

# Evaluation of Health and Human Services Regulatory Responsibilities

*Report to the Minnesota Legislature 2012*

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**Minnesota Department of Health**



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# **Evaluation of Health and Human Services Regulatory Responsibilities**

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**February 16, 2012**

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*Protecting, maintaining and improving the health of all Minnesotans*

February 16, 2012

The Honorable David Hann  
75 Rev. Dr. Martin Luther King Jr. Blvd  
Capitol Bldg. Room 328  
Saint Paul, Minnesota 55155

The Honorable Jim Abeler  
The Honorable Steve Gottwalt  
State Office Building  
100 Rev. Dr. Martin Luther King Jr. Blvd.  
Saint Paul, Minnesota 55155

Dear Senator Hann and Representatives Abeler and Gottwalt:

As directed by Laws of Minnesota, 2011 First Special Session, Chapter 9, article 2, Section 26, we are providing you with the required legislative report evaluating the regulatory responsibilities within the Minnesota Department of Health (MDH) and Department of Human Services (DHS). MDH, in consultation with DHS, evaluated certain regulatory responsibilities within each agency to determine whether combining or merging the activities would lead to better efficiency and cost savings while maintaining the protection of the health, safety, and welfare of the public.

This report outlines the results of the evaluation. It describes where some regulations intersect and others do not, and makes recommendations to blend some regulatory activities, clearly inform the public about each department's responsibilities, cross train staff, and conduct a broader evaluation of all the regulatory responsibilities within each department using the Management Analysis and Development Division of the Minnesota Management and Budget Department.

Thank you for your interest in improving how Minnesota conducts its regulatory responsibilities and for the opportunity to conduct this evaluation.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward P. Ehlinger". The signature is fluid and cursive, with a horizontal line extending from the end.

Edward P. Ehlinger, MD, MSPH  
Commissioner  
P.O. Box 64975  
St. Paul, MN 55164-0975



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# I. Introduction and Scope

Section 26 of the Health and Human Services Budget Bill (hereinafter referred to "Section 26") was enacted in the 2011 Special Session which ended on July 20, 2011. Section 26 directed the Minnesota Department of Health (MDH) in consultation with the Minnesota Department of Human Services (DHS) to evaluate certain regulatory responsibilities within each agency to determine whether combining or merging the activities would lead to better efficiency and cost savings while maintaining the protection of the health, safety, and welfare of the public.

## "Sec. 26. EVALUATION OF HEALTH AND HUMAN SERVICES REGULATORY RESPONSIBILITIES.

(a) The commissioner of health, in consultation with the commissioner of human services, shall evaluate and recommend options for reorganizing health and human services regulatory responsibilities in both agencies to provide better efficiency and operational cost savings while maintaining the protection of the health, safety, and welfare of the public. Regulatory responsibilities that are to be evaluated are those found in Minnesota Statutes, chapters 62D, 62N, 62R, 62T, 144A, 144D, 144G, 146A, 146B, 149A, 153A, 245A, 245B, and 245C, and sections 62Q.19, 144.058, 144.0722, 144.50, 144.651, 148.511, 148.6401, 148.995, 256B.692, 626.556, and 626.557.

(b) The evaluation and recommendations shall be submitted in a report to the legislative committees with jurisdiction over health and human services no later than February 15, 2012, and shall include, at a minimum, the following:

(1) whether the regulatory responsibilities of each agency should be combined into a separate agency;

(2) whether the regulatory responsibilities of each agency should be merged into an existing agency;

(3) what cost savings would result by merging the activities regardless of where they are located;

(4) what additional costs would result if the activities were merged;

(5) whether there are additional regulatory responsibilities in both agencies that should be considered in any reorganization; and

(6) for each option recommended, projected cost and a timetable and identification of the necessary steps and requirements for a successful transition period."

Section 26(a) specifically identified certain regulatory activities to be covered by this report. Section 26(a) did not cover all regulatory activities within all of MDH and DHS. The activities evaluated in this report apply to two divisions in MDH and DHS. For this report, the applicable division in MDH, is the Compliance Monitoring Division in Policy, Quality and Compliance Bureau, and in DHS, the applicable division is the Licensing Division under the Office of Inspector General in the Operations Administration. In this report, the MDH Compliance Monitoring Division will hereinafter be "MDH CM Division" and the DHS Licensing Division will hereafter be "DHS Licensing Division."

Central to the evaluation required by Section 26 is an overview of regulatory responsibilities and an inventory of the regulatory activities specified in Section 26(a) in

the MDH CM Division and DHS Licensing Division. Often, external parties perceive that these divisions conduct regulation of health facilities only. However, that does not consider the many other regulatory and other functions existing in MDH CM Division and DHS Licensing Division. For example, within the MDH CM Division the scope of regulatory oversight ranges from keeping a roster of spoken language health interpreters to licensing hospitals; within the DHS Licensing Division the scope of regulatory oversight ranges from conducting background studies, for example of personal care attendants who provide services in people's homes, to licensing services provided to people with developmental disabilities.

It is important to note that since the enactment of Section 26, each agency has also undergone internal reorganization changes. In DHS, a new Office of Inspector General (OIG) was established in the summer of 2011 to connect its licensing oversight activities and identifying misuse, abuse, or fraud in obtaining public funds used to cover health and human services. MDH reorganized its regulation of Board and Lodging with Special Services establishments in January 2012, and MDH CM Division is now responsible for regulating those establishments. These new regulatory areas are not included in the inventory charts because they were not a part of the Section 26 statutory directive, but these areas are included in the discussion portion of this report.

