munity mental health program will be responsible only for the percentage of the total cost for which they were responsible in a base year, plus an additional ½% which is added each year until the 90-10 ratio is met. For those counties who were paying more than 10% of the total cost in the base year, their contribution will be reduced by 1% each year until the 90-10 ratio is met. For any county which contributed 25% or more of the total cost during the base year, its percentage shall be reduced by 2.5% per year until such time as the 90-10 ratio is met. If the amount appropriated is insufficient to carry forth the scheme set forth in Section 318, the same consideration would apply as applied in the answer to your second question above. The Department of Mental Health can only spend the amount appropriated to it for community mental health programs, and if that amount is inadequate it must take steps pursuant to Section 232 of the Mental Health Code, MCLA 330.1232; MSA 14.800(232) and 1975 PA 257, § 5, to distribute the funds.

FRANK J. KELLEY,
Attorney General.

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ADMINISTRATIVE LAW AND PROCEDURE:
Incorporation by reference

ADMINISTRATIVE LAW AND PROCEDURE:
Amendments or rescissions having solely formal purposes

LABOR AND EMPLOYMENT: Occupational Safety and Health Act

In adopting amendments to its rules that would add to safety standards in effect under the Michigan Occupational Safety and Health Act, the Occupational Safety Standards Commission may not bypass the notice and hearing requirements of the Administrative Procedures Act even though adoption of these standards is for the purpose of complying with federal requirements.

The Occupational Safety Standards Commission may not adopt rules to add conforming federal standards to safety standards continued in effect without appointing and consulting with an advisory committee as provided by the Michigan Occupational Safety and Health Act.

The federal occupational safety and health standards promulgated by the U.S. Department of Labor after the date on which the Michigan Occupational Safety and Health Act was enacted into law and prior to the effective date of the Act may not be incorporated by reference.

Opinion No. 4959 March 22, 1976.

Mr. Keith Molin, Director
Michigan Department of Labor
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You have requested my opinion on the following questions:

1. May the Occupational Safety Standards Commission utilize the promulgation procedure authorized by Section 44 of the Admin-

istrative Procedures Act to amend safety standards continued in effect under Subsection 21(1) of MIOSHA by adding conforming federal standards, without the necessity of public notice and public hearing?

2. May the Occupational Safety Standards Commission utilize the promulgation procedure authorized by Section 44 of the Administrative Procedures Act to amend safety standards continued in effect under Subsection 21(1), without the necessity of obtaining the advice of an advisory committee?
3. Are the federal occupational safety and health standards promulgated by the U.S. Department of Labor after June 18, 1974 (the date on which Public Act 154 was signed into law) and prior to Jan. 1, 1975 (the effective date of the Act) validly incorporated by reference under Subsection 14(1) of MIOSHA?

The Michigan Occupational Safety and Health Act, hereinafter MIOSHA, (1974 PA 154; MCLA 408.1001 *et seq;* MSA 17.50(1) *et seq*) was signed into law with immediate effect on June 18, 1974 with an operative effective date of January 1, 1975, except as to standards applicable to the state or political subdivisions which were effective July 1, 1975.

MIOSHA was enacted to implement Michigan's election to assume the responsibility for the development and enforcement of occupational safety and health standards under the Federal Occupational Safety and Health Act of 1970, hereinafter OSHA, (84 Stat 1590 *et seq* (1970); 29 USC 651 *et seq*) which standards "are or will be at least as effective (as the federal OSHA standards) in providing safe and healthful employment and places of employment" (84 Stat 1608). Under the provisions of OSHA, Michigan has three years from the date of the approval of its plan, or September 30, 1976, to promulgate standards "as effective" as the federal standards and thereby qualify for 50% federal funding of MIOSHA (84 Stat 1609).

