expressed interest in the rules, or who the Department thought might be interested in them. See Ex. 15 for a list of these persons and organizations. In addition, copies of

the Notice were sent to all Deputy Registrars, driver licensing agents, and driver examining sites around the state, along with a request to post the Notice in a conspicuous place. The Department also posted the Notice, the Rules and the SONAR on the Department's Web page. Finally, the Department faxed or sent a press release announcing the proposal of the rules and the availability of the Notice, Rules and SONAR to all print and major electronic media in the state.

4. On September 22, 1997, the Dual Notice of Hearing and a copy of the proposed rules were published at 22 State Register 487.

5. On the day of the hearing, the Department placed the following documents into the record:

-- A copy of the Department's Request for Comment dated March 19, 1997 and a certificate of mailing the Request to the Department's rulemaking list and the School Bus Safety Advisory Committee.

-- A copy of 21 State Register 1413, March 31, 1997, containing the publication of the Request for Comment.

-- A letter, dated April 10, 1997, to the Minnesota Chiropractic Association, enclosing a draft of the rule, and indicating that the Department would propose no change in its existing policy requiring physicians to perform school bus endorsement medical examinations.

-- A memorandum from Major Dennis Lazenberry, State Patrol Division, dated July 15, 1997, indicating that the School Bus Safety Advisory Committee endorsed the draft rule amendments.

-- A letter dated September 13, 1997, to the Legislative Reference Library submitting the SONAR.

-- A letter from the Minnesota Chiropractic Association dated October 7, 1997 (received October 15, 1997) requesting a change in the rule or a public hearing on part 7414.1100. Enclosed were letters from 32 signatories requesting a public hearing, and various materials in support of the change sought by the Association.

-- A letter dated October 13, 1997 from the Minnesota Nurses Association commenting on part 7414.1100, but not requesting a public hearing.

-- All materials filed with the Administrative Law Judge by the Minnesota Chiropractic Association and the Department in connection with the Judge's Prehearing Order (discussed more fully below).

-- A letter dated November (sic -- should have been October) 16, received October 20, from the St. Paul Public Schools requesting a public hearing.

-- Twenty-six letters dated October 10, 1997, received October 22, 1997, from Hoglund Transportation, Inc. employees requesting a public hearing on part 7414.1100.

-- Various comments filed after the October 22 deadline.

-- The Department's Notice of Hearing which was sent to those who requested a hearing and other interested parties, dated October 28, 1997, with a list of all parties to whom the notice was sent.

All of the above-mentioned documents have been available for inspection at the Office of Administrative Hearings from the date of filing.

The initial period for submission of written comment and statements remained open through November 25, 1997, the period having been extended by order of the Administrative Law Judge to 20 calendar days following the hearing. The record finally closed on December 4, the fifth business day following the close of the comment period.

Prehearing Motion and Ruling

6. On October 14, 1997, the Department filed a letter with the Administrative Law Judge, asking for a determination of the validity of the requests for hearing which had been filed by the Minnesota Chiropractic Association and various persons associated with it. The gist of the Department's position was that the requests for hearing were invalid because they asked for a hearing on an issue which was not "fair game" for consideration in this rulemaking proceeding. Attached to the Department's letter were numerous documents outlining the history of the existing rule at issue and varying interpretations of it over the years. (DPS Exhibit 28)

7. The Administrative Law Judge faxed a copy of the Department's letter to the Minnesota Chiropractic Association and offered them the opportunity to comment on it.

8. On October 21, 1997, the Minnesota Chiropractic Association did file a response, generally opposing the Department's motion. Attached to the response were a number of documents supporting the Association's view.

9. On October 28, 1997, the Administrative Law Judge issued a Prehearing Order which held that he would not declare the requests for hearing

to be invalid based upon the record before him at that time, but that he would review the matter further after the hearing when all affected parties had an opportunity to comment on the issue. This Order was faxed to the Department and the Association on October 28.

10. Upon further review, the Administrative Law Judge now decides that the rule at issue is "fair game" for comment. This is discussed in Finding 21 below.

Overview of Judge's Analysis

11. Minn. Stat. § 14.50 requires the Administrative Law Judge to take notice of the degree to which the Department has demonstrated the need for and reasonableness of its proposed rules with an affirmative presentation of facts. Minn. Stat. § 14.14, subd. 2 requires the Department to make an affirmative presentation of facts establishing the need for and reasonableness of its proposed rules. That statute also allows the Department to rely upon facts presented by others on the record during the rule proceeding to support the proposal. In this case, the Department prepared an extensive Statement of Need and Reasonableness ("SONAR") to support the adoption of each of the proposed amendments. At the hearing, the Department supplemented the SONAR, both in prepared statements and also by dialogue with members of the public throughout the hearing session. The Department also submitted written post-hearing comments, both at the end of the initial comment period and at the end of the responsive comment period.

In addition to need and reasonableness, the Administrative Law Judge must assess whether the Legislature has granted statutory authority to the Department, whether rule adoption procedure was complied with, whether the rule grants undue discretion to Department personnel, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another, or whether the proposed language is impermissibly vague.

12. Most of the amendments proposed by the Department drew no criticism. This Report is generally limited to reviewing those proposed amendments that received significant critical comment or otherwise need to be examined. Accordingly, this Report will not discuss each subpart of each rule, nor will it respond to each comment which was submitted. Persons or groups who do not find their particular comments referenced in this Report should know that each and every submission has been read and considered. Moreover, because most of the proposed rules were not opposed, and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of provisions of the rule that are not discussed in this Report, that such provisions are within the

Department's statutory authority noted above, and that there are no other problems that prevent their adoption.

13. Where changes were made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally. Minn. Stat. § 14.05, subd. 2 and Minn. Rule pt. 1400.2240, subp. 7. Upon review, the Administrative Law Judge concludes that the changes proposed by the Department which differ from the rule as published in the State Register are not substantially different from the language published in the State Register.

<u>Statutory Authority and Nature of the Proposed Rule Amendments</u>

14. Minn. Stat. § 299A.01, subd. 6 grants the Commissioner of Public Safety the power to "promulgate such rules pursuant to chapter 14 as are necessary to carry out the purposes of Laws 1969, chapter 1129." Chapter 1129, art. 1, § 18, subd. 2 states:

> All the powers and duties now vested in or imposed upon the Department of Highways and the Commissioner of Highways in regard to drivers' licensing and safety responsibilities as prescribed in Minnesota Statutes 1967, chapters 169, 170 and 171 are hereby transferred to, vested in, and imposed upon the Commissioner of Public Safety.

More particularly, Minn. Stat. § 171.321, subd. 2 authorizes the Commissioner of Public Safety to:

> prescribe rules governing the physical qualifications of school bus drivers and tests required to obtain a school bus endorsement. The rules must provide that an applicant for a school bus endorsement or renewal is exempt from the physical qualifications and medical examination required to operate a school bus upon providing evidence of being medically examined and certified within the preceding 24 months as physically qualified to operate a commercial motor vehicle, pursuant to Code of Federal Regulations, Title 49, Part 391, subpart E, or rules of the Commissioner of Transportation incorporating those federal regulations.

15. The Administrative Law Judge concludes that, except as noted below, the Department does have statutory authority to adopt the proposed rule amendments.