## **II. Executive Summary**

### **A. Background**

- MDH CM Division regulates 30 types of entities and the DHS Licensing Division regulates 21 types of entities. There is no overlap in the scope of the licenses, registrations, or certifications issued by the MDH CM Division and the DHS Licensing Division. However, some providers may have an MDH license and a DHS license. For example, chemical health services provided in a residential setting require a DHS license related to the services provided and an MDH license as a supervised living facility.
- There are many similarities between MDH CM Division and DHS Licensing Division in *how* the divisions conduct their respective regulatory activities. Each reviews applications from providers, issues credentials, provides information to both consumers and providers, conducts onsite inspections, has a complaint intake line and investigates complaints, and takes enforcement actions against providers, when appropriate.
- Both agencies also conduct other activities that are not directly regulatory, but are related to their regulatory functions or expertise. For example, MDH CM Division Mortuary Science section, which licenses and regulates funeral homes, funeral directors and morticians, also manages the state's mobile morgue, which would be used during a mass fatality incident. DHS Licensing Division conducts all the state's background studies for direct care providers in health facilities. Both MDH CM Division and DHS Licensing Division respond to emergencies



(i.e., floods, fires) affecting the entities they regulate and ensure that residents are safe.

MDH CM Division and DHS Licensing Division are licensors and regulators. Another division in DHS operates facilities and services and is a licensee of MDH CM Division and DHS Licensing Division. These facilities are operated through the State Operated Services (SOS) and the Minnesota Sex Offender Program (MSOP) within DHS. DHS is also the state Medicaid agency and payor of some services, while MDH is the federal Centers for Medicare and Medicaid Services (CMS) state survey agency for Medicare.

## **B. Recommendations**

- **Blend Regulatory Activities** for Facilities Licensed by MDH and DHS Licensed Programs in the Facilities.
- **Clearly Inform Providers and the Public** About MDH and DHS Regulatory Responsibilities
- **Cross Train Staff** in MDH CM Division and DHS Licensing Division
- **Establish Linkages** Between MDH CM Division and DHS Office of Inspector Office (OIG)
- **Conduct a Broader Regulatory Evaluation** Of All the Regulatory Activities in MDH and DHS; Continue the Work Started

## **III. Overview of Regulation**

### **A. General Purpose**

The purpose of all government regulation is to protect the public by enforcing minimum standards set for the regulated field. Statutes determine the legal authorities within MDH CM and DHS Licensing Divisions. The standards for each regulated field are specific to the services provided and are defined in state or federal laws, and administrative rules. Regulation has some common themes such as: setting minimum entry qualifications; reviewing and approving applications for credentials; enforcing laws including prohibited conduct; conducting inspections and audits; investigating complaints; taking enforcement actions and monitoring conduct for compliance; communicating to regulated parties and consumers; and providing due process rights concerning action taken by the regulatory agency.

### **B. Consumer Protections**

For the entities regulated by the MDH CM Division or the DHS Licensing Division, each statutory chapter or administrative rule contains different elements of the above

functions designed to protect the public. Often, statutory provisions within a regulatory program establish specific legal rights for clients and even client bills of rights that a provider must ensure and the department can enforce. Other examples of consumer protections are requiring a facility to have adequate infection control systems to prevent the spread of disease, or requiring an individual provider to maintain up-to-date health records so that all the caregivers have the same information. The MDH CM Division and the DHS Licensing Division carry out the regulatory oversight for which each is legally responsible. Often times the services that are regulated require a license, but there are exceptions. Other types of regulations include: voluntary protected title registrations (“assisted living” is a protected title for establishments meeting the additional requirements in statute), federal certifications (eligibility for Medicare reimbursement), state certification (hearing aid dispensers), rosters or registries (spoken language health interpreters are on a roster), and sometimes, no credential is issued at all and the statute confers authority on the department to regulate via an investigation and enforcement system (unlicensed complementary and alternative health care practitioners).

### **C. Provider Due Process Rights**

In addition to the public’s rights to protections concerning certain health and human services, regulatory activities must guarantee constitutional protections for the regulated entities. These protections are important balances to governmental authority and process. These are referred to as procedural due process rights and only apply to governmental regulation. Procedural due process means that a state must conduct a fair decision-making process before it impairs a person’s life, liberty or property. A state-issued license is construed as *property* for the purposes of these constitutional requirements because of its potential impact on the provider’s livelihood. See Mathews v. Eldridge, 424 U.S. 319 (1976).

Basic tenets of fair decision-making process include furnishing reasonable notices of the allegations, providing a meaningful opportunity to be heard and to respond, ensuring a neutral decision-maker who is one without bias or a stake in the outcome, making decisions based on reasoned analysis and facts, and ensuring checks and balances by having more than one set of eyes on a decision. (Constitutional Law, 2nd Edition, Nowak, Rotunda and Young, 1983). Government’s strength and reliability is rooted in excellent process that is fair and transparent.

## **IV. Inventory of Regulatory Activities**

This report inventories MDH CM Division and DHS Licensing Division activities based on the following characteristics: regulated entity/service types, regulatory functions and authority, contractual and interagency relationships, and staffing. The report also includes comparisons of the divisions in these areas.

## **A. Regulated Entity/Service Types**

The statutory directive in Section 26 identifies the following regulatory areas: Minnesota Statutes, sections 62D, 62N, 62R, 62T, 144A, 144D, 144G, 146A, 146B, 149A, 153A, 245A, 245B, and 245C, and sections 62Q.19, 144.058, 144.0722, 144.50, 144.651, 148.511, 148.6401, 148.995, 256B.692, 626.556, and 626.557. The regulatory activities regulated by MDH CM Division and DHS Licensing Division cover a wide range of regulated entities/services and sometimes the regulated entity/service is a business (health facility), sometimes it is an individual (occupational therapist) and sometimes the regulation monitors the treatment program (chemical dependency treatment). Additionally, the requirements concerning reporting suspected maltreatment under the Vulnerable Adults Act and Maltreatment of Minors Act is included above along with the DHS Licensing Division's Background Study requirements for health care workers. These other activities support the consumer protective function for which each division is charged.