Subsection 14(1) of MIOSHA (MCLA 408.1014(1); MSA 17.50 (14)(1) provides for the incorporation by reference of all federal occupational safety and health standards in effect on the effective date of MIOSHA, as follows:

> "The occupational safety and health standards which have been adopted or promulgated by the United States department of labor pursuant to 29 USC sections 651 et seq. and which are in effect on the effective date of this act are hereby incorporated by reference and shall have the same force and effect as a rule promulgated pursuant to this act. A standard which is incorporated by reference pursuant to this subsection shall remain effective until: (a) A standard is promulgated pursuant to this act which covers the same or similar subject; or (b) the standard is rescinded by rule promulgated pursuant to this act."

However, Subsection 14(3) [MCLA 408.1014(3); MSA 17.50(14)(3)] provides the following exception:

> "When a rule or standard which is continued in effect under this act pursuant to section 21(1), covers the same subject as a federal standard, the provisions of subsection (1) shall not apply."

Subsection 21(1) [MCLA 408.1021(1); MSA 17.50(21)(1)] referred to in Subsection 14(3) provides:

> "Standards promulgated by the occupational safety standards commission under the authority of Act No. 282 of the Public Acts of 1967, as amended, and standards promulgated by the construction safety commission under the authority of Act No. 89 of the Public Acts of 1963, as amended, which are in effect on the effective date of this act are continued in accordance with section 31 of Act No. 306 of the Public Acts of 1969, as amended, being section 24.231 of the Michigan Compiled Laws."

It is my understanding that the Occupational Safety Standards Commission now seeks to amend certain safety standards continued in effect pursuant to Subsection 21(1) by adding safety standards which are a part of the federal safety standards on the same or similar subject. The purpose is, of course, to conform the MIOSHA safety standards with the federal OSHA standards and thereby comply with the federal mandate to promulgate safety standards at least as effective as the federal standards.

The questions presented arise because the Occupational Safety Standards Commission is seeking to promulgate these conforming amendments to standards under the authority of Section 44 of the Administrative Procedures Act of 1969, hereinafter APA, (MCLA 24.201 *et seq;* MSA 3.560 (101) *et seq*) which provides:

> "Sections 41 and 42 do not apply to an amendment or rescission of a rule which is obsolete or superseded, or which is required to make obviously needed corrections to make the rule conform to an amended or new statute or to accomplish any other solely formal purpose, if a statement to such effect is included in the legislative service bureau certificate of approval of the rule." [MCLA 24.244; MSA 3.560(144)]

It must be observed that OSHA does not require Michigan to adopt the federal safety standards verbatim, in order to comply with the federal mandate and qualify for matching funds. As previously indicated, it is only required that the Michigan standards be "at least as effective". Thus, the Michigan standards may be stricter than the federal standards and still comply with OSHA. The discretion allowed the Occupational Safety Standards Commission to promulgate safety standards which differ from those promulgated under the federal OSHA program clearly indicates that the proposed amendments are not "solely formal" as the term is used in Section 44 of the APA.

The Michigan Legislature must have contemplated that the Occupational Safety Standards Commission would develop safety standards which would not be identical to federal safety standards when it provided in Subsection 21(2) of MIOSHA, as follows:

> "Before a proposed standard, except an emergency standard, may be promulgated, the appropriate commission shall appoint and consult with an advisory committee which shall be representative of the major interest affected by the proposed standard. The members of an advisory committee shall be selected on the basis of their experience and compe-

tence in the subject of the proposed standard. At least 1 member of each advisory committee shall be a person who devotes a major portion of his time to safety functions."

Since it is possible to comply with OSHA by promulgating safety standards which need not be identical if such standards are "at least as effective" or more effective, it is my opinion, in answer to your first question, that the proposed amendments to the safety standards continued under Subsection 21(1) of MIOSHA cannot be promulgated under the authority of Section 44 of the APA which applies to "solely formal" amendments. Accordingly, with respect to your second question, it follows that the Occupational Safety Standards Commission must appoint and consult with an advisory committee in accordance with Subsection 21(2) of MIOSHA and comply with Sections 41 and 42 of the APA in order to promulgate legally effective safety standards.

Your last question relates to the incorporation by reference of federal OSHA safety standards which were promulgated by the United States Department of Labor after the immediate effect date of MIOSHA on June 18, 1974.