**MDH CM Division** enforces both state and federal laws regulating various entities. For the following regulated entities, there are both state licensing requirements and federal certification requirements: hospitals, boarding care homes, nursing homes, intermediate care for the developmentally disabled (ICF/DD), home health agencies, hospices, ambulatory surgical centers, and end stage renal disease facilities. MDH CM Division administers both the state licensing and the federal certification requirements. Federal certification allows the facility to obtain Medicare and/or Medicaid reimbursement. The Centers for Medicare and Medicaid Services (CMS) delegates its federal enforcement work directly to MDH and monitors MDH's performance of these activities on a regular basis. Another federally required program that MDH CM Division administers is the Nursing Assistant Registry. It is a registry system that every state must administer. Nursing assistants on the registry are authorized to work in nursing homes.

For the following regulated entities, MDH CM Division is responsible for state licensing requirements, not federal certification: audiologists, birth centers, doulas, body art technicians and establishments, county based purchasers, health plans, essential community providers, crematoria, funeral establishments, morticians, spoken language health interpreters, hearing instrument dispensers and trainees, housing with services establishments, assisted living settings, supervised living facilities, occupational therapy practitioners, speech-language pathologists, and unlicensed complementary and alternative health practitioners. MDH CM Division conducts all the regulatory activities for these regulated entities.

**DHS Licensing Division** monitors the license holders' compliance with state licensing standards directly or through delegation of certain licensing functions to counties and a limited number of private agencies that assist in placing children in foster care homes. See Minnesota Statutes, section 245A.16. Notwithstanding the delegated functions, DHS maintains jurisdiction over the sanctions including revocations. Where counties or private agencies have delegated authority, the DHS Licensing Division oversees their work, including conducting reviews to evaluate

their compliance in carrying out the delegated functions. If non-compliance is determined, DHS issues orders to achieve compliance.

Additionally, certain licensing functions may be delegated to counties related to oversight of some services for people with developmental disabilities under the alternative quality assurance license system. Currently, two counties in Southeast Minnesota participate in what is often referred to as the Region 10 Quality Assurance Project. See Minnesota Statutes, section 256B.0955.

Table 1 provides a list of all the regulated entity/service types, the number of regulated providers, and whether MDH CM Division or DHS Licensing Division is responsible.

**Regulated Entities by Agency - TABLE 1**

Regulated Entity/Service Type	Number	MDH	DHS
Adult Day Centers	145		X
Adult Foster Care <sup>1</sup>	4,767		X
Ambulatory Surgical Centers	56	X	
Assisted Living Settings (a subset of Housing with Services)		X	
Audiologists	406	X	
Birth Centers	4	X	
Boarding Care Homes	28	X	
Body Art Technicians and Establishments	850	X	
Chemical Dependency Treatment*	342		X
Child Care Centers	1,587		X
Child Foster Care <sup>1</sup>	3,489		X
Child Placing Agencies	45		X
Children's Residential Facilities*	82		X
Clinical Laboratories	3,456	X	
County Based Purchasers	3	X	
Crematoria	54	X	
Crisis Respite Services	18		X
Day Training and Habilitation	276		X
Detoxification Services*	23		X
Doulas	4	X	
End Stage Renal Disease Facilities	95	X	
Essential Community Providers	73	X	
Family Adult Day Services <sup>1</sup>	13		X
Family Child Care <sup>1</sup>	11,222		X
Freestanding Outpatient Surgical Centers	59	X	

<sup>1</sup> For this service, certain licensing functions are delegated to counties or private agencies under the oversight of the DHS Licensing Division.

Regulated Entity/Service Type	Number	MDH	DHS
Funeral Establishments	561	X	
Health Interpreters (spoken language)	2,857	X	
Health Plans	8	X	
Hearing Instrument Dispensers and Dispenser Trainees	206	X	
Home Care Providers	1,517	X	
Hospice Providers and Residential Hospices	95	X	
Hospitals	146	X	
Housing w/Services Establishments	1,631	X	
Independent Living Assistance for Youth	4		X
Intermediate Care for the Developmentally Disabled (ICF/DD) [NOTE: ICF/DDs are the federal name for SLFs that are federally certified]	214	X	
Mental Health Centers and Clinics	70		X
Morticians	1,282	X	
Nursing Assistant Registry	60,693	X	
Nursing Homes	379	X	
Occupational Therapists	2,957	X	
Occupational Therapy Assistants	931	X	
Psychopathic personality treatment*	2		X
Residential Facilities for Adults with Mental Illness*	52		X
Residential Habilitation Services for people with Developmental Disabilities (generally serving four people in one home)	899		X
Residential Program and Services for Physically Disabled*	4		X
Residential Services for people with Developmental Disabilities	229		X
Semi-Independent Living Services	127		X
Speech-Language Pathologists	1,377	X	
Supervised Living Facilities (SLFs) [NOTE: These also require a DHS program license to oversee the services provided.]	309	X	
Supported Employment Services	94		X
Unlicensed Complementary and Alternative Health Practitioners	2,700	X	
*For this service type licensed by DHS Licensing Division, the providers are required to have an MDH CM Division license if they provide residential services.			

Chart Data Summary			
Program/Activities Total	51		
MDH		30	
DHS			21

In sum, the MDH CM Division is responsible for regulating 30 entity types and over 82,000 providers; the DHS Licensing Division is responsible for regulating 21 types of services and over 23,000 providers. There may be some public perception that there is overlap in the requirements between MDH and DHS in the oversight of these entities; however, the scope of each license, registration, or certification is distinct. Nevertheless, as noted above in Table 1, there are some providers that must have a residential setting license from MDH CM Division and a program license from DHS Licensing Division and some maybe also be federally certified to receive Medicare.

There are three types of settings regulated by MDH CM Division that also have a DHS program license:

- Supervised Living Facilities (SLF)
- Intermediate Care Facility for the Developmentally Disabled (ICF/DD)
- Nursing Facilities (NF-Medicaid only nursing homes)

**Board and Lodging establishments** are another setting regulated by MDH in the Environmental Health (EH) Division. Board and Lodge establishments can have a DHS licensed program in them. Board and Lodging establishments were not a part of the Section 26 directive nor are they a part of the MDH CM Division's regulatory responsibilities. However, item (5) of Section 26 asks whether there are other regulatory areas that should be included as part of the recommendation in this report. Board and Lodging establishments are included in this discussion here and in the recommendations portion because they have a DHS program license and an MDH establishment license.

A related note is that MDH CM Division recently added the regulatory responsibility for **Board and Lodging with Special Services (BLSS)** establishments to its division. A BLSS setting is a special designation given to licensed Board and Lodging settings that offer supportive and health services to its residents. These supportive or health services could be assisting with preparation and administration of certain medications, and assisting with grooming, dressing or bathing. The regulatory responsibility for the fewer BLSS settings with the health or supportive "special services" designation was moved to MDH CM Division because CM Division staff have expertise in inspecting and investigating health settings. There are about 120 BLSS establishments. Board and Lodging settings (without Special Services) remain licensed in the EH Division of MDH, but are included in the Recommendations portion of the report.

#### Supervised Living Facilities

An SLF provides residential, homelike settings for people who are developmentally disabled, adult mentally ill, chemically dependent, or physically disabled. Services include meals, lodging, housekeeping, health services, and a treatment program. Minn. Stat. sec. 144.50, subd. 6. MDH CM Division's regulation of SLFs ensures that the physical plant design, general sanitation, nutritional requirements, medication handling procedures, and health care practices are safe and effective. MDH CM Division conducts regular onsite inspections of the SLFs and also investigates complaints and takes enforcement actions for violations of the health and safety

requirements in these laws. MDH CM Division also enforces a client bill of rights required for SLFs.

DHS Licensing Division issues licenses to provide services for chemical dependency, or detoxification, services for persons with mental illness, services for persons with developmental disabilities and services for persons with physical disabilities within SLFs licensed by MDH CM Division. Please note in Table 1 above, DHS Licensing Division's licensed programs are marked with an asterisk.

A unique type of licensed SLF is the Minnesota Sex Offender Treatment Program (MSOP) which is licensed by DHS Licensing Division for its provision of Minnesota Sexual Psychopathic Personality Treatment Program and licensed by MDH CM Division as an SLF. For MSOP, DHS has two roles; that of operator and licensee, and that of licensor. MDH CM Division is also MSOP's licensor for its SLF facility.

#### Intermediate Care Facility for Developmentally Disabled (ICF/DD)

The ICF/DD is the federal certification identity of some licensed SLFs. CMS delegates its enforcement and regulatory authority of ICF/DDs to MDH CM Division. DHS Licensing Division licenses services for persons with developmental disabilities within ICF/DDs.

Program services for persons with developmental disabilities may be provided in SLFs with or without federal certification as an ICF/DD. The federal certification confers eligibility for Medical Assistance (MA) payments for room and board and services. MDH CM Division inspects the federally certified ICF/DDs for compliance with the federal requirements and the inspection scope under federal requirements includes reviewing the outcomes of the DHS licensed treatment program to ensure that the services are provided as required.

#### Nursing Facilities (NFs)

NFs are nursing homes that are only Medicaid certified. There are four NFs that have a DHS licensed program in them. Note in Table 1 above the DHS program called "residential program and services for the physically disabled." MDH CM Division licenses nursing homes.

Even though some providers have a license from MDH CM Division (or in the case of Board and Lodging establishments, a license from MDH Environmental Health Division) and a license from DHS Licensing Division, the licensing scopes do not overlap. Further, the regulations are written to avoid duplication. However, MDH CM Division and DHS Licensing Division acknowledge that from the providers' points of view, there are two sets of regulators enforcing their respective laws and when there are inspections and/or investigations happening close in time to one another, that might be disruptive. Still, the numbers of settings that involve two licenses are small. Out of the approximately 23,000 licenses issued by DHS Licensing Division, three percent (3%) are for services provided in a setting that also has an SLF or a Board and Lodging establishment license from MDH. Three of the five recommendations in this report address how to manage the regulatory activities

between the two departments differently to lessen the impact on facilities that have a license from MDH CM Division (or EH Division) and one from DHS Licensing Division.

## B. Regulatory Functions

Regulatory functions are activities specified and authorized in statute that allow MDH CM Division and DHS Licensing Division to monitor the provider to ensure the public is protected. For example, the divisions review license applications to ensure that the minimum qualifications are met and divisions also take and investigate complaints.

As noted in the Executive Summary, MDH CM Division and DHS Licensing Division have common regulatory functions in their respective regulatory responsibilities. For example, each conducts inspections and takes complaints from the public. However, there are some functions that are unique to each agency and are dependent on the types of entities they are regulating and whether counties are also directly involved. Table 2 lists the regulatory function and the respective division that is responsible. Those functions that are unique to the agencies are listed last.