It appears that the Occupational Safety Standards Commission has interpreted Subsection 14(1), *supra,* which incorporates federal safety standards in effect on the effective date of MIOSHA to mean that all federal safety standards in effect on the operating effective date of MIOSHA of January 1, 1975 would automatically be incorporated by reference. This assumption is incorrect under Michigan law.

The Michigan Court of Appeals considered the question of incorporation by reference in *People* v *Urban,* 45 Mich App 255, 262-263; 206 NW 2d 511 (1973) wherein it stated:

> "To succinctly state the general rule, statutes which incorporate existing Federal statutes, rules, and regulations by reference are valid and constitutional. *Pleasant Ridge* v *Governor,* 382 Mich 225, 243 (1969); 16 CJS, Constitutional Law, §133, p 563.
>
> "But state legislation which adopts by reference *future* legislation, rules, or regulations, or amendments thereof, which are enacted, adopted, or promulgated by another sovereign entity, constitutes an unlawful delegation of legislative power. *Lievense* v *Unemployment Compensation Commission,* 335 Mich 339, 341-342 (1952); *Dearborn Independent, Inc.* v *Dearborn,* 331 Mich 447, 454 ff (1951); *Colony Town Club* v *Michigan Unemployment Compensation Commission,* 301 Mich 107, 113-114 (1942); *People* v *DeSilva,* 32 Mich App 707, 713-714 (1971); see also Const 1963, art 4, §1; *Coffman* v *State Board of Examiners in Optometry,* 331 Mich 582, 587-589 (1951); *G F Redmond & Co* v *Michigan Securities Commission,* 222 Mich 1, 5 (1923); *In re Brewster Street Housing Site,* 291 Mich 313, 340 (1939); *People* v *Collins,* 3 Mich 343, 344-345 (1854); *Minor Walton Bean Co* v *Unemployment Compensation Commission,* 308 Mich 636, 653-654 (1944)." (Emphasis is the Courts)

Accordingly, it is my opinion that the Occupational Safety Standards Commission was incorrect in its interpretation that the federal safety

standards in effect after June 18, 1974 were automatically incorporated by reference. Also, these safety standards, together with any amendments to safety standards continued pursuant to Subsection 21(1) of MIOSHA required to comply with OSHA should be promulgated only after consultation with an advisory committee and adherence to the provisions of Sections 41 and 42 of the APA.

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MEDICAL PRACTICE BOARD: Hypnosis

To treat or offer to treat any human ailment, complaint or condition by the use of hypnosis constitutes the practice of medicine.

Opinion No. 4877 March 23, 1976.

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This is in response to the inquiry directed to this office by the Medical Practice Board for my opinion on the question of whether the use of hypnosis in the treatment of human illness constitutes the practice of medicine within the meaning of the Medical Practice Act, 1973 PA 185; MCLA 338.1801 *et seq;* MSA 14.542(1) *et seq.*

Before a conclusion may be drawn, reference must be made to 1973 PA 185, *supra,* § 2(g); MCLA 338.1802; MSA 14.542(2), which defines the practice of medicine as follows:

> "As used in this act:
>
> "* * *
>
> "(g) 'Practice of medicine' or 'to practice medicine' means to diagnose, treat, prevent, cure, or relieve a human disease, ailment, defect, complaint, or other condition, whether physical or mental, by attendance or advice, or by a device, diagnostic test, or other means, or to offer, undertake, attempt to do, or hold oneself out as able to do, any of these acts."

Thus, if hypnosis is to be within the practice of medicine as defined above, its use as a diagnostic treatment or curative method must be established.

Hypnosis is defined in Stedman's Medical Dictionary (3rd ed, 1972), p 606, as follows:

> "1. Hypnotic state; an artificially induced state resembling deep sleep, or a trancelike state in which the subject is highly susceptible to suggestion and responds readily to the commands of the hypnotist. 2. Somnus; natural sleep (rare)."

A number of authorities have established the use of this sleep state in various areas of medical practice. Hypnosis has been used as an assessment