Regulatory Functions by Agency - TABLE 2

Regulatory Function	MDH	DHS
Evaluates license (or other credential) applications to determine whether standards and qualifications are met	X	X
Provides technical assistance and feedback to applicants	X	X
Issues license (or other credential) to providers who meet the requirements	X	X
Evaluates whether license (or other credential) applicants have had previous sanctions or background study disqualifications that would prohibit them from being credentialed	X	X
Assures proper zoning, building, and fire inspections are completed	X	X
Conducts inspections to evaluate compliance with applicable standards	X	X
Takes complaints from the public and conducts investigations	X	X
Issues correction orders following licensing reviews and investigations, as applicable	X	X
Issues sanctions/enforcement actions in follow-up to licensing reviews and investigations, as applicable	X	X
Provides due process to providers related to correction orders, sanctions, and enforcement actions, including reconsiderations, administrative hearing, and other proceedings provided in law.	X	X



Regulatory Function	MDH	DHS
Monitors compliance with orders, including settlement agreements	X	X
Evaluates variance requests (called waivers in MDH) and issues when appropriate	X	X
Maintains a website that includes information on programs and reports sanctions and correction orders	X	X
Maintains data related to licensing and investigative actions for public and other reports	X	X
Provides public alerts on trends to increase compliance and improve service delivery and proactively address health and safety issues	X	X
Enforces Maltreatment of Minors Act and Vulnerable Adults Act, including related investigations, determinations, and reports	X	X
Conducts reconsiderations requested of individuals who are disqualified by a background study and conducts preponderance of evidence reviews	X	X
Monitors and responds to emergencies in health facilities such as fire, tornados, floods, and health provider work stoppages and strikes	X	X
Works with various internal and external stakeholder groups	X	X
Provides training/information to providers, for DHS this includes training to providers, counties, and private child placement agencies regarding delegated functions	X	X
Responds to legislative inquiries and initiatives	X	X
Responds to public and media requests	X	X
Operates the state mobile morgue and responds to events with mass fatalities	X	
Reviews requests for exceptions to hospital and nursing home bed moratorium laws	X	
Administers credentialing examinations and issues results with appeal rights	X	
Conducts quality audits of health plans; and federal Minimum Data Sets (MDS) audits in nursing and boarding care homes	X	
Handles appeals and reviews for federally certified facilities (IIDR and IDR procedures)	X	
Monitors continuing education requirements for professional licenses	X	
Conducts engineering reviews of construction plans and blue prints	X	
Manages and staffs advisory councils	X	

Regulatory Function	MDH	DHS
Contacts local entities to inform them of programs seeking to be licensed in their jurisdictions		X
Reports possible funding or finance irregularities to DHS' Surveillance and Integrity Review unit for further evaluation and possible recovery		X
Conducts background studies, including related contacts, determinations, and informing employers when a new disqualifying crime (or characteristic) is determined. Note: Background studies are required for staff that provide direct contact services in programs licensed by MDH or DHS, and some that are licensed by the Department of Corrections. Background studies are also required of unlicensed personal care attendants.		X
Manages the NetStudy system which is the electronic system by which providers submit background studies.		X

### C. Contractual and Interagency Relationships

In addition to important stakeholders like the providers who are regulated by each division and the public who are protected by the regulations, there are many important relationships affecting how regulation is conducted and which are included in this inventory.

For the MDH CM Division, the following are the interagency contractual relationships:

The federal Centers for Medicare and Medicaid Services (CMS). CMS delegates its federal Medicare certification responsibilities to the states and in Minnesota, MDH CM Division is the state survey agency pursuant to federal law. This federal certification is required in order for facilities to provide Medicare covered services.

Minnesota Department of Commerce. MDH CM Division contracts with the Minnesota Department of Commerce for the financial solvency examinations and analyses of health maintenance organizations (HMOs) and county based purchasers (CBPs). MDH CM Division conducts the quality audits of HMOs and CBPs.

State Fire Marshal in the Minnesota Department of Public Safety. CM Division contracts with the State Fire Marshal to do inspections enforcing the federal Life Safety Code for health facilities.

Minnesota Department of Human Services (DHS)

MDH CM Division contracts with the Continuing Care Administration in DHS for activities related to the Minimum Data Set (MDS) used in health facilities for coding and billing purposes, and for MDH CM Division to carry

out survey (inspection), certification, and investigation activities related to Medicaid providers.

MDH CM Division contracts with DHS Licensing Division to do the background studies required of all direct care staff in health facilities and it pays DHS for the studies it conducts on providers MDH CM Division regulates.

The Division of Performance Measurement and Quality Improvement in DHS contracts with MDH CM Division for the regulatory oversight of health maintenance organizations (HMOs) and county based purchasers (CBPs) that participate in Minnesota's public health care programs. MDH CM Division conducts quality assurance examinations of HMOs and CBPs; consult with DHS staff on the selection of annual HMO and CBP performance measures, review and approve HMO and CBP legal documents, and evaluate proposed CBPs for compliance with state and federal laws and rules.

For the DHS Licensing Division, the following are the interagency or contractual relationships:

Board of Behavioral Health. The Board of Behavioral Health is provided with background study information on individuals that they license.

Minnesota Supreme Court. The Supreme Court contracts with the DHS Licensing Division to provide maltreatment and criminal history to the courts for current and prospective Guardians Ad Litem, guardians and conservators.

Tribal Authority – Foster Care and Adoption. The Leech Lake Band of Ojibwe, Mille Lacs Band of Ojibwe, and White Earth Band of Ojibwe contract with the DHS Licensing Division to conduct background studies for individuals applying to provide foster care or seeking to adopt.

Tribal Authority – Gaming Regulation and Compliance. The Mille Lacs Band of Ojibwe contracts with the DHS Licensing Division to conduct background studies on employees of their tribally licensed child care centers located in their Grand Casino sites.

Department of Corrections. The Minnesota Department of Corrections contracts with the DHS Licensing Division to conduct background studies for individuals providing direct contact services to youth in secure and non-secure residential facilities and detention facilities.

County Agencies. The DHS Licensing Division delegates to county agencies certain licensing functions for family child care, adult and child foster care, and family adult day services. The DHS Licensing Division oversees the agencies' performance and also conducts licensing functions that are not delegated, for these providers.

Private Licensing Agencies. The DHS Licensing Division authorizes private agencies to perform certain licensing functions for child foster care. DHS oversees the private agencies' performance and conducts licensing functions, that are not delegated, for these providers.

Region 10 Quality Assurance Project. Houston and Olmsted Counties hold interagency agreements with the DHS Licensing Division to conduct certain delegated licensing functions for a subset of providers that serve people with Developmental Disabilities.

#### **D. Staffing of MDH CM Division and DHS Licensing Division**

As discussed earlier in the report, for each of the fifty-one (51) regulated entity/service types different regulatory standards apply and are governed by state law or rule and for some services federal requirements also apply. Generally, staff in MDH CM Division and DHS Licensing Division who are responsible for the oversight of a specific type or types of services have experience or credentials that qualify them for the specific regulatory area or function. For example, MDH CM Division staff that conduct reviews of nursing facilities are often nurses. Dieticians are also used in nursing home reviews. DHS Licensing Division staff that conduct reviews of child care centers were or are licensed teachers or have related experience or training. Other staff have legal training and/or investigative experience. Providers and the public expect regulators to understand the services being rendered and appropriately apply the regulatory standards. Training is specific to the topical areas and can take months to fully train a licenser or inspector.

MDH CM Division has a total of 213 employees, of which 189 (88%) are nurses, engineers, managers, IT staff, or other professionals. There are twenty-four (24) support and administrative staff. MDH staff is located regionally throughout Minnesota in District Offices, and also centrally in the metro area. MDH CM Division is organized into nine (9) sections; five (5) of them operate closely together in the regulation of a variety of health facilities and organizations. The three (3) sections of Managed Care Section, Health Occupations Program, and the Mortuary Science Section operate independently of the other sections because the staff within each section can cover all the regulatory functions assigned. A last section is the IT Section that provides programming services for the entire division. See the MDH CM Division Organization Chart attached in the appendix.

DHS Licensing Division has 126 staff positions, four of which are part-time, in the Licensing Division. DHS staff conduct licensing functions and investigations statewide and all but one employee is located in the central office. There are approximately 600 staff in county and private agencies that carry out delegated licensing functions in the counties. Of the 126 positions in the DHS Licensing Division, twenty-nine (29) positions are assigned to licensing programs that service people with developmental disabilities, mental illness, chemical dependency and those who receive services in adult day care centers and child

care centers. Six positions are assigned to overseeing licensing functions delegated to counties and child placing agencies. Twenty-seven (27) positions are in the units that address maltreatment reports and investigations and thirty-three (33) positions are in the background studies area. The remaining thirty-one (31) positions include staff in the division's legal, information technology, and support and data processing units, and the division's management. Please see the DHS Licensing Division Organization Chart in the appendix.

## V. Discussion

Section 26 requires specific questions to be considered in this evaluation: (1) whether the regulatory responsibilities of each agency should be combined into a separate agency; (2) whether the regulatory responsibilities of each agency should be merged into an existing agency; and (3) and (4) what are the costs and cost savings. Another question in Section 26 (5) asks whether there are other areas that should be considered in the recommended reorganization.

The inventory of the types of services that are regulated by the MDH CM Division or the DHS Licensing Division shows that there is no overlap in the scope of the licenses – the *who*. Each of the provider types is regulated under distinctly different laws or rules – the *what*. The comparison of regulatory functions shows a significant number of activities that are conducted by each agency – the *how*.

### A. Should divisions' activities be moved to a separate agency or to an existing agency?

For purposes of this report, "existing agency" is either DHS or MDH. Because the type of entities/services regulated by MDH CM Division and DHS Licensing Division and the regulatory standards are very distinct, relocating staff would not by itself create new opportunities for sharing resources or streamlining regulations. Of the 51 license types regulated by MDH and DHS, there are only four settings licensed by MDH that may also have a DHS program license. In other words, of the 23,000 program licenses issued by DHS, only 3% are in a facility that is licensed by MDH. Rather than merge the entire MDH CM Division and DHS Licensing Division, blending the regulatory activities for those four settings will accomplish a more seamless regulatory oversight. The specific ideas for a more seamless regulatory oversight are set out in the recommendations section of this report.

Even though this report does not recommend that the regulatory activities be moved from one agency to another, or from both agencies to a new one, any consideration of how to reorganize should consider the interrelationships of the agencies involved. An example of that is the fact that MDH CM Division is DHS's licensor in DHS's role as operator of the State Operated Services (SOS) and the Minnesota Sex Offender Program (MSOP). As noted earlier in this report, DHS has dual roles because it is the operator of State Operated Services (SOS) and the Minnesota Sex Offender Treatment Program (MSOP) plus the DHS Licensing Division licenses the services

provided in those settings. As noted in section III above, the Overview of Regulation, the due process rights of regulated entities is explained. Regulation requires a fair decision making process by a neutral decision maker without a stake in the outcome. The Commissioner of Human Services is responsible for all parts of DHS. While DHS' administration and the DHS Licensing Division are vigilant to maintain appropriate separations between the Commissioner's role as licensor and licensee, this dual role presents unique challenges.

## **B. Costs and Cost Savings**

There are costs of moving employees no matter where to and MDH CM Division estimates that on average it costs at least \$1,000 to relocate employees. Other costs of moving functions and employees to another agency include changes to letterhead, telephone systems, website and IT, and other important communications to stakeholders such as regulated entities and consumers. Rental agreements for building leases would also be affected.

Because this report does not recommend moving employees, we did not determine what the cost savings or off-sets would be. If one of the purposes of merging would be to deconstruct walls between the divisions for facilities that have two licenses from MDH and DHS, the recommendations would lead to a more seamless way of accomplishing that.

# **VI. Recommendations**

Considering the information in this report, the inventory of the types of services and the regulations that apply, and comparing the regulatory functions, five recommendations are offered. Three of the recommendations relate specifically to the regulation of SLFs, ICF/DDs, NFs and Board and Lodge settings. One recommendation would better connect the new OIG in DHS to MDH CM Division and the final recommendation calls for the work started in this evaluation and report to be continued and broadened and to be conducted by the Management Analysis Division. After each Recommendation below, there is the information required by item (6) in Section 26 about the projected cost and timetable.

## **A. Blend Regulatory Activities for Facilities Licensed by MDH with DHS Licensed Programs**

For SLFs, ICF/DDs, and NFs, MDH CM Division, and DHS Licensing Division should work together to find ways of reducing the inspection and/or investigative impact on facilities where possible and appropriate. The same activity is recommended for Board and Lodging establishments between DHS Licensing Division and MDH EH Division. The laws have specific requirements for these facility types, however the divisions can communicate regularly to schedule inspections and/or investigations together if possible or if that would interfere too much with the objectives of the inspection and investigations, to schedule inspections

or investigations alternately to ensure that a facility is not unnecessarily disrupted when undergoing a review. Of course, the procedures must ensure that the public and complainant's rights are protected and the requisite regulatory function is being carried out fully.

For the past two years, MDH CM Division and DHS Licensing Division have undertaken collaborative efforts in the area of regulating SLFs and this recommendation continues those efforts with more facility types in a more formalized way. Specifically, MDH (CM Division and EH Division) and DHS Licensing Division recommend that the divisions evaluate what is working well and not working well in how the divisions regulate SLFs, ICF/DDs, NFs and Board and Lodging establishments, develop internal procedures for scheduling onsite inspections, discussing ongoing inspections, investigations and enforcement actions. No legislation would be necessary for this recommendation.

#### Projected Cost and Timetable for Recommendation A.

Aside from setting aside staff time to conduct this activity, there is no direct cost to the divisions. This is a project that could be conducted over a year's time with some internal procedures being developed at the end of the year.

### **B. Clearly Inform Providers and the Public about MDH and DHS Regulatory Responsibilities**

This recommendation is to prioritize the updating and revising of MDH CM Division and DHS Licensing Division's websites and other communication sources for information to providers and consumers about SLFs, ICF/DDs, and NFs, also including information from EH Division in MDH about Board and Lodging establishments. The website revisions and updates should include all the divisions' responsibilities related to health regulation. Members of the public and providers often want to see information about health regulations in one place, versus having to know where to go to get information. This recommendation is for the divisions to identify ways of enhancing their communications to providers and the public about the existing regulations, including establishing IT linkages between the departments' websites so that the information is seamlessly available to the public. The access to information must comply with the requirements of the Minnesota Government Data Practices Act in Minnesota Statutes, Chapter 13. This supports transparency in government and enhances access to public data that consumers may use to make more informed decisions about providers.

#### Projected Cost and Timetable For Recommendation B.

There would be a cost to dedicate IT and other personnel to revising websites across the two departments. The cost is estimated at being 1 FTE in each department for a total of 2 FTE for one year to dedicate the time and energy needed to review all the departments' websites (where the public enters) and each of the division's websites (where the public ends up for specific topics) and ensuring that the information between the two is linked and easily accessible and comprehensible. Two IT3 positions; one for MDH CM Division and one for DHS Licensing Division would

cost \$167,000 total. MDH CM Division's staff person could work on updates and connections to MDH EH Division's website about Board and Lodging establishments. If each division was unable to hire additional staff to conduct this activity, the timeline would need to be extended because of the other priorities.

### **C. Cross Train MDH and DHS Staff**

MDH CM Division, and DHS Licensing Division should establish regular meetings of staff to cross train about the others' regulations in the areas of SLF, ICF/DD, NF and for Board and Lodging establishments, include MDH EH Division staff who work in that area. Additionally, staff could share information about methods of conducting inspections, investigations and enforcement actions. The divisions' management should identify opportunities for conducting joint training, and other ways of sharing information and ideas across the divisions.

#### Projected Cost and Timetable for Recommendation C.

Aside from setting aside staff time to conduct this activity, there is no direct cost to the divisions. This is a project that could be conducted over two years. No legislation would be necessary for this recommendation.

### **D. Establish Linkages between MDH CM Division and DHS Office of Inspector General (OIG)**

As noted at the beginning of the report, in the summer of 2011, DHS established a new Office of Inspector General (OIG) to connect its licensing oversight activities to the protection of public funds from abuse, misuse and fraud. DHS Licensing Division is now within the OIG in DHS. MDH CM Division also licenses providers who are reimbursed by public funds for their services. MDH CM Division would like to establish electronic ways to notify OIG about its investigations and enforcement work. Currently, MDH CM Division staff always notify DHS staff in the payment area about any of its enforcement actions, but in light of the new OIG, MDH CM Division would like to make these connections less manual and utilize electronic mechanisms where possible. Providers and consumers should also know that these connections are being made.

#### Projected Cost and Timetable for Recommendation D.

Aside from setting aside staff time to conduct this activity, there is no direct cost to the divisions. This project could be conducted over a year. No legislation would be necessary for this recommendation.

### **E. Conduct a Broader Regulatory Evaluation of All Regulatory Activities in MDH and DHS; Continue the Work Started**

MDH CM Division and DHS Licensing Division recommend that a more comprehensive evaluation be conducted to continue the work started in this report by including all the regulatory areas within MDH and DHS. The comprehensive evaluation could be done by the Management Analysis Division in the Department of



Management and Budget and its purpose would be to identify the other regulatory areas within each department, determine if there are areas where the regulations intersect, whether a reorganization is appropriate or necessary and cost effective, and whether there are other ways of collaborating or sharing resources without reorganizing. The evaluation should include and address the roles of DHS as a direct provider, regulator, and payor. The evaluation process could include input from stakeholders (providers and consumers), including other state and federal agencies that have contractual relationships.

Projected Cost and Timetable for Recommendation E.

The cost would be that of hiring Management Analysis Division (MAD) staff to conduct the review. In setting a price, MAD estimates the number of hours a project would take. A project of this size would be considerable and could easily take a year to complete.

If the broader regulatory study is initiated, the evaluators should consider the following additional information:

1. In December 2011, MDH CM Division and DHS Continuing Care Administration jointly began a project to analyze current state and federal regulations affecting home health care providers in Minnesota. The project is being facilitated by a staff from the Management Analysis Division in the Department of Management and Budget who will identify the extent to which, the MDH CM Division's licensing and the Continuing Care Administration's proposals for regulating home care services for providers under the waiver and Alternative Care (AC) programs intersect or conflict. Any future analysis should include the results of this project.

The background and context for this project is as follows: In 2007, MDH CM Division established a stakeholder workgroup to identify ways to improve the MDH home care licensing regulation. The workgroup, composed of providers, consumer advocacy groups and other state agencies, recommended that the licensing be restructured and that it enhance consumer protections. This work over the next few years led to a licensing restructure proposal by MDH CM Division. The proposal establishes basic and comprehensive levels of home health care licensing that applies to the types of services being provided, not on the location of services and includes improved consumer protection.

Concurrently, the DHS Licensing Division is seeking legislation to apply basic licensing standards to a subset of services not licensed by MDH CM Division and which are covered under the Home and Community-based Service waivers and Alternative Care (AC) program. DHS' Continuing Care Administration oversees the public policy related to waivers and AC. Implementation of these standards could begin as soon as July 2012. A second set of standards for a different set of waiver services (Tier 2) is

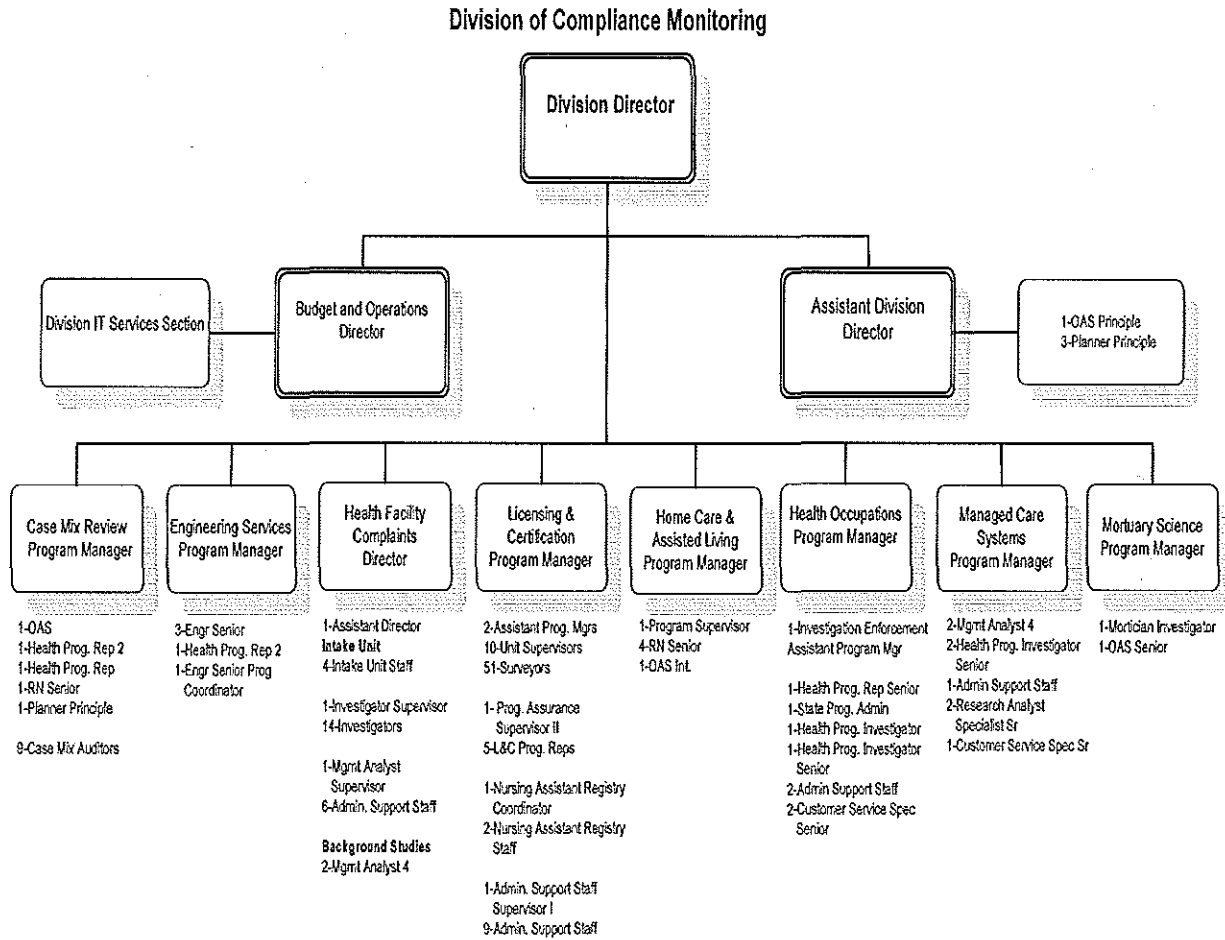
planned for a 2013 implementation. The proposed Tier 2 services cover the services that MDH CM Division licenses.

2. Minnesota Sunset Act

The Minnesota Sunset Act was enacted in Chapter 10 of the 2011 Special Session laws and effective on July 20, 2011. The Sunset Act established a Sunset Advisory Commission whose job it is to review all state agencies and make recommendations whether there is a public need to continue the state agency or its advisory committees based on certain criteria set out in statute. Both MDH and DHS will be reviewed in the same year in 2014.

# VIII. Appendices

## Appendix A MDH Compliance Monitoring Division Organization Chart



# Appendix B DHS Licensing Division Organization Chart

01/01/2012

